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 XXVII.

VICTORIA, B. C.
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1921.

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. ARCHER MARTIN.
THE HON. WILLIAM ALFRED GALLIHER.
THE HON. ALBERT EDWARD McPHILLIPS.
THE HON. DAVID MACEWAN EBERTS.

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. CHARLES HOWARD BARKER,	Nanaimo
HIS HON. JOHN DONALD SWANSON,	Yale
HIS HON. GEORGE HERBERT THOMPSON,	East Kootenay
HIS HON. HERBERT EWEN ARDEN ROBERTSON,	Cariboo
HIS HON. HUGH ST. QUINTIN CAYLEY,	Vancouver
HIS HON. HENRY DWIGHT RUGGLES,	Vancouver

ATTORNEY-GENERAL:

THE HON. JOHN WALLACE DE BEQUE FARRIS, K.C.

TABLE OF CASES REPORTED

IN THIS VOLUME

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TABLE OF CASES CITED.

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RULES OF COURT

NOTICE is hereby given that, under the provisions of the "Supreme Court Act," the Lieutenant-Governor in Council has been pleased to amend the "Supreme Court Rules, 1906," as follows:

ORDER 58.

That the following be added as Rule 8B (Marginal Rule 872B):

"8B. The Registrar, as well as the parties and their legal agents, shall endeavour to exclude from the Appeal-book all documents and notes of evidence that are not relevant to the subject-matter of the appeal or necessary for its decision, and generally to reduce the bulk of the Appeal-book as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the Appeal-book."

That the following be added as Rule 8C (Marginal Rule 872C):

"8C. Where in the course of the preparation of the Appeal-book one party objects to the inclusion of a document or of a portion of the notes of evidence on the ground that it is unnecessary or irrelevant and the other party nevertheless insists upon it being included, the Appeal-book, as finally prepared, shall, with a view to the subsequent adjustment of the costs of and incidental to such document or notes of evidence, indicate in the index of papers or otherwise the fact that, and the party by whom, the inclusion of the same was objected to."

By Command.

JOHN DUNCAN MACLEAN,
Provincial Secretary.

Provincial Secretary's Office,
July 31st, 1920.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

IN RE F. H. BATES, DECEASED.

MACDONALD, J. (At Chambers)

1919

Feb. 21.

IN RE F. H. BATES, DECEASED

Administration—Deceased resident outside Province—Intestate—Personal estate within Province—No relations within Province—Application for letters of administration—Official administrator—Special circumstances—R.S.B.C. 1911, Cap. 4, Sec. 8.

The personal estate of one who dies intestate being at the time of his death resident outside of the Province, and having no relations within the Province, should be administered by the official administrator unless special circumstances are shewn that the estate by the appointment of another would be appreciably benefited.

Statement

APPLICATION by The Royal Trust Company for letters of administration of the personal estate of Fred. H. Bates, a resident of the State of Montana, who died on the 30th of October, 1917, intestate. Heard by MACDONALD, J. at Chambers in Vancouver on the 21st of February, 1919.

Whealler, for the application.
McTaggart, for the Official Administrator.

Judgment

MACDONALD, J.: The Royal Trust Company applies for letters of administration of the personal estate of Fred. H. Bates, who, while a resident of the State of Montana, died on

MACDONALD, J. (At Chambers)

1919

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the 30th of October, 1917, intestate. He had, at the time of his death, $2,355.45 to his credit at the Bank of Montreal, Vancouver. This money, under such circumstances, became vested in the Court, under section 8 of the Administration Act, reading as follows:

"From and after the decease of any person dying intestate, and until administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the Court, subject only to the power of any Court of competent jurisdiction to grant administration in respect thereof."

The widow of the deceased was, at the time of his death, and still is, a resident of the State of Montana. She, as one of the parties entitled to share in the personal estate, supports the application of The Royal Trust Company, by a power of attorney executed in its favour, for that purpose.

In dealing with this property, thus in the hands of the Court, the primary object to be attained, is the interest of the estate.

"The first duty of the Court then is to place it [the administration] in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors, or in making distribution":

see Sir John Nicholl in *Warwick* v. *Greville* (1809), 1 Phillim. 123 at p. 125.

It is contended, that I should be influenced in making the appointment desired, through the support given by the widow, but I do not agree in this contention. I think the effect of the following portion of the judgment in *Warwick* v. *Greville, supra,* has not been destroyed in the meantime, and is still applicable in the appointment of an administrator by the Court, *viz.*:

Judgment

"The selection rests with the discretion of the Court; that discretion however is not to be arbitrarily or capriciously assumed, but to be a legal discretion governed by principle and sanctioned by practice; in exercising it the Court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property."

Under the same statute, which vests the property in the Court, provision is made for the appointment of official administrators throughout the Province. Every official administrator, in default of there being relatives within the Province, ready and competent to take out letters of administration, is required to apply therefor. The one appointed for the County of Vancouver, under such conditions, doubtless, requires to administer

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many estates, which do not, on a percentage basis, bring him an adequate return for the time, trouble and responsibility involved. There has never been, to my knowledge, any complaint, as to the performance of his duties. If any such existed, there is a speedy mode of redress afforded by section 39 of the Act. As to the personal estate in question, it consists of a sum of money to be distributed, under proper advice, and I do not perceive any "special circumstances" which require, that such estate should be administered by The Royal Trust Company in preference to the official duly appointed for that purpose. If it were shewn, that the estate would be appreciably benefited, by granting the application, I would accede to it. I think, however, that the official administrator, upon application, should be appointed to administer the estate, and the material prepared by the present applicant can be partially utilized to assist, for that purpose.

Judgment

While refusing the application, still, The Royal Trust Company is entitled to its costs in connection therewith, to be paid in due course out of the estate.

Application refused.

LANCASTER v. VANCOUVER LOG COMPANY, LIMITED.

CAYLEY, CO. J.

1919

Feb. 21.

LANCASTER v. VANCOUVER LOG CO.

Damages for wrongful conversion—Chose in action—Not assignable—Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, subsec. (25).

A right to recover damages for wrongful conversion is not assignable at law.

ACTION to recover damages for wrongful conversion of certain boom-chains alleged to have been loaned by the Vancouver Timber & Trading Company, Limited, to the defendant during the year 1913, and which the defendant refused to return, the plaintiff claiming ownership under an assignment in writing

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from the Vancouver Timber & Trading Company, Limited, dated the 4th of November, 1918. The Vancouver Timber & Trading Company, Limited (in liquidation), was on the application of the plaintiff added as a party defendant at the trial. The action was tried by CAYLEY, Co. J. at Vancouver on the 21st of February, 1919. Counsel for the defendant moved for dismissal of the action at the close of plaintiff's case.

Argument

G. L. MacInnes, for plaintiff, referred to the Laws Declaratory Act, Sec. 2, Subsec. (25), and *King* v. *Victoria Insurance Company* (1896), A.C. 250.

O'Brian, for defendant: An action for wrongful conversion is founded in tort (see Halsbury's Laws of England, Vol. 27, par. 888) and is therefore not assignable. The English authorities are against the assigning of a cause of action arising *ex delicto.* In *May* v. *Lane* (1894), 71 L.T. 869, the English Court of Appeal held that a right to recover damages for breach of contract to lend money is not assignable. In *Dawson* v. *Great Northern and City Railway* (1904), 1 K.B. 277, Wright, J. held that the right to recover damages for injury to lands was in the nature of damages for tort and was therefore not assignable. See also *Laidlaw* v. *O'Connor* (1893), 23 Ont. 696, where Armour, C.J. held that a claim by a client against a firm of solicitors for negligence was a claim arising out of tort and was not assignable. See also *McCormack* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 656, where Anglin, J. reviewed all the authorities, and held that a claim for damages for personal injuries was not an assignable chose in action.

Judgment

CAYLEY, Co. J.: The claim in this action is founded in tort. I agree with and follow the judgment of Anglin, J. in *McCormack* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 656, and confirmed by the Divisional Court of Ontario, and hold that rights to damages arising *ex delicto* as in this case are not assignable.

Action dismissed with costs.

THE YORKSHIRE AND CANADIAN TRUST LIMITED v. SCOTT.

COURT OF APPEAL

1919

April 1.

YORKSHIRE AND CANADIAN TRUST LTD. v. SCOTT

Promissory note—Action against indorser—Indorsed after maturity—Evidence for defence of no consideration and of agreement not to be held liable—Admissibility.

In an action against an indorser on a promissory note evidence is admissible to shew that the indorsement was made after maturity without consideration, and on the understanding that the indorser was not to be liable on the note.

APPEAL by plaintiff from the decision of GRANT, Co. J., of the 28th of March, 1918, in an action against the defendant as indorser of a promissory note for $400. The defendant was an agent of the New York Life Insurance Company. One Mackenzie Urquhart, owing a premium on his insurance policy, made a promissory note for $400, dated the 8th of April, 1914, payable to the defendant Scott, 90 days after date at the offices of the plaintiff Company. Scott took the note to the plaintiff Company. They advanced the amount of the note to him, and with the proceeds he paid the premium on Urquhart's policy. Upon the note coming due, it was not paid and on the trial Scott was allowed to state in evidence that as the note had been made payable to him he indorsed it after it came due on an understanding with the plaintiff that he was not to be held liable upon it, and that they relied wholly upon Urquhart's promise to pay. The trial judge dismissed the action. The plaintiff appealed on the ground that the alleged verbal agreement made between the plaintiff and defendant should not have been received in evidence, as such evidence was a parol variation of a written instrument.

Statement

The appeal was argued at Vancouver on the 12th of December, 1918, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Coburn, for appellant: The question is whether the defendant's evidence, that he would not be held liable, should be

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received in evidence. On the question of a defective appeal book see *Rogers* v. *Reed* (1900), 7 B.C. 139; *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629. We are holders in due course. That the evidence of the agreement should not be allowed in see *Emerson* v. *Erwin* (1903), 10 B.C. 101; *Royal Bank of Canada* v. *Pound* (1917), 24 B.C. 23; *Hitchings and Coulthurst Company* v. *Northern Leather Company of America and Doushkess* (1914), 3 K.B. 907.

E. J. Grant, for respondent: The plaintiff Company was acting for the Keith estate and the estate owed Urquhart certain moneys. This accounts for the cashing of the note by the Company. The defendant only obtained a small commission on the insurance premium: see Falconbridge on Banks and Banking, 2nd Ed., 605; *Bounsall* v. *Harrison* (1836), 1 M. & W. 611. The note was indorsed by defendant after maturity. They are not holders in due course. The evidence of the arrangement that he was not to be held liable is admissible:

Argument

see *The Bank of South Australia* v. *Williams* (1893), 19 V.L.R. 514; *Walker* v. *Johnson* (1880), 6 N.Z.L.R. 41; *Jacobs* v. *Booth's Distillery Company* (1901), 85 L.T. 262; *Canadian Bank of Commerce* v. *Indian River Gravel Co.* (1914), 20 B.C. 180. We come within the exceptions in *Porteous et al.* v. *Muir et al.* (1884), 8 Ont. 127 at p. 133. As to the indorsement of the bill see Chalmers's Bills of Exchange, 7th Ed., 132. On the question of referring to the facts on appeal see *Dominion Trust Company* v. *New York Life Insurance Co.* (1919), A.C. 254.

Coburn, in reply, referred to *New London Credit Syndicate* v. *Neale* (1898), 2 Q.B. 487 at p. 491; *Auld* v. *Taylor* (1915), 21 B.C. 192 at p. 195.

Cur. adv. vult.

1st April, 1919.

MACDONALD, C.J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal. Chalmers's Bills of Exchange, 7th Ed., at p. 62 says, "oral evidence is admissible . . . . . (b) to impeach the consideration for the contract," citing *Abrey* v. *Crux* (1869), L.R. 5 C.P.

37 at p. 45; 39 L.J., C.P. 9. In that case, p. 13, Keating, J. refers to the rule of law as laid down by Parke, B. in *Foster* v. *Jolly* (1835), 4 L.J., Ex. 65 in these words:

> "'The general rule is that the maker is at liberty to contradict the value as between himself and the party to whom he gave the note; but he is not at liberty to contradict the express contract, to pay at a specified time.'"

Now what was the consideration for the indorsement here? The evidence is very meagre, but such as it is we have the direct evidence of the defendant that he indorsed the bill after maturity. This is not denied by the plaintiff except that they argue that because the bill bears on its back a waiver of presentation and protest signed by the defendant that is some contradiction of the defendant's testimony. It might be sufficient to create a presumption that it was indorsed before maturity, but that presumption is rebutted by the direct testimony. The defendant's evidence further is that when he indorsed the note it was understood he was not to be held liable on the note and this is not denied. We have then, first, indorsed after maturity and, second, agreement at time of indorsement that defendant was not to be held liable. The note was made by one Mackenzie Urquhart to the order of the defendant. The defendant took this note to the plaintiff who cashed it without its being indorsed by the defendant, and the proceeds were applied in payment of an insurance premium upon a policy in favour of Urquhart in the New York Life, for which the defendant Scott was agent. Then according to the evidence, after the note was due and unpaid, the plaintiff requested the defendant to indorse the note, which he says he did on the understanding before mentioned. The point is, is this evidence admissible? If A gives a note to B for $500 and B sues A on the note, although the contract on its face shews a consideration of $500, B can give oral testimony that no consideration actually passed and that it was merely an accommodation note. It seems to me the situation is no different in the circumstances of this case. Scott was in no way liable on the note until indorsed by him. The money was not advanced on the note on the strength of his indorsement. That indorsement was obtained after maturity and then only was there any contract between the plaintiff and Scott. Under the Bills of Exchange Act, consideration is presumed in the case

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of an indorsement, but so it is between the maker and payee of a note. The indorsement by Scott was in the nature of a new transaction, and the same principle would, I think, apply to rebut the presumption of consideration by oral testimony as in the illustration of the note given by A to B.

MCPHILLIPS, J.A.: The facts of this case would appear to be different from those existent in any of the cases referred to by counsel for the appellant, the contention of the appellant being that notwithstanding the evidence is that the respondent indorsed the promissory note after maturity thereof to the appellant, and it was understood that he was not to be liable upon it, that this agreement cannot be given effect to as being inadmissible evidence. The promissory note matured in July, 1914, and this action was only commenced in January, 1918, a circumstance that is noteworthy as being some evidence corroboratory of the contention of the respondent. In any case, his evidence is not denied and if such was not the agreement, why such long delay? It appears that the appellant negotiated the promissory note without the respondent's indorsement, he (the respondent) being the payee thereof and the proceeds thereof went to pay a premium upon a policy of life insurance of the maker of the note, Mackenzie Urquhart, to the New York Life Insurance Company. In my opinion, the present case is within the *ratio decidendi* of *Pike* v. *Street* (1828), 1 M. & M. 226. The agreement here set up goes to the consideration. There is no consideration whatever shewn for the indorsement by the respondent, and as we have seen, no denial of the agreement. Byles on Bills of Exchange, 7th Ed., at p. 122 reads as follows:

MCPHILLIPS, J.A.

> "It has, indeed, been held that, in an action by the indorsee against the drawer of a bill, the defendant might set up that at the time of the indorsement to the plaintiff it was verbally agreed that the plaintiff should sue the acceptor and not the defendant, the indorser."

And the foot-note (*s*) reads as follows:

> "*Pike* v. *Street* (1828), 1 M. & M. 226. This case has been explained on the ground that the evidence really negatived the consideration and so was admissible, *per* Parke, B., *Foster* v. *Jolly* (1835), 1 Cr. M. & R. at p. 708. In the later case of *Abrey* v. *Crux* (1869), L.R. 5 C.P. 37, in practically identical circumstances such evidence was not admitted (*dubitante*, however, Willes, J.), but the decision in *Pike* v. *Street* was but briefly noticed. The case has never in fact been overruled: see *Henry* v. *Smith* (1895), 39 Sol. Jo. 559."

The present case comes quite within the language of Vaughan Williams, L.J. in *New London Credit Syndicate* v. *Neale* (1898), 67 L.J., Q.B. 825 at p. 827, where he said:

"If what the party who was seeking to give the parol evidence was really setting up was that though he had in fact signed the written document he had never executed it so as to be an effective contract at all, there the oral evidence was admissible. Otherwise it was not."

The respondent being the payee of the promissory note, it is fair to assume and to draw the inference, that the appellant was desirous of having the respondent's indorsement to make the promissory note available and capable of enforcement as against the maker thereof, Mackenzie Urquhart.

In Chalmers's Bills of Exchange, 7th Ed., 65, we find this stated, citing *Lindley* v. *Lacey* (1864), 34 L.J., C.P. 7 at p. 9:

"Though the terms of a bill or note may not be contradicted by oral evidence, yet, as between immediate parties, effect may be given to a collateral or prior oral agreement by cross-action or counterclaim. 'Evidence,' says Byles, J., 'may be given of an oral agreement which constitutes a condition on which the performance of the written agreement is to depend; and if evidence may be given of an oral agreement which affects the performance of the written one, surely evidence may be given of a distinct oral agreement upon a matter on which the written contract is silent.'"

In *Smith* v. *Squires* (1901), 13 Man. L.R. 360 the Full Court dissented from *Pike* v. *Street, supra,* but Bain, J., a very able judge in commercial law, said at p. 363:

"By the Bills of Exchange Act, section 30, every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value; but under the Act, as at common law, evidence may be given as between immediate parties to impeach the consideration or to shew that it has failed, or that the delivery of the bill was conditional or for a special purpose and not for the purpose of transferring the property in the bill. (s. 31, s.s. 2). The evidence here, however, does not come within this provision."

MCPHILLIPS, J.A.

I venture to think that the evidence of the present case does come within the class of cases set forth by Mr. Justice Bain.

In *The Bank of South Australia* v. *Williams* (1893), 19 V.L.R. 514, it was held that where several notes were made with an express verbal agreement that there should be no liability thereon, it was held by the Full Court that evidence of this verbal agreement was properly admitted. Mr. Justice Hood (who delivered the judgment of the Court) relied greatly upon *Thompson* v. *Clubley* (1836), 1 M. & W. 212; *Clever* v. *Kirkman* (1875), 24 W.R. 159; *Pym* v. *Campbell* (1856), 6 El. &

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Bl. 370; *Wake* v. *Harrop* (1861), 6 H. & N. 768; and *Rogers* v. *Hadley* (1863), 2 H. & C. 227; and it is to be noticed that Mr. Justice Hood at p. 519, referring to *Abrey* v. *Crux, supra,* said:

"These cases we think shew what the rule is, and shew it to be as we have stated it; and in our opinion the cases cited for the plaintiff not only are not in conflict with this view, but when examined they support it, for in all of them it was clear that the writing was intended as a record of the contract, and therefore the defendants were not allowed to alter it by parol in *Abrey* v. *Crux*, the case most relied upon for the plaintiff; although the parol evidence was held inadmissible, it is, we think, evident from the judgments of Willes, J., and Brett, J., that if the defendant could have shewn that his liability on the bill had never commenced, the decision would have been the other way."

The present case is one in which the indorsement took place after maturity. Admittedly upon the facts the appellant is not the holder in due course (section 56, Cap. 119, R.S.C. 1906) of the promissory notes, and all equities are available and the evidence led by the respondent to shew the condition upon which he indorsed the promissory note was admissible. In *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733 Lord Watson in delivering the judgment of their Lordships of the Privy Council, at p. 745, said:

"But it is a well-established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law-merchant would otherwise assign to them."

MCPHILLIPS, J.A.

(Also see *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512, Idington, J. at p. 524; Duff, J. at p. 529.)

That the defence set up in the present case was one that was not capable of being gone into upon the ground pressed before this Court, namely, that the evidence was inadmissible is impossible of being agreed to. In *Jacobs* v. *Booth's Distillery Company* (1901), 85 L.T. 262 (a case referred to by my brother MARTIN in *Canadian Bank of Commerce* v. *Indian River Gravel Co.* (1914), 20 B.C. 180 at p. 182, a judgment in which I agreed with my brother MARTIN), the appellant, amongst other representations made to him, said that he had been told that he

incurred no liability by signing and that he had signed the memorandum and two promissory notes relying upon that representation. The Lord Chancellor (Lord Halsbury) in his judgment said:

"But when in such a case as this Order XIV. is applied, there are a great many things to be said. I do not propose to enter into the merits of the case or the comprehension of it, which is necessary to some extent in order to deal with the merits. That question will have to be dealt with when the cause is tried, as it ought to be tried."

(Also see *The Commercial Bank of Windsor* v. *Morrison* (1902), 32 S.C.R. 98, Sir Henry Strong, C.J. at p. 105.)

The present case has been tried and certainly it could not have been properly tried if the challenged evidence was excluded. It is true the case comes before us upon short notes of evidence only, but in my view sufficient for this Court to dispose of the appeal. In this connection we have the following observation of the learned trial judge in the Court below when certifying to the notes of evidence:

"The aforegoing is a correct transcript of the notes taken by me in the trial of this cause, but said notes are not, and were not, understood to be all the evidence given before me on the hearing. My notes are never more than fragmentary, while my findings are based upon all the evidence given before me in the trial and the law as I understood it as applied thereto."

MCPHILLIPS, J.A.

I would adopt what Willes, J. said in *Abrey* v. *Crux* (1869), 39 L.J., C.P. 9 at p. 13, as indicating the view I take of the present case:

"I do not see then why, in a case like the present, we may not rather follow what is just than seek to decide according to strict law, or rather to stretch the law to meet a case in which there is no distinct law on the subject."

This appeal does not involve a decision upon rival evidence. The defence of the respondent is not denied. Reliance only is placed upon the contention of the inadmissibility of the evidence. I cannot come to the conclusion that the learned trial judge arrived at a wrong conclusion or that there has been any error in law established. I would therefore dismiss the appeal

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

EBERTS, J.A.

Appeal dismissed.

Solicitor for appellant: *Arthur Coburn.*
Solicitor for appellant: *J. Edward Sears.*

COURT OF APPEAL

1919

Feb. 11.

REX v. NEVISON.

Criminal law—County Court Judge's Criminal Court—Jurisdiction—Offence committed outside County—Criminal Code, Secs. 577 and 584—B.C. Stats. 1909, Cap. 33, Sec. 3(a).

REX v. NEVISON

A sleeping-car conductor on a passenger train running from Calgary to Vancouver was accused of accepting bribes to permit persons to ride free on the train. The acts complained of took place in British Columbia before the train came within the boundaries of the County of Vancouver. He was arrested in Vancouver and committed for trial. He elected to be tried before the County Court Judge's Criminal Court of Vancouver County and on trial was convicted. Before accused pleaded, objection was taken to the jurisdiction of the Court. On appeal by way of case stated:—

Held, that the Court had jurisdiction under section 577 of the Criminal Code. The words "within the jurisdiction of said Court to try" in the section refer not to the territorial limits of the Court but to any crime or offence within the competency of the Court to try.

Statement

APPEAL by way of case stated from a conviction by CAYLEY, Co. J., tried without a jury at Vancouver on the 26th to 29th of November, 1918. The accused was in the employ of the Canadian Pacific Railway as a sleeping-car conductor on trains running from Calgary to Vancouver. In July, 1918, on his arrival in Vancouver at the C.P.R. station he was arrested on a warrant on two charges: (1) That while in the employ of said Company as a sleeping-car conductor on a train running from Calgary to Vancouver he accepted from two passengers the sum of $34 for permitting them to ride on the train without paying the regular fare therefor or for forbearing to inform the train conductor of their presence on said train; (2) that while on said train on or about the 5th of June, 1918, in British Columbia he did unlawfully steal $34, the property of the Canadian Pacific Railway. The magistrate committed the accused for trial on both charges. No objection was taken to the jurisdiction of the magistrate. Accused was allowed out on bail, and on the 24th of September, 1918, consented to be tried in the County Court Judge's Criminal Court without a jury. He was convicted on the first charge and acquitted on

the second. The offence was committed on a passenger train of the Canadian Pacific Railway Company going west at a point west of Field, in British Columbia, beyond the boundaries of the County of Vancouver. The train, after it had passed through other judicial counties, entered the County of Vancouver on its eastern boundary and proceeded to its terminus in the City of Vancouver in said county. Before allowing accused to plead, counsel objected that there was no jurisdiction in the County Court Judge's Criminal Court of Vancouver to try the accused, because, under a proper interpretation of the word "through" in section 584(*c*) of the Criminal Code, the vehicle in question did not pass "through" the County of Vancouver. This objection was overruled, and prisoner pleaded not guilty. The following questions were submitted to the Court of Appeal:

Statement

"(1) Was I right in overruling the said objection?

"(2) Given the facts as found by me and that the offence committed came within the provisions of section 3(*a*) of Cap. 33, 8-9 Edw. VII., Statutes of Canada (the Secret Commissions Act, 1909), but was committed not in the County of Vancouver, but in another county within, however, the Province of British Columbia, (a) had the County Court Judge's Criminal Court of Vancouver jurisdiction under section 577 of the Criminal Code? (b) Had the County Court Judge's Criminal Court of Vancouver jurisdiction under section 584 of the Criminal Code?"

The appeal was argued at Victoria on the 7th of January, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

W. W. B. McInnes, for appellant: Section 584 of the Code is the only section with which we are concerned, and my contention is the "vehicle" in question did not pass "through" the County of Vancouver, as the train stopped at the terminus in the City of Vancouver. It passed through Yale and Cariboo, but not Vancouver. The question is the interpretation of the word "through," and I submit it does not include "in" or "into." The next point is as to the words in the Act "in respect of any property." The offence in question does not come within any of the offences set out in the section, and I contend this offence is not an offence in respect of property. This is an act of corruption, and not in respect of property at all. The accused, in common law, has the right to be tried in his own

Argument

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district, and section 577 is somewhat revolutionary. An interpretation should be put upon it that is consistent with the other sections: see *Rex* v. *Lynn* (*No. 1*) (1910), 17 Can. Cr. Cas. 354.

Argument

Wood, for respondent: The word "through" frequently means "within": see Words and Phrases, Vol. 8, p. 6967; *Provident Trust Co.* v. *Mercer County* (1898), 170 U.S. 593 at p. 602. The words "in respect of any property" cover what was taken in this case. The coming into Court for the purpose of election amounts to surrender of bail and liberty, and he was in the custody of the Court: see *Regina* v. *Burke* (1893), 24 Ont. 64. On the question of whether there was theft see *Rex* v. *McLellan* (*No. 1*) (1905), 10 Can. Cr. Cas. 1; *Rex* v. *Thompson* (1911), 21 Can. Cr. Cas. 80. There is jurisdiction under section 577 of the Code: see *Rex* v. *McKeown* (1912), 20 Can. Cr. Cas. 492; *Rex* v. *Thornton* (1915), 26 Can. Cr. Cas. 120 at pp. 130-1; *Re Seeley* (1908), 14 Can. Cr. Cas. 270, note at p. 280.

Cur. adv. vult.

11th February, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The prisoner was a sleeping-car conductor in the employ of the Canadian Pacific Railway Company on a through train from Calgary to Vancouver. He accepted bribes from two persons to permit them to ride free in his car. This happened prior to the arrival of the train within the boundaries of the County of Vancouver. He was arrested in Vancouver, given a preliminary hearing, and committed to take his trial before the then next competent Court of Criminal jurisdiction. Subsequently he elected to be tried before the County Court Judge's Criminal Court of Vancouver County, and was there tried and convicted of having corruptly accepted bribes contrary to the statute.

With the prisoner's guilt or innocence we have nothing to do. The only questions submitted to us relate to the jurisdiction of that Court to try the accused. Two sections of the Criminal Code were relied upon by counsel for the Crown as giving the said Court jurisdiction, namely, section 584(*c*) and section 577. With respect to the first, I am of opinion that that sec-

tion is not applicable to the facts of this case as we are concerned with them, since the charge of theft was dismissed and that of acceptance of a bribe only sustained.

A good deal of argument hinged on the meaning of the word "through" as used in said section, but in the view I take, as above expressed, it is unnecessary to decide whether "through" means merely "into" or "into and out of the county." The first question submitted to us, however, has to do with this controversy, because it appears that before permitting the accused to plead, his counsel objected to the jurisdiction of the Court, on the ground that as the train in question did not pass into and out of the County of Vancouver, it could not be said to have passed "through" that county. The objection was overruled, and we are asked: "Was I right in overruling the said objection." The question is, for the reasons above stated, irrelevant, and therefore does not call for an answer.

Section 584 has to do with offences committed on or in respect of mail or mail carriers, or "on any person or in respect of any property in or upon any vehicle employed in a journey." It is admitted that there is no question affecting mail or mail carriers involved in this case. Now, the acceptance of a bribe by a car-conductor is not an offence committed on any person in or upon a vehicle, nor on any property in or upon a vehicle. This reasoning also answers question 2(b), which reads:

"Had the County Court Judge's Criminal Court of Vancouver jurisdiction under section 584 of the Criminal Code?"

MACDONALD, C.J.A.

which answer is: No. I do not say that the Court could not entertain the charge of theft, but that is immaterial in view of the dismissal of that charge.

The only remaining question is question 2(a), which reads as follows:

"Had the County Court Judge's Criminal Court of Vancouver jurisdiction under section 577 of the Criminal Code?"

My interpretation of that section is that the requisite jurisdiction was thereby given to the Court below. Jurisdiction is given to "every Court of criminal jurisdiction," and is not restricted, as was contended by Mr. *McInnes,* to superior Courts.

The words "within the jurisdiction of said Court to try" have no reference to the local territorial jurisdiction of the

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Court, a limitation to which would be manifestly absurd when the object of the section is plainly to give jurisdiction territorially beyond such local limits in the circumstances set out in the section. This interpretation of the meaning of section 577 is in harmony with the decision of the Alberta Appellate Division in *Rex* v. *Thornton* (1915), 26 Can. Cr. Cas. 120.

Question 2(a) should, therefore, be answered in the affirmative.

MARTIN, J.A.: In my opinion, the answer to the first question reserved, dealing with the objection to the jurisdiction, should be in the affirmative. While it is true that one construction of the expression "in any magisterial jurisdiction through which such vehicle . . . . passed in the course of the journey" would require an entry and exit, yet another equally appropriate would be satisfied by something short of that. It would, *e.g.*, be quite proper, popularly and descriptively, for a traveller who had entered the eastern boundary of this Province in the Rocky Mountains and gone to the western boundary at tidewater to say that he had gone "through British Columbia." And if he had traversed the centre of this great island of Vancouver from tidewater at Victoria to tidewater at Cape Scott he would say, accurately, that he had gone "through" it, even though he was at the end of the journey stopped by the sea, as the transcontinental train in question was when it reached Burrard Inlet on the mainland. If mere entry and exit are the test of passing "through" this Province, then a train which enters it at the extreme southeast corner at the Crow's Nest and leaves it at Kingsgate, on the United States boundary, has passed through it, though only a very small corner of its vast area has been traversed. This shews that the expression must be construed with respect to the country in which the "magisterial jurisdiction" is being exercised.

MARTIN, J.A.

The second question should, I think, be answered in the affirmative also. The language of the statute may have an unexpectedly wide application, but it is sufficient to cover the case, and we should be greatly influenced by the decision of the Quebec Court of King's Bench in *Rex* v. *McKeown* (1912), 20 Can. Cr. Cas. 492.

Such being my opinion, it is not necessary strictly to consider the interesting third question on section 584(*c*) as to whether or no the "offence is [was] committed on or in respect to a mail, or a person conveying a post letter bag . . . , or on any person, or in respect to any property, in or upon any vehicle employed in a journey," but I feel justified in saying that Mr. *McInnes's* argument has raised the gravest doubt in my mind, for though the section does not require that the offence should be "in respect to" (which I take to mean "against") property owned by the Railway Company, yet if the payment here is to be regarded as a bribe, and not a theft from the Company (and I think the learned judge was right in so finding, based on the soundest authorities) then the only "property" is the cash received for such bribery which is in the pocket of the bribed conductor. And if John Doe suborns Richard Roe on a train to commit perjury by paying him $10, how can that be regarded as an offence against "property in or upon" the train? For though the $10 in the pocket of the passenger, Richard Roe, is property upon the train in one sense—*i.e.*, Richard Roe's property—however nefariously acquired, yet what offence has been committed against it as such? Certainly Roe committed no offence against his own property; nor did Doe, who gave it to him. And what is the difference in "property" between a bribe of money paid to an official, brakeman or conductor, to smuggle a passenger on and off a train, and a bribe paid to a passenger on a train to commit perjury off it?

MARTIN, J.A.

GALLIHER, J.A.: There is no substance in the first point reserved, and I would answer that in the affirmative. I am equally clear that the learned trial judge had jurisdiction under section 577 of the Criminal Code. The words in section 577, "within the jurisdiction of such Court to try," have reference not to the territorial limits of the Court, but to any crime or offence within the competence of the Court to try. Such being my view, it follows that section 577 meets any contention raised as to the trial being held where the offence is actually committed. This question, (a), being answered in the affirmative, it becomes unnecessary to consider question (b).

GALLIHER, J.A.

I might point out that in the case of *Rex* v. *Lynn* (*No. 1*)

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(1910), 17 Can. Cr. Cas. 354, relied on by Mr. *McInnes,* Lamont, J. uses this language at p. 359:

"The charge alleges that the journey on which the offence was committed was one from Swift Current to Parkberg, both within the judicial district of Moose Jaw. So far as we can gather from the charge, the train, while on the journey during which the offence was committed, did not pass through any judicial district other than the judicial district of Moose Jaw. If the charge had alleged that the offence was committed on the train in the course of a journey from Swift Current to Regina, I could see some force in the contention that this section enabled the Crown to proceed here, because in that case the offence would be considered as having been committed in the judicial district of Regina, as well as in the judicial district of Moose Jaw."

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The learned counsel for the appellant, Mr. *W. W. B. McInnes,* in a very able argument, submitted that there was no jurisdiction in the County Court Judge's Criminal Court, County of Vancouver, to try the accused, the offence admittedly being actually committed outside the boundaries of the County of Vancouver; that whatever jurisdiction there might be under section 577 of the Criminal Code in respect to the offence, no jurisdiction extended to the County Court Judge's Criminal Court; that the common law rule that the accused should have been tried in the county where the crime was committed had not been followed, and that there was no statutory authority for any departure from the rule in the present case; further, that jurisdiction could not be claimed in the present case, under section 584(*c*) of the Criminal Code, the "vehicle," the passenger train, not having passed through the County of Vancouver (see *Provident Trust Co.* v. *Mercer County* (1898), 170 U.S. 593 at p. 602), in that the railway depot in the City of Vancouver at which the train stopped is situate within the County of Vancouver, not at the western boundary of the county, and that the Court was for this reason *coram non judice,* with the still further objection that in any case no offence was established under section 584(*a*), in that the accepting of the gift or bribe was not an offence committed "in respect of any property" within the purview of the statute. I do not find it necessary to consider section 584(*c*), but were I called upon to do so as at present advised, I am inclined to the view that the offence of which the accused has been found guilty comes within the meaning of the language as set forth in sec-

tion 584(*c*). In my opinion, section 577 is conclusive, and conferred jurisdiction upon the County Court Judge's Criminal Court of the County of Vancouver, the offence being committed in the Province of British Columbia, the accused being "in custody within the jurisdiction of such Court," being a Court of "criminal jurisdiction" within the purview of section 577 of the Criminal Code. The accused elected to be tried before the Court, and consented to be so tried as required under the provisions of the Criminal Code without the intervention of a jury, although it would appear that counsel for the accused objected, before he allowed the accused to plead, that there was no jurisdiction in the County Court Judge's Criminal Court of Vancouver to try the accused for the offences charged. The accused was acquitted upon the charge of theft, but convicted under section 3 of the Secret Commissions Act, 1909 (8-9 Edw. VII.). It would appear to me that Parliament has in apt words, in section 577 of the Criminal Code, conferred jurisdiction which admitted of the County Court Judge's Criminal Court of the County of Vancouver exercising the jurisdiction it did in trying the accused and finding him guilty of the offence as charged under the Secret Commissions Act, 1909, and an authority for so deciding is to be found in the decision of the Court of King's Bench, Quebec (appeal side): *The King* v. *McKeown* (1912), 20 Can. Cr. Cas. 492; also see *Rex* v. *Harrison* (1918), 1 W.W.R. 12). The Court in the Quebec case upheld a conviction of the Court of Session at Montreal, the complaint in that case being laid in Victoriaville, the offence being committed in the District of Athabasca, the accused being arrested in Montreal, and tried and convicted in Montreal. It is fitting that in the carrying out of the criminal law of Canada and the exercise of jurisdiction by the Courts of criminal jurisdiction throughout Canada, that there should be as much uniformity of decision as possible and it is to be noted that the decision of the Court of King's Bench, Quebec, was pronounced as long ago as 1912, and no legislation from the Parliament of Canada to the contrary since, it therefore can be well concluded that the intention of Parliament has been rightly interpreted, couched, as the language of section 577 is, in apt words indicative of the intention to confer the jurisdiction here challenged. I would

MCPHILLIPS, J.A.

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answer the question in the affirmative, that the County Court Judge's Criminal Court of the County of Vancouver had jurisdiction under section 577 of the Criminal Code, and do not find it necessary to give any considered opinion as to whether there was jurisdiction under section 584(*c*) of the Criminal Code, as, in my view, there is no necessity to invoke the application of that section to sustain the conviction. It follows that, in my opinion, the conviction should be sustained.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

GALLIHER, J.A. (At Chambers)

1919

March 6.

SHIELDS v. HINE

SHIELDS v. HINE.

Costs—Taxation—Appeal—Interlocutory—Taxed as final order—No objection taken—Review—R.S.B.C. 1911, Cap. 53, Sec. 122(1)—Marginal rule 1002(41).

Notwithstanding the provisions of Order LXV., r. 27(41), that the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters not objected to in the manner provided in said rule, the certificate may be set aside when the bill has been taxed on a wrong basis, and this was ordered where agents of the unsuccessful party's solicitors appeared on a taxation without instructions, and the bill of costs of an appeal was taxed without objection as an appeal from a final order when in fact it was an appeal from an interlocutory order. *Robinson* v. *England* (1906), 11 O.L.R. 385 followed.

Statement

APPLICATION to a judge of the Court of Appeal for an order to review the taxation of the plaintiff's (appellant) costs of appeal and to set aside the certificate of the taxing officer on the ground that under the provisions of section 122(1) of the County Courts Act the costs are not taxable at a greater sum than $50. Messrs. Cochrane & Ladner of Vernon, respondent's solicitors instructed Mr. R. L. Reid, of the firm of Messrs. Bowser, Reid, Wallbridge & Co., to act as counsel on the appeal. Upon the appeal being heard the appeal book and papers were

returned to the principals. On the 3rd of February, 1919, notice of taxation of the appeal was served on Messrs. Bowser, Reid, Wallbridge & Co., returnable on the 5th of February. Mr. Murray of the firm of Messrs. Bowser, Reid, Wallbridge & Co. appeared on the taxation without instructions from the principals and without the appeal book, and the bill was taxed on the assumption that the order appealed from was a final order and without objection. On the 8th of February following Messrs. Cochrane & Ladner instructed Messrs. Bowser, Reid, Wallbridge & Co. that the order was interlocutory and the costs should not exceed $50. Appellant's solicitors were then asked to consent to the taxation being reopened. This was refused. Heard by GALLIHER, J.A. at Chambers in Victoria on the 27th of February, 1919.

GALLIHER, J.A. (At Chambers)

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Statement

Gibson, for the application.
Jackson, K.C., contra.

6th March, 1919.

GALLIHER, J.A.: This is an application to review taxation of costs of appeal from a County Court order. The first point to be decided is, was the order interlocutory or final? The order was one opening up a default judgment allowing the parties in to defend. Such an order is one which in no way disposes of the issues between the parties, but on the other hand places them in a position where they can adjudicate upon and have the matters in controversy decided. In the authorities we find a fine line of distinction drawn as to what are and what are not final orders, but as I view the order in question, it cannot for the purposes even of taxation be deemed to be a final order. When the appeal came up for hearing, it was abandoned, and when the taxation of the costs of appeal came up before the registrar, through inadvertence, the costs were taxed upon the scale allowed as for a final order. No objection was taken at the time, and the taxing officer issued his allocatur. The error was discovered within a few days, and the respondent applied to the appellant to have the taxation reopened, which was refused, hence this application.

Judgment

Under section 122 of the County Courts Act, the costs of appeal from an interlocutory order shall not be allowed upon

GALLIHER, J.A. (At Chambers)

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taxation at a greater sum than $50. The sum taxed here and for which the allocatur issued, was greatly in excess of that. The application here is made under marginal rule 1002 (41) of the rules of the Supreme Court, which reads as follows:

"Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, or as to any item or part of an item which may have been objected to, may within 14 days from the date of the certificate or allocatur, or such other time as the Court or a Judge, or taxing officer, at the time he signs his certificate or allocatur, may allow, apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as the Judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid."

The respondent contends that no objection having been taken and the allocatur having issued, it is final and conclusive under this section. If the order appealed from had been a final order, perhaps so, but being an interlocutory order the taxing officer is by statute prohibited from taxing a greater sum than $50; in other words, he has taxed upon a wrong basis, and surely in such a case it cannot be said that the Court is helpless to remedy a manifest injustice. See *In re Furber* (1898), 2 Ch. 538, followed in *Robinson* v. *England* (1906), 11 O.L.R. 385.

Judgment

Let the order go setting aside and discharging the registrar's certificate and directing that it be not signed for a period of 15 days from entry of this order to permit, if the parties shall so desire, of a new taxation.

As to costs of the application, I think they should go to the appellant. The respondent was at fault in not taking the objection in the first instance, and there was a *bona fide* question to be argued out, *viz.*: whether the order was final or interlocutory, apart altogether from the construction of sub-rule (41).

The respondent is, I think, seeking an indulgence, and under the circumstances here should be visited with costs.

Application granted.

CAINE v. CORPORATION OF SURREY *ET AL.*

CLEMENT, J.

1919

March 10.

CAINE v. CORPORATION OF SURREY

Statute, construction of—Municipal Act—"Occupation"—Scope of—B.C. Stats. 1914, Cap. 52, Secs. 181 and 325.

Section 325 of the Municipal Act, which provides that a district municipality may resume any part of lands reserved in any Crown grant for making roads, canals, etc., contains a proviso "that no such resumption shall be made of any lands on which any buildings may be erected or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings." In an action to restrain the defendant Corporation from exercising its alleged right to resume portions of the plaintiff's lands under said section:—

Held, that the word "occupation" must be read in its wider sense and a drive-way to a house is in use for the more convenient occupation of the house and the ordinary farm barn-yard is in use for the more convenient occupation of stable and barn; the test is whether the land is withdrawn from the larger purposes of the farm, such as growing of grain, depasturing of cattle, and the like, and kept for use in connection with the house and farm buildings.

ACTION for an injunction to restrain the defendant Municipality from resuming occupation of certain portions of the plaintiff's lands for road purposes under section 325 of the Municipal Act. The facts are sufficiently set out in the reasons for judgment. Tried by CLEMENT, J. at Vancouver on the 10th of March, 1919. Statement

S. S. Taylor, K.C., for plaintiff.
Whiteside, K.C., for defendant Stevenson.
McQuarrie, K.C., for defendant Corporation.

CLEMENT, J.: The action taken by the defendants in entering upon the plaintiff's land was avowedly taken upon the authority of By-law No. 161. No such entry could be honestly based upon By-law No. 158, for the defendant Municipality to this day questions the plaintiff's right to be paid for the land to be taken for the proposed road and asserts that it has the right to resume (not expropriate) the land so to be taken, paying the plaintiff for his improvements only. If this claim to "resume" fails, the plaintiff is entitled to a perpetual injunction against the defendants, enjoining them from any attempt Judgment

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CAINE v. CORPORATION OF SURREY

to exercise the alleged right of the defendant Municipality to resume, and to his costs of this action against all defendants. In face of section 181 of the Municipal Act, I cannot award damages, but the costs of this action have not been in any appreciable degree increased by the claim for damages. This would leave the defendant Municipality free to take expropriation proceedings, relying or not, as they may be advised, upon what has been already done or attempted along that line (including By-law No. 158).

And this, in my opinion, is the real situation. On the evidence, I have not the slightest hesitation in holding that the defendant is attempting to resume portions of the plaintiff's land which fall within the exception specified in the Crown grant and repeated in section 325 of the Municipal Act:

"No such resumption shall be made of any lands on which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings."

Strictly speaking, it may seem erroneous to speak of any land outside of the four walls of a building as being in use for the more convenient occupation of the building, but to my mind the word occupation has here a much wider meaning. I would say that regard must be had to the uses to which the building is put and so having regard I would say that a drive-way to a house is in use for the more convenient occupation of the house and the ordinary farm barn-yard is in use for the more convenient occupation of stable and barn. In any view, it is not a question as to the extent of the ground so used, whether a restricted or a generous area; the question is one of fact, was it so used? One guide to a decision on this question of fact or, perhaps I should say, one element which should enter into the calculation is this: Is the land withdrawn from the larger purposes of the farm, the growing of grain, the depasturing of cattle, and the like, and kept for use in connection with the house and farm buildings? Looking at the matter in this light, I have no hesitation in holding that all the land to the south of the plaintiff's house, of his stable, and of his barn, right up to the south boundary of his land was land in use for the more convenient occupation of those buildings. I need not, therefore, go into details, but I should add that, in my opinion, the evidence

Judgment

CLEMENT, J.

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shews that the proposed road actually encroaches in detail upon garden land.

To my mind, there are great difficulties in the way of giving effect to one of these resumption clauses after the original grantee has sub-divided and sold to many holders, but as Mr. *Taylor* did not see fit to raise any point along that line, although invited so to do, I need not, in view of the facts as I have found them, pursue the topic further.

Judgment

Judgment will, therefore, be entered for the plaintiff with costs as indicated in the opening paragraph.

Judgment for plaintiff.

BOUSKILL v. WILLIAMS.

HUNTER, C.J.B.C. (At Chambers)

1919

March 28.

BOUSKILL v. WILLIAMS

Practice—Appeal—Judge's notes—Must be given after notice of appeal—Marginal rule 875.

Upon notice of appeal being given, the trial judge should, on application, produce his notes of evidence taken on the trial.

Statement

APPLICATION by plaintiff for a writ of *mandamus* to compel a judge to produce notes of evidence taken on a trial. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 28th of March, 1919.

Argument

Rubinowitz, for the application: The judge must produce his notes when requested: see marginal rule 875.

F. R. Anderson, contra: There is no duty upon a judge to take notes. Where a judge's notes are mere private memoranda the Court will not receive them: *Baudains* v. *Liquidators of Jersey Banking Company* (1888), 13 App. Cas. 832. No notice of appeal was given in this case; said notice must be given before the judge produces his notes.

Judgment

HUNTER, C.J.B.C.: Notice of appeal must be given before the judge can be asked to give his notes. On the appeal being constituted, the judge should then produce his notes. Application dismissed.

Application dismissed.

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REX v. CHURTON.

Criminal law—Jury—Empanelling—Direction to stand by—Called a second time—Right to challenge—Criminal Code, Sec. 928.

REX v. CHURTON

When jurors, on being directed to stand aside on a criminal trial, are called a second time after the panel has been exhausted, the Crown has no right to peremptorily challenge such jurors even where the right to peremptorily challenge four jurors on the first calling of the panel has not been exhausted (MACDONALD, C.J.A. dissenting).

If the Crown is allowed to peremptorily challenge jurors recalled after the panel has been exhausted, the jury is improperly constituted, and a substantial wrong has been done, entitling the accused to a new trial.

APPEAL by way of case stated and appeal from the refusal to state a further case by MACDONALD, J. at Victoria on the 23rd of May, 1918. The accused was tried on two counts, *i.e.*, (1), stealing $175, and (2), receiving and having said money knowing it to have been stolen. The jury brought in a verdict of guilty on the first count, and accused was sentenced to three years' imprisonment in the penitentiary. The entire jury panel was called on the trial, and five jurors were stood aside by the Crown prosecutor.

Statement

By reason of challenges and directions to stand by, the jury panel was exhausted without leaving a sufficient number to form a jury, and those jurymen who had been directed to stand by were again called, four of whom were then challenged by the Crown prosecutor without any cause being shewn why they should not be sworn, the fifth having been challenged by counsel for the prisoner, and by reason thereof a complete jury could not be had. The Crown prosecutor then requested the presiding judge, under section 939 of the Criminal Code, to order the sheriff to summon other persons pursuant to the provisions of section 939, and an order was made directing the sheriff to summon five persons by word of mouth in order to make a full jury, and a full jury was finally selected by the addition of five persons brought into Court by the sheriff.

The questions reserved for the consideration of the Court were as follow:

"1. Should the Crown prosecutor after the panel had been exhausted by challenges and directions to stand by then have challenged each of the said jurymen who had been directed to stand by (with the exception of the one of said jurymen challenged by counsel for the prisoner) as each of said jurymen were again called to be sworn and shewn cause why they should not be sworn?

"2. Was the said jury properly constituted?"

Statement

The appeal was argued at Victoria on the 24th and 27th of January, 1919, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Lowe, for the prisoner: After certain jurors had been stood aside, on the panel being exhausted they were recalled and counsel for the Crown was allowed to challenge four of them peremptorily. My contention is, this cannot be done under section 928 of the Code: see *Reg.* v. *Boyd* (1896), 4 Can. Cr. Cas. 219; Tremeear's Criminal Code, 2nd Ed., p. 734; *Rex* v. *Barsalou* (1901), 4 Can. Cr. Cas. 343; *Morin* v. *The Queen* (1890), 18 S.C.R. 407. As to whether this is sufficient ground for a new trial see *Allen* v. *The King* (1911), 44 S.C.R. 331; *Rex* v. *Murray* (1915), 25 Can. Cr. Cas. 214.

J. S. Brandon, for the Crown: When the panel was exhausted the Crown had not made any peremptory challenges. The Crown has four peremptory challenges under the Act, and I contend, not having exhausted these, on the jurymen who stood aside being recalled, the Crown has the right to use the four peremptory challenges provided for by the Act, and there is nothing in section 928 denying such right.

Cur. adv. vult.

11th February, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: On the hearing of this appeal we dismissed the motion made on behalf of the prisoner to direct that other questions not stated by the learned judge should be submitted for the opinion of the Court. The only question, therefore, now before us is the one stated, which is founded on the following facts: The list of jurors was first called and gone through, and in the process several jurymen were, at the instance of the Crown, directed to stand aside. A complete

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jury not being obtained, the list was gone through a second time, when the Crown, not having exhausted its right of peremptory challenge, so challenged a number of jurymen, but not in excess of the number of peremptory challenges allowed by statute. There were not a sufficient number of jurymen left to complete the panel, and tales were summoned pursuant to section 939 of the Criminal Code. No objection was taken by prisoner's counsel to the said challenges until after trial and conviction of the prisoner.

The first question is very inaptly stated, but the point involved and argued is this: Was it open to the Crown, in the circumstances detailed above, to challenge peremptorily on the second perusal of the panel?

We were referred, among other cases, to *Morin* v. *The Queen* (1890), 18 S.C.R. 407; and *Reg.* v. *Boyd* (1896), 4 Can. Cr. Cas. 219. Neither of them is quite in point, and *Morin* v. *The Queen* is earlier than section 928 of the Code, but the question involved in this appeal is touched on *obiter*. Ritchie, C.J. at p. 421 said:

"Having been gone through and a jury not secured the clerk proceeds to go over the panel a second time when the right of the Crown to require jurors to stand aside ceased, and the Crown was bound, if its officers sought to perfect its challenge, to do so by shewing some good and sufficient cause or to challenge peremptorily if the peremptory challenges were not exhausted."

MACDONALD, C.J.A.

Strong, J. at p. 429 said:

"I am of opinion that this ruling [namely, to stand jurors aside a second time] having regard to section 164 of the Criminal Procedure Act, which limits the right of the Crown to order jurors to stand aside only until the panel has been once gone through, was substantially an allowance of eleven peremptory challenges [eleven being the number stood aside the second time], and therefore the Crown not having the right to challenge peremptorily that number of jurors, the objections to more than four of those jurors were unwarranted by law and consequently the Court erred in allowing them."

And Patterson, J. at p. 460 said:

"But when the panel had been gone through and the power to cause a juror to stand aside in place of shewing cause for challenging him is asserted a second time, what is done is not easily distinguishable in its effect from a peremptory challenge, and is not warranted by the authority of any English decision or (beyond the number of four) by section 164. The first four of the eleven might, perhaps, be held in this view to be properly excluded from the jury as being peremptorily challenged, but the other seven should not have been set aside except for cause"

Gwynne, J. thought that even on the facts of that case, what was done was only an irregularity and was, in the absence of prejudice to the prisoner, though objected to, not ground for interference. The proposition of law submitted to us by counsel for the prisoner, and the only one which he put forward, amounts to this, that if the Crown officer neglects to use his right of peremptory challenge while the jury list is being perused the first time he loses it, and when the jurors are called a second time the Crown's only right is to challenge for cause.

The prisoner's counsel relies upon section 928 of the Criminal Code. In England the Crown had long been deprived of the right of peremptory challenge, and the practice grew up of ordering, at the instance of the Crown, jurors to stand by until it could be seen whether a jury could be got without calling upon the Crown to shew cause of challenge. When an attempt was made to go further than to order jurors to stand by the first time and stand them by a second time, the right was denied and the law so settled was, I think, that intended to be expressed by section 928, which is a codification of the then existing practice in England and, so far as challenges for cause was concerned, in Canada as well.

The right to challenge four jurors peremptorily is expressly given to the Crown in Canada, and according to the well-settled practice, a challenge could always be made at any time before the juror came to the Book. Is section 928 to be read as, by implication, taking away this right or modifying this practice? I think not. But if what is complained of was not according to law, then I am of opinion that no substantial wrong or miscarriage was thereby occasioned, and hence, applying section 1019 of the Code, a new trial should not be ordered. It will be noted that the proviso in this section is indicative of its applicability to the facts of this case. It shews that Parliament had challenges in mind when the section was enacted, and made particular exception, from the application of the section, of any challenge for the defence improperly disallowed. It is, therefore, I think, evident that the section may be invoked as I have invoked it, where challenges other than of the description mentioned in the proviso are complained of.

MACDONALD, C.J.A.

That no substantial wrong was done to the prisoner here is

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perhaps best evidenced by the fact that her counsel made no objection at the time to what he now complains of. While failure to object is not necessarily a ground for refusal to consider the merits of the question raised in the appeal, yet it is a mistake to suppose that the Court will, as a matter of course, sustain objections made for the first time in the appeal, or where there has been failure to make the objection at the proper time, when the fault could have been remedied. The prisoner took her chance of conviction as well as acquittal with the jury as sworn, and ought not, on the facts of this case, now to be heard to complain.

MACDONALD, C.J.A.

The first question should be answered in the negative, which means that the Crown prosecutor was not, on the facts stated, bound to shew cause for his challenges; that they were rightly treated as good peremptory challenges.

The second question should be answered in the affirmative.

GALLIHER, J.A.: Mr. *Lowe* asks that the learned trial judge be directed to state a case on six different grounds, all of which were considered and disposed of against his contention.

The case as stated by the learned trial judge was then proceeded with. The points reserved were: [already set out in statement.]

The second ground depends, of course, upon the answer to No. 1.

When the entire jury panel was called, by reason of challenges and standing aside by the Crown, sufficient jurymen were not sworn to form a jury. On those who had been stood aside being called a second time, one was challenged by counsel for the prisoner, and the other four were challenged peremptorily by the Crown. It is admitted that the Crown had its four peremptory challenges left, but it is contended that once having been stood aside they were not the subject of peremptory challenge, and could only be challenged for cause.

GALLIHER, J.A.

In the case of *Morin* v. *The Queen* (1890), 18 S.C.R. 407, where this question was discussed by the learned judges, we find Ritchie, C.J., at p. 421, using these words:

"If we look at the practice in England, as to the effect of desiring jurors to stand aside, or that in the Provinces previous to the passing of this statute, so far as my experience extends and as I can discover, the practice

has been entirely consistent, namely, that the panel shall be gone through, or perused as it is termed, once on which calling or perusal it was the privilege of the Crown to require jurors to stand aside until the list shall be gone through. Having been gone through and a jury not secured the clerk proceeds to go over the panel a second time when the right of the Crown to require jurors to stand aside ceased, and the Crown was bound, if its officers sought to perfect its challenge, to do so by shewing some good and sufficient cause or to challenge peremptorily if the peremptory challenges were not exhausted."

And Strong, J. at pp. 428-9:

"It remains to be considered whether the decision of the learned judge at the trial in sustaining the objection of the counsel for the Crown to eleven of the jurors who had on the first calling over of the panel been ordered by the Crown to stand aside was erroneous in law. I am of opinion that this ruling, having regard to section 164 of the Criminal Procedure Act, which limits the right of the Crown to order jurors to stand aside only until the panel has been once gone through, was substantially an allowance of eleven peremptory challenges, and therefore the Crown not having the right to challenge peremptorily that number of jurors, the objections to more than four of those jurors were unwarranted by law and consequently the Court erred in allowing them."

And see Patterson, J. at p. 460. [Already quoted by MACDONALD, C.J.A.]

And in England we find the rights of the accused summed up in these words in Blackstone's Commentaries (Lewis's Ed.), Vol. 4, p. 353, dealing with the rights of the prisoner as to challenge:

"Upon challenges for cause shewn, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provide a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

GALLIHER, J.A.

The statute of 33 Edw. I., st. 4, denied the right of peremptory challenge to the King, but under our own Criminal Procedure Act which was in force when *Morin* v. *The Queen, supra,* was decided, the Crown had the right to challenge four peremptorily.

I think then, in view of what I have above set out, I am justified in concluding that at all events prior to the passing of our Criminal Code in 1892, what was done in the case before us would be in accordance with law.

There was, however, introduced into our Judicature Act section 928, which is as follows:

"If, by challenges and directions to stand by, the panel is exhausted without leaving a sufficient number to form a jury, those who have been

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directed to stand by shall be again called in the order in which they were drawn, and shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them and shews cause why they should not be sworn: Provided that if before any such juror is sworn other jurymen in the panel become available the prosecutor may require the names of such jurymen to be put into and drawn from the box in the manner hereinbefore prescribed, and such jurors shall be sworn, challenged or ordered to stand by, as the case may be, before the jurors originally ordered to stand by are again called."

The particular words are:

"Those who have been directed to stand by shall be again called in the order in which they were drawn, and shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them and shews cause why they should not be sworn."

Is the effect of this section to prevent the Crown challenging peremptorily any juror whom they have asked to stand aside? In effect, that section seems to me to mean that when such juror is called a second time he shall be sworn unless one of two things happens, *i.e.*, first, he is challenged by the accused, and second, unless the prosecutor challenges him and shews cause why he should not be sworn. But the Crown prosecutor submits that assuming this to be so, section 1019 of the Code and subsection (3) of section 929 meet the objections raised. Section 1019, as affecting this case, is:

"No conviction shall be set aside nor any new trial directed, although it appears . . . . . that something not according to law was done at the trial . . . . . unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial."

GALLIHER, J.A.

Now, what was done not according to law here was the peremptory challenging of jurors who had been stood aside by the Crown when the panel was first called upon their being called a second time, instead of shewing cause why they should not be sworn. It might be that the Crown, had they proceeded to shew cause in the case of the four peremptorily challenged, would have failed, and that these jurymen would then have to be sworn. At all events, the accused was deprived of a right which the law gave her to have the competence of these jurors tried in a certain way by the Crown. Of course, had the Crown challenged these jurors peremptorily when first called, the result, as it turns out, would have been the same, *viz.*, that the prisoner would have been tried by the same jury which actually did try her. This, however, is not a sufficient answer. The

deprivation to the accused, under the explicit words of the statute, seem to me to go to the root of the matter, to the very constitution of the jury, and if the jury is not properly constituted, I think we cannot say a substantial wrong has not been occasioned to the accused on the trial.

As to section 929 (3), that can only be applicable in so far as the sections are directory, and if I am right in the view just expressed, would be no answer to the objection taken here.

I would answer the first question in the affirmative and the second question in the negative.

There should be a new trial.

GALLIHER, J.A.

McPHILLIPS, J.A.: This reserved case, stated by Mr. Justice MACDONALD for the consideration of the Court of Appeal, raises a very important point which is fundamental in its nature. The question in effect is, whether the Court which tried the prisoner was the constitutional tribunal called for as constituted, can be said to have been without jurisdiction, *i.e., coram non judice?*

It would appear that the entire jury panel was for a first time called over and the Crown stood by five of the number called, when, by reason of challenges and directions to stand by, the panel was exhausted without leaving a sufficient number to form a jury. Then those of the panel who had been stood by were again called, and from out of the five, four challenges were exercised by the Crown without shewing cause why they should not be sworn. In my opinion, error in law took place in this procedure. It is only necessary to read section 928 of the Criminal Code to see that this course was a course in plain contravention of the enactment. Section 928 reads as follows: [already quoted by GALLIHER, J.A.].

MCPHILLIPS, J.A.

It was held in *Rex* v. *Barsalou* (1901), 4 Can. Cr. Cas. 343 (see head-note), that "a direction to a juror to 'stand by' at the instance of the Crown is in substance a deferred challenge for cause, and cannot be made after the juror has by direction of the clerk of assize taken the Book to be sworn." At p. 345, Wurtele, J. said:

"The direction to stand by is practically a challenge for cause, and such being the case, the order to stand by must be given at a time when a challenge could be made."

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Now, it is true the Crown has the right to four peremptory challenges, but this right does not extend to challenging peremptorily those already stood by. As to those, the Crown is under the statutory obligation to shew cause. The words of the section are:

"Those who have been directed to stand by shall be again called in the order in which they were drawn, and shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them and shews cause why they should not be sworn."

If what was done was not the selection of a jury in accordance with the law, from and out of the panel, a right the accused person had, save where necessity required the ordering of a tales, the error in law is fundamental (see Duff, J. in *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425 at p. 446), and it cannot be said that by reason of section 929 (3) of the Criminal Code the validity of the trial remains unaffected. The error is not merely one of failure to comply with directory provisions. In the present case a tales was ordered, and the accused was tried by a jury not from and out of the panel, but with the intervention of unqualified jurors, because of the action of the Crown in challenging peremptorily men from the panel who had already been stood by, not challenging them and shewing cause, as required by the plain terms of section 928 of the Criminal Code.

MCPHILLIPS, J.A.

The peremptory challenges admitted in the present case taking place when the jurors were called a second time and after the panel had been exhausted, in effect was the standing by of the same jurors a second time, as the four peremptory challenges were exercised by the Crown against four of the men who had previously been stood by. I interpret the judgment of Ritchie, C.J. in *Morin* v. *The Queen* (1890), 18 S.C.R. 407 at p. 421 as deciding, upon the law as it then stood (section 164, Cap. 174, R.S.C. 1886), that when the entire panel was gone through a second time there might be peremptory challenges by the Crown where the challenges had not been exhausted upon the first calling over of the panel, but not to support that which was done in the present case, where, in pursuance of section 928 of the Criminal Code, those who had been directed to stand by only were again called. As the law now stands, these men shall be sworn (note the express words) "unless challenged by

the accused or unless the prosecutor challenges them and shews cause why they should not be sworn." The *ratio decidendi* of the judgments of Ritchie, C.J., and Strong, Fournier and Patterson, JJ. is unmistakable, and, as applied to the present Criminal Code, is incontrovertibly to the effect that what was done in the present case was error in law.

The accused had the inalienable right to have as the jury to try the issues those men whose names stood upon the panel (section 929 of the Criminal Code), save where as of necessity a tales must be ordered (section 939 of the Criminal Code). In the present case a tales was ordered, but, in my opinion, it was not a proper case to so order. I would refer to the concluding portion of the judgment of Ritchie, C.J. in the *Morin* case at pp. 425-6.

In considering the Criminal Code of Canada it is instructive to note what Mr. Crankshaw, K.C., in his admirable work on The Criminal Code of Canada, said in the introduction of the 4th Edition (1915) as indicating the intention of Parliament:

"It codified both the common and the statutory law relating to criminal matters and criminal procedure; but, while it aimed at superseding the statutory law, it did not abrogate the rules of the common law; these being retained, and left available, whenever necessary, to aid and explain the express provisions of the Code and of statutes remaining unrepealed, or to supply any possible omissions, or to meet any new combination of circumstances that may arise; so that, in this respect, all that elasticity which is claimed for the common law rules and principles of the old system is preserved for the system established by the Code."

MCPHILLIPS, J.A.

It is right and proper, and in accordance with natural justice, that the prisoner should be given every protection, and that there should be at all times accorded to the prisoner a fair trial, and to effectuate this, the statutory requirements must be complied with and strictly followed, otherwise there cannot be "due administration of criminal justice" (Lord Campbell, C.J. in *Bird's Case* (1851), 2 Den. C.C. 94 at p. 216).

It is to be noted that in England the Crown has no peremptory challenge, whilst under the Canadian Criminal Code (section 933) the Crown has four peremptory challenges. In Vol. 9 of Halsbury's Laws of England, at p. 361, we find this stated:

"The Crown has no peremptory challenge in any case, but may challenge as the names are called over, and is not bound to shew the cause of chal-

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lenge until the panel is gone through; a defendant on a charge of misdemeanour or a defendant on a charge of felony whose peremptory challenges have been exhausted may follow the same course. *R.* v. *Horne Tooke* (1794), 25 St. Tri. 1 at 25; *per* Eyre, C.B.; *R.* v. *Frost* (1839), 4 St. Tri. (N.S.) 86, at 123; *Mansell* v. *R.* (1857), Dears. & B. 375; *R.* v. *Blakeman* (1850), 3 Car. & K. 97; *R.* v. *McGowan* (1858), cited in *R.* v. *M'Cartie* (1859), 11 Ir. C.L.R. 188, at p. 206."

I would answer the first question in the affirmative and the second question in the negative, and would consider the case one in which a new trial should be directed.

EBERTS, J.A.

EBERTS, J.A. would order a new trial.

New trial ordered, Macdonald, C.J.A. dissenting.

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April 1.

NORTHERN PACIFIC RY. CO. v. FULLERTON LUMBER & SHINGLE CO.

NORTHERN PACIFIC RAILWAY COMPANY v. FULLERTON LUMBER & SHINGLE COMPANY, LIMITED.

Contract—Carriers—Freight—Way-bill stating charges, marked "collect"—Carried on second line to destination—Delivered to others than consignee—Freight charges not collected—Liability.

Trial—County Court—Evidence—Full note of should be taken.

Goods consigned to the defendant at a station in the Province of Alberta were carried on the plaintiff's line from a point in the State of Washington to the border, and from there, on the line of the Canadian Pacific Railway to its destination. The way-bill which gave the freight charges was marked "collect." On arrival at its destination the goods were delivered to parties other than the consignees without collection of the freight charges. In an action for freight charges:—

Held, that as the plaintiff is suing on a contract which was not performed on its part, it cannot recover.

In the absence of a stenographer it is the duty of a County Court judge to take down a full note of the evidence submitted on the trial.

Statement

APPEAL by plaintiff from the decision of RUGGLES, Co. J., of the 3rd of April, 1918, in an action to recover freight charges on a load of lumber carried from Clear Lake in the State of Washington to Cadogan in the Province of Alberta. The

defendant, whose office is in Vancouver, ordered the lumber in question from the Clear Lake Lumber Company as agent for one Block, who resided in Cadogan. The lumber was delivered by the Clear Lake Lumber Company to the plaintiff Company, consigned to the defendants at Cadogan. The lumber was carried on the plaintiff's railway to Sumas on the border, and from there was carried on the Canadian Pacific Railway to Cadogan. Block had in the meantime assigned the lumber to one McCartney, who took the lumber on its arrival at Cadogan, the Canadian Pacific Railway allowing the lumber to be taken without collecting the freight charges. Shortly after McCartney assigned for the benefit of his creditors. The bill of lading contained a condition that the Railway Company was not liable for loss or damage occurring off its own line, but the way-bill attached stating the freight charges, was marked "collect." The trial judge dismissed the action.

Statement

The appeal was argued at Victoria on the 20th of January, 1919, before MACDONALD, C.J.A., GALLIHER and EBERTS, JJ.A.

A. H. MacNeill, K.C., for appellant.

J. H. Senkler, K.C., for respondent, raised the preliminary objection that the judge's notes did not include evidence that is material to the issue, the notes closing with the words "the evidence as taken was very fragmentary and constitutes only a small portion of the evidence given."

Argument

MacNeill: The action is to recover freight payable for transportation from Washington State to Cadogan in Alberta.

MACDONALD, C.J.A.: With all due respect to the learned County Court judge, and his reference to fragmentary notes, we are entitled to have all the learned judge's notes of the evidence given before him. It seems to me that there is an idea on the part of the learned County Court judges that they should decline to take down notes, that is, to do the duty which the statute imposes upon them, to take down the evidence. Whether they could get through their work or not is not a matter that affects this Court. Their business is to do their duty, and to take down a full note of the evidence.

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MACDONALD, C.J.A.

What I have said is with no disrespect to the learned County Court judge; but there have been a number of cases before us where the same complaint has been made of the failure to take down the evidence, and at least the full effect of all the evidence should be taken. It is the duty of the learned trial judge to take down a note of the evidence; and if either party chooses to engage a stenographer, of course he can do it. If that is not done, and one of the parties complains when the case comes before us that all the evidence is not down, it is open to him to supplement his evidence, if he can, upon any point upon which it is alleged to be defective; and if that cannot be done, I think the cases go so far, that a newspaper report of the proceedings in Court may be proven before the Court of Appeal; that is to say, it is open to the parties to amend as best they may. But where a party comes with all the evidence he can get, he cannot say, "well, some evidence was given which is not here." He must succeed, if he succeed at all, upon the evidence in the appeal book.

Argument

MacNeill, on the merits: We say we discharged our duty when we delivered over the lumber to the Canadian Pacific Railway at the boundary. They are not our agents and it is their statutory duty to take it on to its destination, and the statutory duty of the Canadian Pacific Railway relieves us from liability: see R.S.C. 1906, Cap. 37, Secs. 284, 317, 336; and Cap. 118, Sec. 3; *The Directors, &c., of the Bristol and Exeter Railway* v. *Collins* (1859), 7 H.L. Cas. 194; *Rennie* v. *Northern R.W. Co.* (1876), 27 U.C.C.P. 153; *Aldridge* v. *G.W. Railway Co.* (1864), 15 C.B. (N.S.) 582. Under section 2 of the conditions of the bill of lading the Company is not liable for any loss beyond its own lines: see *The Grand Trunk Railway Company* v. *McMillan* (1889), 16 S.C.R. 543 at p. 548; *The Lake Erie and Detriot River Railway Company* v. *Sales* (1896), 26 S.C.R. 663 at pp. 675-7; *McCready* v. *Grand Trunk Ry. Co.* (1912), 15 Can. Ry. Cas. 179. It is a question of the effect of section 5 of the conditions of the bill of lading. There is no obligation on the Canadian Pacific Railway to hold the freight at the station.

Senkler: The way-bill for the freight charges attached to the

bill of lading was marked "collect," and it was their duty to see the freight was collected before delivery. Having failed to do this, they have no right of action for the freight: see *Canadian Pacific R. Co.* v. *Watts* (1914), 20 D.L.R. 607.

MacNeill, in reply.

Cur. adv. vult.

1st April, 1919.

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

The plaintiff sued upon a contract with defendant by which it agreed to deliver the lumber referred to in this action at a named destination to defendant or to its order. The lumber had to be carried on the latter part of the journey on a railway, the Canadian Pacific, other than the plaintiff's railway. By the conditions of the contract between the parties, the plaintiff was not to be held liable for loss or damage occurring off its own line. The lumber on arriving at its destination was, without the order of the defendant, delivered by the Canadian Pacific Railway to a third party without payment of the freight, which, by the terms of the bill of lading, was to be paid on delivery. The plaintiff sues for the freight charges over its own line and that of the Canadian Pacific Railway Company. The defendant denies liability and by the judgment below its defence was sustained. The contention of plaintiff's counsel was that because of the conditions of the contract whereby the plaintiff was not to be liable for loss and damage occurring off its own line, plaintiff is not responsible for the wrong delivery. That may be so, but that is not the issue. The plaintiff sues on a contract which was not performed on its part. It is not entitled to succeed. The statutes, R.S.C. 1906, Cap. 37, Secs. 284, 317 and 336, and Cap. 118, Sec. 3, have, in my opinion, no bearing on this dispute. The appeal should therefore be dismissed.

MACDONALD, C.J.A.

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

GALLIHER, J.A.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitor for appellant: *A. H. MacNeill.*
Solicitor for respondent: *J. H. Senkler.*

CLEMENT, J.

1918

Sept. 10.

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WHITESIDE v. WALLACE SHIPYARDS, LIMITED.

WHITESIDE v. WALLACE SHIPYARDS, LIMITED.

Principal and agent—Commission—Agreement—Procuring a loan—Contract between principal and outside party—Money procured required to carry out contract—Contract broken outside agent's control—Right of commission.

The plaintiff, who was solicitor for the defendant, was instructed, under special arrangements as to remuneration, to go to Montreal to assist in negotiations for the sale of the assets of the defendant Company. While engaged on this mission, the defendant Company entered into a contract with a Norwegian firm for the construction of four steel ships, the contracts being subject to obtaining permission to sail the ships under a neutral flag. The defendant Company, requiring funds for the purpose of carrying out the contracts, immediately wired the plaintiff to use all his efforts in obtaining a loan of the required funds. The plaintiff proceeded to New York, where he interested a financial company that sent experts to Vancouver for examination purposes, the plaintiff proceeding to Vancouver with them. He there advised the managing director of the defendant Company he expected a commission of from 2 to 5 per cent. of the amount of the loan should he succeed in obtaining it. The managing director said nothing in answer to this statement, but requested the plaintiff to go back immediately and endeavour to obtain the loan. The plaintiff proceeded to New York and succeeded in obtaining the assent of the New York company to lend the required sum. Subsequently, for reasons (other than that of obtaining permission to fly a neutral flag on the ships), the Norwegians repudiated the contracts for the ships and the defendant Company took no further action, and the money not being required, was never advanced by the New York company. The evidence of the managing director of the defendant Company was that the payment of commission was contingent upon the money being paid and the Norwegian contract going through. In an action by the plaintiff for a 3 per cent. commission upon $500,000, being the amount agreed to be advanced by the New York company, it was held by the trial judge that the plaintiff, having been solicitor for the company, must clearly prove the special bargain alleged, and on the evidence it did not appear that the parties were at one in their understanding of the bargain, and the action was dismissed.

Held, on appeal (MCPHILLIPS, J.A dissenting), that assuming defendant's contention to be correct that the payment of commission was contingent upon the Norwegian contract being carried out, this had reference only to obtaining permission to sail under a neutral flag. The repudiation of the contract was for other reasons, and the defendant acquiesced in it without the plaintiff's consent. The plaintiff, having performed his part in obtaining the loan, and being in no way respon-

sible for the failure in the carrying out of the Norwegian contracts, and the consequent payment of the money under the loan, he was entitled to his commission.

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APPEAL from the decision of CLEMENT, J. dismissing an action for commission for services in procuring capital for the defendant, shipbuilders operating at North Vancouver, tried by him at Vancouver on the 19th and 20th of June, 1918. On the 3rd of June, 1916, the defendant gave one McEvoy an option to purchase its whole plant for $450,000. McEvoy went East for the purpose of floating the option and spent some time in endeavouring to negotiate a sale. Later, through correspondence between himself and the defendant, and after consultations between the defendant and the plaintiff Whiteside, who had been acting as the defendant's solicitor, it was arranged between Whiteside and the defendant that he should go East to assist McEvoy in his endeavours to bring about a sale, Whiteside to be paid a nominal fee for his services. Shortly after Whiteside left for the East the Wallace Shipyards, Limited, entered into certain negotiations with a Norwegian company for the building of four steel ships, and contracts were entered into on the 20th of September, 1916. In order to finance the building of these ships the defendant had to raise money, and Whiteside was instructed by wire to devote himself exclusively to raising money for this purpose. His efforts were delayed from time to time by changes in the contract, but eventually he arranged with Spencer Trask & Co., of New York, whereby said company was ready and willing to make the necessary loan for the purpose of carrying out the contracts. When Whiteside had interested Spencer Trask & Co. in the matter, said company sent experts and a naval architect to Vancouver to examine into the standing of the defendant and its capacity to complete the work. Whiteside accompanied these men to Vancouver. While there he discussed with Wallace, the managing director of the defendant, what he should receive for his services, and said he expected a commission of from 2 to 5 per cent. To this Wallace said nothing, but told him to go back East immediately in order to complete negotiations for the loan. Wallace, on examination, did not contradict the statement that a commission was to be paid

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on the amount of the loan procured, but stated it was contingent upon the money being actually loaned and upon the Norwegian contracts being carried out. The Norwegian contract was conditional upon the defendant obtaining permission for the ships to be sailed under a neutral flag. This permission was never obtained, but in December, 1916, the Norwegians repudiated the contract on other grounds and the defendant acquiesced in the repudiation. The money therefore not being required, the loan was never carried through.

Mayers, for plaintiff.
Abbott, and *J. K. Macrae,* for defendant.

10th September, 1918.

CLEMENT, J.: On the authorities I must, I think, hold the plaintiff to clear proof of the special bargain or bargains alleged by him; and it is for him to convince the Court that his clients appreciated clearly the exact contract into which they entered with him.

As to the initial bargain, I must hold that the plaintiff was to receive $10 *per diem* for the time spent on his trip East in the event (which has happened) that the negotiations under the McEvoy option proved completely futile. In addition, he was to be recouped his living and travelling expenses, but I am unable to find upon the evidence that the defendant ever agreed to pay the living and travelling expenses of the plaintiff's wife. The defendant was also to render financial aid to the plaintiff's office during his absence, but no question arises on this head, as the plaintiff is content to give credit to the defendant for the sums so advanced to his office.

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As to the alleged agreement that the defendant should pay a commission of from 2 to 5 per cent. upon the loan which, as a result of the plaintiff's efforts, Spencer Trask & Co. ultimately agreed to make to the defendant, this is the branch of this case which has given me much anxious consideration. The alleged bargain was made at a time when the plaintiff had been some time engaged upon this loan, during which time, and indeed, during his whole trip, the plaintiff had from time to time drawn on the defendant for his expenses. Were it not for the alleged

bargain made hastily on the eve of the plaintiff's second departure from Vancouver, everything points to this, that there was no idea of a definite segregation of the plaintiff's work as between the reconstruction under the McEvoy option and the securing of a temporary loan to finance the Norwegian contracts. The plaintiff was working generally in the interest of the defendant, and the two projects were intimately connected. The financing successfully of the Norwegian contracts would render the other larger project much more likely to result in a successful flotation. On the whole, while not impugning the plaintiff's testimony, I have come to the conclusion that the plaintiff and the defendant were never at one in their understanding of the bargain as to the commission and, as already intimated, the burden lies rather heavily upon a solicitor making a bargain with his client to make out a clear case and shew that his client fully appreciated the terms of the bargain. I think Mr. Wallace is honest in his statement that he understood that everything hinged on the Norwegian contracts, with this result, that if the money was not actually advanced by Spencer Trask & Co. by reason of the fact that the need for it had disappeared, no commission would be payable. In this view, the original bargain stands.

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The plaintiff is entitled to $10 *per diem* from August 20th to (say) February 6th—$1,710—and his own living and travelling expenses during that time, including the expenses of the home trip. There will be a reference to settle this amount, and (if the parties differ) to find what credits the defendant is entitled to. Further directions and costs reserved until the district registrar at Vancouver has reported.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 27th, 28th and 29th of November and 2nd of December, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant: The breaking off of relations between the defendant and the Norwegians has no bearing on the contract with the plaintiff. As to a solicitor taking commission on obtaining a loan see *Gradwell* v. *Aitchison* (1893), 10 T.L.R. 20; *Bell* v. *Cochrane* (1897), 5 B.C. 211; *Allen* v. *Aldridge*

Argument

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(1843), 5 Beav. 401 at p. 405. On the question of weight of evidence see *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241; *In re Dickie, De Beck & McTaggart and Sherman* (1916), 23 B.C. 538. The contract between the defendant and Norwegians was capable of enforcement, but defendant did not enforce it. Commission may be payable although the principal gets no benefit: see Bowstead on Agency, 5th Ed., 201; see also *Green* v. *Lucas* (1875), 33 L.T. 584; *Fisher* v. *Drewett* (1878), 48 L.J., Q.B. 32; *Fuller* v. *Eames* (1892), 8 T.L.R. 278; *Herbert* v. *Vivian* (1913), 23 Man. L.R. 525. As to the amount of commission he should receive see *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614 at p. 626.

Argument

Abbott, for respondent: As to the alleged contract, there was a vague statement by Whiteside that he expected from 2 to 5 per cent. The mere statement of a person's intention is not an offer, and will not bind as a contract: see Halsbury's Laws of England, Vol. 7, p. 346; *Henning* v. *Toronto R.W. Co.* (1905), 11 O.L.R. 142; *P. Burns & Co., Ltd.* v. *Godson* (1918), 26 B.C. 46. The evidence shews the arrangement was entirely contingent upon the Norwegian contract being carried through.

Mayers, in reply: An acceptance of a contract in words is not necessary: see Halsbury's Laws of England, Vol. 7, p. 433, par. 884; *Bryant* v. *Flight* (1839), 5 M. & W. 114. We are entitled at any rate to 2 per cent., and it is in the discretion of the Court to give more: see *Broome* v. *Speak* (1903), 1 Ch. 586 at p. 599; *Croasdaile* v. *Hall* (1895), 3 B.C. 384.

Cur. adv. vult.

11th February, 1919.

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MACDONALD, C.J.A.: The circumstances out of which the action arose are set forth in the reasons for judgment of my brother GALLIHER, which I have had the advantage of reading, and I shall therefore proceed directly to the points at issue.

The learned trial judge thought the parties were not *ad idem* and dismissed the action. There is, in my view of the evidence, no essential difference between the plaintiff's and defendant's version of the contract. Mr. Wallace, defendant's managing director, who conducted the negotiations with the plaintiff, states the plaintiff's proposal thus:

"He [plaintiff] said if this Spencer Trask and Norwegian deal goes through I will charge you 2 per cent."

and again, in answer to the question by the Court:

"But if it had gone through would it be 2 per cent. on the $500,000, or whatever you got out of it?"

said:

"Yes, whatever we got out of it."

And again, reasserting former testimony, he said:

"I said it [the commission] was contingent on the deal. On the Spencer Trask lending the money and the Norwegian contract being carried out, that was the two it was contingent on."

Mr. Turney, secretary-treasurer of defendant, said that Mr. Wallace told him that there was a commission of 2 per cent. to be paid to the plaintiff "On the amount of money to be raised." That is precisely the plaintiff's contention, and differs only from Mr. Wallace's testimony in that it does not mention the contingency in reference to the Norwegian contracts. These Norwegian contracts were contracts entered into by the defendant with Messrs. Ellingsen & Johnnessen for the building of ships in accordance with the terms set out in the contracts. They had been made and executed prior to the contract between the plaintiff and defendant now in question, and the only contingency upon which they were subject to cancellation was the event of failure of the defendant to procure the permission of the department of trade and commerce of Canada to the vessels being sailed under a neutral flag. I think it is fair to assume that this was what the parties herein had in mind when the commission was made contingent on these Norwegian contracts being carried out, as well as upon the success of the loan.

It is manifestly fair to the defendant to take its own version of its contract with the plaintiff, which I do, and on that footing there is no question of failure on the plaintiff's part to discharge the heavy burden, emphasized by the learned judge, resting upon him to clearly prove the terms of the contract entered into between him and his client, the defendant. Nor does any question arise in this appeal as to the fairness of the contract and the full knowledge of the defendant of all the facts and circumstances of which it was entitled to disclosure.

Therefore, I take it that the contract proven is one by which the defendant promised to pay to the plaintiff at least 2 per

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cent. commission on the amount of the loan should he succeed in getting it and should the defendant succeed in complying with the condition upon which the Norwegian contracts should become unconditional.

There is no question here of failure to obtain the agreed permission to the said ships being sailed under a neutral flag. The defendant acquiesced in the repudiation by the said purchasers of their contract for other reasons than the failure to obtain said permission, as to which no question was raised in this appeal.

The said purchasers withdrew from their contracts, and on the evidence I must hold that the defendant acquiesced in such withdrawal without plaintiff's consent. It is conceded that the plaintiff performed his part in obtaining the loan, and is in no way to blame for the failure to bring about a complete consummation of the transaction involved in the carrying out of the Norwegian contracts and the obtaining of the loan. In these circumstances, I think the plaintiff is entitled to a commission of 2 per cent. on the sum which the lenders were prepared to advance, *viz.*: $500,000. This commission was earned when the Norwegian contracts came to an end.

It was argued, however, that the plaintiff's subsequent conduct amounted to an abandonment on his part of his right to the commission. This conduct was relied upon also as evidence that there was no contract at all for commission, or, if there was, that it was one to pay the commission only if the Norwegian contracts were carried out without regard to whether their failure was brought about by defendant's act or omission or not. As to the first, nothing short of a release, or what is equivalent to a release, of plaintiff's right to the commission could divest him of it, and the evidence is far from establishing that. The answer to the second is that the contract is that proven by the evidence of the defendant itself and is not in doubt. As regards the third, there must, in reason, be some point of time at which the plaintiff could say: I have done my part and am entitled to my commission. That point of time, in the ordinary course of a transaction of the kind, would have been reached when the loan was secured and the contingency of failure to obtain con-

sent to the sailing of the ships under a neutral flag was removed. It would not, in my opinion, be reached only when the ships were built and delivered and all possibility of the contracts not being "carried out" on the one part or the other was removed. By permitting the Norwegians to withdraw from the contract the defendant has estopped itself from saying, as against the plaintiff, that the contracts were not carried out.

There is another question remaining to be considered. Up to the time the plaintiff was instructed to enter into negotiations for the loan he was, the judgment below declares, entitled to receive from the defendant a fee of $10 a day and expenses while absent from his home on defendant's business in Montreal and New York. In his evidence, the plaintiff says that he put aside all other business of defendant's and devoted his whole time and attention to the loan negotiations from and after the 22nd of September, 1916, and up to the withdrawal of the Norwegians, of which plaintiff appears to have been advised on or about the 21st of December of the same year. During that period the commission must be plaintiff's remuneration. Up to the 22nd of September there can be no doubt about the correctness of his claim for fees and expenses.

With respect to the period between the 21st of December and his recall on the 6th of February, 1917, I think the plaintiff is also entitled to his agreed fees and expenses, as during the latter period he was again devoting his attention to business of defendant outside the commission contract and within the scope of his retainer.

The judgment below should, therefore, be varied in accordance with the above findings.

MARTIN, J.A. would allow the appeal.

GALLIHER, J.A.: This is an appeal from the decision of CLEMENT, J. of the 10th of September, 1918.

The plaintiff was at all times material to the contracts in question herein solicitor for the defendant, though as to the contract for commission sued on he claims not to have been acting in that capacity. The facts are shortly these: The defendant is a shipbuilding firm operating at North Vancouver.

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On the 3rd of June, 1916, the defendant gave to one Arthur McEvoy an option to acquire all the undertaking and assets of the defendant as a going concern, for the sum of $450,000. McEvoy went East to float this option and after being East some time and after correspondence between himself and Whiteside and the defendant and consultation between Whiteside and the defendant, Whiteside was authorized to go East to assist McEvoy at a nominal fee, which the judge has fixed at $10 per day (and against which there is no appeal) and travelling, living and other necessary expenses, as to which latter the learned judge has directed a reference. Shortly after Whiteside arrived in the East the defendant entered into negotiations with a Norwegian company for the building of certain ships, which culminated in an agreement dated the 20th of September, 1916. To finance the carrying out of this contract the defendant was obliged to raise money, and Whiteside was instructed to devote himself to this object in the East. He therefore dropped work on the McEvoy option and devoted his time and attention exclusively to the procuring of a note issue for the financial purposes I have referred to. After long and arduous work his efforts, which were from time to time delayed by changes in the contract permitted by the defendant, were crowned with success, and he procured in Spencer Trask & Co. of New York a company able, ready and willing to handle the note issue. In other words, everything had been done by Whiteside which he had undertaken to do for the defendant in this regard, so as to entitle him to payment of any commission agreed upon, provided it came within the terms of his contract. Now coming to the terms of the contract, what occurred was this: At a time when Whiteside had interested Spencer Trask & Co. to the extent that they sent out experts and a naval architect to Vancouver to examine into the standing and capability of the defendant to undertake and complete the work it proposed entering into for constructing these Norwegian ships, Whiteside accompanied them from the East to Vancouver and while in Vancouver, on the eve of his leaving again for the East to complete negotiations for the note issue, the alleged agreement for commission was entered into. The evidence as to what occurred according to

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Whiteside is in no material way altered in cross-examination. The evidence is short and is here set out:

"At any rate it was not discussed, but on Friday evening of that week I got Mr. Wallace at his house—I went to his house. He had had an appointment with me that afternoon and had not kept it. However, I found him at his house and we discussed the business that we were engaged on generally, and in that interview the question of my remuneration for the making of this loan came up. If you will remember, any commission to be paid in the case of the transfer of the company's assets to a reorganized company would be out of the purchasers if a deal were made under the McEvoy option; but this was a totally different matter; and I had been taken off the other financial transaction in September and had since been engaged in obtaining this temporary financial assistance, and my remuneration of course would be on a different scale. Mr. Wallace asked me what I was going to charge him, and I told Mr. Wallace that I expected to make some money out of the reorganization of the company, which I had thought would be carried on after this transaction, for a temporary financial assistance had been closed. I told him that as I expected to make some money out of that I felt inclined to let him state what my remuneration for the obtaining that note issue would be—raising that note issue—that if Spencer Trask & Company agreed to make the loan—to take this note issue, that I should expect him to pay commission between 2 and 5 per cent. of the amount of the note issue, not less than 2 per cent. and not more than 5 per cent.—5 per cent. being the proper charge in negotiating loans of that kind. Mr. Wallace—I don't know what Mr. Wallace said to that, if he said anything, but he begged me to leave at once. He did not demur, and he begged me to leave at once for the East, and complete the deal as they were anxious to get on."

Wallace's evidence at the trial does not contradict the statement that two per cent. was to be paid on the amount of the loan procured but qualifies it in two respects: That it was contingent on first, Spencer Trask & Co. lending the money, and second, the Norwegian contract being carried out. Counsel for plaintiff pointed out that the answer is not consistent with the answer made in examination for discovery, and this is quite true, but I think the explanation of Wallace shews, although it is not quite clear, that there was no intention to make a wrong statement but that his memory was rather hazy as to what took place. In fact, from reading the evidence, I have come to the conclusion that while Mr. Wallace was called into consultation on matters of detail and finance, when they had been decided upon he left them largely to his staff and did not charge his memory with what took place to the same extent as he did with the practical matters of construction. Turney, the secretary-

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treasurer of the Shipyard Company, admits that Wallace told him Whiteside was to be paid a two per cent. commission on the amount of money that was raised. He also states that he thinks Mr. Whiteside understood that the need of the Spencer Trask money was contingent upon the carrying out of the contracts for the Norwegians. Asked why he thought Mr. Whiteside understood that, he replied: "Why should we want to borrow money if we were not going into these other contracts?" There is no doubt Whiteside understood that the money was needed for the carrying out of these contracts, but that is quite a different thing to his commission for floating the loan being contingent on the carrying out of the contracts, unless it was so stipulated.

Now as to whether there was a contract. We have Whiteside's evidence as to the conversation. No assent or dissent expressed by Wallace at the time other than to be inferred from his urging Whiteside to leave at once and go on with the work, and his afterwards telling Turney they had to pay Whiteside a two per cent. commission, and there being a consideration, a contract is established. The remaining question in regard to the contract is what was the remuneration contingent on. Both sides are agreed that it was contingent on procuring the money to be advanced, and it is admitted, or at all events it cannot be disputed upon the evidence, that Whiteside procured Spencer Trask & Co. able, ready and willing to advance the money. The more difficult problem as to which the parties are at variance is, was the remuneration contingent upon the entering upon and the carrying out to completion of the construction of the Norwegian ships, for the defendant must go that far on this branch of the case in order to escape lability? No definite words were used in the conversation between Whiteside and Wallace as to any contingency upon which commission was to be paid. Ordinarily speaking, when you employ an agent to perform certain work for you for an agreed amount, that amount is payable when the work is completed even should it transpire that the work done by your agent proved useless to you. We have to look at all the circumstances in this case. First, there was the agreement with regard to assistance on the McEvoy option, and right here

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might be a convenient time to deal with the suggestions of defendant's counsel that this option deal and the work done in procuring the note issue are so linked up that the work done on the latter may be said to be in furtherance of the former. Assuming that the procuring of the shipbuilding contract and the raising of the money which would enable the defendant to carry out these contracts might be an inducing element in bringing about a sale or reconstruction under the option out of which Whiteside expected to make a substantial commission, yet in the face of what took place at the meeting in November between Wallace and Whiteside we must regard them as two separate transactions. There Whiteside in effect said: I am inclined to let you down easy as regards my charges for procuring this loan because I expect if the deal under the option goes through I will get a commission out of the purchasers; clearly shewing that he was not relying on that chance and the nominal fee as remuneration for his services in connection with the loan but only stating that as a reason why he would make his charges more reasonable. At the time this arrangement was made and for some time prior thereto the defendant had a binding contract under seal enforceable against the Norwegian interests. Both Whiteside and Wallace believed that the contracts would go through providing they could be financed. Whiteside's special mission then was to procure these finances, which he did, and certainly it was through no fault of his or of those he procured that the matter fell through.

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It was the fault of either the Norwegian interests or of the defendant, and as the matter appears to me, it was the fault of both. The defendant did not seek to hold the Norwegians to their contract or enforce it, but on the other hand allowed changes to be made in its terms, changes which rendered it infinitely more difficult for Whiteside to carry out his part and in the end resulted in the whole transaction falling through.

We will first deal with the matter as if Whiteside had not been the defendant's solicitor or in fact a solicitor at all but simply a broker or agent for procuring the loan. In view of what I have already stated, could it be said for a moment that he would not be entitled to his commission? I think not.

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Now looking at it from the point of view that Whiteside at the time was the defendant's solicitor. It is urged that there is a greater burden placed upon the shoulders of a solicitor in transactions with his client than where the parties are at arm's length in dealing, and I admit the general principle. That has been decided in a number of cases. We have first to enquire in what capacity Whiteside acted. I doubt if the mission on which Whiteside first went East could in strictness be called solicitor's work, but we need not concern ourselves as to that. There was a special agreement as to that and the learned trial judge has fixed the amount, against which there has been no appeal. Whiteside, however, was taken from this work by the defendant and requested to negotiate for the procuring of a very large amount of money, from one-half to three-quarters of a million dollars. This is very much the work of a financial broker. Of course, Mr. Whiteside has demonstrated that a solicitor can accomplish it but I think when one reads the appeal book one must realize how far removed from ordinary solicitor's work it is. Transactions of this nature are specialties in themselves and often in the hands of men skilled in such fail. I am only using these illustrations to shew the reasonableness or unreasonableness of either Mr. Wallace or Mr. Whiteside being under the impression that Whiteside was acting in his capacity as solicitor. Is it reasonable to suppose, or was it reasonable for Wallace to suppose that Whiteside would absent himself from his practice in Vancouver for $10 per day and expenses with an arrangement as to office expenses? It is true he did so on the work he originally went East upon, but then there was the inducement and the certainty if successful of getting a substantial commission out of the purchasers, while as to the loan transaction he could only look to the defendant. I feel that I have already dwelt upon this matter at too great length, suffice it to say that in my opinion we should not apply the stricter rule under the circumstances of this case. What the defendant submits practically amounts to this—that Whiteside should have told Wallace that his commission was payable whether the contracts were carried through or not. In my opinion the facts do not warrant this. I do not think, under

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the circumstances of this case, that we are at all embarrassed by the decisions cited that solicitors dealing with their clients should exercise the utmost good faith. The evidence discloses no bad faith, and the transaction was one of a strictly business character and which business men should and could readily comprehend. I would allow the commission at the minimum fixed by Whiteside himself and understood by Wallace, *viz.*: 2 per cent. on the $500,000. From this should be deducted all sums awarded by the trial judge for *per diem* fees, and also for expenses during the entire time Whiteside was engaged in the work of floating the loan, and to this extent the judgment entered below should be altered. The judgment below orders a reference as to expenses and this, I think, should be had.

McPHILLIPS, J.A.: This appeal has relation to a claimed commission upon arranging a loan by way of short term notes, the respondent to be the borrower and Spencer Trask & Co., bankers and brokers of New York, to be the lenders, the appellant claiming to have brought about the agreement to make the advance, and the contention of the appellant is that the respondent contracted to pay a commission for his services not less than 2 per cent. nor more than 5 per cent. upon the total amount of the note issue, namely, $500,000.

The respondent is a Company engaged in shipbuilding and at the time of the happening of the events necessary to be considered in this appeal, was in the market for orders for the building of ships, this class of work being accelerated and large orders offering consequent upon the loss of shipping during the continuance of the war. The respondent needed money to engage in these operations, and adopted two methods of procedure to meet the situation; one was the giving of an option to one McEvoy (who had been a partner of the appellant at one time in the practice of law in the City of Vancouver) for the sale of the undertaking and assets of the respondent for $450,000. As to $225,000 of the purchase price, this was to be in cash, and as to the balance to be secured by debentures of the new company to be formed to take over the undertakings and assets of the respondent, it was to be really more or less the procuring of purchasers who would make the necessary cash

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advance, form a new company and Mr. Wallace was to be the president of the new company, and to carry on; in fact, it was to be in the nature of a reorganization to meet the situation which had presented itself of the possible very profitable building of ships, but which was only possible with additional capital. The second idea of meeting the situation largely arose because of the fact that McEvoy was not making any speedy headway in bringing about the new floatation and the introduction of the needed capital. Then it was thought that it would be well to see if the required moneys could not be obtained by way of loan. The appellant was to receive, if the McEvoy option went through, one-third of the commission or profit recoverable by McEvoy. It would seem that McEvoy was desirous that the appellant should assist him in his work in the East at Montreal and New York and other financial centres, and it resulted in the respondent retaining him to go East to assist McEvoy, the appellant to have a *per diem* allowance and expenses. The expense account, it would seem, was to be liberal. The appellant contended for an allowance of $20 per day, and the learned judge at the trial allowed $10 per day, and expenses, and there is no cross-appeal, the learned judge disallowing any further claim of the appellant.

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The whole transaction is somewhat involved and complicated by the fact that the appellant was at one time, if not at the actual time of the occurrences, the solicitor of the respondent. In fact, it would seem that the respondent really dealt with the appellant more as a solicitor than as a broker in the matter. This is illustrated by one feature amongst others, namely, that as the appellant was to be necessarily away from his office in the City of Vancouver, advances were to be made, and were made, by the respondent in the way of meeting the appellant's office expenses. The claim for the commission, which is made for 3 per cent. on the $500,000, is in amount $15,000—this being the disallowed item and which forms the subject of this appeal. It was never really advanced as a claim until a short time before action was commenced, and it is to be noted that even after the lapse of two months after this commission was earned, if the appellant's view is to be accepted, no specific claim was made, a period of time that the appellant was embarrassed

for funds. The new flotation or re-organization was not possible of accomplishment nor the loan, unless the respondent was able to demonstrate that substantial contracts for the building of ships had been entered into. Contracts were entered into with a Norwegian syndicate which would, it was estimated, have produced a profit of a million dollars, but the Norwegians after entering into the contracts withdrew from same, and apparently it was not possible to enforce these contracts, at any rate no steps were taken to that end. Then negotiations with a French syndicate and with others were entered upon, but nothing came of these negotiations, and difficulties arose about deposits in the bank to ensure the carrying out of the contracts and the execution of needed surety bonds. Without entering into the details of all these matters, I cannot but come to the conclusion that the appellant was in the position all through of a joint adventurer with McEvoy in the chances of obtaining remuneration for his services over and above the *per diem* allowance and expenses in relation to the option, new flotation and re-organization, and as to the loan was a joint adventurer with the respondent, that is, either one of the contemplated occurrences was to become an accomplished fact to enable the appellant to obtain more than the daily allowances and expenses. It is a truism upon the facts that neither of the possible events were at all possible unless there were firm contracts for the building of ships, and without these contracts all was impossible. Nevertheless, although neither of the contemplated events happened, the appellant insists upon this further claim for services rendered although nothing in the way of executed contracts took place, followed by any advance of moneys from Spencer Trask & Co., that is, the respondent in no way profited by the services of the appellant, yet the respondent did make very considerable advances to the appellant for services and expenses, and the learned trial judge has allowed his claim in this respect, only disallowing the claim for the commission upon the arranged loan, which, under the circumstances, by reason of the failure of obtaining firm contracts for the building of ships, was not possible of being taken advantage of.

In view of all the facts and circumstances attendant upon all the happenings, the relationship of the parties to each other

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all being considered, a very considerable onus unquestionably rests upon the appellant to make out his case, and the learned trial judge, who had the opportunity of seeing and hearing the witnesses, has found against the appellant, and it rests upon the appellant to establish that the learned trial judge arrived at the wrong conclusion. The question now is, has the appellant discharged this onus resting upon him?

I have been impelled to the conclusion that the appellant fails in this appeal. It is more incumbent upon a solicitor dealing with a client to make out his case than any other person acting in business transactions; he must be held to be better acquainted with the necessity for and certainty of contract and not leave matters too vague and difficult of ascertainment. It would have been reasonable and proper that the contract should have been reduced to writing, so that the possibility of misunderstanding would be reduced to a minimum. As it is now, upon the facts before us in this appeal, all is left to conjecture, and the respondent disputes the appellant's understanding of the words of the alleged contract and all is uncertainty, and in such a state of facts, who is to suffer? The appellant suing must make out his case, not leave it for the Court to make the contract; that is not the province nor within the line of duty of the Court. The contract failing of establishment cannot be enforced nor can damages be awarded for the breach of a non-existent contract. I would refer to what the Lord Chancellor said in *Jorden* v. *Money* (1854), 23 L.J., Ch. 865 at p. 869, the language being peculiarly applicable to the present case:

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> "The question on this case then becomes one merely of fact. In my opinion, no case has been made out, in point of fact, by this complaint. There could be but one witness on each side for the undertaking, as a promise binding in equity, if made at all, was only made in conversation between . . . . [in the present case between the appellant and Wallace, the manging director of the respondent]. Now, he asserts that the promise was distinctly given, and she as positively denies the fact. In such circumstances, equity cannot, without additional testimony shewing the promise to have been made, enforce the observance of it, unless indeed, the denial of the promise should be so alleged as to prove that it could not be relied on. So far from that being the case, I think on the evidence here no such contract was entered into in the sense which the respondent supposes."

And Lord Brougham at p. 870:

". . . . amounted merely to the expression of intentions, which at the moment no doubt she intended to fulfil; but they were mere intentions; they were altered by subsequent circumstances, and therefore the performance of them could not be enforced."

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[The learned judge after setting out the evidence at length, continued]:

It is apparent that really no concluded contract was ever entered into whereby the advance by way of loan could ever have been exacted from Spencer Trask & Co., and it is evident that the appellant fully appreciated this and was desirous of keeping in touch with them to the end that if further contracts for the building of ships could be got on satisfactory terms, then to revive negotiations for the loan. It is further apparent that at this time no suggestion is made by the appellant that notwithstanding the changed situation, the default of the Norwegian syndicate and no contracts in sight, that nevertheless he would claim a commission on the loan transaction with Spencer Trask & Co., abortive as it was, and the telegram from the respondent is clear indication that no thought of a commission being payable was in the mind of the respondent. There could not reasonably be commission and as well *per diem* allowance and expenses, and everything indicates that under the circumstances all that was done by appellant was referable only to the agreement—that he should receive a *per diem* allowance and expenses, and this has been allowed to the appellant throughout the whole time. The judgment entered in its operative part reads as follows:

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"This Court doth order and declare that the plaintiff is entitled to be paid or allowed by the defendant for his services mentioned in the statement of claim, $10 *per diem* for the period from August 20th, 1916, to February 6th, 1917, namely $1,710, and also his own living and travelling expenses during that period including the plaintiff's own expenses of his return from Montreal to Vancouver after his recall by the defendant and all other expenses properly incurred by the plaintiff on behalf of the defendant;

"And this Court doth order that the following questions in this action, namely: the amount of the plaintiff's own living expenses and travelling expenses during the said period, including the plaintiff's own expenses of his journey from Montreal to Vancouver after his recall by the defendant, and all other expenses properly incurred by the plaintiff on behalf of the defendant and the amount for which the defendant is entitled to credit in respect of payments already made by the defendant to the plaintiff, be referred to the district registrar for his enquiry and report."

I cannot satisfy myself that the evidence establishes any con-

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tract or agreement which may be said to be susceptible of legal enforcement for the payment of the commission claimed. The appellant really does not go the length of saying that there was a concluded contract for the payment of commission to him, nor was the rate or percentage of commission agreed upon, if all that the appellant says be accepted as against the explicit denial of Wallace. The learned trial judge has held that the parties were not *ad idem*. With this holding I entirely agree. No concluded agreement was come to whereby the appellant was to receive a commission for arranging a loan such as is claimed. In *Love and Stewart (Limited)* v. *S. Instone and Co. (Limited)* (1917), 33 T.L.R. 475, Lord Loreburn at p. 476 said "The law would not come in and say they must agree on what was reasonable. It would say that there was no bargain. That was this case, and on that ground the appeal failed." And Lord Parmoor at p. 478 said ". . . they could not convert into a contract an arrangement of which the terms were not agreed. . . . "

According to Wallace any commission, if payable at all, was contingent upon Spencer Trask & Co. advancing the money and the Norwegian contract being carried out, and certainly if contract there was, upon the evidence it is impossible to say that it was of any other nature. This situation was one of very considerable advantage to the appellant, as in the event of matters going off (which was the result) he was protected to the extent of the *per diem* allowance and expenses, really a very favourable position, with the possibility of earning a very handsome commission if the whole transaction matured. It certainly would not appear to be at all equitable that the commission should now be payable with nothing achieved to the advantage of the respondent. Unquestionably to establish the claimed contract upon all the surrounding facts and circumstances calls for the presentation of more cogent evidence than that advanced by the appellant at the trial. And in view of the express finding of the learned trial judge against the appellant's contention, and with ample evidence to so find, it is clear to me that the appellant fails utterly in making out a case for the commission. Even were a contract established for the payment of a commission, it is indeed doubtful in view of the admitted fact that the rate or percentage of commission remained to be

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agreed upon, that there would have been no enforceable contract. In *Henning* v. *Toronto R.W. Co.* (1905), 11 O.L.R. 142 it was held (see head-note) that "A provision in a contract for the right to use space for advertising purposes for its renewal 'at the end of three years at a price to be agreed upon but not less than $5,000 per annum' leaves the matter at large unless the price is agreed upon, and the person using the space cannot insist on a renewal at the rate of $5,000 per annum." However, upon this point I give no considered opinion (see *Taylor* v. *Brewer* (1813), 1 M. & S. 290; *Roberts* v. *Smith* (1859), 4 H. & N. 315, in which both Martin and Bramwell, BB. appeared to disapprove of *Bryant* v. *Flight* (1839), 5 M. & W. 114; *Harvey* v. *Facey* (1893), 62 L.J., P.C. 127; and *P. Burns & Co., Ltd.* v. *Godson* (1918), 26 B.C. 46).

In the present case the appellant states what he will charge as a commission (within a sliding scale) and does not pretend to say that there was any acceptance by Wallace on behalf of the respondent. In view of this what Anson says in Law of Contract, 14th Ed., 48 is applicable:

"And an offer must be capable of affecting legal relations. The parties must make their own contract: the Courts will not construct one for them out of the terms which are indefinite or illusory."

MCPHILLIPS, J.A.

In the present case there is no written contract to interpret. All is based upon a very hurried conversation, and the learned judge was called upon to decide the question of fact upon rival evidence. It is, therefore, a heavy burden that rests upon the appellant when he asks that the finding of fact of the learned trial judge should be displaced and judgment be entered for him. Lord Loreburn, L.C. in *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326 said:

"When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons. The former practice of Courts of Equity arose from the fact that decisions often rested upon evidence on paper, of which an appellate Court can judge as well as a Court of first instance."

In *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96, Lord Buckmaster said:

"But upon questions of fact an Appeal Court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their con-

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tending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

I cannot persuade myself that the appellant has made out a case in this appeal. The appeal, therefore, in my opinion fails.

EBERTS, J.A. would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *D. G. Marshall.*
Solicitors for respondent: *Abbott, Macrae & Co.*

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IN RE CEPERLEY, DECEASED

IN RE ESTATE OF GRACE E. CEPERLEY, DECEASED.

Will—Executors and administrators—All estate except one property to be converted into money—Debts and testamentary expenses to be paid—Life tenancy for excepted property before sale—Upkeep—Not to be paid out of general estate—R.S.B.C. 1911, Cap. 4, Sec. 111; Cap. 208, Sec. 16—B.C. Stats. 1918, Cap. 77, Sec. 2.

A testatrix bequeathed all her estate except "Fairacres" to her executors in trust to convert into money and pay thereout all her debts, succession and probate fees and legal and testamentary expenses and then pay several legacies. She then bequeathed "Fairacres" with the furniture and personal property belonging thereto to said executors upon trust to the use of her husband for life, and on his death to be sold and the proceeds up to a certain sum to be paid to the park commissioners of Vancouver for a playground for children.

Held, that the executors could not apply any moneys from the general estate for the upkeep of "Fairacres."

Statement

APPEAL by the Board of Park Commissioners of the City of Vancouver from the order and judgment of CLEMENT, J. of the 8th of May, 1918, made on the petition of the executors and trustees under the will of Grace P. Ceperley, deceased, for directions. The will contained, *inter alia,* the following clauses:

"I give devise and bequeath all my real and personal property whatsoever and wheresoever situate to my said trustees, ... their executors and administrators, upon trust to sell and convert into money such real

and personal estate save and except that property situate at Burnaby Lake, British Columbia and known as 'Fairacres,' being lots two and three, subdivision of lot seventy-nine, group one, New Westminster district [then providing that all her debts, etc., be paid thereout including succession duty and for a large number of legacies].

"As to my estate at Burnaby Lake, British Columbia, hereinbefore referred to as 'Fairacres,' I give devise and bequeath the same to my said executors upon trust to hold the same together with all furniture and personal estate belonging thereto and situate thereon to the use of my said husband, Henry Tracey Ceperley, during his natural life and at his death I direct the same to be sold and the proceeds up to the sum of $50,000 and in case the proceeds shall not amount to that sum then the whole proceeds I give and devise to the Park Commissioners for the time being of the said City of Vancouver to be used by them in providing a playground for children in Stanley Park."

"Fairacres" was encumbered with a mortgage for $20,000, its net value being sworn at $40,000 for probate, and its average revenue was about $5,000 per annum, but to produce this income various sums had to be expended from time to time, for which no provision was made in the will and Henry T. Ceperley, to whom was bequeathed a life interest, was not in a position to maintain the property and provide for its upkeep. The balance of deceased's estate was far below an amount sufficient to provide for the several legacies in the will. The question submitted to the Court was whether it was permissible for the executors to expend and apply from time to time moneys from the general estate for the maintenance and upkeep of the property known as "Fairacres"—the moneys so expended to be repaid from time to time from such revenue as may be received from "Fairacres," and if and to such extent as such revenue shall or may be insufficient to repay the moneys so expended, to charge such insufficiency against the capital account to be produced from the sale of "Fairacres" when it is sold. It was held by CLEMENT, J. that it was not permissible for the executors and trustees to expend and apply any moneys from the general estate for the maintenance and upkeep of "Fairacres."

Statement

The appeal was argued at Vancouver on the 13th and 16th of December, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

Harper, for the Park Commissioners: There is a mortgage on "Fairacres" for $20,000, and interest charges of $1,600 a

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year. My submission is the mortgage and interest should be paid out of the general estate, and the trustees are empowered to pay for its upkeep out of the estate. It is clear from the will that "Fairacres" should be kept intact, the payment of all debts being specifically provided for. It will be argued that Locke King's Act, 17 & 18 Vict., Cap. 113 (Imperial), as copied into the Administration Act (R.S.B.C. 1911, Cap. 4, Sec. 111) is against me, but I say there is a contrary intention shewn in the will, and as the will was dated in January, 1911, prior to the Administration Act, under B.C. Stats. 1912, Cap. 41, Sec. 6, that Act does not apply: see Halsbury's Laws of England, Vol. 28, p. 668, par. 1280; *Jones* v. *Ogle* (1872), 8 Chy. App. 192 at p. 195. The mortgage should be included in a direction to pay just debts: see Williams on Executors, 10th Ed., Vol. 2, p. 1324; *Moore* v. *Moore* (1863), 1 De G. J. & S. 602; *Eno* v. *Tatham* (1863), 3 De G. J. & S. 443; *In re Newmarch. Newmarch* v. *Storr* (1878), 9 Ch. D. 12; *Re Nevill; Robinson* v. *Nevill* (1890), 62 L.T. 864 at p. 867; *Maxwell* v. *Maxwell* (1870), L.R. 4 H.L. 506. On the question of maintenance and upkeep of "Fairacres," section 16 of the Settled Estates Act, as amended by Sec. 2, Cap. 77, B.C. Stats. 1918, applies; see also Underhill on Trusts and Trustees, 7th Ed., 253; *In re Farnham's Settlement* (1904), 2 Ch. 561; *Conway* v. *Fenton* (1888), 40 Ch. D. 512. On the question of costs see *Maxwell* v. *Maxwell, supra.*

Argument

A. H. MacNeill, K.C., for Ceperley: The tenant for life does not desire that the mortgage be paid out of the estate, merely that there should be reasonable outlay for maintenance, considering the unusual state as to value of property at present, and the Court should act accordingly: see *In re Tollemache* (1903), 1 Ch. 457.

A. E. Bull, for the general legatees: A will must expressly say mortgage debts before they can be included: see *Nelson* v. *Page* (1868), L.R. 7 Eq. 25; *Sackville* v. *Smyth* (1873), L.R. 17 Eq. 153. The old cases construed the first section of Locke King's Act very narrowly, but the later views are the other way: see *In re Fraser. Lowther* v. *Fraser* (1904), 1 Ch. 726 at p. 735; *Elliott* v. *Dearsley* (1880), 16 Ch. D. 322; *In re Smith* (1886), 33 Ch. D. 195.

Armour, K.C., for the trustees: As to the Act being retrospective see Maxwell on Statutes, 5th Ed., 361. As to the application of Locke King's Act see Theobald on Wills, 7th Ed., 172 to 180. The costs should be paid out of the general estate.

Harper, in reply.

Cur. adv. vult.

11th February, 1919.

MACDONALD, C.J.A.: I would dismiss the appeal. All to have costs except the husband of the testatrix.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion the directions given below are correct, and therefore the appeal of the Board of Park Commissioners for Vancouver should be dismissed. As in *Stephen* v. *Miller*, 25 B.C. 388; (1918), 2 W.W.R. 1042, and *Stinson* v. *Stinson* (1881), 2 Pr. 560, I think the costs should follow the event, except that the tenant for life, who supported the contention that the up-keep should come out of the general estate, ought not to have any.

MARTIN, J.A.

GALLIHER, J.A.: I agree in the directions given by the learned judge below. In the disposition of costs I agree with the Chief Justice.

GALLIHER, J.A.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitor for appellants: *E. F. Jones.*
Solicitor for the executors and trustees: *D. G. Marshall.*
Solicitors for the general legatees: *Harris, Bull & Mason.*
Solicitors for H. T. Ceperley: *Senkler & Van Horne.*

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RORAY v. NIMPKISH LAKE LOGGING CO., LTD.

RORAY & YEAMAN v. NIMPKISH LAKE LOGGING COMPANY, LIMITED, AND GARLAND.

Principal and agent—Sale of timber lands—Agreement—Construction of—Evidence—Efficient cause—Jury.

The plaintiff brought action for commission or in the alternative for a *quantum meruit* for services rendered on the sale of timber lands of the defendant Company. The articles of association of the Company contained a stipulation that the property should not be sold for less than $640,000 cash without the consent of the shareholders. On the 5th of September, 1910, the shareholders passed a resolution authorizing a sale at $650,000 on such terms as the directors thought fit. On the 2nd of December, 1914, one Garland, the managing director of the Company, wrote the plaintiff Roray offering $35,000 commission should the plaintiff bring about a sale of the property for $685,000. The plaintiff worked on the sale and in fact introduced to Garland one English who was one of the eventual purchasers. In October, 1917, a sale was brought about through other agents to Messrs. Wood and English, the purchase price being based on board measurement, to be paid for as the timber was taken, and $25,000 to be paid when the timber was logged. The shareholders gave the required assent to this sale, with a commission to the agents who brought it about, but they appeared to have had no knowledge of the plaintiff's employment by Garland. On the trial the jury found that the sale had been induced by the plaintiff's efforts and judgment was given for $35,000 for services rendered.

Held, on appeal, reversing the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting in part), that the contract with the plaintiff was one of special employment and the eventual sale was not within the contract; that in view of the stipulation in the articles of association, of which the plaintiff must be charged with knowledge, Garland, the managing director, had no authority to enter into a contract of general employment, the acceptance by the Company of the offer to purchase resulting in the sale that was made, only bound the Company to pay commission to agents whom the managing director was authorized to employ to procure the very offer accepted, and in order to claim commission thereon the plaintiff was bound to see that recognition by the Company of his employment in the transaction had been obtained, and this could not be implied in the absence of knowledge of the plaintiff's connection with the sale.

Per GALLIHER, J.A.: Assuming that the grounds given for allowing the appeal are wrong, there should be a new trial, as the finding of the jury that the plaintiff was the efficient cause of the sale was against the weight of evidence, unreasonable, and against clear inferences to be drawn from uncontradicted facts.

Per McPHILLIPS, J.A.: There was sufficient evidence to support the jury's findings, which should not be disturbed, but as such findings were upon the contract in said letter of the 2nd of December, 1914, which expressed said commission to be payable "as and when received" and no moneys were yet paid on the purchase, the judgment was in error in calling for immediate payment but should have been declaratory, the relief being limited to payment in accordance with the receipt of the purchase price.

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APPEAL by defendant Company from the decision of MACDONALD, J. of the 8th of October, 1918, and the finding of a jury in an action for commission or in the alternative for remuneration for services upon a *quantum meruit* for the sale of timber lands, the property of the defendant Company. The facts are sufficiently set out in the head-note and reasons for judgment.

Statement

The appeal was argued at Victoria on the 14th and 15th of January, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C., for appellant: The jury found Garland had authority to make the offer and that the plaintiff was the efficient cause of the sale. There are three grounds of appeal: first, the judgment is not in accordance with the alleged agreement and is not warranted by the alleged agreement. Second, Garland had no authority to enter into the agreement and there was never any ratification by the Company in so far as the commission is concerned. Third, there is not reasonable evidence on which the jury could find the plaintiff was the efficient cause of the sale, and in that respect it was a perverse verdict. As to the first ground, even assuming the letter from Garland was the Company's, the jury found the letter was the agreement that was made, but the actual sale was a sale on a stumpage basis to be carried out in eight years, and on which there might be no cash paid at all: see *McGraw* v. *Toronto R.W. Co.* (1908), 18 O.L.R. 154; *Prentice* v. *Merrick* (1917), 24 B.C. 432. If there is a change in the sale price there must be a change in the commission; in this case, therefore, there could not be a commission of $35,000. On the second ground, to have ratification you must have knowledge that the Company knew nothing of the agreement: see *Canada Central Railway Company* v.

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Murray (1883), 8 S.C.R. 313 at pp. 318-9 and 334. On the third point the jury in finding the plaintiff was the efficient cause of the sale, based it entirely on the agreement; it was, therefore, a perverse verdict.

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S. S. Taylor, K.C., for respondents: The jury did not base its verdict on the agreement, it was a *quantum meruit* verdict and the learned judge approved. They could not do anything else, as the contract was not carried out. There was a distinct verbal agreement to pay us $50,000 if we landed English: see *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614 at pp. 625-6; *Howard* v. *George* (1913), 49 S.C.R. 75; *Toulmin* v. *Millar* (1887), 58 L.T. 96. The letter of the 2nd of September only shews a basis of our being employed. As far as we are concerned Garland had authority to sell: see *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382 at p. 385; *Biggerstaff* v. *Rowatt's Wharf, Limited* (1896), 2 Ch. 93 at pp. 102-4. Assent of shareholders is required for an agreement for sale, but not in case of an agreement for commission. The shareholders were not misled. That they were the efficient cause is the only verdict they could give, and the judge agreed.

Argument

Davis, in reply: That the judge was in accord with the verdict is not correct. There was no authority in the directors to make a sale for less than $640,000 cash.

Cur. adv. vult.

1st April, 1919.

MACDONALD, C.J.A.: The defendant Company were the owners of certain timber licences and other assets which they desired to sell. At a shareholders' meeting held in Vancouver on the 6th of September, 1910, a resolution was adopted authorizing the board of directors to offer for sale and sell the Company's said property for a sum to be not less than $650,000 upon terms agreeable to the directors, and without further reference to the shareholders.

MACDONALD, C.J.A.

I ought here to mention that article 100 of the defendant Company's articles of association contains this stipulation:

"The property of the Company shall not be sold or disposed of for a lesser sum than $640,000 cash without the consent of the holders of two-thirds of the shares numbered 1 to 100,000 inclusive."

Mr. M. N. Garland was managing director of the defendant Company, and he on December 2nd, 1914, wrote to the plaintiff Roray, a member of the plaintiff firm, a letter in which he said:

"It is understood should you succeed in making a sale of the above-named property [defendant's said property] for the sum of $685,000, the terms and conditions of sale to be satisfactory to the Company, they will pay you the sum of $35,000 as a commission to you as and when received. Any deviation from the above-named selling price, or commission allowance, must be first agreed upon, and in proportion to the above-named selling price, and commission allowance. This is subject to confirmation, or previous sale, or withdrawal without notice."

The concluding sentences are not very intelligible, but I do not think they have any substantial bearing on the issues involved in the appeal.

The defendant denies the authority of Garland to write that letter, but I will assume, for the purposes of my opinion, that he was authorized to write it or that as between the plaintiffs and the defendant Company, his authority to do so cannot be disputed. On that assumption, therefore, had the plaintiffs made the sale thereby authorized, his claim for the commission of $35,000 could not have been successfully resisted. The sale which was made by the Company and because of which the plaintiffs make their demand in this action, was not for a lump sum. The purchase price was based on board measurement, to be paid for as the timber was taken, with an additional sum of $25,000 to be paid when the timber had been logged. It was not actually effected by the plaintiffs, but by Wyatt and Dixon, whom Garland appears also to have authorized to offer the property for sale. The sale was consented to, or rather the offer of the purchasers, Messrs. Wood and English, was accepted with the consent required by said article 100 and is binding on the Company. But the said shareholders had no knowledge whatever of Garland's employment of the plaintiffs. The offer of Wood and English was communicated to them in England by cable through Mr. Pugh, the Company's solicitor at Vancouver, by a message in which, after stating the terms of the offer of purchase, Mr. Pugh said:

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"we to pay . . . . seven and one half per cent. commission on each payment."

It was not therein stated to whom the commission was to be

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paid nor did the shareholders in England know, but there is no pretence that the plaintiffs were the persons to receive it.

In these circumstances the plaintiffs brought this action, claiming a commission under the contract evidenced by the letter of the 2nd of December, and in the alternative, remuneration for his services on a *quantum meruit*. He founds his claim on his efforts to effect the sale and his introduction of Mr. English, one of the purchasers, to Mr. Garland, and alleges that as a result of this introduction the sale was made. The claim based upon the *quantum meruit* may be at once dismissed from consideration. The answers of the jury to the questions submitted to them amount, in my opinion, to a finding on the contract contained in the letter. It is true that in their answers there is a vague suggestion of additional authority conferred on the plaintiffs by Garland, which the jury inferred from Garland's conduct in connection with plaintiffs' endeavours to sell the property, namely, Garland's interview with King & Bowden and his introduction of English to Garland, but these two incidents have no importance at all beyond shewing that the contract contained in the letter was then recognized as still subsisting, notwithstanding the lapse of three years' time since its date.

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Plaintiffs' counsel relies on the principle stated by Erle, C.J. in *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681 and by Lord Watson in *Toulmin* v. *Millar* (1887), 58 L.T. at p. 97, but in my opinion it cannot be held that the price named was a tentative one, such as is referred to by Lord Watson in the last-named case. The price stipulated for was that fixed by the shareholders, $650,000, with the commission added, which would appear to be Garland's interpretation of the meaning of the resolution of the 5th of September, 1910. Garland had actual authority only to employ plaintiffs to negotiate a sale at a fixed minimum price of $640,000. At best he might bind the Company by estoppel to an agreement with plaintiffs to negotiate a sale at the minimum price of $650,000. He had no authority and no power to bind the defendant by an employment to procure a purchaser ready and willing to buy at such other price as defendant might be willing to accept. In other words,

he had no authority to enter into a contract of general employment with plaintiffs or anyone else, and therefore the letter must be construed with reference to these circumstances and to the further fact that plaintiffs must be charged with knowledge of article 100 and therefore of the limited authority of Garland. In this view of the case the plaintiffs' action must fail unless, as was contended for by their counsel, the acceptance of Wood and English's offer at a price and on terms different from those contained in the letter, rendered the Company liable to pay. As far as the contract contained in the letter is concerned, no ratification was necessary. A sale in the terms thereby authorized would have bound the Company to pay the commission. The argument therefore must go this far—that by the acceptance of the Wood and English offer by the Company, with the consent of the shareholders mentioned in article 100, a new contract between the Company and the plaintiffs was created, by which the Company bound themselves to pay to the plaintiffs not seven and a half per cent. commission, because the agreement to pay that commission had no reference to the plaintiffs, but $35,000. The acceptance of the offer to purchase might, and I think would, bind the Company, though ignorant of the employment, to pay commission to agents whom Garland was authorized to employ to procure the very offer accepted, but not in like ignorance to pay commission on a contract of employment which Garland had neither the actual authority to enter into nor to bind the Company by estoppel. I think the plaintiffs were bound to see to it that recognition by the Company of their employment in the transaction was obtained, and this cannot be implied in the absence of knowledge on defendant's part of the plaintiffs' connection with the offer.

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There were other questions raised in the appeal, such as that the plaintiffs' introduction of English to Garland could not properly be held by the jury to be the effective cause of the sale. That is a question of some difficulty, and in the result arrived at as above stated it is unnecessary for me to decide it.

The appeal should therefore be allowed and the action dismissed.

MARTIN, J.A.: It is impossible, in my opinion, to hold that

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the sale set up by the plaintiff was one for "cash," as required by article 100; and, therefore, the consent of a certain class of shareholders was necessary to ratify the contract for sale, even assuming that Garland had authority to give the letter of December 2nd, 1914. It is alleged that a sufficient ratification was obtained by the exchange of the cables of September 6th and 13th, but I am unable to take that view, because there could be no ratification without disclosure of all the substantial terms of the sale and the shareholders were not informed of the important fact that a second commission would have to be paid to the plaintiffs in addition to a first one of seven per cent. to Wyatt and Dickson.

It follows that the appeal should be allowed.

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GALLIHER, J.A.: I think it is clear from reading the answers of the jury that their finding is based on the contract contained in the letter of December 2nd, 1914, confirmed, as they state, by acts of the managing director of the Company, Mr. Garland. None of the confirmations they allude to in any way alter the nature of that contract, nor do their answers in any way indicate that they took into consideration the alleged verbal agreement to pay $50,000, or that they were awarding any sum outside the contract, notwithstanding that question was distinctly put to them. If this be so, then the verdict must stand or fall as a judgment founded on the contract itself, in which case the question of *quantum meruit* does not arise. There cannot be both contract and *quantum meruit*.

The contract is complete in itself and provides for any necessary changes. It is a contract for a sale at a specific sum for a specified commission, with the proviso that any deviation from the selling price or the commission allowance must first be agreed upon. The Chief Justice has gone very fully into the question of contract, and I agree with his view. The contract is, I think, one of special employment and comes within *Bridgman* v. *Hepburn* (1908), 13 B.C. 389, affirmed 42 S.C.R. 228, and the case of *Holmes* v. *Lee Ho* (1911), 16 B.C. 66, decided by this Court, and not within *Toulmin* v. *Millar* (1887), 12 App. Cas. 746, and *Burchell* v. *Gowrie and Blockhouse Col-*

lieries, Limited (1910), A.C. 614, followed by this Court in *Prentice* v. *Merrick* (1917), 24 B.C. 432.

The contract calls for a sale at $685,000 with a commission of $35,000, leaving net to the Company $650,000. This amount would be in accordance with the sum fixed by the resolution of the directors of 10th September, 1910, and is evidently what Garland had in mind when he gave the letter of December 2nd, 1914, to the plaintiff, and would not require the assent of the shareholders mentioned in article 100 of the articles of association. Article 100 is as follows:

"The property of the Company shall not be sold or disposed of for a lesser sum than $640,000 cash without the consent of the holders of two-thirds of the shares numbered 1 to 100,000 inclusive."

Keeping this in mind and turning to the contract, the plaintiffs must be taken to have known of this provision in the articles of association. With this knowledge it it clear that the plaintiffs must be taken to have known that Garland had no authority to bind the Company by any contract for a lesser sum than $640,000 unless it was ratified by these shareholders. I do not think, therefore, that the words of Lord Watson in *Toulmin* v. *Millar, supra,* apply, where he is reported as saying: "The mention of a specific sum . . . . is given merely as the basis of future negotiations . . . ."

When we look at all the circumstances of this case, the contract is, I think, one of special employment. If so, the sale which eventually took place cannot be said to be a sale within the contract. In view of article 100, Garland had no authority to enter into a contract of general employment, and if this were to be construed as such then it is a contract beyond his authority, and assuming that the Company would be bound by notice of the authorized acts of Garland, it could not be held to have notice of unauthorized acts, which the plaintiffs themselves must be taken to have known were unauthorized, and notice would be necessary for ratification, because you cannot ratify what you have no notice of, either express or implied. The evidence is clear they had no such express notice, and under the circumstances no notice can be implied.

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It is said this sale may be one which would eventually realize $685,000 or more for the Company, but I do not think that is

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the point, and in any event it is subject to contingencies, one of which, destruction by fire, would absolutely prevent it. I am, therefore, in agreement with the conclusions reached by the Chief Justice upon this point. Should this view be wrong, I think there should be a new trial on the ground that the finding of the jury as to who was the efficient cause of the sale is against the weight of evidence. I have carefully read and weighed the evidence *pro* and *con.* and without entering into a full discussion of it I will shortly state the reasons for my conclusions.

The plaintiffs on the one hand and Wyatt and Dickson on the other are given authority to sell the property. The eventual purchasers of the property are a Mr. English and a Mr. Wood, interested equally. Both parties have had dealings with English, but Wyatt and Dickson only with Wood. Wyatt brought Wood and English together, when it was agreed if they got a certain other property which Wyatt had then put up to them, known as the Drummond limits, and which were in proximity to the Nimpkish, they would take up the consideration of the latter as a logging proposition. Wood says he would not have gone into this without English, and English says the same with regard to Wood, and both say they would not have considered Nimpkish unless the Drummond deal went through. Plaintiffs had nothing to do with the Drummond deal. Wood, a half

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owner, was not induced to go into the deal by the plaintiffs, in fact never knew him in it at all. English swears he was not induced to go in by the plaintiffs. The jury can, of course, disbelieve that statement if they choose. It is admitted that English was first introduced to Garland, the Company's representative, on August 30th, 1917, by the plaintiffs.

We have, then, spread before the jury on the one hand the evidence of the plaintiffs, their contract, their introduction of English and the work they did all uncontradicted. On the other hand the evidence on behalf of Wyatt and Dickson, their contract and the work they did, also uncontradicted. This up to the 30th of August, 1917. Up to this time no intimation had been given to the plaintiffs by English that he would take the property, no discussion of a deal on a stumpage basis, no tentative proposition discussed, merely going over the plans

and Rankin's cruise, and a jotting down from that cruise, by English, of certain figures as to the timber. I may say here that the letter of July 26th, 1917, from Garland to Wyatt and Dickson, giving them authority to deal with the property is attacked by Mr. *Taylor* as not genuine at least as to date, but unsuccessfully.

The position, then, on August 30th, 1917, is that we have the two agents for the Company dealing with the same prospective purchaser, English, and Wyatt and Dickson only with the other prospective purchaser, Wood. The plaintiffs claim, and the jury are entitled to so hold, that the property was first brought to the notice of English by them, and it is admitted that English was introduced by him to the vendors. That might well be and still nothing result therefrom, and it is only an element from which the jury can draw inferences in determining who was the *causa causans* of the sale going through. In fact, it is not a question here of contradictory evidence, but of drawing inferences from uncontradicted facts.

I have explained the position as it was on August 30th, 1917. After that date and after the Drummond deal had been closed through Wyatt and Dickson, English chose, as he had a perfect right to do, to carry on his negotiations regarding the Nimpkish through or in conjunction with Wyatt and Dickson rather than the plaintiffs, any propositions that he ever made were in conjunction with Wyatt and Dickson, and the deal was finally closed without any intervention by the plaintiffs. It is quite true if an agent procures and introduces a purchaser and a deal afterwards goes through by reason of that introduction, the agent is entitled to his commission even if he does nothing afterwards. The point here for the jury to decide was, did that introduction of English (I eliminate Wood for this purpose) become an effective cause of the sale or create the relation of vendor and purchaser, as it is otherwise put? Apart from that I do not think the plaintiffs' case could stand for a moment. The weight of evidence is, as I view it, strongly against the introduction having any effect at all or in any way strengthening the plaintiffs' case in conjunction with acts outside the introduction, and the jury could not reasonably so find.

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MCPHILLIPS, J.A.: This appeal has been very fully and ably argued. The evidence is somewhat voluminous, but the issue after all a simple one and does not partake of complexity of law or fact. The action was one for a commission upon the sale of certain timber holdings of the appellant, situate in the vicinity of Nimpkish Lake, Vancouver Island, B.C., and a sale was effected thereof, which to the satisfaction of both the judge and jury was the result of the services of the plaintiffs acting as agents for sale duly authorized by Garland, the managing director of the appellant. The case would appear to have been fully presented to the jury, and the words of Lord Loreburn (the Lord Chancellor) in *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697 are particularly applicable:

"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."

That there is sufficient evidence to support the jury's findings is clear to demonstration. The learned judge, however, has erred in law in this respect—the jury unquestionably in its judgment went upon the contract sued upon, *i.e.*, the letter of the 2nd of December, 1914, and the judgment is in error in being entered for $35,000, calling for the immediate payment thereof; that was not what the jury found. The jury found for the contract as contained in the letter, and the respondents were only entitled to payment in the terms of the contract, that is, a declaratory judgment, the relief being limited to payment in accordance with the receipt of the purchase price, the words of the contract being, "as and when received." The letter referred to is in the words and figures following: [already quoted by MACDONALD, C.J.A.]

The questions put to the jury and the answers thereto follow:

"1. Did plaintiffs, acting as agents for defendant Company, create the relationship of vendor and purchaser between such Company and Wood and English? Yes.

"2. Did defendant Company, with knowledge of the actions of plaintiffs as agents—adopt and take the benefit of their services? Yes, through the managing director.

"3. Did defendant Company, in good faith, accept Wyatt and Dickson as the agents who alone had effected the sale to Wood and English? In our opinion the Company through the managing director did not act in good faith.

"4. Did plaintiffs have authority, as agents of defendant Company, to sell property in question? Yes.

"5. (a) If answer to question four (4) be in affirmative, then, state whether there was any authority from Company in addition to letter of 2nd December, 1914? In our opinion the authority was continued by various actions of the Company's managing director. (b) If so, then state in general terms the nature of such additional authority? Interviews of August 30th in plaintiffs' office, acquiescence in the King deal and visit to Howden in connection therewith.

"6. (a) Did the Company confirm the authority contained in letter of December, 1914? Yes, by the actions of the managing director. (b) If so, then state, how and when such confirmation took place? By not withdrawing authority and by reasons expressed in clause (b) of question 5.

"7. (a) Did defendant Garland represent to the plaintiffs that he had full authority to employ them as agents in the sale of the property? Yes. (b) If so, did plaintiffs believe and act upon such representations? Yes.

"8. Damages against defendant Company? $35,000. Or alternatively against defendant Garland? For the same amount."

The jury was composed of business men and undoubtedly men of experience and good judgment, and it is evident thoroughly comprehended the points submitted for their consideration. What the jury have found is reasonable upon all the evidence. I would refer to what Sir Arthur Channell said when delivering the judgment of their Lordships of the Privy Council in *Toronto Power Company, Limited* v. *Paskwan* (1915), A.C. 734 at p. 739,

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"that they [the jury] have come to a conclusion which on the evidence is not unreasonable."

In two recent cases before the Privy Council Lord Buckmaster made reference to conclusions of fact. In *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96 Lord Buckmaster said:

"But upon questions of fact an Appeal Court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

And in *McIlwee* v. *Foley Bros.* (1919), 1 W.W.R. 403 at p. 407 said:

"It is unnecessary to repeat the warnings frequently given by learned judges, both here and in Canada, against displacing conclusions of disputed

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fact determined by a tribunal before whom the witnesses have been heard and by whom their testimony has been weighed and judged, and did the question depend solely on the decision between rival evidence the case would be free from difficulty."

The learned counsel for the appellant, Mr. *Davis,* in his very able argument, advanced three propositions: (a) That the verdict of the jury was not warranted by the agreement (I accede to this argument to the extent that the judgment must be varied, *i.e.,* the commission is only payable as the purchase price of the property is paid; in the words of the contract, "as and when received"). (b) That there was no authority in Garland to enter into the contract, and no subsequent ratification thereof. (c) That there is no reasonable evidence that the respondents were the efficient cause of the sale. I do not consider it necessary to, in detail, refer to or canvass the evidence as to the authority in Garland, but it is clear to me that what Garland did was well within the scope of his authority as managing director, and that the contract as contained in the letter of the 2nd of December, 1914, must be held to be a contract binding upon the appellant and the respondents' services were referable to and consequent upon the giving of that authority, and that the appellant accepted the services of the respondents and profited by those services, the respondents being the effective cause of the sale made. There was no necessity in law for any ratification of the commission contract (*Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327). It is unreasonable to hold otherwise when all the facts and circumstances attendant upon the transaction are fully considered. It is wholly unreasonable to conclude that the managing director in British Columbia would not have the authority he exercised, and it was admitted at this bar that the extent of Garland's authority might be assumed to be as extensive as any authority that his co-directors could give him, but it was contended nevertheless that that authority did not extend the length of entitling him to enter into the challenged contract.

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The learned counsel for the appellant relied greatly upon article 100 of the articles of association of the defendant Company (appellant) which reads as follows:

"100. The property of the Company shall not be sold or disposed of for

a lesser sum than $640,000 cash without the consent of the holders of two-thirds of the shares numbered 1 to 100,000 inclusive."

No doubt the respondents would be in law affected with notice of this article, but I fail to see, with deference, what effect this has upon the commission contract. There is nothing to establish that the sale will not work out and realize $640,000. In any case the sale has been duly approved, the commission contract is a usual and customary incident of all such sales, and I cannot see why the Company should not be required to carry it out. It certainly was a contract made within the scope and authority of the managing director.

It was attempted to distinguish the case of *Canada Central Railway Company* v. *Murray* (1883), 8 S.C.R. 313, but in my opinion that case is very much in point in the present case, and it may be said to be an analogous case—that is, with many items of evidence in common. Here the appellant, as in that case, has taken the benefit of the services of the respondents. I would in particular refer to the judgment of Mr. Justice Gwynne from p. 324 to p. 334. Unquestionably in the present case Garland, the managing director, would appear to have been in effect the defendant Company. In the words of Gwynne, J. at p. 325, "in fact, himself the company."

Now, one matter calls for consideration, and that is that the case went to the jury in alternative form—that is, there was a claim for $50,000 as commission upon the sale, independent of the express contract also relied upon for $35,000, and a claim upon the *quantum meruit* for $50,000. This was all presented to the jury, but it is abundantly clear that what the jury found was upon the express contract in writing, namely, the letter of the 2nd of December, 1914. It was strenuously contended at the bar by counsel for the respondents that the verdict of $35,000 was a *quantum meruit* verdict. With this submission I cannot agree. The whole of the evidence, the charge of the learned judge to the jury, the questions put to them and the answers thereto portray in the clearest way that what the jury found was that the appellant was liable upon the contract of the 2nd of December, 1914, and it is impossible for the respondents to now contend otherwise. It is idle to contend that the jury in assessing the damages at $35,000 by mere accident arrived

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at the same figures as those contained in the letter of the 2nd of December, 1914. The verdict of the jury is plainly referable to the contract, which they find and as evidenced in the letter. The jury have answered the questions; the questions and answers are what are to be looked at and to govern when it comes to the entering of the verdict and judgment thereon. The present case is not one similar to *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512—there there was a general verdict as well. When that case was before this Court I said in my judgment (23 B.C. at p. 220),—

". . . . . 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).

"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."

Upon the appeal to the Supreme Court of Canada, Davies, J. (now Chief Justice of Canada) said at pp. 517-18:

"In this case, however, and apparently with consent of both parties and certainly without any objections, questions were put to the jury by the trial judge and they were told they were not obliged to answer them unless they chose. They however did answer most of them and added a general verdict for defendant. Under these circumstances, I think the general verdict being inconsistent and irreconcilable with the jury's specific answers to the questions put must be ignored and the verdict entered, as was done by the trial judge, on these specific answers for the plaintiffs."

And Anglin, J. at p. 538 said:

"I am also of the opinion that inasmuch as the jury saw fit to answer the questions put to it, thus informing the Court of the findings of fact upon which it based the conclusion expressed in its general verdict, those specific findings cannot be ignored. If they are inconsistent with the general verdict the latter cannot be sustained. 'They have explained what they meant by their verdict and how they arrived at it, and it is on this basis that we have to consider their verdict. We must take it as we find it.' If any judgment is to be entered upon it, it must be that which it warrants when taken as a whole. That I understand to be the effect of the decision in *Newberry* v. *Bristol Tramways and Carriage Co.* [(1912)], 107 L.T. 801; 29 T.L.R. 177 and *Dimmock* v. *North Staffordshire Railway Company* [(1866)], 4 F. & F. 1058 at p. 1063."

In the result the Supreme Court of Canada held that the general verdict must be ignored and the judgment as entered by the trial judge, based on the specific answers of the jury, be restored. In the present case, can there be any doubt upon

reading all the questions and the answers, that the jury have found anything else but that there was a contract upon which the appellant was liable, evidenced by the letter of the 2nd of December, 1914, and that there was continuation of the employment and confirmation thereof? Therefore, in my view, the jury in what they have said absolutely rebut any contention that the damages as assessed were assessed upon the *quantum meruit*, and the learned trial judge, with great respect, erred in entering the judgment as he did.

The respondents, as already stated, earned the commission under the contract of the 2nd of December, 1914, and was the effective cause of the sale which actually took place. That the appellant dealt with other agents and is liable to them cannot affect the rights of the respondents; the respondents' acts brought the purchasers into relation with the appellant. It was admitted at this bar by counsel for the appellant that the respondents first brought the property sold to the attention of the purchasers. The evidence well supports this, and taking the whole evidence and the surrounding circumstances, the right to the commission as found by the jury is well supported and the finding is a reasonable finding—the jury cannot be said to have acted perversely.

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And as to the law, the present case is well within the *ratio decidendi* of the leading cases, amongst others *Toulmin* v. *Millar* (1887), 12 App. Cas. 746, and *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614; 80 L.J., P.C. 41. In *Prentice* v. *Merrick* (1917), 24 B.C. 432, this Court followed the last two cases referred to, and the Chief Justice of this Court, in his judgment at pp. 436-37, points out the form the judgment should take in that case. There a "bond" evidenced the sale, an agreement in its nature an option, *i.e.*, the purchaser could withdraw from the purchase at any time without penalty other than as stated in the agreement. The judgment therefore was for the commission on the moneys already paid and a declaration of right as to any future payments. Here the case is somewhat different. The agreement of sale was entered into on the 15th of October, 1917, and the consideration is a stumpage charge of $1.25 per thousand feet board measure in respect of fir, spruce and cedar, and 50 cents

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per thousand feet board measure in respect of hemlock, laurel and white fir, with a further payment of $25,000 for the balance of the scheduled premises payable at the expiration of eight years from the date of the completion of the logging of the timber or the purchase of the timber licences, "whichever may be the sooner." The purchase price will work out as it has been estimated at from $685,000 if the option be exercised to take the timber licences at the stated cruise, or possibly as much as $800,000 upon the stumpage basis. The terms of sale leave the payment of the consideration to be determined by the course adopted by the purchasers acting within the terms of the agreement. The respondents are unable to complain as to this; they must abide by the commission contract which reads, "they [the appellant] will pay you the sum of $35,000 as a commission to you as and when received." That the jury found upon this contract as I have already pointed out, in my opinion, cannot be gainsaid, and the judgment the respondents are entitled to and only entitled to is a judgment in conformity with the plain terms of the contract, nothing more and nothing less. There is no evidence that up to the present time any moneys have been received from the purchasers by the appellant in respect of the purchase price, it follows that the relief can only be by way of a declaratory judgment. I cannot see that *Howard* v. *George* (1913), 49 S.C.R. 75 is helpful to the respondents, save upon the point of the principle that the respondents have earned the commission, but only of course to be paid in accordance with the terms of the commission contract.

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I am, therefore, of the opinion that the appeal should succeed to the extent that there be a declaratory judgment that the respondents are entitled to a commission of $35,000 payable in accordance with the terms of the commission contract of the 2nd of December, 1914, and that the judgment be varied accordingly.

Appeal allowed; McPhillips, J.A. dissenting in part.

Solicitors for appellant: *Davis & Co.*

Solicitors for respondents: *Taylor, Mayers, Stockton & Smith.*

YUKON GOLD COMPANY v. CANADIAN KLONDYKE POWER COMPANY, LIMITED.

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YUKON GOLD CO. v. CANADIAN KLONDYKE POWER CO.

Contract — Repudiation — Breach going to root of contract — Damages — Measure of—Wilful violation—Effect of clause limiting liability.

The defendant (Power Company) entered into a contract to supply electric power to the plaintiff (Purchasing Company) for operating mining-dredges in the Yukon for a period of seven years from the 1st of May, 1911, the working season during each year being divided into four periods, namely, from the 1st of May to the 15th of May; the 15th of May to the 1st of June; the 10th of August to the 1st of October; and the 1st of October to the 1st of November. The Power Company was to maintain a voltage of 33,000 volts at the point of connection between the lines of the parties, which was not to vary beyond 5 per cent.; and said Company was to construct a station between the lines of the Companies in which it was to install and maintain the necessary switches and measuring meters. It was agreed that if in any year the power dropped 5 per cent. below 33,000 volts for 4 hours in each of a number of days aggregating more than 25 days, or for causes other than specially provided for for 100 hours in the four periods, the purchasing Company could terminate the contract, and the Power Company was allowed to suspend delivery of power for making repairs or improvements up to 24 hours at any one time, but not to exceed in the aggregate 288 hours in the four periods, in which event the purchasing Company could terminate the contract, and it was agreed that in the event of interruptions during the first and last periods the damage thereby incurred should equal $5 per hour, but the Power Company was not to be held liable for more than $5,400. On the 1st of May, 1911, when power was to be supplied under the contract, the Power Company had not constructed a station between the lines nor installed switches or measuring meters, and the purchasing Company refused to take power until they were installed, obtaining power elsewhere in the meantime at greater expense. The evidence shewed that during the fourth period of 1912, owing to lack of power, the purchasing Company was unable to dredge certain ground that had been previously thawed, which necessitated the rethawing of this ground in the following Spring. In 1913, the interruptions owing to power being off, aggregated 351 hours and low voltage was recorded for 222 hours, and at the expiration of the fourth period the purchasing Company gave notice terminating the contract. In an action for a declaration that the contract was lawfully terminated and for damages, it was held by the trial judge, that the interruptions in service entitled the plaintiff to terminate the contract; that the Power Company was guilty of wilful violation of the terms of the contract, and the pur-

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chasing Company was entitled to reasonable damages for the loss sustained, and was not confined to the special damages provided in the contract. He allowed $6,068.44 for loss by reason of the necessity of rethawing ground ready for dredging in the Fall of 1912; $11,392.50 for lost time of dredges in 1913; $11,615 for wages of men employed and idle during time of failure to supply power; and $4,608.64 extra expense in purchasing power in the first period of 1911.

Held, on appeal (MACDONALD, C.J.A. and MARTIN, J.A. dissenting on question of damages), that the plaintiff Company was within its rights in terminating the contract, and as the maximum payment in damages fixed by the contract was in respect of interruptions provided in the contract and did not apply in the case of a wilful withholding of power in direct breach of the Power Company's obligation under the contract, the appeal should be dismissed.

Per MACDONALD, C.J.A.: Assuming the interruptions in supplying power were wilful and amounted to repudiation of the contract, the purchasers had their election either to assent to the repudiation or to stand by the contract; they could not, after relying on the interruptions as within the contract in their computation for the purpose of terminating the contract, say that these interruptions were not within the purview of the contract at all.

Per MARTIN, J.A.: The clause as to damages for interruptions contemplates a total interruption for both periods, which is compensated for by a maximum payment, and the element of motive must be excluded. The purchaser can get no more than the sum he agreed to take in satisfaction of total interruption, and is not concerned in the motives that created the situation.

Statement

APPEAL by defendant from the decision of MACAULAY, J., in the Territorial Court of the Yukon, of the 15th of November, 1917, in an action for a declaration that a certain contract for the supply, by the defendant to the plaintiff, of electrical power was lawfully terminated, and for damages for breach of the contract. The plaintiff Company carried on mining on a large scale in the Yukon, mining the hills by the hydraulic method and the creeks by dredges operated by electric power. The Company used the waters of Twelve Mile Creek, about 40 miles from the mining operations, both for hydraulicking and for generating electrical power. Owing to the decrease in the water supply in the early Spring and late Fall there was not sufficient for both branches of its operations during these periods. The defendant Power Company installed a hydro-electric plant on the Klondyke River about 25 miles from the mining operations and owing to lower

altitude was able to generate power earlier in the Spring and later in the Fall than the plaintiff Company could on Twelve Mile Creek. On the 5th of May, 1910, the parties entered into a contract whereby the Power Company agreed to supply the plaintiff with power during the working season in each year (divided into four periods as hereinafter set out) from the 1st of May, 1911, until the 1st of November, 1917. The contract provided, *inter alia* (clause 2), that the Power Company should construct a station between the lines of the Power Company and the purchasing Company in which it should install and maintain all necessary switches, wattmeters and voltmeters; and (clause 3) should maintain a voltage of 33,000 volts at the point of connection with the plaintiff's lines, not to vary more than 5 per cent., and that a drop in excess of 5 per cent. would be regarded as interruption of service. Clause 4: the Power Company agreed to hold electric power in reserve for and ready to deliver to the plaintiff up to the rate of 1,350 kilowatts per hour from the 1st of May to the 15th of May, and from the 1st of October to the 1st of November; and 1,875 kilowatts per hour from the 15th of May to the 1st of June, and from the 10th of August to the 1st of October. Clause 5: from the 1st of June to the 9th of August the plaintiff was to have first call upon all of the power in excess of the amount required to supply existing contracts with the Power Company during that period. Clause 7: if the power furnished dropped more than 5 per cent. below 31,500 volts for a period of four hours in each of a number of days in the four periods aggregating not less than 25, or should it drop more than 5 per cent. below the agreed voltage, from causes not provided for in clause 15, during a greater number than 100 hours in the aggregate during the four periods, the purchaser had the right to terminate the contract at any time up to the 10th of November in the year in which the interruptions occurred. Clause 8: in the event of interruptions in either the first or last periods, except as provided for in clause 15, the Power Company should pay in full liquidation for all losses and damages, $5 per hour for each hour of interruption, but should not be liable for a greater sum than $5,400. Clause 9: the plaintiff was to pay for not less than 65 7/10 per cent. of the

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amount of power to be provided for the four periods under the contract and at the rate of 3 cents per kilowatt hour up to two and one-half millions, and 2 cents thereafter, and to pay a minimum of $85,000 for the four periods in each year, provided the Power Company has maintained power ready for delivery as provided in the contract. Clause 11 provided that the Power Company should render bills at the end of each period, and that the purchaser should pay each bill within ten days of the receipt thereof. Clause 13: the plaintiff was to provide and install standard protective devices for the protection of its lines and systems against lightning, short circuiting, and grounding. Clause 15: the Power Company to suspend delivery of power for the purpose of repairs and improvements in the system, and there was to be no claim for any penalty for such interruptions up to a period of 24 consecutive hours at any one time, but in the event of interruptions amounting in the aggregate to 288 hours in the four periods the purchaser could terminate the contract. Clause 17: should either party be prevented from operating by riot, fire, invasion, explosion, an act of God, or the public enemies, during such period, the contract was to be deemed suspended. The contract was to come into operation on the 1st of May, 1911, but owing to delays in delivery the proper measuring meters were not installed until the second day of the third period in that Summer.

Statement

The plaintiffs would not accept power until the meters were installed, and obtained power in the meantime from the Northern Light Company at a higher charge than they were to pay the Power Company under the contract. The defendant contended that they were ready to supply power and the measurement could have been taken from the meters at the power station in the meantime, but to this the plaintiff would not agree and relied on the terms of the contract. Under the contract it was intended that the plaintiff's plant should operate in parallel with the defendant's, but in the early part of the first period and the latter part of the fourth, the plaintiff, owing to lack of water on Twelve Mile Creek, was unable to both supply water for hydraulicking and operate its power plant, and it was more important during these periods to obtain full measure of power

from the defendant under the contract. A canal and forebay, or storage basin, were to be constructed, but it was not constructed of sufficient dimensions to materially assist in the supply of water at the first and last portions of the working season. In the year 1913, owing to ice difficulties and lack of water supply, the defendant was never able, in the first and last periods, to supply the power contracted for, and during the season there were interruptions with power off for 351 hours and 55 minutes, and low voltage for 222 hours and 52 minutes. On the 8th of November, 1913, the plaintiff gave the defendant notice terminating the contract. The learned trial judge found that the interruptions entitled the plaintiff to terminate the contract, and that the plaintiff had provided everything and performed all acts required under the contract. He held that the plaintiff was justified in refusing to accept power in 1911 until proper meters were installed and in readiness for delivery of power under the terms of the contract. He allowed in damages $6,068.44 for loss in thawing ground that they were unable to dredge owing to the defendant having wilfully withheld power which it was supplying to others, and the plaintiff was required to rethaw in the following Spring; the sum of $11,392.50, damages for lost time of dredges in the year 1913; the sum of $11,115 for wages of men employed who were idle during the periods when the defendant failed to supply power, but the plaintiff was obliged to pay; and the sum of $4,608.64, being the difference between what the plaintiff had to pay the Northern Light, Power & Coal Company, Ltd., for power in the forepart of 1911, before the measuring meters were installed, and the price the plaintiff would have paid the defendant under the contract had the meters been installed in proper time.

Statement

The defendant Company appealed on the grounds that the failure of the plaintiff to comply with clause 13 of the contract justified the defendant in interrupting service of power; that the learned judge erred in holding that the plaintiff was justified in repudiating the contract; that he should have held that the defendant was entitled to be paid by the plaintiff the minimum amount of $85,000 for the years 1911 and 1913; that the damages allowed for 1913 were too remote or in the alternative

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there was not sufficient evidence of damages having accrued; that the plaintiff was not entitled to the damages allowed for the year 1911; and that in the alternative the damages should be limited to the amount provided for in clause 8.

The appeal was argued at Victoria on the 8th, 9th, 10th and 13th of January, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Mayers, for appellant: The first branch of the case is that there was no breach of contract in the sense of repudiation at all, and second, that the plaintiff Company had failed to perform certain conditions precedent, which precluded them from cancelling the contract: first, they had not installed certain protective devices; and second, they had not paid the Power Company for the power previously supplied. The first complaint was that the Power Company had not installed meters on the 1st of May, 1911, when the supply of power was to commence, but my contention is that this could have been averted by reading the meters at the power station until the proper meters had been installed. The failure to provide at certain times was through lack of water due to ice and unusual weather conditions, which falls within "act of God" and something beyond the contemplation of the parties. This trouble was early in May and late in October: see *Nichols* v. *Marsland* (1876), 2 Ex. D. 1; *Bailey* v. *Cates* (1904), 11 B.C. 62. They complained but they took no decisive stand. Although Mr. Boyle was not complying strictly, there was nothing to shew an intention on his part to void the contract. He always hoped to give everybody what they wanted: see *Meadow Creek Lumber Co.* v. *Adolph Lumber Co.* (1918), 25 B.C. 298; *Jonassohn* v. *Young* (1863), 4 B. & S. 296. A breach entitling the other to put an end to the contract must go to the root of the matter: see *Simpson* v. *Crippin* (1872), L.R. 8 Q.B. 14. As to one party to a contract being relieved from future performance by the conduct of the other see *Mersey Steel and Iron Company* v. *Naylor* (1882), 9 Q.B.D. 648 at p. 657; (1884), 9 App. Cas. 434 at p. 438; Pollock on Contracts, 8th Ed., p. 276; *Avery* v. *Bowden* (1856), 6 El. & Bl. 953; *Frost* v. *Knight* (1872), L.R. 7 Ex. 111; *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460 at

p. 467. There are only two clauses that refer to right of cancellation: first, as to voltage; and second, as to failure to supply owing to repairs and alterations over a certain period. As to the voltage we are relieved as the failure was owing to water shortage, which was beyond our control. The limit for repairs and alterations was 288 hours, but we did not stop for that length of time for repairs and alterations, although the failure to supply went beyond that period for other reasons beyond our control: see Addison on Contracts, 11th Ed., pp. 987 and 1027; *Nugent* v. *Smith* (1876), 1 C.P.D. 423; *Bailey* v. *Cates, supra.* We have sued for breach as they did not take power for 2½ years under the contract when we were ready and willing to supply it: see *Varrelmann* v. *Phœnix* (1894), 3 B.C. 135. As to the construction of the contract, our not being ready in time to supply and not having the measuring meters in place, although the volt meters might reasonably have been used provisionally, see *Bettini* v. *Gye* (1876), 1 Q.B.D. 183 at pp. 187-8. On the question of damages we complain of certain damages allowed: first, the charge of interest on the amount expended on thawing ground that it was necessary to thaw a second time; second, the cost of labour kept idle owing to non-supply of power; and third, the difference between what the plaintiff had to pay the Northern Light, Power & Coal Company and the amount payable under the contract. On charging interest on the thawed ground see *Wall* v. *Rederiaktiebolaget Luggude* (1915), 3 K.B. 66 at p. 75. They could not recover these damages because we never undertook to pay them: see *Horne* v. *Midland Railway Co.* (1873), L.R. 8 C.P. 131 at pp. 137 and 145.

Argument

Congdon, K.C., for respondent: As to cancellation of the contract the clause with reference to alterations and repairs allows interruptions aggregating 288 hours for the year. The total interruptions irrespective of reasons therefor amounted to 574.40 hours, and although the interruptions for alterations and repairs did not exceed 288 hours, the actual interruptions amounted to so much more there was ample ground for cancelling the contract as they were such as to frustrate the whole object of the contract. On the question of deductions owing

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to unforeseen weather conditions, there might be a waiver in common law but we are trusting in the terms of the contract. Authorities on the term "act of God" are *Oakley* v. *Steam Packet Co.* (1856), 11 Ex. 618 at p. 623; *Blyth* v. *Birmingham Waterworks Co., ib.* 781; *Forward* v. *Pittard* (1785), 1 Term Rep. 27 at p. 33; *Pandorf* v. *Hamilton* (1886), 17 Q.B.D. 670 at p. 675. The severity of the weather in the Klondyke is well known. Ice in May or October is not an unforeseen circumstance. The meters to be provided by the defendant for measuring the power were a condition precedent and the plaintiff was justified in refusing to go on until they were provided. We contracted for measured power and not estimated power. The measurement by meter is intermingled in several sections of the contract: see Fry on Specific Performance, 5th Ed., 175, par. 355; Pollock on Contracts, 8th Ed., 275; *Milnes* v. *Gery* (1807), 14 Ves. 400 at p. 408. The case of *Baker* v. *The Metropolitan Railway Company* (1862), 31 Beav. 504, which is the other way, is disapproved in *Bridgend Gas and Water Company* v. *Dunraven* (1885), 31 Ch. D. 219 at p. 222. Section 8 of the contract is a penalty clause, but this is a case where the plaintiff may recover beyond the penalty as the section only applies to interruptions contemplated by the contract: see *Harrison* v. *Wright* (1811), 13 East 343 at p. 347, a

Argument

case referred to in *Wall* v. *Rederiaktiebolaget Luggade* (1915), 3 K.B. 66. The contract had two branches: first, "installation and equipment"; second, "operation." The causes of the lack of equipment and non-supply was not within the control of the plaintiff Company. Numerous interruptions were more injurious in the way of labour supply than continuous stoppage.

Mayers, in reply: On measure of damages see *British Columbia Saw Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499 at p. 508. As to protective devices see *Fryett ex dem. Harris* v. *Jeffreys* (1795), 1 Esp. 393; *Doe dem. Muston* v. *Gladwin* (1845), 6 Q.B. 953; *Doe d. Baker* v. *Jones* (1850), 5 Ex. 498; *Penton* v. *Barnett* (1898), 1 Q.B. 276 at p. 279.

Cur. adv. vult.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: The evidence in this case is very voluminous, but the issues are simple enough, though one might be deceived into thinking otherwise from a perusal of the pleadings, which occupy some 70 pages of the case.

The contract in question covers a term of years and by it the defendant agreed to supply to the plaintiff electrical energy for the operation of plaintiff's gold dredges. The year of service is divided into four periods, the first period being from the 1st to the 14th of May, inclusive; the fourth from the 1st to the 30th of November, inclusive. The other two are intermediate periods which do not call for special mention.

Defendant's obligation commenced on the 1st of May, 1911, but they were not at that time or at any time during the said first period of that year in a position to deliver measured electric current to the plaintiff. They were under obligation to install certain meters, which would measure the current taken by the customer. The defendant alleges that it was in a position to deliver the current but not through the meters, which they had failed to install until after the expiration of the said first period. Plaintiff, foreseeing the defendant's inability to supply the current as contracted for, obtained it elsewhere at the best price procurable, which was a price in excess of that at which the defendant had agreed to supply it. Plaintiff therefore claimed the difference between these two prices and was given judgment in accordance with that claim. I think the judgment is right. The plaintiff was not obliged to take unmeasured current and thereby incur the danger of a controversy.

The next dispute arises out of alleged breaches of the contract by the defendant in the first and fourth periods of the year 1913. By the contract the defendant agreed to maintain a voltage of 31,500 kilowatts and this was by amendment increased to 33,500, which is now to be taken as the agreed voltage. Article seven of the contract sets forth that if in any year the voltage shall fall below the agreed voltage more than 5 per cent. for a period of 4 hours in each of a number of days aggregating not less than 25 days, the plaintiff shall be at liberty to terminate the contract by notice to be given not

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later than the 10th of November. That article sets forth a further event, on the happening of which the contract may be terminated at the plaintiff's option, but as I have come to the conclusion that it was entitled to terminate the contract on the first recited event, I do not deal with the second. Article eight of the contract sets forth, *inter alia,* that if the service be interrupted in either the first or fourth periods, the defendant shall pay to and the plaintiff shall accept in full satisfaction of all damages caused thereby, a sum equal to $5 an hour of such interruptions, but not to exceed in the aggregate $5,400; and by article three, the falling below 95% of the agreed voltage is to be considered an interruption of the service.

Now, during the first and fourth periods in the year 1913 there were many interruptions of the service, in some instances by total failure of current and in others by low voltage, by which I mean voltage below the 95% agreed upon. The plaintiff gave notice terminating the contract on the 8th of November of that year, *inter alia,* because of said interruptions. It claims that the several interruptions which admittedly occurred in these periods not only entitled it to terminate the contract in the terms of the said article seven, but amounted as well to a repudiation of it on defendant's part. I will dispose of this latter point at once. If there was such repudiation, it was clearly not assented to on the plaintiff's part. On the contrary, they elected to treat the contract as subsisting and to invoke it for the purpose of giving the notice of cancellation aforesaid.

MACDONALD, C.J.A.

The right to terminate the contract under that part of article seven on which I found my opinion, as above stated, is absolute when the supply of current had been interrupted for periods aggregating 25 days. In arriving at the said number of days, interruptions caused by the plaintiff's own fault or by the act of God (article seventeen) are to be excluded. It was conceded in argument that the total of the interruptions came to 30 days, but it was contended by defendant's counsel that some of these days are to be deducted because, as he contended, the interruption was brought about by plaintiff's wrongful refusal or neglect to install certain safety devices in their plant, which, he submitted, they were bound by the contract to install. The

learned judge found that the plaintiff committed no breach of its obligation in this respect, and I agree with him. Moreover, I am of opinion that the assignment of that cause of interruption was a mere afterthought. Then again, it was contended that some of the interruptions had been caused by accumulation of ice in the defendant's waterways, which, it was submitted, were attributable to acts of God within said article seventeen, and that these interruptions should be eliminated from the tally. But even if they were taken into account, they were not of sufficient duration to reduce the aggregate of the interruption below 25 days, hence it is unnecessary to decide whether they were within the exception or not.

It was also submitted that because the plaintiff had not fully paid for current supplied at the time interruptions occurred, owing to a dispute about the amount due, that this circumstance was a justification of the interruptions. The contract will not bear out such a contention, nor were any interruptions attributable to such dispute. I am, therefore, of opinion that the plaintiff was within its right in terminating the contract.

The only question remaining is that of the damages to which the plaintiff is entitled for the interruptions complained of. It is entitled to the said sum of $5 per hour for every hour of said first and fourth periods during which the current was either altogether withheld or had fallen below the agreed voltage of 95% of 33,500 volts. As I understand it, there is no dispute about the duration of these interruptions, they amount, I think, to 30 days, but in case of dispute about this or any other question of computation, counsel may speak to the minutes.

MACDONALD, C.J.A.

The learned trial judge thought that the true inference to be drawn from the breaches of contract complained of, was that defendant did not intend to perform its part of the contract; in other words, that it had repudiated its obligations, and he applied the common law rule to the assessment of damages on the assumption that the compensation in the contract, providing for interruptions in the service, could not be applied. If, as was argued, the interruptions, or some of them, during the period in question, were wilful and amounted to repudiation of the contract, and there is no doubt evidence

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from which an inference of that kind might be drawn, and assuming that this would affect the measure of damages, yet the answer to the submission is that the plaintiff in these circumstances had its election either to assent to the repudiation or to stand by the contract. It cannot approbate and reprobate; it cannot after relying on them as within the contract in its computation of the 25 days mentioned in article seven, now say that these interruptions were not within the purview of the contract at all.

MACDONALD, C.J.A.

The stipulations on defendant's part to hold power in reserve are mere surplusage. They are co-extensive simply with its stipulations to supply the power, and they do not, in my opinion, in the circumstances affect the question of damages in the smallest degree.

MARTIN, J.A.

MARTIN, J.A.: This case has caused me not a little difficulty, but as I have reached the same conclusion as the Chief Justice, and the case is not one of public importance, I shall not add anything to his judgment, which I have had the benefit of perusing, other than to remark that section 8 of the contract is a peculiar and very specific one, and the most important thing about it is that it contemplates a total interruption for both periods, which is to be compensated for by a maximum payment of $5,400, and in such circumstances the element of motive, good or bad, must necessarily be excluded, because if the purchaser can get no more than the sum he has agreed to take in satisfaction for a total interruption, how is he concerned in the motives that created the situation that entitled him to recover said sum?

GALLIHER, J.A.

GALLIHER, J.A.: In my view of clause 8 of the contract it does not provide for all damages between the parties. That there was a wilful withholding of power from the plaintiff in direct breach of its obligation under the contract by the defendant, I think there can be no question. I do not think the words of clause 8 can be taken to apply to any such contingency nor can it be said that the parties could have had such in contemplation; in fact, it is in the face of what the parties were contracting for. The penalty is, as I view it, in respect of

interruptions as provided in the contract. I have carefully read and weighed the evidence and the well reasoned judgment of the learned trial judge, and will content myself with agreeing in his findings of fact and disposition as to damages. The appeal should be dismissed.

MCPHILLIPS, J.A.: This appeal has been very ably and exhaustively argued by the learned counsel for the appellant and respondent, respectively. The evidence is voluminous and to a great extent technical. The subject-matter of the litigation is now rather well known to the Courts—having relation to the supply of electrical power. In the present case, however, it has the additional feature of the carrying on of undertakings in that remote portion of the Dominion of Canada known as the Yukon Territory, the climatic conditions of that part of the Dominion being severe, having a long winter, seven to eight months in duration. The gold mining is done with large dredges, and at a time when the respondent was in active gold mining in the Territory with other electrical power, it was desired to increase the supply of power for its operations. Then it was that negotiations opened with the appellant for the supply of electrical power—the appellant being then about to establish an electrical power plant—and it was at the outset the expressed desire on the part of the respondent and a matter of agreement with the appellant that the supply of power to be contracted for would extend from the 1st of May to November 1st of each year, the intention being to obtain a longer operating season. In the result a contract was entered into under date the 5th of May, 1910, between the appellant under the then name of the Granville Power Company (afterwards changed to its present name), and the respondent, the undertaking of the appellant to be in its nature a hydro-electric power plant. The contract may be said to be the usual contract for the supply of electric power, with some features of unusual nature consequent upon the particular section of the country in which the power was to be generated, but it may be said that the parties to the contract were well versed in the conditions obtaining and what would be the resultant effect of non-compliance with the express terms of the contract, *i.e.*, as to damages if there should

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be a failure to supply the power contracted to be supplied and taken. The appellant's undertaking was completed, and the supply of power was available on or about the time contracted that it should be available, but owing to default on the part of the appellant in installing the requisite meters to determine the power to be supplied, the respondent was unwilling to accept power until the meters were in place. This was the first happening. This was later remedied and power was supplied and taken by the respondent at and from a later time and throughout the years 1911, 1912 and 1913, but not in the quantities called for by the contract, there being various reasons given for the non-supply in accordance with the terms of the contract, many of which were dealt with in the very elaborate and most careful argument of counsel for the appellant, in the main said to be consequent upon the act of God and default in the respondent. These excuses have all been dealt with by the learned trial judge in his very able and comprehensive judgment, with which I entirely agree, as after careful consideration of all that has been advanced at this bar, I cannot but conclude that full consideration was given to all the points that have been elaborated here. The case is one that peculiarly required a thorough understanding of the *locus in quo* and the nature of the operations carried on, and I feel constrained to say that the appellant cannot be viewed as having lived up to the terms of the contract, but in defiance of its plain contractual obligations refused the respondent the supply of power contracted to be supplied, and with the power available supplied it to others, in clear breach of the terms of the contract entered into with the respondent, with a full and complete knowledge of the consequent effect thereof. It therefore follows that unless the terms of the contract will excuse, the appellant must be held to be responsible for the breaches thereof. The learned trial judge held against the appellant and assessed damages to the respondent for the non-supply of power, and held that the respondent was entitled to rescind or put the contract at an end at the close of the season of 1913, and it is against this holding that the appellant appeals. In my opinion it cannot be successfully contended that there was any waiver in the present case of the breaches of contract

MCPHILLIPS, J.A.

by any of the delays that took place. Upon this point of waiver I would refer to what the Lord Chancellor (Earl of Halsbury) said in *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda* (1904), 74 L.J., P.C. 1 at pp. 5 and 6:

> "It is enough, however, to say that there is no evidence upon which any tribunal should reasonably act, even if there could be a waiver in point of law, as to which I venture to express considerable doubt; but, be that as it may, there is no evidence upon that, and I need not therefore express any opinion upon that subject."

The respondent was under a very considerable handicap by reason of the want of knowledge of the power generated and capable of being supplied and the failure in supply to it, and the facts on later disclosure demonstrated that the appellant was flagrantly and wilfully withholding power available and supplying it to others in plain dereliction of the contractual obligation to supply it to the respondent. Amongst other points strenuously urged at this bar was the contention that the respondent should have accepted power without the meters being first installed, claiming that meters, although not the ones contracted for, were available for the indication of the power which could have been supplied; that there was at times default in making payments for power, and that the respondent failed to place protective devices to ensure against damage resulting to the works of the appellant from the works of the respondent, but I cannot agree that any of these objections can be said to be at all tenable or went to the root of the contract or are available as matters of excuse to the appellant for the non-supply of the power agreed to be furnished under the terms of the contract. There was default in the non-installation of the meters and the respondent was entitled to withhold taking power until they were installed, and there was no contractual obligation at all calling for the respondent placing other protective devices than the facts disclose they did install, that is, the usual and customary protective devices that in well-equipped undertakings such as the respondent had in place are always maintained. It occurs to me that all these exceptions are really matters of afterthought and do not merit any serious attention, as after all they are beside the question and do not really enter into the issue which requires determination upon this appeal.

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The twenty-first clause of the contract reads as follows:

"It is further agreed by and between the parties hereto that in case of a disagreement between the parties hereto as to any question arising under this agreement, such question shall be submitted to arbitrators to be designated as follows: The Power Company shall appoint one arbitrator and the Purchaser shall appoint one arbitrator and, if the two arbitrators so appointed shall disagree on the matter submitted to them, they shall appoint a third arbitrator, to be associated with them, if they can agree upon such an appointment; if the two arbitrators appointed by the parties hereto do not agree upon the third arbitrator, such third arbitrator shall be appointed by the Gold Commissioner of the Yukon Territory. The decision of any two of the arbitrators shall be binding and conclusive upon both of the parties hereto.

"But nothing in this contract shall be construed to prevent either of the parties from bringing such action at law as it may deem necessary in order to protect its rights against the wilful violation by the other party hereto of any of the terms or conditions of this contract."

The arbitration provisoes above set forth were not invoked by either of the parties to the contract.

The fifteenth clause of the contract reads as follows:

"The Purchaser agrees to permit the Power Company at any time on any day during the term of this agreement, to suspend delivery of electric power for the purpose of making repairs or improvements in any part of its generating or distributing system, on such notice from the Power Company as circumstances may permit, and the Purchaser shall not claim any penalty for such interruption up to a period of twenty-four consecutive hours at any one time but in the event of such interruptions amounting in the aggregate to 288 hours in the four periods herein provided for then the Purchaser may at its option terminate this contract provided such option is exercised before the 10th day of November of the year in which the interruption occurred. The Purchaser further agrees to permit the Power Company at all times, when it is delivering power under this agreement, to have access to and in the premises of the Purchaser for any and all purposes connected with the delivery of electric power and for the exercise of the rights secured to the Power Company by this agreement."

MCPHILLIPS, J.A.

Now, the respondent, in the exercise of the right given under the above clause, elected to terminate the contract. That the conduct of the appellant in its flagrant breach of the terms of the contract—non-supplying to the respondent to the extent contracted for and supply to others—entitled the respondent to exercise this option, there can be no question (see Earl of Selbourne, L.C. in *Mersey Steel and Iron Company* v. *Naylor* (1884), 9 App. Cas. 434 at pp. 439-40; *Meadow Creek Lumber Co.* v. *Adolph Lumber Co.* (1918), [25 B.C. 298]; 2 W.W.R. 466, my reasoned dissenting judgment, pp. 469-71, and the judgment

of the Supreme Court of Canada reversing the judgment of this Court: see (1919), 1 W.W.R. 823). This was done by the letter of the 8th of November, 1913, and reads as follows: [After reading the letter the learned judge continued].

The contention upon the part of the appellant is that if there was any liability in damages to the respondent, that the eighth clause of the contract controls, and no damages for interruption of the electric service are assessable save in accordance therewith and with the limitation therein contained. The eighth clause reads as follows:

"The Power Company further agrees that if the electric service is interrupted from causes not within the control of the Purchaser as provided for in this contract, then the Purchaser shall be held harmless from liability under the terms of the guarantee in paragraph nine of this contract during the continuance of the interruption, and in the event of such interruption occurring in either the first period (May 1st to May 15th), or the last period (October 1st to November 1st) except as provided for in paragraph fifteen, then the Power Company shall pay to and the Purchaser shall accept in full liquidation and satisfaction for all losses and damages incurred by such interruption a sum equal to Five ($5) dollars per hour for each and every hour of such interruption, but the Power Company shall not be held liable for a sum greater than Five thousand four hundred dollars, and the Power Company shall not be liable for any penalty whatsoever if the Purchaser has received during the four (4) periods provided for in this contract electric service to the extent of three million (3,000,000) kilowatts.

"All penalties shall be adjusted after the first day of November and before the tenth day of November in each year, and the record of the graphic recording meters measuring the voltage and the power factor and the rate of delivery of power in kilowatts, together with the readings of kilowatts recorded by the integrating wattmeter as taken at the end of each of the four (4) periods provided for in this contract shall be accepted as final in the adjustment of all questions as to any balance due to the Power Company and of all penalties due to the Purchaser."

The fourth clause deals with the periods of supply, and reads as follows:

"The Power Company further agrees to hold electric power in reserve for and ready to deliver to the Purchaser up to the rate of thirteen hundred and fifty (1350) kilowatts per hour from May 1st to May 15th and from October 1st to November 1st, and to hold in reserve for and ready to deliver electric power at the rate of eighteen hundred and seventy-five (1875) kilowatts per hour from May 15th to June 1st and from August 10th to October 1st, the above periods to include the first day of each period, but to exclude the last day of each period."

The twenty-fourth clause shews the life of the contract, and reads as follows:

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"It is further agreed by and between the parties hereto that this contract shall remain in full force and effect for a period of seven (7) years, that is to say, from the 1st day of May, 1911, to the first day of November, 1917, or from the first day of May, 1912, to the first day of November, 1918, if extended under the provisions of the preceding paragraph, and shall be binding upon the respective successors and assigns of the parties hereto."

The damages which have been allowed to the respondent are damages for default in the supply of electric service during the year 1913, and it is clear that under the fifteenth clause the 10th of November in each year was the time fixed admitting of the respondent determining the contract, and the four periods had to elapse to demonstrate the extent of the interruption, so that the breaches throughout the four periods cannot in any way be said to have been condoned—the right to rely upon the default is kept alive up to the 10th of November of each year.

I am of the opinion that the eighth clause is in no way an absolute provision that damages must be assessed under it and it alone. The plain reading of that clause indicates that it is a provision only for assessing the damages when there is a fair compliance with the terms of the contract, and that it is limited in this way in its effect. This is the more apparent when it is seen that it has reference only to two of the four periods of the contract for electric service. The damages allowed by the learned trial judge extend over the second and third periods as well. It is absurd to think that in a contract of this nature, where so much capital and expenditure were at stake, that a sum of $5,400 would be the maximum of damages in any one year. It is plain that the eighth clause has no relation to what may be said to be almost upon the facts a complete frustration of the contract upon the part of the appellant. The intention could not have been to have the eighth clause the controlling clause where the contract itself speaks in terms of the right of action for "wilful violation" (see twenty-first clause). In my opinion the eighth clause is a provision for limiting the damages for the breach of the particular stipulation contained therein, and does not reach to that which goes to the root of the whole contract, a "wilful violation" of its terms, its whole scope and tenor. Further, the eighth clause in its application to the interruption of the electric service there contemplated is in its

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nature a penalty and does not inhibit damages being assessed for the breaches of covenant; that is, the respondent had his right of election to sue for damages independent of proceeding for the penalty, and recovery may be had in damages even beyond the amount of the penalty (see *Harrison* v. *Wright* (1811), 13 East 343; *Wall* v. *Rederiaktiebolaget Luggude* (1915), 3 K.B. 66; 84 L.J., K.B. 1663). It might well be thought that if the eighth clause be confined to the breaches of the particular stipulation which, in my opinion, is covered and only covered by the clause, that the amount fixed is liquidated damages, but it cannot extend to the "wilful violation" of the contract—a right of action specifically kept on foot by the terms of the contract (*Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda, supra*; *Dimech* v. *Corlett* (1858), 12 Moore, P.C. 199; *Dunlop Pneumatic Tyre Company, Limited* v. *New Garage and Motor Company, Limited* (1915), A.C. 79).

Now as to the damages allowed by the learned trial judge, I do not propose to discuss those items of damage in detail. The learned trial judge has amply defined the heads of damage and the method of assessment. I am not of the opinion that there has been any error in law in the assessment or that the learned trial judge proceeded upon any wrong principle. It may be that the damages are capable of assessment in other and different ways, but this is a case special in its nature and the undertaking of the respondent was so vitally dependent upon the electric service agreed to be furnished that it is a proper case for the imposition of at least all such damages as can well be deemed compensatory (*Addis* v. *Gramophone Company, Limited* (1909), A.C. 488 at p. 491; *Robinson* v. *Harman* (1848), 1 Ex. 850; *Sapwell* v. *Bass* (1910), 2 K.B. 486; *Simpson* v. *London and North Western Railway Co.* (1876), 1 Q.B.D. 274; *Chaplin* v. *Hicks* (1911), 2 K.B. 786; *Roper* v. *Johnson* (1873), L.R. 8 C.P. 167; *Williams Brothers* v. *Ed. T. Agius, Limited* (1914), A.C. 510), and I am not of the view that the damages allowed are in their nature excessive or too remote. During the argument the learned counsel for the appellant frankly stated that the damages, if in law rightly

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assessable, which of course he combatted, did not err in excessiveness, save as to the one item of damages in respect of the re-thawing of the ground, that that item of damage was not sustainable in any case; he did not labour the point, but I assume that besides other exceptions thereto that it was in its nature too remote.

Upon the question of the assessment of damages, I would refer to what Lord Moulton said in *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309. The language is peculiarly applicable to the task that Mr. Justice MACAULAY had to perform in the present case:

"Their Lordships are of opinion that the assessment of damages by the learned judge at the trial should stand. There was evidence on which the learned judge could come to the conclusion that by the negligent behaviour of the defendants' agent the mortgaged property had become deteriorated so that it realized less than it ought to have realized upon sale. The assessment of the damages suffered by the plaintiff from such a cause of action is often far from easy. The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to quantum of damages from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck, J.'s assessment of the damages is erroneous, and they are therefore of opinion that it ought not to have been disturbed on appeal."

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For the foregoing reasons I am of the opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *J. A. Fraser.*

Solicitors for respondent: *F. T. Congdon,* and *J. P. Smith.*

HAMILTON AND ABBOTT v. HART, TRIPP, AND THE ROYAL TRUST COMPANY.

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Will—Construction—Vesting—Gift over in case of death of beneficiary before "receiving" bequest—Death of beneficiary more than year after testator's death—Never "received" bequest.

A testator provided in his will that his trustees, after paying his debts, should first set aside a sufficient portion of the trust premises to produce an income of not less than $500 per annum to be paid to his parents, and after such portion had been set aside that one-fourth of the balance should be paid to each of his two daughters. He then directed that the trustees pay his wife the balance remaining after all the foregoing bequests had been made, and in the event of his wife dying before his decease, or before receiving such bequest, then said balance was to be paid to his said daughters. His wife died more than a year after his decease but before receiving the bequest and before the trustees had set aside a portion of the trust premises to provide the annual income for the parents. It was held by the trial judge that the trust premises mentioned in the bequest did not vest in the wife.

Held, on appeal, reversing the decision of MACDONALD, J. (25 B.C. 553), that the wife would become entitled to receive the share mentioned in the bequest when the property required to be set aside to produce the annuity was or ought to have been set aside; that a reasonable time is intended to be allowed trustees to segregate the property to be set aside, and in applying the rule which Courts of Equity have always applied in such cases, the reasonable time is one year. As the segregation should therefore have been made in the lifetime of the wife, her share in the estate became vested in her although not actually received, and upon her death became the property of her personal representatives.

APPEAL by The Royal Trust Company from the decision of MACDONALD, J. of the 5th of September, 1918, on an originating summons issued by the surviving executors of the will of W. H. Gardner, deceased, for the determination of the following questions:

Statement

"1. What construction should be placed on the following clause in the will of W. H. Gardner: 'pay to my wife, the balance remaining of said trust premises in the hands of said trustees after all the foregoing bequests have been set aside; and in the event of my wife dying before my decease or dying before receiving this bequest, then said balance of said trust premises shall go and be paid by the trustees to my said daughters?'

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"2. Did the trust premises mentioned in the said bequest vest in Linnie L. Gardner, the wife of the said William Humphrey Gardner, deceased, prior to her death, or did the said trust premises vest in the daughters of the said William Humphrey Gardner, deceased, on the death of the said Linnie L. Gardner?

"3. To whom should the said trust premises mentioned in the said bequest be paid by the plaintiffs?"

Statement

The will of W. H. Gardner was executed on the 21st of October, 1911, Mrs. Gardner, T. L. Hamilton and P. W. Abbott having been appointed his executors. He died in September, 1915, and probate was granted on the 17th of November, 1915. Mrs. Gardner died on the 22nd of November, 1916. Administration of her estate was granted The Royal Trust Company. The defendants Rose V. Hart and Eva P. Tripp are the daughters of W. H. Gardner by a former wife. The estate consisted chiefly of real estate in Edmonton, the only liquid assets being $5,000 of insurance which was used up in paying pressing debts. Under this will Mr. Gardner directed the executors (1) to pay his debts; (2) to set aside sufficient to realize an annuity of $500 per annum for his father and mother, and after such portion had been set aside one-fourth of the balance be paid to each of his two daughters. He then directed the trustees to pay to his wife the balance remaining after all the foregoing bequests had been made, and in the event of his wife dying before his decease or dying before receiving such bequests, then said balance was to be paid to his said daughters. The estate was heavily involved, the moneys realized from the insurance only being sufficient to pay the more pressing debts, and owing to the slump in real estate at the time, there was no opportunity to sell any of the realty. The result was the executors were unable to set aside sufficient to provide for the annual payment for the father and mother, and no bequests had been made to the daughters or Mrs. Gardner prior to her decease. It was held by the trial judge (see 25 B.C. 553) that the trust premises mentioned in the bequest did not vest in the wife. The Royal Trust Company appealed.

The appeal was argued at Victoria on the 26th and 27th of January, 1919, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. D. Macfarlane, for appellant (Royal Trust Company): The question is the interpretation of the words "before receiving this bequest." Did the property vest before the wife's death? The trustees must make the dispositions directed in will within a reasonable time, and the cases shew they should be made within one year: see *Sitwell* v. *Bernard* (1801), 6 Ves. 520 at p. 539; *In re Arrowsmith's Trusts* (1860), 2 De G. F. & J. 474; *Monkhouse* v. *Holme* (1783), 1 Bro. C.C. 298; *Gaskell* v. *Harman* (1805), 11 Ves. 489. As to the gift being an immediate one see *Scott's Trustees* v. *Scott* (1891), 18 R. 1194; Halsbury's Laws of England, Vol. 28, p. 797, pars. 1446-7; *Bacon* v. *Proctor* (1822), Turn. & R. 31; *Birds* v. *Askey* (1857), 24 Beav. 615; *Packham* v. *Gregory* (1845), 4 Hare 396 at pp. 397-8; *Adams* v. *Robarts* (1858), 25 Beav. 658. As to the meaning of the words "receipt of moneys" see *Re Collison* (1879), 48 L.J., Ch. 720; *West* v. *Miller* (1868), 37 L.J., Ch. 423; *In re Chaston* (1881), 50 L.J., Ch. 716; *In re Wilkins* (1881), 50 L.J., Ch. 774; *Maclean's Trustees* v. *Maclean* (1897), 24 R. 988.

Maclean, K.C., for respondent Tripp: The estate included two $5000 insurance policies and the rest of the estate was burdened with debt. The insurance went to pay the pressing debts. He first directed payment of debts; next, that a portion be set aside to pay his parents $500 a year. But there was not sufficient in the estate to do this. It is the representative of the wife who comes in and says she is entitled to the property that would have gone to her, but in this case there was nothing for the wife to receive. As to gifts over see Jarman on Wills, 6th Ed., pp. 2184 to 2194; *Doe* v. *Woodhouse* (1790), 4 Term Rep. 89.

Argument

Higgins, K.C., for respondent Hart, referred to *Elwin* v. *Elwin* (1803), 8 Ves. 547; *Ditmas* v. *Robertson* (1840), 4 Jur. 957; *In re Chaston* (1881), 50 L.J., Ch. 716; *Minors* v. *Battison* (1876), 46 L.J., Ch. 2; *In re Sampson* (1896), 65 L.J., Ch. 406; *Wilks* v. *Bannister* (1885), 54 L.J., Ch. 1139.

H. G. Lawson, for the trustees: The trustees took hold of the estate under extraordinary conditions. There was no sale

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for property and there is discretion in the trustees in dealing with the estate. If disposed of at the time there would be no assets at all: see *Marsden* v. *Kent* (1877), 5 Ch. D. 598.

Macfarlane, in reply.

Cur. adv. vult.

1st April, 1919.

MACDONALD, C.J.A.: The facts of this case are very fully set forth in the judgment appealed from, and I shall therefore not attempt more than a summary of them here.

The testator, who died on the 12th of September, 1915, directed his executors, whom he also declared to be the trustees under the will, to take possession of all his estate, real and personal. He gave them full discretion to retain his real and personal property or to sell it and invest the proceeds and vary the investments. Out of the income arising from the "trust premises," and out of the principal, if necessary, he ordered and directed his trustees to pay his debts, funeral and testamentary expenses; to set aside a sufficient portion of the premises to produce an annuity of $500, and to pay same to the testator's father and mother for life, or for the life of the survivor of them, and on the death of the survivor he directed that the property so set aside should be divided between his two daughters, one quarter each, and his wife the remaining half.

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The estate consisted of both lands and personalty, but the real estate was rather heavily encumbered, and in the condition of the real-estate market at the time of the testator's death and since, the executors and trustees thought it impracticable to sell it, as it could, if saleable at all, be sold only at a ruinous sacrifice. They have therefore not sold or converted the assets, nor have they set any of them aside for the production of the sum payable to the testator's father and mother, the latter of whom is still living. The income of the whole estate is insufficient to satisfy interest, taxes and other expenses chargeable against the property and to enable the trustees to pay the said annuity. The testator's wife died more than a year after his own decease.

In my opinion, it was the duty of the trustees to set aside the whole estate after payment of debts, funeral and testamentary

expenses, for the purpose of the annuity. They were clearly authorized to set aside sufficient of the testator's property to meet this clause of the will. They were not bound to sell or convert the estate, or any part of it. If they could not sell, they could at least obey the direction of the testator and set aside sufficient, or if there was not more than sufficient, the whole estate for the purpose so expressly directed. Had this been done, no question would arise as to the disposition of the residue, because there would be no residue to distribute.

Now, the question submitted for the opinion of the Court has to do with the rights of the residuary legatees only, and while in the result above stated it may not be strictly necessary to deal with this phase of the case, yet, as I have considered it with some care, and as our judgment must in any case be a declaratory one only and by way of advice to the trustees, I will state the conslusion to which I have come. Shortly, the testator directs his trustees, after they shall have set aside the property required to produce the annuity, "to pay"—which means to give, since it is not confined to money—one-quarter to each of his said daughters and one-half to the wife, "and in the event of my wife dying before receiving this bequest," then to the said daughters. The wife died intestate, and her administrators, The Royal Trust Company, claim that this bequest became vested in her in her lifetime, while on the other hand, the daughters claim that it could not vest until actually received by the wife. In my opinion the wife became entitled to receive it when the property required to be set aside to produce the annuity was, or ought to have been, set aside, and that the property ought to have been set aside at least within one year from the testator's death. The cases dealing with the construction of clauses in a will similar to the one in question are considered in Jarman on Wills, 6th Ed., at pages from 2175, and particularly from 2184 to 2194, and the rule seems to be established that unless a contrary intention can be inferred, the Court ought to favour an early vesting of the bequest, and that rights of the beneficiaries are not to be left to the caprice or the dilatoriness of trustees or executors. It may be open to question as to whether or not the said bequest to the wife did

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not vest in interest at the time of the testator's death. I am, however, inclined to think not. I think a reasonable time was intended to be allowed the trustees to segregate the property to be set aside for the production of the income from the rest of the estate, and that upon such separation, the bequest to the wife should become vested in her in interest if not in possession. There were no insuperable difficulties in the way of the trustees carrying out the direction of the will. The fact that the property was not really saleable does not, in my opinion, affect the matter. They were not bound to sell; had they been, then perhaps the question of an enquiry as to when the residue might have been received, so much discussed in the cases referred to in the pages of Jarman above referred to, might have arisen, but here the duty of the trustees is imperative, and does not depend upon the getting in and conversion of outstanding properties. That duty, therefore, ought to be discharged within a reasonable time, and applying the rule which Courts of Equity have always applied in cognate matters, the reasonable time is, in my opinion, one year. I can find nothing in the context of the will, or in the circumstances in which it was made, to shew an intention that "receive" was intended to mean actual receipt or, as has been said, receipt in hard money. It was not necessarily money which was to be distributed, but the residue of the property itself. I am therefore of opinion that had the segregation been made, as it ought to have been, in the lifetime of the wife, her share in the residue would have thereupon vested, though not actually received, and upon her death it would go to her personal representatives.

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I would, therefore, allow the appeal.

GALLIHER, J.A.: I would allow the appeal. The intention of the testator, as expressed in the will, was that after payment of his debts, funeral expenses, etc., a sufficient portion of his estate was to be set aside to provide an income for the maintenance of the father and mother. It was the duty of the trustees and executors to do this within a reasonable time, and for that purpose the whole estate, if necessary, should have been set aside to produce this income, or so much of it as would be produced

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thereby. Had this been done, no question could have arisen as to the interest vesting in the widow. As no definite time was fixed for this in the will, and as the widow survived the testator by more than a year, I would treat the period of one year as the reasonable time within which what should have been done would be taken to have been done.

MCPHILLIPS, J.A.: This appeal calls for the consideration of a very close point, when the cases are looked at, and it would seem that there is variance of decision. We find it stated in Hawkins on Wills, 2nd Ed., at pp. 262-3, that

"Where there is a gift over in the event of a legatee dying before 'receiving' his legacy, a very difficult question arises. The decisions in *Johnson* v. *Crook* [(1879)], 12 Ch. D. 639, *In re Chaston* [(1881)], 18 Ch. D. 218, *In re Wilkins* [(1881)], 18 Ch. D. 634, and *In re Goulder* (1905), 2 Ch. 100, ignore the fact that the order of the House of Lords in *Minors* v. *Battison* [(1876)], 1 App. Cas. 428, seems to imply that the divesting clause was void."

In the present case, as in *Minors* v. *Battison, supra,* it can be said that there is "not a mere power of sale, but an absolute trust for sale, subject to a discretion in the trustees as to the manner and time in which the sale should be carried out." The words of the will which require particular attention are the following:

"Pay to my wife, the balance remaining of said trust premises in the hands of said trustees after all the foregoing bequests have been set aside; and in the event of my wife dying before my decease or dying before receiving this bequest, then said balance of said trust premises shall go and be paid by the trustees to my said daughters."

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The wife survived her husband, the testator, for more than a year, so the period for distribution of the estate had elapsed. After careful consideration of the authorities I am of the opinion that the present case is one that falls within the *ratio decidendi* of *Minors* v. *Battison, supra,* a judgment of the House of Lords, and should be decided in accordance with the judgments of Malins, V.C., in *West* v. *Miller* (1868), 37 L.J., Ch. 423, and *Bubb* v. *Padwick* (1880), 49 L.J., Ch. 178. In *West* v. *Miller* the word calling for consideration was "received." Malins, V.C., at p. 425, said:

"It was rightly admitted that the word 'received' must be equivalent to 'receivable,' because of course it would depend on the diligence of the trustees whether the fund was actually to be got at or not."

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And at p. 426 said:

"I think a judge can never be worse occupied than in frittering down rules of this kind by minute distinctions; and I desire to be understood as deciding here, that in all cases where there is a gift for life, followed by a gift in remainder, which is to vest at the attainment of a particular age, or upon any other event personal to the legatee in remainder, and then a gift over in the event of the latter dying before the legacy is 'payable,' 'receivable,' 'vested in possession,' or any other form is used which means 'paid' or 'received,' there all such expressions are to be taken as equivalent to 'vested.' I will only add, that I entirely agree with *Dodgson's Trusts* [(1853), 1 Drew. 440], which decision has my full concurrence."

Bubb v. *Patwick, supra,* was a case where the testator directed that if any child should die before the youngest attained 21, and "without having actually received" his share, then his share should go over. The testator died in 1879. His youngest child was then of the age of six years. It was held that each child on attaining 21 acquired an absolute vested interest. Now, in the *Bubb* case, Malins, V.C., at pp. 180-1, made reference to the decision of Jessel, M.R. in *Johnson* v. *Crook* (1879), 48 L.J., Ch. 777, in these words:

"I should have thought that these authorities were conclusive; but it is said that the Master of the Rolls, in an elaborate judgment in *Johnson* v. *Crook*, has come to an opposite conclusion. It is very unfortunate that, in that case, the two important cases of *Hallifax* v. *Wilson* [(1809), 16 Ves. 168] and *Re Yates* [(1851), 21 L.J., Ch. 281] were not cited or considered.

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"For the reasons I have stated I adhere to the old rule; and am clearly of opinion that, where a legacy is absolutely vested, it cannot be divested by a clause which says that it is to go over if the legatee die without having actually received his legacy. I therefore entirely dissent from the judgment of the Master of the Rolls in *Johnson* v. *Crook*. That being so, and the Master of the Rolls being a judge of co-ordinate jurisdiction, I am at liberty to follow my own opinion, though I should not have done so if I was not following a long line of authorities.

"In my opinion the plaintiffs have acquired absolute vested interests. The question must, therefore, be answered in the affirmative."

If called upon to decide as between the two decisions, *i.e.,* as between that of Malins, V.C., and Jessel, M.R., bearing in mind the House of Lords' case of *Minors* v. *Battison, supra,* I would feel constrained to follow the judgment of Malins, V.C., but I do not think it really necessary to go that far, as the facts of the present case are essentially different, but if I should be in error in so supposing, then I unhesitatingly accept the law as laid down by Malins, V.C., as in my opinion it is in

true compliance with a very long line of decided cases. Now, *Johnson* v. *Crook, supra,* may be distinguished from the present case in this way (and all that the Master of the Rolls said which is in opposition to what Malins, V.C., said in the *Bubb* case is *dicta* merely, not being the exposition of a legal proposition necessary in the judgment pronounced). In that case we have words which we have not in the present case, *i.e.*, "whether the same shall have become due and payable or not." It is true that the Master of the Rolls did not think these words mattered, but, with great respect to a very eminent and distinguished judge, I venture to think the contrary, especially when I consider the facts of the present case. Here we have an immediate vesting and the widow lived beyond the statutory period for distribution. Can it be that the delay of the trustees in setting aside the bequests shall be held to postpone the vesting of the bequest in the widow? I think not, and *Minors* v. *Battison, supra,* makes this abundantly clear. See *per* Lord Selborne at pp. 14-15.

The case of *In re Chaston* (1881), 50 L.J., Ch. 716, a judgment of Fry, J. (afterwards Lord Justice Fry), creates, in my opinion, no difficulty in the decision of the present case. There it was held that "payment" referred to the time when the shares given would become payable, and at p. 720 Fry, J. said:

"But the case does not come before me upon the words 'actual receipt.' If it had, I might have felt myself in some difficulty. It comes before me on the words 'which have been held' to mean period of receipt, and therefore the difficulty does not arise."

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Fry, J. refers to *Johnson* v. *Crook, supra.* Continuing, at p. 720 he says:

"Undoubtedly Vice-Chancellor Malins has expressed his dissent from *In re Arrowsmith's Trusts* [(1860), 2 De G.F. & J. 474; 29 L.J., Ch. 774], and Vice-Chancellor Malins and Vice-Chancellor Hall have expressed their dissent from the case of *Johnson* v. *Crook*, in which the Master of the Rolls very elaborately investigated the whole of these cases. If it were necessary for me to express my opinion, I am bound to say I think *In re Arrowsmith* is a perfectly good decision, and I greatly prefer that construction of wills which shall give effect to the intention of the testator to that construction of wills which shall defeat it."

That Lord Justice Fry would have decided the present case in accordance with the conclusion I have arrived at I feel bold enough to say, when his judgment in *In re Wilkins* (1881), 50 L.J., Ch. 774 is read. There the head-note reads as follows:

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"A testator gave each of four persons a fourth of the proceeds of his residue, and in case of the death of any legatee before the 'final division' of his estate he gave that legatee's share over. One legatee died more than a year after the testator but before the estate had been distributed:—*Held*, that his personal representatives were entitled to his fourth share."

To fully illustrate what I have said I think it well to quote in full the judgment, which reads as follows, pp. 775-6. [The learned judge, after quoting the judgment in full, continued].

In *In re Goulder* (1905), 74 L.J., Ch. 552, a decision of Swinfen Eady, J. (now Master of the Rolls), has relation to a contingency specifically set forth, which occurred and cannot be said to affect the point we have here to determine. It is true that in that case approval was expressed of *Johnson* v. *Crook, supra,* but as I have indicated, *Johnson* v. *Crook* is distinguishable from the present case. *Scott's Trustees* v. *Scott* (1891), 18 R. 1194 is much in point. It was there held "that the words 'after these payments are made,' did not refer to a point of time, but meant 'subject to these payments,' and that the residue vested in the son *a morte testatoris.*" Also see *In re Sampson* (1896), 65 L.J., Ch. 406, Stirling, J. at p. 409.)

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That there was a vesting *a morte testatoris,* in my opinion cannot be questioned, and the Court aids vesting rather than divesting. The latter is what is contended for here. See *Re Litchfield (deceased); Horton* v. *Jones* (1911), 104 L.T. 631, Parker, J. (afterwards Lord Parker of Waddington); also see *Ward* v. *Brown* (1915), 31 T.L.R. 545.

I am, therefore, but with great respect to the learned trial judge, of the opinion that the decision he arrived at cannot be affirmed, and the appeal should be allowed. I must confess, though, that with the many decisions and the variance existing, the point of law is a difficult one. I wish to express my indebtedness to Mr. *Macfarlane,* the learned counsel for the appellant, for the brief but cogent argument with which he assisted the Court.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellant: *A. D. Macfarlane.*

Solicitors for various respondents: *Bodwell & Lawson; Frank Higgins; and Elliott, Maclean & Shandley.*

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REX v. MALISKA

Criminal law—Prohibition Act—Second offence—Conviction for—No proof of previous conviction—Style of cause in criminal matters—B.C. Stats. 1915, Cap. 59, Secs. 80 and 99; 1916, Cap. 49, Secs. 10, 28, 33 and 42.

The accused was charged with having sold liquor contrary to the provisions of the British Columbia Prohibition Act, with the added allegation that she had previously been convicted of the same offence. She was convicted by the magistrate, who imposed the penalty for a second offence, but there was no evidence adduced at the hearing of a former conviction. On *certiorari* the conviction was amended and a penalty imposed for a first offence.

Held, on appeal, affirming the decision of MACDONALD, J. (GALLIHER, J.A. dissenting), that there is but one offence under section 10 of the British Columbia Prohibition Act, the penalty only being different for a second offence, and the Court may amend the conviction so as to impose only the penalty for a first offence where there is no evidence to support the finding of the magistrate that the accused had been previously convicted.

Per MARTIN, J.A.: In the style of cause in criminal matters it should always be "The King." There is no precedent for putting "The Crown" on the record.

APPEAL by the accused from the decision of MACDONALD, J. of the 11th of February, 1919, on an application for a writ of *certiorari*. The accused was charged with unlawfully selling liquor, and that previously she had been convicted of the same offence in contravention of the British Columbia Prohibition Act. She was convicted by the police magistrate in Vancouver, the conviction reading "that she unlawfully sold liquor, and further that previously she was convicted of unlawfully selling liquor." After the evidence had been heard the magistrate asked, "Is this the first or second offence?" to which counsel for the Crown replied, "second offence." There was no evidence put in of a second offence. The accused was sentenced to 12 months' imprisonment with hard labour.

Statement

E. M. N. Woods, for the accused.

R. L. Maitland and *W. B. Cochrane*, for the Crown.

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MACDONALD, J.: On the 8th of January, 1919, Anna Maliska was convicted of a second offence, of selling liquor, contrary to the British Columbia Prohibition Act. She was sentenced to imprisonment for 12 months. Upon an application to quash the conviction, after deciding some points raised, which are not of importance, I became satisfied that there was no proper evidence adduced, which warranted the police magistrate in convicting her for a second offence. The provisions of the Act in this connection, had not been complied with, and the procedure adopted was not such as to furnish requisite legal proof of a previous conviction. See on this point *Reg.* v. *Herrell* (1898), 1 Can. Cr. Cas. 510 at p. 526. The question then arises, whether I can consider the depositions before the magistrate and, if they satisfy me as to guilt, then, impose the requisite punishment for a first offence under the Act. It is contended, however, that, even if this course be permissible, it should not, on the material before me, be pursued on two grounds. The first being, that the section of the Act dealing with the sale of liquor says: "Sec. 10—No person shall within the Province . . . . sell . . . . to any other person any liquor." And the conviction does not state that the liquor was sold to "any person." In other words, that it should state the person, if known, to whom the liquor was sold, in order to constitute a proper description of an offence under this section of the Act. I do not think this is a material allegation and is not usual in the description of an offence involving the sale of liquor. If the essence of the offence, consisted in the character, such as age or race of the person to whom the liquor was sold, then, the person should be described, *e.g.,* in the case of a sale of liquor to an Indian. It was not deemed necessary, under a similar section in the Alberta Liquor Act: see *Rex* v. *Dominion Drug Stores, Ltd.* (1919), 1 W.W.R. 285, where, upon an application to quash a conviction, the description of the offence charged was not questioned. It was in the following terms: "did unlawfully sell intoxicating liquor contrary to the Liquor Act of Alberta, 1916 and amendments thereto."

Then it was objected that a safeguard, in the course of prosecution, had been placed by section 33 of the Act, for the

protection of parties accused and that such provision had been ignored. A portion of this section reads as follows:

"In any prosecution under this Act for the sale or keeping for sale or other disposal of liquor . . . . the justice trying the case, so soon as it appears to him that the circumstances in evidence sufficiently establish the infraction of law complained of, shall put the defendant on his defence, and, in default of his rebuttal of such evidence convict him accordingly."

It does not appear from the proceedings that this course was literally adopted. The accused was not represented by counsel and, at the termination of the evidence of one of the witnesses, counsel for the prosecution announced the close of the case. There is no mention of the defendant, then, being called upon or "put upon a defence." She, however, gave evidence, on her own behalf, and also called as a witness, one Kim Gee. There would appear to be difficulty in complying with this provision of the Act. Is it intended that the magistrate should closely watch and follow the evidence, as it is submitted, and the moment he arrives at a conclusion in favour of guilt, to so announce it and put an end to further evidence on the part of the prosecution, by calling upon the defendant for a defence? Or is he to wait until the evidence of the prosecution is closed and then come to a decision? Strictly speaking, the wording of the Act is, that he should not delay his decision until such period in the proceedings. The section is difficult of interpretation and in practice would, to say the least, be embarrassing to a magistrate. However, upon the facts submitted, I do not think that further consideration of this point is important. It was proved, by the evidence for the prosecution, that the accused had made the sale complained of, and the defendant "put herself upon her defence," whether she was formally required to do so or not, by giving evidence. Her own testimony, coupled with that of her employer, did not supply any rebuttal evidence, so there was no doubt as to her guilt.

MACDONALD, J.

The only point then is, whether, having depositions before me for perusal, which determine that the accused is guilty of a first offence of selling liquor under the Act, I have power and should amend the conviction and impose the proper sentence. It is submitted that *Rex* v. *Van Fleet* (1918), 41 D.L.R. 65.

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as well as *Rex* v. *Fox* (1918), 3 W.W.R. 197, are authorities in support of such a procedure. The facts, in the first case, are similar to those here presented, as there was a conviction for a second offence, where the evidence was defective in support of the conviction for a first offence, and the conviction was amended and a penalty only imposed for a first offence. It must be borne in mind, however, that these decisions of the Court of Alberta, authorizing such amendment, are based upon statutory provisions dissimilar to those which can be invoked, for a like purpose, in our Province, and so do not prove of assistance.

It is quite apparent that the accused was tried and convicted for a second offence, although the legal proof afforded, only shewed the commission of one offence. Can section 99 of the Summary Convictions Act, in the event, be applied? It is an adoption of section 1124 of the Criminal Code, and provides, that—

"No conviction . . . . shall . . . . be held invalid for any irregularity, informality, or insufficiency . . . . if the Court or judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction . . . . has been committed over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence."

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Then, there is the further provision, that where the Court is so satisfied, it shall, if the punishment imposed is in excess of that which might have lawfully been imposed, have the like powers in all respects, as are by section 80 of the Act conferred upon the Court in case of an appeal under section 75. Section 80, *inter alia,* provides that the Court to which the appeal is made, from a conviction of justice, shall

"hear and determine the charge or complaint . . . . upon the merits, and may confirm, reverse, or modify the decision of such justice, or may make such other conviction or order in the matter as the Court thinks just; and may by such order exercise any power which the justice whose decision is appealed from might have exercised."

While in one sense the magistrate was trying the accused for a second offence, still the essence of the charge was, whether the sale complained of had taken place, and not a previous sale, for which the party had already been convicted. Such circumstance was only material when, after guilt is established,

the amount of punishment has to be determined. The magistrate should, in default of proper proof of the previous offence, have simply convicted the accused for a first offence. The conviction, for a second offence, thus was wrong; but I think the provisions for amendment apply. In coming to this conclusion, I am impressed with the desirability of decisions, in *quasi*-criminal matters, being consistent throughout Canada in determining the effect of similar statutory provisions. In *Rex* v. *Meikleham* (1905), 10 Can. Cr. Cas. 382, the defendant was convicted of unlawfully allowing liquor to be sold contrary to the Ontario Liquor Licence Act. It was held that the conviction did not disclose any offence and Sir W. R. Meredith, in giving the judgment of the Court, at p. 390, says as follows:

"The offence is unlawfully allowing liquor to be sold, etc. There is no such offence created by the Liquor Licence Act. The offence is the selling or bartering without the licence required by law; and, therefore, if there is not power in the Court to amend the conviction so as to make it for an offence under Subsec. 1 of Sec. 49 of the Act, *viz.*, the selling or bartering of liquors without the licence required by law, Mr. Mackenzie's motion must prevail and the conviction must be quashed.

"My learned brothers entertain a strong opinion that the case is one in which the remedial provisions of the Code should be exercised. I have not so strong an opinion upon the point as they have, but I agree hesitatingly in their conclusion upon that branch of the case."

And at p. 391:

"Another doubt I have had is as to whether we can say that we are satisfied that an offence of the nature described in the conviction is shewn by the depositions to have been committed: Criminal Code, Sec. 889.

"I do not know of any judicial interpretation of those words that will help us in coming to a conclusion, and I hesitatingly accept the view of my learned brothers, that the offence of selling without a licence is of the nature of the offence alleged in this conviction."

This was a case in which an offence was alleged not provided for by statute but in which the Court amended the conviction so as to bring it within the provisions of the Liquor Act. The effect of its decision is emphasized in the judgment of Sir William Mulock in *Rex* v. *Harris* (1917), 41 O.L.R. 366 at p. 368, as follows:

"Where a conviction is by *certiorari* (or its equivalent, a motion to quash), brought before a judge, Sec. 1124 authorizes the judge to modify the same as may seem just, to the extent provided by Sec. 754; and I think that justice requires that the fine imposed be reduced to $200, and this I direct to be done; the order to protect the magistrate."

In the latter case, a magistrate would have imposed the

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minimum fine of $200, upon a plea of guilty, had it not been for some facts being brought to his attention, which were foreign to the charge, and upon the strength of which he imposed a penalty of $1,000. I think that here, according to general practice, the magistrate, if he had simply been dealing with the first offence, would have imposed the minimum penalty of six months imprisonment. I should deal with the matter in the same way, and not be affected by any other consideration. The conviction and warrant of commitment should thus be amended, and the imprisonment reduced to six months. There will be no costs.

From this decision the accused appealed. The appeal was argued at Vancouver on the 1st of April, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

E. M. N. Woods, for the accused: The learned judge quashed the conviction in so far as it was a second offence, but he held he had power to reduce the sentence and amend the conviction under section 99 of the Summary Convictions Act. I contend he had no power to make the amendment. Under section 33 of the British Columbia Prohibition Act it is a condition precedent that the accused must be put on her defence. It is a matter of substance and not of formality: see *Rex* v. *Tystad* (1909), 15 Can. Cr. Cas. 236; *Rex* v. *Beesby* (1909), 1 K.B. 849. The greater offence is a distinct offence and the power of amendment is gone. If he had not found there was a second offence the magistrate would have had to dismiss the complaint: see Paley on Convictions, 8th Ed., 75 and 78; *Martin* v. *Pridgeo* (1859), 28 L.J., M.C. 179; *Blake* v. *Beech* (1876), 1 Ex. D. 320. It is not a question of irregularity but one of inherent defect: see *Re Sing Kee* (1901), 5 Can. Cr. Cas. 86. The learned judge followed *Rex* v. *Meikleham* (1905), 11 O.L.R. 366 in allowing the amendment. The evidence given is not clear enough for conviction.

R. L. Maitland, for the Crown: My submission is, the learned judge took the right position in amending the conviction and

reducing the sentence: see *Rex* v. *Van Fleet* (1918), 41 D.L.R. 65; *Rex* v. *Fox*, 13 Alta. L.R. 535; (1918), 3 W.W.R. 197.

Woods, in reply.

MACDONALD, C.J.A.: I would dismiss the appeal. As I see it, the point which we have to consider is as to whether there are, as argued by appellant's counsel, two offences—one for the illegal sale of liquor for the first time, and another for the sale of liquor after a previous conviction.

I do not read section 10 of the Act which defines the offence as meaning that at all. Section 10 has simply to do with the illegality of selling liquor. If an accused person is convicted under that section, and is again accused of the like offence and found guilty, the penalty may be different for the second offence, and it would be quite proper in the second information to allege the offence which is set out in section 10 and to add that there had been a previous conviction for the same offence. If the Crown succeeded in proving the first and did not succeed in proving the second, the penalty would be such as the Act provides for what is called the first offence. If the Crown succeeded in proving both, then the penalty might be a heavier one. In this case what really happened was that the evidence of the previous conviction was not sufficient. All that the magistrate therefore could do was, having found an offence under section 10 had been committed, to impose the penalty accordingly. The magistrate made the mistake of imposing the heavier penalty. Now, when the appeal came before the learned judge of the Court below, what was his duty and what were his powers? It seems to me that he had power to impose the proper sentence. He had power to reduce the sentence, which he did.

It does not seem to me it was necessary to amend the information at all. It was necessary, of course, to amend the conviction and this has been done by reducing the sentence from the improper one to the proper one.

The appeal, therefore, is dismissed. I wish to add this, that my decision does not go to the length of saying that it was improper to include in the information the statement that there had been a previous conviction. It may be proper and necessary

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to do that. So that in that respect, perhaps, my learned brother McPHILLIPS and I are not quite in accord. I mention it only that it shall not be understood that I think such a statement is not necessary or proper. It is only necessary to decide here that it is not improper to plead the prior conviction in the information. It is unnecessary to decide more here, and as far as I am concerned I go no further.

MARTIN, J.A.

MARTIN, J.A.: I am of substantially the same opinion. I have only to add under section 42, where the statement says previous convictions are charged, it means alleged. As has been indicated by Mr. Justice Stewart and as stated by Mr. *Maitland,* the case is absolutely distinct from the view that they are two separate charges and two separate offences.

It would appear that the learned judge below (Mr. Justice MACDONALD) took the view that the magistrate, in effect, had convicted for two separate offences, but it is perfectly clear, under the magistrate's conviction, that he did not do anything of the kind. He simply cites a conviction. He records a conviction before himself on the 7th of January and proceeds to say that there was a previous conviction upon a prior day—such being the case, the appeal must fall to the ground. I have only to add as a matter of practice I am entirely in accord with the view expressed by Mr. Justice McPHILLIPS with regard to the caption of this appeal before us, in putting in the indefinite word "The Crown" on the record. The Crown is an impersonal personality in so far as the actual proceedings in Court are concerned and there is no precedent for putting "The Crown" on the record. In criminal matters it is always "The King." It is a fact in certain *certiorari* proceedings it is proper to put *Ex parte* John Doe, or *Re* John Doe, but in the generality of cases, as appears by the cases stated by the learned counsel for the appellant, His Majesty should appear.

GALLIHER, J.A.

GALLIHER, J.A.: Assuming that the language of the Ontario Prohibition Act is the same as our Act, I would have some hesitation in following the reasoning in the *Van Fleet* case. If this were really a criminal case, in the true sense of criminal offences, I would take the view that I would follow the decision

of a Court of another Province of equal jurisdiction with this Court in order to preserve uniformity of decisions. Whilst in a sense this is a criminal matter and is laid under our Prohibition Act, and as in other Prohibition Acts it places people in the category of criminals who are otherwise perfectly honest people (I am speaking generally in these remarks), I do not look upon it in the same way that I would look upon an offence under the Criminal Code. I cannot divest my mind of the view that there is really a distinction as between a first offence and a second offence. There is in reality a first and second offence, as I view it. When you lay the charge you lay your information of an illegal sale of liquor. At some period during the trial and during the proceedings, it develops (whether it is in the information in the first place or whether it is not) that there has been a previous offence—then what is being tried out is in reality a second offence, that is a graver offence than the first offence, for which a graver punishment is provided, and in that view, I say it with every respect, I cannot follow what I understand is the view of the majority of the Court and also the view of the Court in *Rex* v. *Van Fleet*. I think Mr. *Woods's* appeal should succeed on that ground, because if they are separate offences, I think there is no power of amendment.

GALLIHER, J.A.

McPHILLIPS, J.A.: In my opinion the appeal fails. In looking at the statute it is clear that the offence is selling liquor, and no other charge ought to be laid under the Act. Having relation then to the question as to whether or not there was a previous conviction, that is only a matter of evidence. Now, what was the procedure in this case? The previous conviction was set forth in the information. That certainly was not treating the accused in any manner to her prejudice. She had notification at once that it was proposed to prove that she had been previously convicted.

MCPHILLIPS, J.A.

When we turn to *Rex* v. *Beesby* (1909), 1 K.B. 849, the enactment there under consideration may be said to be analogous statute law. There the offence is defined and in the penalty clause it is provided, as in the present case, that the penalty may be greater where there has been a previous conviction.

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As the learned judges in *Rex* v. *Beesby, supra,* pointed out when the evidence developed and it was shewn there was a previous offence, then it was and then only that the justices committed an error in law. They were required to state to the accused that he or she was entitled to a trial by jury. This case that we are now considering, if looked at in the light of *Rex* v. *Beesby,* contains no error in law at all, because it was developed at the outset and at the very threshold by the statement that there was a previous conviction. The fact that there was a previous conviction did not, under the statute we have to pass upon, entitle the accused to any different form of trial. Therefore I am unable to see any error in law. But when it came to the question of the imposition of the penalty, that was erroneously imposed upon the footing that there was a previous conviction, which in fact was not established, and in that there was error. And just as the learned judge of the Court below was entitled to correct that, so could this Court correct it, if need be. Now the question is, did the learned judge in the Court below proceed correctly? In my opinion he did. The learned judge corrected that which was extraneous to the substantive charge, having relation only to the penalty. It is a matter of satisfaction to note that the Alberta Court arrived at the same conclusion upon analogous statute law. It is well, in the administration of criminal law (and this partakes of that character), that there should be uniformity of decision. I am pleased to know that in so deciding as we do that we are in alliance with the Court of Alberta. The only other observation I wish to make is that, with great deference to all contrary opinion, I think it would be highly inconvenient to have to necessarily set out in the information that there was a previous conviction—it might not then be known but be later developed.

MCPHILLIPS, J.A.

EBERTS, J.A.

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

Appeal dismissed, Galliher, J.A. dissenting.

Solicitor for appellant: *Donald Downie.*
Solicitor for respondent: *R. L. Maitland.*

IN RE GARTSHORE. THE KING v. CLEMENT.

HUNTER, C.J.B.C.

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IN RE GARTSHORE

Intoxicating liquor—Importation of—Public Inquiries Act—Commission of inquiry—Prohibition—R.S.B.C. 1911, Cap. 110, Sec. 4.

The Lieutenant-Governor in Council, under the provisions of the Public Inquiries Act, appointed a judge of the Supreme Court sole commissioner to inquire whether intoxicating liquor had been unlawfully imported into the Province, if so, as to the names of the persons or corporations engaged in such unlawful importation, the disposition of the liquor, and all unlawful sales of intoxicating liquor within the Province in respect of which no prosecution was had. On the application of one G., who had been subpœnaed to appear before the commission as a witness, HUNTER, C.J.B.C. ordered the issue of a writ of prohibition.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C., that the commissioner was not acting judicially in holding the inquiry; that he had no power to impose any legal duty or obligation on any person, and was, therefore, not subject to control by a writ of prohibition.

Godson v. *The Corporation of the City of Toronto* (1890), 18 S.C.R. 36 followed.

APPEAL from an order of HUNTER, C.J.B.C., of the 22nd of January, 1919, that a writ of prohibition do issue to prohibit the Honourable Mr. Justice CLEMENT from proceeding upon a commission issued to him by the Lieutenant-Governor in Council under the Public Inquiries Act to inquire:

"(a) Whether intoxicating liquor has been unlawfully imported into the Province of British Columbia since the 24th day of December, 1917, and if so, in what manner and by what means or devices such importation was effected:

"(b) If any intoxicating liquor was so unlawfully imported into the Province of British Columbia, the names of the persons, firms or corporations engaged directly or indirectly or in any wise connected with such unlawful importation:

"(c) Into the disposition of all intoxicating liquor so unlawfully imported:

"(d) Into all unlawful sales of intoxicating liquor within the Province of British Columbia since the 1st day of October, 1917, in respect of which no prosecution has been had under the British Columbia Prohibition Act or under any statute, order in council, or regulation having the force of law in British Columbia."

Statement

Upon the issue of the Commission the Honourable Mr. Justice

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CLEMENT proceeded to hear evidence. One Alexander L. Gartshore was served with a subpœna to appear before the Commission as a witness. At his instance a summons was issued that the Commissioner shew cause why a writ of prohibition should not issue to prohibit further proceedings upon the said commission on the ground that it was issued without legal authority, and that the Commissioner had no jurisdiction under the said commission for any of the purposes mentioned therein.

Argument

C. W. Craig, for the Crown: We do not wish to take any technical objections, as we want a decision on the merits as soon as possible. The Commission can not otherwise safely proceed, and if it is valid, the prosecution must be proceeded with as soon as possible, as there is a time limit of six months.

Wilson, K.C., and *Symes,* for the applicant.

22nd January, 1919.

HUNTER, C.J.B.C.: This is an application to shew cause why a writ of prohibition should not issue to prohibit the Honourable Mr. Justice CLEMENT from proceeding under the mandate of a Royal Commission, dated December 21st, 1918, purporting to issue under the authority of the Public Inquiries Act, R.S.B.C. 1911, Cap. 110. Acting under the authority of the Commission, the Commissioner required the applicant's attendance as a witness. On the applicant refusing to attend, the Commissioner thereupon issued a warrant for his arrest, but as I understand it, the same has not yet been enforced. Hence these proceedings and, as the case raises questions of cardinal importance, the Court reserved judgment.

HUNTER, C.J.B.C.

The Commission recites that the Public Inquiries Act enacts that whenever the Lieutenant-Governor in Council deems it expedient that an inquiry be made into and concerning any matter in connection with the administration of justice within the Province (and such inquiry is not regulated by any special law), the Lieutenant-Governor in Council may appoint a Commissioner to inquire into such matters. Why the words included in the brackets were inserted is not clear, as they do not appear in the new section substituted by the amending Act of 1917, but as I think nothing turns on this, there is no need to refer to it further.

The Commission directs the Commissioner to inquire:

"(a) Whether intoxicating liquor has been imported into the Province of British Columbia since the 24th of December, 1917, and if so, in what manner and by what means or devices such importation was effected.

"(b) If any intoxicating liquor was so unlawfully imported into the Province of British Columbia, the names of the persons, firms or corporations engaged directly or indirectly or in any wise connected with such unlawful importation.

"(c) Into the disposition of all intoxicating liquor so unlawfully imported.

"(d) Into all unlawful sales of intoxicating liquor within the Province of British Columbia since the 1st of October, 1917, in respect of which no prosecution has been had under the British Columbia Prohibition Act or under any statute, order in council, or regulation having the force of law in British Columbia,"

and then, by virtue of the Act and other powers vested in the Crown, clothes the Commissioner "with the power of summoning before you any person or witnesses and requiring them to give evidence on oath orally, or in writing or solemn affirmation (if they be persons entitled to affirm in civil matters), and to produce such documents and things as you may deem requisite to the full investigation of the said matters," and directs the Commissioner to report, in writing, the facts found, together with the evidence "and the opinions which you may have formed in relation to the matters aforesaid as a result of such inquiry."

The first three inquiries are directed to unlawful importation of liquor into the Province since the 24th of December, 1917, *i.e.*, for the period of practically a year before the date of the Commission; the names of the guilty parties are to be reported, and also what became of the liquor. That is to say, the Commissioner is to inquire into the commission of offences against Dominion law, as it has been settled by the Privy Council that legislation relating to importation is assigned by the British North America Act exclusively to the Dominion Parliament, and in this matter the violations aimed at appear to be principally in respect of the prohibitions against importation and sale contained in the Dominion order in council of the 11th of March, 1918, passed under the authority of the War Measures Act, 1914.

The fourth inquiry is directed to all unlawful sales of intox-

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icating liquor since the 1st of October, 1917, under any law in force in the Province, *i.e.*, whether Dominion or Provincial.

The first question that arises is, can a Royal Commission issue under the Provincial Public Inquiries Act to inquire into breaches of Dominion law?

Possibly, if the Commission were not armed with compulsory powers and people could please themselves about testifying, there would be no legal objection to a Commission being issued to inquire into any subjects whatever relating to the general welfare of the Province, as a naked power to inquire could not bind anyone for any purpose, and any person conceiving himself injured or defamed by any evidence given would have his remedies in the Courts. But when the Commission is armed with coercive powers, which can be given only by statute, the matter assumes a different aspect.

By section 3 of the Provincial Public Inquiries Act, as amended by the statutes of 1917, Cap. 30, it is enacted that Commissions may issue to inquire, *inter alia,* "into and concerning any matter connected with the good government of the Province or the administration of justice therein," and it is only under one or other of these two clauses that this Commission is authorized by the Act, if at all.

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After consideration, I think that the expression "good government" is not to be taken in the wide sense which that expression bears in the British North America Act in relation to the powers of the Dominion. I think that in using this expression the Legislature rather meant to refer generally to the administration of the Government and to the exercise of the executive and ministerial functions and to the management and conduct of official business, and by giving it this interpretation it would be brought within the scope of the power given to the Province by section 92, subsection (16), of the British North America Act to legislate in respect of merely local matters within the Province. An example of a Commission within the meaning of such a clause occurred in *Kelly* v. *Mathers* (1915), 25 Man. L.R. 580, where a Commission to inquire into "all matters pertaining to the new Parliament Buildings" was held valid by the Court of Appeal under a similar clause in the Manitoba

Inquiries Act, even though the result might be to expose certain persons to prosecution. But such a clause would not authorize a Commission of the character in question here.

The other clause, *viz.*: "Administration of Justice," is the phrase used in the British North America Act itself in section 92, subsection (14), and of course it must be assumed that the Legislature by its use did not intend to include any matter not included in the phrase as used in the British North America Act. By the said subsection of the British North America Act, "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both civil and criminal jurisdiction, and including procedure in civil matters of those Courts," is assigned to the Province, while, on the other hand, by section 91, subsection (27), "the criminal law, except the constitution of Courts of criminal jurisdiction, but including procedure in criminal matters," is assigned to the Dominion. Criminal procedure, then, on the one hand, is for the Dominion, while "the administration of justice in the Province," in a restricted sense, is for the Province, and the boundary is not always clear. For instance, it has been decided that whether there should be a grand jury in criminal trials is a matter of procedure, and, therefore, for the Dominion; how many should compose it is a question of organization, and, therefore, for the Province; while again the number who may find a bill is for the Dominion. Now, I do not think it would be wise to attempt to give an exhaustive definition of what is included in either of these heads of jurisdiction as used in the British North America Act, but any case which involves their consideration ought to be left to be dealt with as the occasion arises, especially as it is sometimes easier to say what is not included in one or other of them, as the case may be, than to say what is included.

But if a coercive Commission to investigate breaches of Dominion law dealing with the importation of liquor is within the meaning of the expression "administration of justice in the Province," as used in the British North America Act, then I see no reason why evasions of the customs laws, as for instance with regard to opium, could not be made the subject of a Provincial inquiry. Assume, then, that a commissioner, directed

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to make such an inquiry, required the presence of customs officers and the books of the office, and that the minister of customs ordered the officers not to attend or to produce the books. Here there would at once be a conflict of jurisdiction which can not be intended by the British North America Act. The underlying principle of that Act is to divide and allot the powers of self-government between the Dominion and the Provinces, and not to establish or allow a clashing of jurisdiction. Therefore it must be clear that a Commission could not be issued by the Province under cover of the Provincial Public Inquiries Act to inquire into evasions of the customs laws or their efficacy or working generally, although to do so might be, in a broad sense, to inquire into a question of "good government" or into the "administration of justice in the Province."

Therefore I think it must follow that the Legislature did not intend to authorize any coercive inquiry into matters exclusively under Dominion control. At any rate, if it did so, I think the Act is to that extent *ultra vires,* in view of the decision of the Privy Council in the case of the *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Company, Limited* (1914), A.C. 237, the *ratio decidendi* of which is that a Legislature with limited powers can not create a coercive tribunal to examine into matters over which it has no jurisdiction. I do not understand the principle established by that case to be one of an absolutely rigid and unyielding character. For instance, a Commission to inquire into the working and efficiency of the grand jury system might, I think, be validly issued by the Provincial Government, even although it was called on to examine into some aspects of the system which, as pointed out, are under Dominion control.

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But where, as here, the Commission is directed to inquire into matters that are exclusively under the control of the Dominion Parliament, I think the principle applies, with the result that the Commission is void so far as concerns the mandate to inquire into violations of Dominion prohibitions relating to intoxicating liquor. The Commission then, from this point of view, being *ultra vires* of the Lieutenant-Governor in Council to the extent mentioned, the question might arise whether the

Court should declare the Commission unlawful in whole or only in part. As I think there are other fatal objections to its validity as a whole, it will not be necessary to consider this point.

Reverting again to the mandate, what is its nature and purpose? Whatever other object there may have been in the issuing of the Commission, the main object stands out conspicuous and clear. It is that the Commissioner shall inquire into all cases of unlawful importation and sale in violation of Dominion and Provincial law, and to report the names of the guilty parties with a view to prosecution. Why else should they be reported, and why only those who have not already been prosecuted? While it is true that Mr. *Craig* made no secret of the object of it and of the fact that the Attorney-General intended to prosecute, I think such declarations are irrelevant and that the intention must be gathered from the document itself.

We have, then, a tribunal of a highly inquisitorial character created by prerogative Act and armed with compulsory powers, designed to force the giving of evidence under oath for the purpose of discovering and reporting all offenders against certain Dominion and Provincial laws during a considerable period of time, nor is there any limit set on the time during which the tribunal may carry on its operations. It appears to me that the Legislature itself could not create such a tribunal, much less the Executive, for the simple reason that to do so is to deal with matters of criminal law and procedure which, as already stated, are assigned by the British North America Act to the Parliament of Canada.

A tribunal of this character is in reality assuming to exercise some of the functions of a grand jury with certain obvious differences in the procedure which do not make in favour of the protection of the subject. Under our system, a grand jury generally proceeds in respect of specific charges against named accused persons; here the tribunal is for the purpose of finding out who ought to be accused; the grand jury does not hear the accused, who can not be compelled to give evidence; the Commission, on the other hand, can force the suspect to give evidence while assuring him that his evidence can not be used against

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him; the grand jury hears the incriminating evidence in private, thereby protecting the person, where it throws out the bill, from the injury and annoyance of being publicly stigmatized by irrelevant or *mala fide* evidence or merely defamatory gossip; here the tribunal hears the evidence in public, which may seriously and without any adequate remedy injure the person against whom the evidence is directed and who has no right to test it by cross-examination.

All these matters are clearly matters of procedure, and as the inquiry is admittedly for the purpose of reporting those who are guilty of violations of the provisions of Dominion law which are punishable with severe penalties, they are matters of criminal procedure. Mr. *Craig* strenuously argued that it was irrevelant to talk of criminal procedure when no specific person was being proceeded against. I fail to see any force in this. I grant that in all properly-constituted criminal proceedings there must of necessity be an accused; but when a suspected person is forced to give evidence which incriminates himself, and who is to be reported as one who ought to be prosecuted, I think that, although technically not so, he is in reality an accused person, and none the less so because the procedure happens to be by way of summary trial rather than by indictment.

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I therefore think that as the Commission was created for the purpose of inquiring into violations of Dominion penal enactments with a view to prosecution and armed with compulsory powers in relation to the giving of evidence, that its establishment has necessarily dealt with matters of criminal procedure, and that in fact a special kind of criminal procedure has been set up for the effecting of a particular object, and that therefore the Commission is not only *ultra vires* of the Lieutenant-Governor in Council, but also of the Legislature itself.

There is another fatal objection to a Royal Commission created for the purpose of inquiring into punishable violations of law and ascertaining the malefactors, and that is that it is in violation of the Imperial statute 16 Car. I., Cap. 10, which abolished the Star Chamber. I see no reason to doubt that

this statute is in force both in Canada and in the Provinces, except so far as the law which is established may be altered by a competent Legislature.

After reciting, among other matters, that by the Great Charter "it is enacted that no free man shall be taken or imprisoned . . . . . and that the King will not pass upon him or condemn him but by lawful judgment of his peers or by the law of the land," and that by the statute 42 Edw. III., Cap. 3, "It is enacted that no man be put to answer without presentment before justices . . . . . or by due process . . . . . according to the old law of the land, and that if anything be done to the contrary it shall be void in law and holden for error," and after reciting in effect that the Privy Council and the Star Chamber had abused their powers, some of which were usurped, and that the common law and the ordinary course of justice provided all proper remedies and redress, the Act proceeded to abolish the Court and to provide that no Court, council or place of judicature should be henceforth constituted with the powers exercised by that Court.

It seems to me that a Commission of this character is within the sweep of the Imperial enactment, as there can not be any doubt that when a man is asked whether he has imported liquor within a prohibited period, he is being "put to answer." While the enactment relates to England and Wales, there can be no doubt of the applicability of its principle to all the self-governing Dominions, and it has been decided to be in force in New Zealand by the highest Court of that colony.

I think that its declarations of principle and prohibitions, so far as applicable, form part of our criminal as well as our civil jurisprudence, and that therefore only the Parliament of Canada, and not the Legislature, can authorize the creation of any tribunal which is within the sweep of its condemnation and designed to discover offenders against penal laws with a view to their prosecution. And if the Legislature can not do this directly, it can not do it indirectly under the guise of legislating concerning the "good government of the Province," or "the administration of justice," or "civil rights," or "local matters."

Thus in *Union Colliery Company of British Columbia* v.

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Bryden (1899), A.C. 580, the Legislature enacted that no Chinaman should be employed in coal mines below ground and, on behalf of the Province, it was argued that it could do this under its power over "local works and undertakings," and over "civil rights." But the Privy Council held that in reality the Legislature intended to strike at the employment of a certain class of aliens, and that this was competent only to the Parliament under its jurisdiction over aliens, which decision is really only an illustration of the fact that, broadly speaking, to make laws concerning the liberties of the people is for Parliament, while to make laws relating to "civil rights" is for the Legislature.

I think, moreover, that the creation of this particular tribunal violates two of the fundamental principles of criminal law and procedure which are the main safeguards of persons who are being proceeded against. The first is, that no man can be compelled to accuse himself. It is true, that by both the Dominion and Provincial Evidence Acts a witness can not refuse to answer on the ground that he may incriminate himself, but is protected to the extent that it can not be used against him, but notwithstanding these enactments, he can not be compelled to give evidence in any prosecution against himself. Is not this protection destroyed when he can be compelled to give evidence before one tribunal which is created for the purpose of finding out whether he should be put on trial before another tribunal?

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The second principle is, that every man is presumed to be innocent until he is proved to be guilty by a Court of competent jurisdiction. In a trial by the ordinary Courts of justice, the Court (and jury, if there be one) starts out with the assumption that the accused is innocent, and it is only when the offence is clearly proved that the accused is found guilty. Here the underlying assumption, and the very reason for the creating of the Commission, is that there are one or more guilty persons whom it is the office of the tribunal to discover and report for prosecution.

For these reasons I think that the Commission was issued without lawful authority and the applicant is entitled to relief, but, in conformity with the usual practice, there will be no costs.

From this decision the Commissioner and the Attorney-General appealed. The appeal was argued at Vancouver on the 1st, 2nd and 3rd of April, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Craig, K.C., for appellants: It was held that the Legislature could not authorize an inquiry into matters exclusively under Dominion control. Under section 92(14) of the British North America Act the administration of justice is in the Province. Subsection (16) should also be considered. This is a matter of a purely local nature: see *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at p. 365. The subject-matter of the Commission comes under "procedure in criminal matters": see *Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221. The pith of the investigation is not to bring a man up and by his own evidence convict him of a crime, but the subject-matter is of such a nature that the ordinary methods are not sufficient, and this investigation is necessary in order that the social state may be remedied. It is the duty of the Province to enforce the Dominion criminal law. It is the duty of the Province to administer the criminal law efficiently; and an inquiry of this nature is the most effective method to this end. As to the right to direct an inquiry in public matters: see *Licence Commissioners of Frontenac* v. *County of Frontenac* (1887), 14 Ont. 741; *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Company, Limited* (1914), A.C. 237; *Re City of Berlin and The County Judge of the County of Waterloo* (1914), 33 O.L.R. 73; *Lane* v. *City of Toronto* (1904), 7 O.L.R. 423. Because an investigation may result in prosecutions is no reason for disputing the jurisdiction. As to the powers of the local Legislature to issue the Commission: see *Kelly* v. *Mathers* (1915), 25 Man. L.R. 580. In this case the Commission was issued with a view to amending the law: see Clement's Canadian Constitution, 3rd Ed., 426; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117. The subject-matter comes within the "administration of justice": see *Regina* v. *Bush* (1888), 15 Ont. 398 at p. 403. No person is charged here. The Commissioner simply makes a report: see *In re References by the Governor-General in Council* (1910),

Argument

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43 S.C.R. 536 at p. 591. The word "procedure" in subsection (14) of section 92 of the British North America Act includes procedure in criminal matters. The word implies a destination or result. For a definition of the word see *Poyser* v. *Minors* (1881), 7 Q.B.D. 329 at p. 333. We have to distinguish when considering in a constitutional sense the word "crime" or "criminal law": see Clement's Canadian Constitution, 3rd Ed., p. 552; *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502 at p. 505; *Quong-Wing* v. *The King* (1914), 49 S.C.R. 440 at p. 462; *Pope* v. *Griffith* (1872), 2 Cartw. 291; *Ex parte Duncan* (1872), *ib.* 297; *Page* v. *Griffith* (1873), *ib.* 308; *Cote* v. *Chauveau* (1880), *ib.* 311. The application was premature. Gartshore had no right to take the action he did after being served with a subpœna. If we have the right to investigate breaches of the Provincial laws we have the right to subpœna him. He was in no danger. Prohibition will not lie. The proper remedy is by injunction: see *Re Godson and the City of Toronto* (1888), 16 Ont. 275, and on appeal (1889), 16 A.R. 452; and (1890), 18 S.C.R. 36; *Cote* v. *Morgan* (1881), 7 S.C.R. 1; *Chabot* v. *Lord Morpeth* (1850), 15 Q.B. 446; *Regina* v. *Hastings* (1865), 6 B. & S. 401; *Osgood* v. *Nelson* (1872), L.R. 5 H.L. 636; *The Queen* v. *Local Government Board* (1882), 10 Q.B.D. 309 at p. 321; *The King* v. *The Justices of Dorset and Others* (1812), 15 East 594; *In re Local Government Board; Ex parte Kingstown Commissioners* (1885), 16 L.R. Ir. 150. It falls within the subject-matter of the administration of justice in the Province.

Argument

Wilson, K.C., for respondent: We will first take the point that prohibition will not lie. He says it will only lie to a Court; a Court that can impose a penalty. There are four branches of the Commission. They have here a Commission to inquire into crimes. The result of the report is that certain persons may be prosecuted. As to cases in which prohibition is said to lie see *Honan* v. *The Bar of Montreal* (1899), 30 S.C.R. 1; *In re Hall* (1888), 21 Q.B.D. 137; *The Queen* v. *Judicial Committee of the Privy Council* (1838), 3 N. & P. 15. There is a marked distinction from the *Godson* case (1888), 16 Ont. 275; see also *Rex* v. *Kensington Income Tax Commis-*

sioners (1914), 3 K.B. 429. In the case of a coroner, prohibition will lie and all a coroner does is to find the cause of death; he does not impose a penalty: see *The Queen* v. *Herford* (1860), 3 El. & El. 115.

MACDONALD, C.J.A.: We think we should consider whether prohibition lies before hearing further argument.

Cur. adv. vult.

4th April, 1919.

MACDONALD, C.J.A. (oral): Before motions are heard I desire to say that I think there is only one course open to the Court, and that is to allow the appeal and set aside the writ of prohibition. Such a writ cannot be directed to a person whose powers do not enable him to pronounce a judgment, or make an order imposing legal duties or obligations. The Commissioner in this case was authorized to inquire into certain matters, and report to the Government the result of his inquiries. The only legal duty which he had the power to impose on anyone had to do with evidence merely; and the Supreme Court of Canada has decided that the enjoyment and exercise of that power does not give the Commissioner the judicial character which he must possess before he can be made the object of a writ of prohibition. I refer to the case of *Godson* v. *The Corporation of the City of Toronto* (1890), 18 S.C.R. 36, which, in my opinion, leaves no choice but to set aside the writ.

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We were urged to give an expression of opinion of the merits of the case; and I need only point out that such opinion would be binding on no one, and might be entirely disregarded if the case should come up in another form. The questions involved are of too important a character to be dealt with except on a sound footing. The appeal is therefore allowed and the writ set aside.

MARTIN, J.A.: In view of the decision of the Supreme Court of Canada in *Godson* v. *The Corporation of the City of Toronto* (1890), 18 S.C.R. 36, which is binding upon us and is, I think, in principle directly in point, I see no other course open to us

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than to sustain the objection taken by Mr. *Craig,* that this is a case wherein prohibition does not lie because the learned Commissioner "was in no way acting judicially; he was in no sense a Court," as it is put in *Godson's* case, *supra.* We were referred to the case of *Chambers* v. *Jennings* (1703), 2 Salk. 553 (91 E.R. 469), wherein prohibition issued to the Court of Honour, which had entertained "a suit by libel," but it is to be noted that it was a matter of doubt whether there was or could be any such Court, despite which that Court was in fact asserting its pretended jurisdiction, which caused Chief Justice Holt to say that "a prohibition would lie to a pretended Court"; and the report goes on to say that "after no one precedent could be found of such a suit for words in the Court of Honour, the prohibition went absolutely." There is no similarity between that case and this, because the Commissioner here does not "pretend" to be a Court of any description.

MARTIN, J.A.

In my opinion, therefore, the appeal should be allowed, and as a wrong remedy has been sought, and so the matter cannot be further entertained, I do not think it proper to say anything about its other aspects.

GALLIHER, J.A.

GALLIHER, J.A. (oral): I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I also agree that in the opinion of *Re Godson* there is the point determined that a writ of prohibition will not lie to a commissioner acting under the commission issued to him in this matter.

EBERTS, J.A.

EBERTS, J.A.: I feel bound by the judgment in the case of *Godson* v. *The Corporation of the City of Toronto* (1890), 18 S.C.R. 36, and agree that the appeal should be allowed.

Appeal allowed.

Note:—The Commission did not proceed further.

POWELL v. IMPERIAL LIFE INSURANCE COMPANY AND ROYAL TRUST COMPANY.

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POWELL v. IMPERIAL LIFE INSURANCE CO.

Will—Insurance policy—Wife named beneficiary—Subsequent trust deed—Moneys made payable to son—Made payable to others in case of son's death—Benefit to others nugatory—Validity of appointment to son—R.S.B.C. 1911, Cap. 115, Sec. 8.

The wife of an insured was named beneficiary in the policy. Later, by trust deed, the insured appointed trustees to collect upon his death the amount of certain policies, including the above, and pay the proceeds to his son on attaining the age of 25 years, with provision for investment and maintenance in the interval, and if the son should die before the insured or before attaining the age of 25 years the moneys were to go to the wife or issue of the son, but if none, then the money's were to go to insured's residuary legatees. The residuary legatees were said son and certain others whom it was not within the power of the insured to benefit without the consent of the wife under the Life-insurance Policies Act.

Held, that the appointment of the son under the trust deed as a beneficiary of the insurance moneys from said policy was valid under section 8 of said Act. The intention was to benefit the son at all events, and such intention and its effects can and ought to be separated from the nugatory intent to benefit persons not proper objects of the power.

STATED CASE on an interpleader issue heard by CLEMENT, J. at Vancouver on the 8th of April, 1919. The plaintiff brought action as beneficiary named in a policy of insurance on the life of her husband, Clarence M. Marpole, for the amount payable under the policy, which was dated the 15th of December, 1903. The Royal Trust Company claimed under a declaration of trust dated the 9th of November, 1914. The Insurance Company interpleaded, paying the moneys into Court. The action was stayed, and the claimants were directed to state a special case to the Court. By declaration of trust, Clarence M. Marpole appointed The Royal Trust Company trustee, to collect upon his death the proceeds of certain insurance policies, including the one in question, said Company to receive money upon certain trusts, the first of which was to pay to Harry Gifford Marpole, deceased's son, in the event that he

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was still living and of the full age of 25 years, the money collected from the insurance policies; provided that if the said son was alive and not of the full age of 25 years, then the Trust Company was to invest the moneys set forth, and upon the said son attaining the age of 25 years to pay to him the principal of the said moneys and all income received. It was further provided that if the said son should have predeceased the said Clarence M. Marpole, or should he die before attaining the full age of 25 years, having no wife or issue alive, then in either of such cases the trust moneys should be paid to the persons named in his will to receive the residuary estate. It was further provided that if the said son should have predeceased Clarence M. Marpole and left a wife or issue living, or if he should have survived the said Clarence M. Marpole and died before attaining the age of 25 years leaving a wife or issue alive, then the said moneys should be held for the benefit of the said wife or issue, as the Court should direct. The trust deed also provided for the maintenance of the said son until he should have attained the age of 25 years in the event of his not predeceasing his father. The parties named in the will to receive the residuary estate were the said son, Harry Gifford Marpole, Irene McDougal, Richard Frederick Marpole, and certain nieces of the deceased. The residuary legatees, with the exception of the son, were persons whom it was not within the power of the deceased to benefit under the policy, unless with the consent of the wife under the Life-insurance Policies Act. The question submitted for the opinion of the Court was whether the plaintiff is entitled to receive immediately and unconditionally the proceeds of the policy.

Statement

Davis, K.C., for plaintiff.
Mayers, for The Royal Trust Company.
Russell, K.C., for other defendants.

10th April, 1919.

CLEMENT, J.: Mr. *Mayers* concedes that the trust declared in favour of the residuary legatees named in the will of the deceased, Clarence M. Marpole, is nugatory, they not being proper objects of the power. But he contends that so far as

Judgment

the trust deed appoints the son a beneficiary in respect of the insurance moneys in question herein, it is a valid appointment under section 8 of the Life-insurance Policies Act (now R.S.B.C. 1911, Cap. 115); that the *bona fide* intention was to benefit the son at all events, and that such intention and its effect can and ought to be separated from the further and nugatory intent to benefit persons not proper objects of the power. And, on a careful consideration, I think he is right. In addition to the cases cited by him, I may mention *In re Holland* (1914), 84 L.J., Ch. 389, and *Vatcher* v. *Paull* (1914), 84 L.J., P.C. 86. The one question which is submitted to me by the special case must therefore be answered in the negative. The costs of all parties, including the original defendants, will be paid out of the fund in Court, those of the Trust Company as between solicitor and client; and the balance of the fund will be paid to the Trust Company to be administered according to the terms of the trust deed so far as its terms are not void. Mr. *Mayers* concedes that if the son dies before attaining his majority, the fund will be payable to the wife. I cannot so decide now. The question is not before me. It is quite within the possibilities that the son may die before attaining his majority, leaving a wife or children, or both, who might contend that the appointment to the son is of the fund absolutely so that it would pass to his next of kin. Even if I thought the point not arguable (in fact, I have reached no opinion upon it), I could not bind those mentioned by any expression of opinion as the matter comes before me.

Judgment

I should perhaps add that I have read the Ontario cases cited by Mr. *Davis*, but they go no further than Mr. *Mayers* conceded, as above stated, namely, that an appointment to one not a proper object of the power is nugatory. It is true that section 7 of the Act speaks of a trust in favour of the wife. It does the same as to children. Section 8 gives power to divest in either case and, in my opinion, the only question is as to the validity of the appointment to the son. So far as the benefit conferred on him may not exhaust the fund, the wife's interest still subsists.

Order accordingly.

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METCALFE v. VAN HOUTEN.

Vendor and purchaser—Sale of land—Want of title—Rescission—Recovery of purchase-money paid.

METCALF *v.* VAN HOUTEN

Where a vendor is unable to make title to land he has sold without the concurrence of a third party over whom he has no control, the purchaser is entitled to the return of all moneys paid on the sale, with interest.

ACTION to recover moneys paid on an agreement for sale by reason of the vendor's inability to give a good title to the property involved. The Canadian Pacific Railway entered into an agreement with certain purchasers whereby they were to be permitted to enter upon certain parcels of land and build warehouses, a warehouse to cover the whole of each parcel, the work to commence and the warehouses to be completed within certain periods. It was agreed that when the buildings were erected the company would sell the purchasers the lands on which the buildings were erected, but in the event of failure to commence building operations within the time specified the company could cancel the agreement. The defendant entered into an agreement with certain of the purchasers in respect to one of the parcels, agreeing to erect the required warehouses. He then sold the plaintiff one-half the said parcel, on the plaintiff agreeing to erect the required building, the plaintiff paying the defendant the purchase price. The plaintiff did not commence the erection of a building, but no building had been commenced on the other half of the parcel, and the defendant was unable to give title for the half parcel sold the plaintiff. The company cancelled the agreement with the first purchasers. Tried by CLEMENT, J. at Vancouver on the 9th of April, 1919.

Statement

Craig, K.C., for plaintiff.

Crisp (*Abbott*, with him), for defendant.

10th April, 1919. CLEMENT, J.

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CLEMENT, J.: By the very making of the agreement in question herein the defendant put himself in such a position that he could not, without the concurrence of the Canadian Pacific Railway Company, make title to the particular piece of ground covered by the agreement. This concurrence he could not compel the Canadian Pacific Railway Company to give. And if the plaintiff had learned of this situation as between the defendant and the Canadian Pacific Railway Company immediately after the making of the agreement in question herein, he could, I think it very probable, at once have repudiated. Later on, however, and before any obligation had fastened itself upon the plaintiff to commence building operations, such title as the defendant had was completely destroyed; and he cannot make title without the concurrence of the Canadian Pacific Railway Company, which concurrence he cannot compel. On this position being brought to the plaintiff's knowledge he demanded back the moneys paid on the agreement with defendant, and, on consideration, I think there is no possible answer to the demand except compliance. The covenant to sell in paragraph 8 of the agreement I read as a covenant to convey, and that is the pith of the transaction as between plaintiff and defendant. That covenant, it has become manifest, the defendant never could or can implement except with the concurrence of others, which concurrence they are under no obligation to give, and for which, in any case, the plaintiff is not obliged to wait: Halsbury's Laws of England, Vol. 25, p. 402, par. 690.

Judgment

There will be judgment for the plaintiff for the amount sued for (less the amount of the one cheque, which the plaintiff was not able to attribute definitely to this purchase), with interest, as claimed, and his costs of this action.

Judgment for plaintiff.

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CLOUGH v. GREENWOOD AND CLOUGH.

Practice—Replevin—Order for—Affidavit in support—Value of certain articles not given—Order set aside—R.S.B.C. 1911, Cap. 201—Replevin rules 2 and 4.

CLOUGH v. GREENWOOD

An affidavit in support of an application for an order of replevin set forth precisely a list of the articles claimed, and placed a valuation on each of a majority of the articles mentioned, but no valuation was placed on the balance, consisting of several articles.

Held (MCPHILLIPS, J.A. dissenting), that there was not a sufficient compliance with the statute and there was no jurisdiction to make the order.

APPEAL by defendant Clough from the order of LAMPMAN, Co. J. of the 14th of January, 1919, dismissing an application to set aside a replevin order obtained in an action for a declaration that the plaintiff is the owner of certain goods and chattels in the possession of the defendant Greenwood and for an order in replevin for their recovery. The defendant, A. H. Clough, is the divorced wife of the plaintiff, and lives with the defendant Greenwood. The chattels were in the possession of Greenwood in his house, he holding them for Mrs. Clough, who claimed they were hers. The writ was issued on the 20th of December, 1918, and on the same day a summons was taken out for a writ of replevin. The affidavit of the plaintiff in support of the application set out a list of the chattels and gave the value of certain items, but no value was given for some of the specific articles that were described. Order of replevin was issued on the 21st of December, 1918, and on the 14th of January, 1919, an application by the defendants to set aside the order was refused.

Statement

The appeal was argued at Vancouver on the 11th of April, 1919, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS, and EBERTS, JJ.A.

Lowe, for appellant: An application for a replevin order must be supported by an affidavit, which must contain all the

requirements of the rules in the Replevin Act: see *Schatsky* v. *Bateman* (1908), 17 Man. L.R. 347; *Russell* v. *Russell* (1918), 57 S.C.R. 1. In this case there was no jurisdiction to make the order, as the affidavit in support did not give the value of a material portion of the chattels in question.

D. S. Tait, for respondent: There must be something essential to set aside the judgment given by the judge in the exercise of his discretion, as he has discretion under rule 4 of the schedule to the Act. A clock is the only item of any importance for which a value was not given, and the difficulty of placing a value on it was considered by the judge. The nature of the items was given and the value of all the items of importance. The order should not be disturbed.

Argument

MACDONALD, C.J.A.: I think the appeal should be allowed. The learned trial judge unfortunately appears to have overlooked the section of the statute which provides that an order can be made only on an affidavit shewing the value of the goods. How he could come to the conclusion that an affidavit shewing the value of some of the articles could prove the value of the whole lot I cannot see, but that appears to have been the assumption. From what I have read of the affidavit, which is very short, it would appear that these goods are in the possession of the defendant Greenwood. They were the goods of the husband before the divorce. If the statute had been followed and the value of the goods replevied stated, the order would not have been open to objection. The question is one of law, and there does not seem to be any escape from the conclusion that the defect in the affidavit is fatal. Therefore the order should be set aside. Costs will follow the result.

MACDONALD, C.J.A.

MARTIN, J.A.: Rule 2 of the Replevin Rules does, I think, contemplate in a large measure the element of satisfaction that the learned judge is entitled to take into consideration in arriving at the value of the property, but the difficulty is, of course, here that there is no evidence at all in regard to four items at least of the allotted goods that were included in the order. That means, necessarily, that the value is not before the judge, and the circumstances were such here, at least, that there is

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nothing else before him to which he could resort to make up for that deficiency. Therefore, the materials for arriving at that satisfaction were absent, and consequently he had no jurisdiction to make the order. If the materials had been before him, it would not be proper to review his satisfaction.

Then as to rule 4, I quite agree that if the situation had been changed and there were any more circumstances or evidence before the learned judge in regard to that question of value upon the application to discharge his order, then he could have, at that stage, made an order which would supply the deficiency existing in the original one, but in the absence of any fresh evidence, the original defect in the lack of materials upon which to satisfy, that is to say, the exercise of discretion could be arrived at, continuing all through the proceedings up to that stage. The expression I draw attention to, as I did during the argument, "make such order thereon as under all the circumstances best consists with justice" goes no further than the similar statement at the conclusion of the preceding rule, where the learned judge is bound to make such order as under the circumstances and the evidence appears just, or as appears under rule 196 of the Supreme Court Rules, where the judge should make such order as the Court may deem just. All those terms "as may be just" goes to the exercise of the proper judicial discretion based upon proper materials, but there is nothing in the language of rule 4 which carries it beyond the ordinary exercise of a judge's discretion. For that reason I feel that I am led to take the view that the situation was changed under the application of rule 4, that the original defect of jurisdiction existed, and therefore the appeal must be allowed.

MARTIN, J.A.

McPHILLIPS, J.A.: I would dismiss the appeal. In my opinion, the Act we have to consider, the Replevin Act, is one which indicates that the Court is to exercise discretionary power in accordance with what may be said to be a code as set forth in the rules. It is quite apparent, with regard to the application to be made to the judge for the order, that he has a discretion as to the evidence of ownership and value, and it is quite evident that value need not be sworn to specifically by

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the person claiming the property. It is to be shewn to the satisfaction of the judge, that is, by proof acceptable to him.

Now, it is clear that as to the major portion of the articles the value has been sufficiently established. The contention is, that by failure in shewing any value as to four specific articles that the whole proceeding must fail. To give effect to that contention, it seems to me we should find intractable language in the statute or rules. We well know that in cases of attachment of debts the Court has been very strict, but there there is no discretion left with the judge at all. The judge is disentitled to make the order unless he has the express sworn statements required by the statute. That I do not find present here. Then, when we come to consider rule 4, it is evident that the judge is given a complete discretionary power in disposing of the matter, as the language reads, "which best consists with justice between the parties." Now, in this case, as to the major number of the articles in question there is proof of value, and as to an insignificant number there is no express, but inferential value.

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I must say that the exceptions here taken, given effect to, tends to bring the Court under adverse criticism, especially when in the County Court it is intended that there should be a wide discretion, and the judge is to make such order as "consists with justice between the parties."

The writ has issued and the property has been replevied, and because of the fact that a cup and saucer, a clock, and one or two other items are left unvalued, the whole proceedings are to be abortive! With great respect to contrary opinion, I am of the view that this order can be rightly sustained. I would affirm the order of LAMPMAN, Co. J. and, as previously stated, would dismiss the appeal.

EBERTS, J.A.: I am of the opinion that the appeal should succeed. By section 2 of the Act, in order to get an *ex parte* order of that kind, the applicant should make an affidavit of value and description of the property. In this case he only made an affidavit of value and description of a portion of the property. Supposing a man was to make an affidavit in a

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replevin action of this kind and set out two articles at $50 apiece, making $100, and leave out another article worth $1,000, he might put up a bond of $200 and get possession of the article worth $1,000. I say, with regret, that I have to give a judgment of this kind and allow the appeal. I think, under all the circumstances, it would appear that I have no other recourse before me.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Moresby, O'Reilly & Lowe.*
Solicitors for respondent: *Tait & Marchant.*

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ESQUIMALT AND NANAIMO RAILWAY COMPANY v. DUNLOP.

ESQUIMALT AND NANAIMO RY. CO. v. WILSON

THE SAME v. DUNLOP

Practice — Parties — Crown — Attorney-General defendant — Declaratory judgment—B.C. Stats. 1884, Cap. 14—B.C. Stats. 1903-4, Cap. 54—B.C. Stats. 1917, Cap. 71.

The Attorney-General is properly made a defendant where the Crown is "indirectly affected," but where the Crown is directly affected, the proper proceeding is by petition of right.

Where the plaintiff claimed certain lands and minerals by virtue of letters patent from the Crown, Federal, in fee simple of the 21st of April, 1887, authorized by a Provincial statute (B.C. Stats. 1883, Cap. 14), and the defendant claimed the same estate by virtue of a grant from the Crown, Provincial, of the 15th of February, 1918, authorized by Provincial statutes (B.C. Stats. 1903-4, Cap. 54, and B.C. Stats. 1917, Cap. 71), said parties being claimants for the same estate from the Crown, and the Crown having divested itself of all interest in the property and not being affected by the result, the Attorney-General should not be added as a party defendant.

[Reversed by the Judicial Committee of the Privy Council.]

Statement

APPEAL by defendants from an order of MACDONALD, J. of the 17th of June, 1918, granting the plaintiff Company's

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application to add the Attorney-General as a party defendant in the action. The action was with reference to the title to section 2 and the east 60 acres of section 3, range 7, Cranberry District, B.C. Under the Settlement Act (B.C. Stats. 1884, Cap. 14) the Province granted to the Dominion a certain tract of land (which included the ground in dispute) to aid in the construction of a railway from Esquimalt to Nanaimo. On the plaintiff Company undertaking to build the railway the Dominion granted said lands to it by way of subsidy. There was expressly excluded from the area covered by said grant such portions thereof as were then held under Crown grant, lease, agreement for sale, or other alienation from the Crown, Indian reserves, land reserved for school purposes, settlements and Naval or Military reserves. On the 24th of December, 1890, the Esquimalt and Nanaimo Railway Company granted to one Joseph Ganner the surface rights of the land in dispute, expressly reserving to itself the coal and other minerals therein specified and the right of entry for the purpose of mining and taking the minerals. Joseph Ganner died on the 26th of September, 1903. In pursuance of the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917 (B.C. Stats. 1917, Cap. 71) Messrs. Charles Wilson and Angus D. McKenzie, executors and trustees of Joseph Ganner, deceased, applied to the Lieutenant-Governor in Council for a grant in fee simple of the lands in question, claiming that Ganner as a "settler" was entitled to a grant in fee simple to this land under the Act, and on the 15th of February, 1918, a Crown grant was issued to the defendants as trustees, for the land in question in pursuance of said Act. The plaintiff's claim was for a declaration that said Crown grant was null and void in so far as it purported to grant the minerals under said lands or the surface rights reserved in the grant of the surface rights by the plaintiff to Ganner, and for an injunction to restrain the defendants from registering said Crown grant.

Statement

The appeal was argued at Vancouver on the 13th of November, 1918, before MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellants: The learned judge made the Attor-

Argument

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ney-General a party following the case of *Dyson* v. *Attorney-General* (1911), 1 K.B. 410, but it does not apply as the action is based on a liability to the Crown, the subject having a right of action under a Statute of Henry VIII. They must proceed by petition of right. There was no jurisdiction to make this order. On the question of jurisdiction to make the Attorney-General a party see *Hix* v. *Attorney-General* (1661), Hardr. 176; *Whitehill* v. *Attorney-General* (1665), *ib.* 395; *Pawlett* v. *Attorney-General* (1667), *ib.* 465; *Ex parte Colebrooke* (1819), 7 Price 87; *Colebrook* v. *Attorney-General, ib.* 146; *Craufurd* v. *Attorney-General, ib.* 1 at p. 69; *Rex* v. *Peto* (1826), 1 Y. & J. 169 at p. 170; *Casberd* v. *Attorney-General* (1819), 6 Price 411; *Deare* v. *Attorney-General* (1835), 1 Y. & C. 197; *Hodge* v. *Attorney-General* (1839), 3 Y. & C. 342; *Attorney-General* v. *Halling* (1846), 15 M. & W. 687 at pp. 693-8. In *Reeve* v. *Attorney-General* (1741), 2 Atk. 223, it was held the Attorney-General will not be made a party in a Court of Chancery. As to remedy by petition of right see *Kirk* v. *The Queen* (1872), L.R. 14 Eq. 558 at p. 563; *Taylor* v. *The Attorney-General* (1837), 8 Sim. 413 at p. 423; *Eastern Trust Company* v. *Mackenzie, Mann & Co., Limited* (1915), A.C. 750 at p. 759; *Viscount Canterbury* v. *The Attorney-General* (1842), 1 Ph. 306 at p. 324; *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619 at p. 623. They must proceed by petition of right and obtain a *fiat* before making the Attorney-General a party.

Argument

Davis, K.C. (*Harold B. Robertson,* with him), for respondent: You cannot maintain an action against the Crown when the Court is asked to make an order against the Crown. As to recovery of property from the Crown in any way an action cannot be maintained as the Court will not make an order, but if the Crown is willing to come in, they have no *status* to say the Crown cannot come in, the Attorney-General only can take objection. We say, first, he has no *status* to object, and second, when the action is for nothing more than a declaration of right the Crown will and can be made a party. The Crown is undoubtedly interested and should be notified and heard. All we are asking for is a declaration of the value and effect of a particular Crown grant: see *Guaranty Trust Company of New*

York v. *Hannay & Company* (1915), 2 K.B. 536. He says *Dyson* v. *Attorney-General* (1911), 1 K.B. 410 is not an authority as it arose under circumstances in which the subject had a right of action under a statute, *i.e.*, 33 Henry VIII., Cap. 39, Secs. 73 and 79, but practically all the cases he has cited were cited by the appellant in that case: see also *Attorney-General* v. *Edmunds* (1868), L.R. 6 Eq. 381 at p. 391; *Pawlett* v. *The Attorney-General* (1667), Hardr. 465 at pp. 467-9. On the question of the Attorney-General being a party see *Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221; *Laragoity* v. *Attorney-General* (1816), 2 Price 172; *Burghes* v. *Attorney-General* (1911), 2 Ch. 139 at p. 146; *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 443. The Court has all the powers of the Exchequer Court in England. The principle is, you cannot make any order for conveyance or sale, but relief can be given. If the order does not directly affect Crown property it can be made: see Robertson on Civil Proceedings against the Crown, p. 477, where it is recited that where the interests of the Crown are only incidentally concerned in the proceedings the Attorney-General on behalf of the Crown may and must be made a defendant, citing *Reeve* v. *Attorney-General* (1741), 2 Atk. 225, and a number of other cases. We say we do not need to proceed by petition of right but the Attorney-General must be made a party. It is a discretionary order and the Court should not interfere with the order already made.

Argument

Mayers, in reply.

Cur. adv. vult.

1st April, 1919.

MARTIN, J.A.: This is an appeal from an order made by Mr. Justice MACDONALD adding the Attorney-General as a defendant.

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It is first objected by the respondent Company that it is not open to the original defendant to contest this order and only the Attorney-General can do so. But upon the application to add, the summons was served upon the then defendant alone, which is the proper practice—*Ashley* v. *Taylor* (1878), 10 Ch. D. 768; 48 L.J., Ch. 406, and the order thereupon directs, pursuant to rule 133, that the writ shall be served upon the

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added party, which service is the beginning of proceedings against him. In such circumstances it would be an anomalous and unjust thing if the only party who was or could be invited to oppose the making of the order should not have a *status* to appeal from it, if wrongly made, and therefore I think he can do so.

We have no evidence before us that the writ was in fact served upon the Attorney-General, and in such circumstances, I can see no reason why the statement made at the bar by the appellants' counsel, that he was authorized by the Attorney-General to say that he objected to the order adding him, should not have been made: it does away with any question about the Attorney-General's consent, which arose in *Hodge* v. *Attorney-General* (1839), 3 Y. & C. 342; 8 L.J., Ex. 28, considered in *Dyson* v. *Attorney-General* (1910), 80 L.J., K.B. 531; (1911), 1 K.B. 410 at p. 416.

Turning then to the main question, it must be borne in mind, as Lord Justice Farwell twice remarks in *Dyson* v. *Attorney-General, supra,* at pp. 421, 424; (1911), 81 L.J., K.B. 217; (1912), 1 Ch. 158; that in deciding the question the facts stated in the pleadings "must therefore be taken as true for the present purpose" as upon demurrer, and therefore I do not intend, as I am not warranted in doing, to go beyond them in the slightest degree and, *e.g.,* enter upon a speculation as to what may be the actual clauses or language contained in letters patent or grants from the Crown, which have been authorized to be issued under certain statutes, but which are not in fact before us so that we can say with the requisite certainty if that has been done, or other clauses inserted or omitted, that the parties might have agreed upon apart from the statute.

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The matter in a nutshell is this: The plaintiff claims the lands and minerals in question (apart from the precious metals) under and by virtue of letters patent from the Crown Federal in fee simple, dated April 21st, 1887, authorized by a Provincial statute of 1883, 47 Vict., Cap. 14; and the defendant claims the same estate under and by virtue of a grant from the Crown Provincial, dated February 15th, 1918, likewise authorized by a Provincial statute [Vancouver Island Settlers' Rights Act,

1904], B.C. Stats. 1903-4, Cap. 54, as amended in [Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917] Cap. 71, 1917. It will thus be seen that upon the record there are two claimants to the same estate from the Crown, the precious metals being admittedly excluded from the controversy. In such case, the Crown has no interest whatever in the estate it has parted with and which is in controversy, and the validity of the conflicting Crown grants depends upon the principles considered and set out in several cases in this Province, *viz.*: *Victor* v. *Butler* (1901), 8 B.C. 100; 1 M.M.C. 438, note 446; *North Pacific Lumber Co.* v. *Sayward,* 25 B.C. 322; (1918), 2 W.W.R. 771; *Quesnel Forks Gold Mining Co.* v. *Ward,* 25 B.C. 476; (1918), 3 W.W.R. 230; and *Esquimalt & Nanaimo Ry.* v. *McLellan* [26 B.C. 104]; (1918), 3 W.W.R. 645. The learned judge below found on the facts before him that "the Crown has divested itself of any interest in the property and is not affected by the result," and in this he was right, but he proceeded nevertheless to add the Attorney-General as a party, "for conformity," as he puts it, which, with the greatest respect, is a ground that, whatever it may be (and I confess I do not know) is not, I think, a legal one. He grounded his judgment upon *Dyson's* case, *supra,* a revenue one, the application of which should be restricted to the facts under consideration, as pointed out by Lord Chancellor Halsbury in *Quinn* v. *Leathem* (1901), A.C. 495; 70 L.J., P.C. 76; but whatever that case may be an authority for (it is considered, I note, with others in the Law Quarterly Review for July, 1918, *sub nom.* "The Attorney-General as Interpreter") it is therein laid down clearly, in Lord Justice Farwell's judgment, that it only applies to a case where the Crown is "indirectly affected," as a petition of right solely does where the Crown is directly affected; it has and can have no application to a case where the Crown, as here, is not affected at all. In such circumstances the rights of the respective holders of the conflicting grants from the Crown should be determined apart from the unnecessary presence of the Crown upon the record, pursuant to the authorities already cited.

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It follows that the appeal should be allowed.

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MCPHILLIPS, J.A.: The question to be determined is one of importance—that is, whether the Attorney-General may be made a party to an action without applying to be added or assenting thereto, and from an order so directing this appeal is taken, Mr. Justice MACDONALD having decided that the Attorney-General should be made a party defendant. The action is for a declaration that the respondent is the owner of certain lands, being a portion of the railway subsidy lands covered by the statutory conveyance thereof made in pursuance of B.C. Stats. 1884, Cap. 14, to the Government of Canada, and by the Government of Canada, in pursuance of Cap. 6, Can. Stats. 1884, conveyed to the appellants, and that the Crown grants issued to the appellants in pursuance of the Vancouver Island Settlers' Rights Act, 1904, and the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, are null and void.

This fact is at once apparent, and that is, that the Crown in the right of the Province has divested itself of all right and title to the lands, and the contest really may properly be said to be one between the respondent and the appellants. There is no evidence that the Crown in the right of the Province is questioning the Crown grant, in truth under section 4 of the Vancouver Island Settlers' Rights Act, 1904, Cap. 54, it is provided that the rights granted to the settlers under the Act shall be "asserted by and be defended at the expense of the Crown." In view of the statutory mandate, it is not surprising that we do not find the Crown questioning in any way the validity of the Crown grants. In the defence the appellants set up that the Crown grants can only be impeached in an action to which the Crown is a party. The learned judge in his reasons for judgment, when deciding that the Attorney-General of the Province should be a party defendant, says:

> "It is true that the action of the Crown in issuing such grants is being attacked, but it is only sought, as I take it, to add the Crown as a party to the action for conformity, and in order to remove the objection to the form of the action as now constituted."

The learned judge in making the order founded it upon the authority of *Dyson* v. *Attorney-General* (1911), 1 K.B. 410, being a case where a declaratory judgment was sought against

the Crown, and the learned judge quotes what Cozens Hardy, M.R. said at p. 417:

"In my opinion the plaintiff may assert his rights in an action against the Attorney-General and is not bound to proceed by petition of right."

Very able and elaborate arguments have been addressed to the Court dealing with the question involved, and it has been submitted by counsel for the appellants that it is a rule of universal application that the Crown cannot be made a party to an action save in certain cases, of which the present action is not one—that is, in cases comprising penalties or forfeitures, or where the subject is or may be liable to a charge—that in such cases the subject is not bound to await the action of the Crown but may anticipate and question any liability, this originating under an ancient statute, namely, Henry VIII., Cap. 39, dealing with forfeitures, escheats, outlawry and attainder. Many cases were cited to substantiate this submission, and in my opinion the submission is correct, and the cases may be said to be in the main revenue cases, as the *Dyson* case was. The case of *The Attorney-General* v. *Hallet* (1846), 15 M. & W. 97, 110, illustrates the point. There the profit of the Crown came in question and the case was ordered to be removed into the Office of Pleas of the Exchequer. Platt, B. at p. 109 said:

"It has been said that in cases of ejectment the Crown has not been allowed to carry on the proceedings in this Court. Is there not a very plain answer to that, *viz.*, that it is the prerogative of the Crown not to be sued by writ? and it would be one of the most absurd proceedings in the world for the Crown to commit itself. It is the prerogative of the Crown not to be sued by writ, and therefore another proceeding is adopted, called a petition of right, upon which, if it is successful, the direction of the Crown is 'that right shall be done.'"

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The case last cited was approved in *Stanley of Alderley (Lord)* v. *Wild & Son* (1899), 69 L.J., Q.B. 318, and at p. 321 Vaughan Williams, L.J. said:

"But inasmuch as an action of ejectment will not lie against the Crown, the party must proceed by a petition of right."

And A. L. Smith, L.J. at p. 321 said:

"An authority of more recent date to the same effect [having referred to *Yates* v. *Dryden* [1634)], 2 Cro. Car. 589] is *Att.-Gen.* v. *Barker* [(1872)], 41 L.J., Ex. 57; L.R. 7 Ex. 177, in which Chief Baron Kelly said: 'On principle and authority, I feel bound to hold that the Crown has at any time a right to insist upon its claim to land, or upon its right to the

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establishing of any customs belonging to a manor, by means of a suit instituted by the Crown itself, and is not bound to abide the event of any action or suit in which the Crown, through a subject, is made the real defendant, and can only appear as a defendant.' That, again, is a clear authority that the Crown is entitled *jure coronæ* to be actor in any litigation affecting its rights,"

but it is to be observed that the Crown is not moving or asking to be a party in the present case, but without its consent has been made a party defendant. Can it be suggested that there is any authority for this? In my opinion there is none, if the *Dyson* case is not applicable.

No question of title as affecting the Crown arises in the present case—no matter of profit or revenue of the Crown—the Crown has parted with all its rights and the question can only be one between the respective litigants other than the Crown, and it would seem incontrovertible that it is not a case for the Crown to be made a party in default of its moving the Court to be added as a party. That the proper proceeding for the respondent to adopt would appear to be by way of petition of right if the Crown is to be affected or the Crown grants set aside, is apparent by *Taylor* v. *The Attorney-General* (1837), 8 Sim. 413 at pp. 423-4, an analogous case to the case at bar. Then, if it is a proper case for petition of right, it follows that it is not a case falling within the *Dyson* case. This, I think, is apparent from what Farwell, L.J. said at pp. 421-2 in the *Dyson* case. In the present case it is only conceivable that the Crown is made a party because "the estate of the Crown is directly affected" (the words of Farwell, L.J. in the *Dyson* case at p. 421), and that being so, proceedings by petition of right only are applicable if it is sought to affect the Crown in that estate, and any declaratory judgment relative to the lands in question or the validity of the Crown grants would affect "the estate of the Crown." In *Eastern Trust Company* v. *Mackenzie, Mann & Co., Limited* (1915), A.C. 750, Sir George Farwell, who as Lord Justice Farwell took part in the judgment in the *Dyson* case and whose language I have just quoted, at p. 759 said:

"There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Dyson* v. *Attorney-Gen-*

eral (1911), 1 K.B. 410, and in *Burghes* v. *Attorney-General* (1912), 1 Ch. 173."

It is to be noted that the language used by Sir George Farwell is "in certain cases," and it is pertinent to note that the *Dyson* case as well as the *Burghes* case have relation to revenue. The ratio of the *Dyson* case is after all limited and cannot be expanded into covering a case where, as here, there is called in question the validity of Crown grants—the estate of the Crown in the lands described therein—the validity of (if it is) the resumption of title thereto, and its transfer of title to the appellants in its exercise of the statutory mandate of Parliament sovereign in its authority in the matter. See *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), 76 L.J., P.C. 85, where it was held that the appellant's title (a title similar to that obtained by the appellants in the present case), supported by a Crown grant issued in pursuance of the Vancouver Island Settlers' Rights Act, 1904, Sec. 3, including the mines and minerals superseded that of the respondent (Esquimalt and Nanaimo Railway, the respondent in this appeal), and that the British Columbia Legislature had power to enact the Vancouver Island Settlers' Rights Act, 1904.

What Sir Barnes Peacock said in delivering the judgment of their Lordships of the Privy Council in *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619 at p. 623, it would seem to me is conclusive upon the point in the present case, where the Crown is being sued by the adding of the Attorney-General as a defendant. In that case Her Majesty's Deputy Commissioner-General for Natal was being sued:

MCPHILLIPS, J.A.

"It is unnecessary to determine whether the Court would have had jurisdiction if a petition of right had been presented, and the Crown had ordered that right should be done. The suit was not a petition of right, and there was no order of Her Majesty that right should be done. If the action had been against the Crown, either by name or title, or in substance, it is clear that the Court would have had no jurisdiction to entertain it."

If the *Dyson* case is in the way at all it is displaced by this decision of the Privy Council. (Also see *Hosier Brothers* v. *Derby (Earl)* (1918), 2 K.B. 671, 675).

The present case is distinguishable in any case from the *Dyson* case. Here it is really the Crown which is being sued by the adding of the Attorney-General as defendant, and the

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remedy can only be by petition of right. The Attorney-General cannot be said to be in any way acting or with the power to act as a principal in the subject-matter for adjudication, which would entitle a declaratory judgment being given (see *Graham* v. *Public Works Commissioners* (1901), 2 K.B. 781; *Dixon* v. *Farrer* (1886), 18 Q.B.D. 43; *Dunn* v. *Macdonald* (1897), 1 Q.B. 555; *Macbeath* v. *Haldimand* (1786), 1 Term Rep. 172; *Gidley* v. *Lord Palmerston* (1822), 3 Br. & B. 275; *Reg.* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387; 41 L.J., Q.B. 178; *Grant* v. *Secretary of State for India* (1877), 2 C.P.D. 445, 461; 46 L.J., C.P. 681).

Here we have an Act of Parliament and as stated by Sir Henri Elzear Taschereau at p. 86 in delivering the judgment of their Lordships of the Privy Council in the *McGregor* case, *supra*:

> "It seems clear to them [their Lordships of the Privy Council] that the true construction of that clause [section 3, Vancouver Island Settlers' Rights Act, 1904] is that it imposes upon the Crown the obligation—and does not merely confer the power—of issuing a grant to certain of the settlers therein mentioned, of whom the appellant is one."

MCPHILLIPS, J.A.

The learned counsel for the respondent strenuously submitted that under Order XXV., r. 5 (marginal rule 289), there was a right to a declaratory order, even as against the Crown, which within the terms thereof would be a "binding declaration of right," without—as in this case it would be—the Crown assenting in any way to the jurisdiction. With this submission I cannot agree, and it is to be noticed that the rule relied upon does not mention the Crown. Any such declaration is only possible where the Crown is proceeding by way of petition of right and has granted the *fiat* that right be done. Even then, Parliament could issue its statutory mandate in denial of the judgment of the Court, although it might be said that such a course is inconceivable where the *fiat* had issued. In support of the contention made *Guaranty Trust Company of New York* v. *Hannay & Company* (1915), 2 K.B. 536 was cited, but that was a case in which the Crown was not a party. Of what value would any declaratory order be in the present case as against the Crown? None whatever, in my opinion. Therefore, why make the Attorney-General a party

defendant? It can only be with the purpose of embarrassing action upon the part of the Crown in carrying out the intentions of the Legislature. In this view of the matter the language of Mr. Justice Jelf in *Attorney-General* v. *Scott* (1904), 20 T.L.R. 630 at p. 633 is exceedingly apposite:

"As regards the counterclaim for a declaration as to the duty of the county council to repair the road to the extent mentioned therein, such counterclaim is not brought under the aegis of the Attorney-General, and is, on the contrary, set up against him. It was sought to be supported under Order XXV., rule 5, which, while not countenancing applications for declarations 'in the air,' yet does seem to sanction the granting of a declaration as to the future in cases where it is definite and useful. But it is not the practice to grant it if it is embarrassing or useless for any good purpose, and I think that is the case here, especially as the extent of the obligation of the county council may vary very considerably at different dates and under different circumstances."

The questions involved in the present case, as we have seen, are dealt with by legislative enactment, and there may be further legislation, and there may be further obligations imposed upon the Crown, which any declaratory order would be futile in affecting, but at the same time would be a matter of embarrassment and not perhaps comport with the dignity of the Court if it should be that the obligation imposed upon the Crown were in antagonism to any such declaratory order.

It is true that the learned counsel for the respondent has stated at this bar in his argument that it is not asked that there should be any declaration as against the Crown, then why have the Crown a party defendant? Upon this view of the matter there remains, in my opinion, no possible reason or authority for the making of the order adding the Attorney-General as a party defendant. Cozens Hardy, M.R. in the *Dyson* case at p. 417 said:

MCPHILLIPS, J.A.

"But then it is urged that in the present action no relief is sought except by declaration, and that no such relief ought to be granted against the Crown, there being no precedent for such action."

This clearly brings out the fact that at least in the *Dyson* case relief to the extent of a declaration was asked as against the Crown.

It may not be perhaps amiss in the present case to refer to the case of *Roquette* v. *Overmann* (1875), 44 L.J., Q.B. 221. In that case Cockburn, C.J., at p. 228, said:

"The power of a Legislature to interfere with and modify vested and

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existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation."

It follows that where there is legislation and an obligation is imposed upon the Crown, the statutory mandate must be carried into execution and a declaration to the contrary made by the Court would be in effect an idle declaration—in the words of Mr. Justice Jelf: "useless for any good purpose."

I am of the opinion that the order under appeal adding the Attorney-General as a party defendant was erroneous and that the appeal should be allowed.

EBERTS, J.A. would allow the appeal.

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. DUNLOP.

MARTIN, J.A.

MARTIN, J.A.: This appeal should be allowed for the reasons today given in *Esquimalt and Nanaimo Railway Company* v. *Wilson et al.*

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appeal raises the same question as that determined in *Esquimalt and Nanaimo Railway Company* v. *Wilson et al.* For the same reason as in that appeal expressed I would allow the appeal.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeals allowed.

Solicitors for appellants: *Taylor, Mayers, Stockton & Smith.*

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

PATEN v. SIGMORE AND SIGMORE.

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PATEN v. SIGMORE

Practice—Appeal—Motion for further evidence—Point not pleaded—Refused.

Damages—Tort of wife—Husband a party to action—Liability—Married Women's Property Act—Not pleaded—R.S.B.C. 1911, Cap. 152, Secs. 30 and 31.

An application to the Court of Appeal to introduce new evidence on a matter not pleaded will be refused.

In an action against husband and wife for damages to an automobile caused by wrongful trespass on the part of the wife the plaintiff claimed damages, (a) for deterioration in the value of the car; (b) for costs of repairs; and (c) loss of use of car during repairs. The husband did not claim in his defence the benefit of section 30 of the Married Women's Property Act. It was held by the trial judge that the wife was liable in damages under the first two items, but would allow nothing for loss of use of the car, as there was no evidence upon which he could proceed to assess damages in this connection; and that the husband was liable only within the limitations prescribed by section 30 of the Married Women's Property Act.

Held, on appeal, varying the judgment of MACDONALD, J., that there should be judgment against both defendants, and damages should be assessed for loss of use of the car (which was fixed at $75) and added to the amount allowed on the trial.

APPEAL by plaintiff from the decision of MACDONALD, J., of the 8th of December, 1918, in an action for damages to an electric-car caused by wrongful trespass by the defendant, Mrs. Sigmore. The electric-car was in a garage where it was usually kept. Mrs. Sigmore came into the garage in another car. She got out, and seeing the electric-car, and wanting to look it over, stepped on the running board. The car, for some unexplained reason, started forward, and, throwing Mrs. Sigmore off the running board, it crashed into a motor-truck and was damaged. Mrs. Sigmore's husband was made a party defendant to the action. The learned trial judge gave judgment for $275, and costs, against Mrs. Sigmore, payable out of her separate estate, and directed an inquiry to ascertain the value of the property Mr. Sigmore had received from or through Mrs. Sigmore, and that the plaintiff recover

Statement

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from Mr. Sigmore the value thereof, not exceeding $275 and costs. In computing damages, the learned judge did not allow anything for loss of use of the automobile from time of the accident until it was repaired.

The appeal was argued at Vancouver on the 11th of April, 1919, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant.

W. J. Taylor, K.C., for respondent, moved to be allowed to put in evidence the marriage certificate of the defendants. [He referred to *Matthews* v. *Whittle* (1880), 13 Ch. D. 811 at p. 814; *Cuenod* v. *Leslie* (1909), 1 K.B. 880; 53 Sol. Jo. 340.]

Argument

Mayers: If the husband is married after the act, it is a defence which he must plead: see Odgers on Pleading, 8th Ed., 102-3; *Birch* v. *Bellamy* (1701), 12 Mod. 540; marginal rule 211. You must plead the statute on which you rely: see Bullen and Leake's Precedents of Pleading, 7th Ed., 589. He must plead the year of his marriage. There is no excuse for this evidence not having been put in at the trial: see *In re Dominion Trust Co. and Allan* (1917), 24 B.C. 450.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I am of the opinion that we ought not to admit the new evidence which Mr. *Taylor* proposes to offer, for two reasons, the first being that no diligence at all was shewn to obtain the evidence for the trial. The fact must be admitted that the evidence was obtainable before the trial. It was a simple oversight on the part of counsel. Secondly, there is nothing in the pleadings setting out the facts necessary to raise the question under the Married Women's Property Act. For these two reasons, the application ought not to be acceded to.

MARTIN, J.A.

MARTIN, J.A.: That is my opinion. The situation is not brought within the rules laid down in this Court in the case of *In re Dominion Trust Co. and Allan* [(1917), 24 B.C. 450] and numerous other cases. And secondly, on the facts which are admitted, it would not be relevant on this record as it stands.

McPHILLIPS, J.A.: I agree.

EBERTS, J.A.: I agree.

Motion refused.

Mayers, on the merits: If the husband does not claim the benefit of the section by pleading it, he is liable: see *Cuenod* v. *Leslie* (1909), 1 K.B. 880; 78 L.J., K.B. 695; *Matthews* v. *Whittle* (1880), 13 Ch. D. 811 at p. 814. If he had pleaded the statute, the onus would be on the plaintiff: see Roscoe's Nisi Prius Evidence, 18th Ed., Vol. 2, p. 1170. The repairs took seven weeks. Certain parts were not available at the time. We are entitled to damages for loss of use during that period: see *The "Greta Holme"* (1917), A.C. 596 at p. 605; *The "Mediana"* (1900), A.C. 113; *The Astrakhan* (1910), P. 172; *McHugh* v. *Union Bank of Canada* (1913), A.C. 299.

Argument

Taylor: They insisted on having new parts instead of old parts that were good enough to put the car in as good condition as it was before the accident. The delay was due to his insisting on new parts. It was Paten's car, but he never used it. His wife used it, and he is not entitled to damages for loss of its use.

MACDONALD, C.J.A.: We must take this into consideration, that the learned judge thought $275 was a proper sum to allow for repairs. We must also take into consideration that if the learned judge was not mistaken as to the law he could have allowed something for loss of time, but apparently he considered there was no evidence upon which he could assess such damages. I think he was wrong in that, and therefore we have to assess the damages or send the case back for that purpose.

MACDONALD, C.J.A.

In deciding these general damages we can use our own experience. I know that one can get a very good car, a 6-cylinder car with a chauffeur for $1.50 an hour, and I do not suppose this lady used this car more than 10 hours a week. The appeal should be allowed. In my opinion, the judgment should be against both defendants, the wife as to her separate estate, and the amount should be increased by the sum of $75 for the loss of the use of the car.

MARTIN, J.A.: I agree.

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McPHILLIPS, J.A.: I agree.

EBERTS, J.A.: I agree.

Appeal allowed.

Solicitors for appellant: *Crease & Crease.*
Solicitor for respondents: *J. R. Green.*

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1919

April 3.

BIRD v. GREENHOW

BIRD v. GREENHOW.

Practice—Lapse of year from last proceeding—Notice to proceed—Marginal rule 973—Sufficiency of letter.

Delivery of a letter by a solicitor stating that he would get a certain case under way (naming the case) and bring it to trial, is sufficient notice under marginal rule 973.

Statement

MOTION by defendant to set aside notice of trial on the ground that one month's notice was not given under marginal rule 973 of the Supreme Court Rules, as there had been no proceeding in the action for one year. Heard by MACDONALD, J., at Vancouver on the 3rd of April, 1919.

Argument

Gibson, for the motion: Formal notice must first be given under rule 975.

R. M. Macdonald, contra: A letter from the plaintiff's solicitor was delivered to the defendant's solicitors containing the following words: "I will, therefore, get the *Bird* v. *Greenhow* case under way again, and bring it to trial." This is sufficient notice: see *Burlington* v. *Richardson* (1853), 22 L.J., Q.B. 385. There is no form in the Supreme Court Rules of notice of intention to proceed.

Gibson, in reply: The letter is not proper notice. Formal notice must be given.

MACDONALD, J.

MACDONALD, J.: The letter is sufficient notice of intention under the rules. Motion dismissed. Costs in the cause to plaintiff in any event.

Motion dismissed.

TRUMBELL v. TRUMBELL *ET AL.*

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TRUMBELL v. TRUMBELL

Real property—In name of deceased woman—Claim of ownership by husband—Evidence.

Conveyance—Made for protection against creditors—Action for restoration—Court will not assist.

In an action by a husband to recover property standing in the name of his deceased wife, on the ground that the vesting of the property in her was in the nature of a trust for his benefit, the Court must be satisfied not only that the property was not purchased with her money, but that it was not intended as a gift to her, and in view of her death, the Court will require strict proof and must be thoroughly satisfied as to the truth of the evidence.

Where it appears that a person transferred property to his wife for the purpose of protection against creditors, although it did not result in any loss or injury to any creditor, the Court will not assist such person in the recovery of his property.

Scheuerman v. *Scheuerman* (1916), 52 S.C.R. 625 followed.

ACTION for the recovery of two lots, one in Elkhorn, in the Province of Manitoba, and the other in the City of Vancouver, which the plaintiff had conveyed to his wife, now deceased. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 3rd of March, 1919. Statement

Singer, for plaintiff.

L. B. McLellan, for defendant, Eric Trumbell.

H. O. Alexander, for the estate.

12th April, 1919.

MACDONALD, J.: Eleanor Elizabeth Trumbell, wife of the plaintiff, died on the 20th of October, 1907, leaving her surviving, her husband and two children, Eric Christopher and Sylvia Eleanor, as the only persons entitled to share in her estate. At the time of her death, she was the registered owner in fee simple of lot 12, block 33, Elkhorn, Manitoba, and lot 11 in block 54, district lot 541, Vancouver, B.C. Plaintiff now alleges that these two properties were never really owned by his wife, but were placed in her name with an object that has failed, and seeks a declaration from the Court to that effect Judgment

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with proper directions. The son, Eric Christopher, entered a defence, denying the allegations supporting the plaintiff's claim, but at the trial, through his counsel, did not offer any opposition to the contention of his father. His release of any claim upon the properties would not, however, operate to effectually complete an agreement for sale of the Elkhorn lot or vest the title to the Vancouver lot in the plaintiff. His sister, Sylvia Eleanor, is not capable of taking a like course, as she is lawfully detained as a patient in a public hospital for the insane. The Attorney-General of the Province, as *ex officio* committee of her estate, instructed counsel to represent her in the matter and protect her interests. In the meantime, her proportion of the purchase price of the Elkhorn property is held pending result of this action.

It appears that the said lot 12, Elkhorn, was conveyed by the plaintiff to his wife, and as to said lot 11, Vancouver, he caused the conveyance to be made to her direct. The question then arises, whether I should conclude, upon the evidence, that such vesting of the property in the wife was simply in the nature of a trust, accepted by her, for the benefit of her husband. He must satisfy me, not only that the property was not purchased with her money, but that it was not intended as a gift to her. In view of her death, I should require strict proof and be thoroughly satisfied as to the truth of the evidence.

Judgment

The attitude that I should adopt in this connection is outlined by Brett, M.R. in *In re Garnett. Gandy* v. *Macaulay* (1885), 31 Ch. D. 1 at p. 9 as follows:

> "The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in Law or in Equity."

I have considered the matter on these lines and accept the statements of the plaintiff, and they are corroborated by other necessary evidence. I find that the property was not intended as a gift by the husband, and was simply held in the name of the wife as trustee to serve his purposes.

While the plaintiff thus placed the property in his wife's name, I am met with a serious difficulty in implementing my findings by judgment. Plaintiff, in satisfying me as to the real ownership, felt called upon to give his reasons for thus transferring some of his property and having the other portion conveyed directly to his wife. He originally stated, as a reason for such trust being created, that it was for the purpose of protecting his interests in the event "of the failure of a business venture which the plaintiff then contemplated entering into." This allegation in the pleadings was amended at the trial and the ground given was, that it was as a protection in the event of an action being brought upon a certain promissory note for $500, upon which he was one of the makers. As a matter of fact, no proceedings were ever taken upon this note, but had a *bone fide* holder of the same, obtained judgment against the plaintiff, the placing of the property in the wife's name, might have hindered or delayed recovery thereunder. Plaintiff also, in his evidence, referred to the danger of liability that was present to his mind in connection with a canning business in which he was engaged. It is quite apparent that the purpose sought to be accomplished, by the property being held in the wife's name, was to prevent it being available as an asset, upon which a judgment, against the husband, might be realized. This course did not result in any creditor being prejudiced nor affected in any way. The intent, however, of the plaintiff in so acting was fraudulent. Does this fact deprive him of the aid of the Court, as to granting the judgment desired? Where there is an intention to transfer property upon trust for an illegal purpose, and such purpose has been partly carried out, then, the Court will not give assistance to the party, who has thus disposed of his property and seeks its recovery, on the basis of a resulting trust. The plaintiff, however, relies upon the following as an exception to this principle: Halsbury's Laws of England, Vol. 28, pp. 50-1:

Judgment

"If, however, nothing has been done to carry the illegal purpose into effect, the disposer is entitled to have the property reconveyed."

The cases of *Symes* v. *Hughes* (1870), L.R. 9 Eq. 475; *Taylor* v. *Bowers* (1876), 1 Q.B.D. 291; and *Barclay* v. *Pear-*

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son (1893), 2 Ch. 154 are cited in support of this proposition. The correctness of this statement of the law is doubted in *Kearley* v. *Thomson* (1890), 24 Q.B.D. 742, 746. Plaintiff principally relied upon *Taylor* v. *Bowers, supra,* but the weight to be attached to this judgment has been greatly lessened, if not destroyed, by a subsequent decision in *Scheuerman* v. *Scheuerman* (1916), 52 S.C.R. 625 at p. 634. Duff, J. refers to it as follows:

"It has been seriously doubted whether the general principle stated by Lord Justice Mellish in his judgment was correctly applied to the facts of that case; and the subsequent decisions of *Kearley* v. *Thomson* [(1890)], 24 Q.B.D. 742, and *Herman* v. *Jeuchner* [(1885)], 15 Q.B.D. 561, afford considerable justification for such doubts."

Then again Boyd, C., in *Mundell* v. *Tinkis et al.* (1883), 6 Ont. 625, at pp. 627-8, refers to the same case as follows:

"That was a decision with reference to goods in respect of which no instrument of transfer had been executed, and in which it was not necessary for the plaintiff to give evidence of the fraudulent scheme, in order to enable him to recover.

"The Judges in Appeal treat the case as on all fours with *Bowes* v. *Foster* [(1858)], 2 H. & N. 779, and upon turning to that report it will be seen that all the Barons emphasize the distinction that exists between transactions where there is a transfer of the property in fact and those where the transfer is only in semblance. That is, as I understand the matter, the *ratio decidendi* in *Taylor* v. *Bowers*. There the fraudulent purpose was not accomplished because there was in law and in fact no change of property carried out. But here the unlawful scheme was consummated so far as it was possible for the actors therein to proceed. Nothing remained to be done; the conveyance was signed, the specified consideration duly handed over from grantor to grantee in return for the delivery of the conveyance, and thereafter the due registration of the instrument, by which all the world was informed that the plaintiff had ceased to be owner of the property. Having reached this stage, no repudiation on the plaintiff's part could avail to undo the completed transfer, no *locus penitentiæ* was possible."

Judgment

The head-note to *Mundell* v. *Tinkis* is as follows:

"The decided weight of authority is that after the property passes, whether by the execution of a written instrument or by other means sufficient in law, it is not open for the fraudulent granter to undo the matter either out of Court or by the aid of the Court."

Is this statement of the law correct and applicable to the facts of this case? Plaintiff contends, that I should follow the English decisions already referred to. There is no doubt that, even if the decisions in the English Courts had not been questioned, I would be bound to follow any contrary

decision of the Supreme Court of Canada. See on this point *Pacific Lumber Agency* v. *Imperial Timber & Trading Co.* (1916), 23 B.C. 378, MARTIN, J.A. at p. 380:

"Certain decisions in certain English cases are relied upon in support of the submission. . . . . 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."

This decision was referred to and followed in *Chilliwack Evaporating & Packing Co.* v. *Chung* [(1917), 25 B.C. 90]; (1918), 1 W.W.R. 870.

It remains, then, only to consider, whether the judgment in *Scheuerman* v. *Scheuerman, supra,* is of such a nature as to preclude me from giving the desired assistance to the plaintiff with respect to the property. While the majority of the judges of the Supreme Court were not all agreed in their reasons for allowing the appeal, still, I think that the proper deduction therefrom is, that a Court should not grant relief to a party, against the consequences of his unlawful attempt to delay his creditors, even though the illegal purpose has not been accomplished. I am supported in this conclusion, by the following emphatic statement of the law by the Chief Justice, at p. 627:

"I am prepared to hold that the plaintiff is not entitled to come into Court and ask to be relieved of the consequences of his actions done with intent to violate the law, and that though they did not and even could not succeed, in such purpose."

Judgment

Idington, J., at p. 630, refers to the fact, that the husband required to present his object in making the conveyance and thus disclosed an illegal purpose, and points to the effect as follows:

"Here he has to tell the facts disclosing the illegal purpose as his chief, and indeed only, motive for constituting the trust he claims to have existed, and rely thereon, and cannot, as I view the law, successfully do so."

Brodeur, J., at p. 641, says:

"The Courts never assist a person who has placed his property in the name of another to defraud his creditors, and some decisions go so far as to state that it is of no consequence whether any creditors have been actually defeated or delayed."

Here the only reason given by the plaintiff, for having the property conveyed to and held in the name of his wife, was to

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protect it against his creditors. Whatever course the son, and the representatives of the daughter may take, I feel bound by *Scheuerman* v. *Scheuerman*. I think the Court should not, under the circumstances, assist the plaintiff in obtaining a restoration of his property. In the words of the Lord Chancellor in *Muckleston* v. *Brown* (1801), 6 Ves. 52 at p. 69, " 'Let the estate lie, where it falls.' "

Judgment

Viewing the trend of the trial and the reasons for refusing relief to the plaintiff, the action should be dismissed without costs.

Action dismissed.

MACDONALD, J. (At Chambers)
1919
April 16.
DOMINION TRUST CO. v. ROYAL BANK OF CANADA

DOMINION TRUST COMPANY v. THE ROYAL BANK OF CANADA.

Practice—Winding-up—Affidavit of documents by liquidator—Willing to make full disclosure—Order for affidavit refused.

In an action by the liquidator of a company, he being an officer of the Court and subject to its directions, an order will not be made compelling him to make an affidavit of documents when he is willing to make disclosure.

In re Mutual Society (1883), 22 Ch. D. 714 followed.

Statement

APPLICATION by the defendant to compel the liquidator to make an affidavit of documents. The action was brought by the liquidator of the plaintiff Company to obtain certain securities held by the Royal Bank. Heard by MACDONALD, J. at Chambers in Vancouver on the 16th of April, 1919.

Argument

Sir C. H. Tupper, K.C., for the application: The liquidator is only an officer of the Court in a winding-up proceeding, and subject to the summary jurisdiction of the Court.

Wilson, K.C., contra: The official liquidator is not in the same position as an ordinary litigant, and is not bound to make an affidavit of documents: see *In re Mutual Society* (1883), 22 Ch. D. 714 at p. 720.

Judgment

MACDONALD, J.: The liquidator is an officer of the Court

and subject to its direction. No order should be made for discovery, as he was willing to disclose and assist without an order to that effect, following the course pursued in *In re Mutual Society* (1883), 22 Ch. D. 714.

Application refused.

MACDONALD, J. (At Chambers)

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HAYES v. HOWARD.

MACDONALD, J. (At Chambers)

1919

April 22.

HAYES *v.* HOWARD

Practice—Notice of trial—Date of hearing to be within reasonable time—Marginal rule 438.

The plaintiff gave notice of trial on the 3rd of April, fixing the date for the trial in the following September. On motion to set aside the notice:—

Held, that such a long notice was not intended by the rules, and the plaintiff should proceed to trial in June.

APPLICATION by defendant to set aside notice of trial on the ground that it is an abuse of Order XXXVI., r. 14, of the Supreme Court Rules. The writ was issued on the 28th of February, 1918. The statement of claim was delivered on the 18th of May, 1918, and the statement of defence on the 11th of June, 1918. Shortly after discovery in January, 1919, the defendant requested the plaintiff to set the case down for trial. On the 15th of March, 1919, the plaintiff gave the defendant an undertaking to serve notice of trial by April, 1919, or discontinue. On the 3rd of April, 1919, plaintiff served notice of trial fixing the date therefor in September, 1919. The defendant contends that five months' notice of trial is excessive, and an abuse of the rules. Heard by MACDONALD, J. at Chambers in Vancouver on the 22nd of April, 1919.

Statement

A. S. Johnston, for the application.
Armour, K.C., contra.

MACDONALD, J.: Such a long notice is not intended by the rules or the undertaking. Plaintiff must proceed to trial in June, 1919: see Annual Practice (1919), p. 601—*Sacher* v. *De Laitte* (1909), (unreported).

Judgment

Application refused.

CAYLEY, CO. J.

1919

April 28.

REX v. ANDERSON.

Criminal law—Dismissal of information by justice of the peace—Appeal—Notice—Copy served—Insufficiency of—Criminal Code, Sec. 750 (b).

REX v. ANDERSON

A notice of appeal from an order of a justice of the peace dismissing an information was properly filed in the County Court registry but the copies served respectively on the respondent and the justice were signed by some person other than appellant's solicitor without further description, and gave the wrong date for the hearing of the appeal.

Held, that the notices served were not "copies" of the notice filed within the meaning of the Act, and were invalid.

Rex v. *Brimacombe* (1905), 10 Can. Cr. Cas. 168 applied.

Statement

APPEAL by the Crown from an order of R. J. Walker, a justice of the peace at Heriot Bay, B.C., of the 17th of February, 1919, dismissing an information against the accused, who was charged with unlawfully having in his possession portions of deer meat during close season, contrary to section 33 of the Game Act. The notice of appeal filed in the County Court registry gave notice that the informant appealed to the sitting of the County Court of Vancouver holden at Vancouver on the 7th of April, 1919, and was signed "John A. Hird" by his solicitor, H. S. Wood. The notice of appeal served upon the respondent and the justice gave notice of appeal to the sitting of the County Court of Vancouver, holden at Vancouver on the 17th of April, 1919, and was signed by "John A. Hird *per* S. Marshall." Argued before CAYLEY, Co. J. at Vancouver on the 28th of April, 1919.

Argument

Wood, for appellant.

R. L. Maitland, for respondent, took the preliminary objection that the notice of appeal served on the respondent and the justice was not a copy of the notice filed in the registry, and did not set out the next sitting of the County Court, which was holden on the 7th of April: see *Rex* v. *Brimacombe* (1905), 10 Can. Cr. Cas. 168.

Wood: The difference in the dates was because of a telegram

being wrongly transmitted. The respondent is not prejudiced, as he is appearing on the appeal, and a notice to the sitting of the Court holden on the 17th of April is setting out with reasonable certainty the Court appealed to, as the respondent knew the appeal was to the April sittings.

CAYLEY, Co. J.: Objection is taken by the respondent with reference to the notice of appeal, that the notice of appeal does not set out, with reasonable degree of certainty, the Court appealed to, and that a copy of the notice filed was not served as provided for in section 76(*b*) in the Summary Convictions Act. What has occurred is this: The notice of appeal filed, stated that the appeal would be to the County Court of Vancouver, City of Vancouver, to be holden at Vancouver on the 7th of April, 1919, while the notices served upon the respondent and the magistrate read "Sittings in the County Court of the City of Vancouver on the 17th of April, 1919." This is explained by counsel for the appellant as arising from the fact that the notice as filed had to be telegraphed to the point where it was to be served. Further, the notice of appeal as filed is signed "John A. Hird, by his solicitor, Herbert S. Wood, 922 Standard Bank Building, Vancouver, B.C.," while the copy as served reads "Signed, John A. Hird, *per* S. Marshall." Counsel for the appellant contends that the variation between the copy and the original is immaterial. I am afraid, however, that the objection is fatal. In the first place, I do not consider that the Act has been complied with as far as serving a "copy" is concerned. It cannot be contended at all, that a notice for the 7th of April, coming from the solicitor of the appellant and giving the solicitor's address, can properly be described as "copied" by a copy which is signed by a gentleman named Marshall, with no description as to who Marshall is, or where he lives, or what his occupation is.

Judgment

And then in regard to the sittings of the Court, notice served upon the respondent calling him to a certain Court to be holden on the 17th of April, cannot be fairly described, as indicating with reasonable certainty a Court which was set out in the notice that was filed, as sitting on the 7th of April. I notice

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in the case cited to me—*Rex* v. *Brimacombe* (1905), 10 Can. Cr. Cas. 168—that some importance seems to be attached to the words "next sitting." In other respects, however, *Rex* v. *Brimacombe* seems to be an authority for considering that the notice given in this case was insufficient for the reasons I have pointed out. Preliminary objection upheld, appeal dismissed.

Preliminary objection upheld and appeal dismissed.

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1919

May 2.

WELCH v. KRACOVSKY

WELCH v. KRACOVSKY.

Landlord and tenant—Distress—Suite of rooms in apartment-house—Entry—Landlord using pass-key—Excessive distress.

A tenant occupying an apartment or a suite of rooms in an apartment-house, owing two and one-half months' rent, removed part of her furniture from the building; the landlord then entered the apartment (which was locked) with a pass-key and made distress by removing the remaining furniture to another room. An action for breaking and entry was dismissed.

Held, on appeal, that the landlord was in possession of the hall and other passages in the building which were common to himself and the other tenants and there could be no breaking of the outer door of the building by the landlord, the only outer door to bar his entrance being the door from the hall into the apartment, and the use of the pass-key by him to obtain entrance was equivalent to breaking in, and amounted to a trespass for which the plaintiff was entitled to relief.

APPEAL by plaintiff from the decision of CAYLEY, Co. J., of the 14th of March, 1919. The plaintiff rented a suite of rooms in the Quebec Mansions in May, 1918, at $6.50 a month. Rent was paid until the 15th of July and then stopped. On the 30th of September, 1918, she removed a dray of furniture, and did not come back that night. Next day the landlord entered the suite with a pass-key. He then put a padlock on the door, saw a lawyer and then went back, took out $175 worth of goods to another room across the hall and locked the padlock. The tenant came back next day, broke the padlock and found

Statement

the furniture was gone, but finding where it was placed, she entered the room where it was, by the window, opened the door, and instructed a drayman to take the furniture. He was stopped by the janitor of the building, who told him he would get in trouble if he took it. An action for a return of the goods taken, $50 for detention, and $25 damages for the goods, was dismissed. The plaintiff appealed.

The appeal was argued at Vancouver on the 2nd of May, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Statement

Mellish, for appellant: The defendant entered with a pass-key he had and was a trespasser. First, I say he broke in; and secondly, the distraint was excessive. He took $300 worth of furniture to cover $16.25 rent. As to breaking see *Ryan* v. *Shilcock* (1851), 7 Ex. 72. If a door is locked you cannot go in: see *Miller et al.* v. *Curry* (1893), 25 N.S. 537; 32 Am. Dig. Cent. Ed., p. 1228. He will contend the outer door is the entrance, but each apartment must be looked on as a distinct dwelling. On the second point of excessive distress, the goods on a second-hand sale were worth $175. It was unlawful for him to put a padlock on the door.

Argument

E. A. Lucas, for respondent: A landlord may enter in the circumstances, as he entered the outer door peaceably: see *Lee* v. *Gansel* (1774), 1 Cowp. 1; *Long* v. *Clarke* (1894), 1 Q.B. 119. The breaking only refers to the outer shell of the structure: see *The American Concentrated Must Corporation* v. *Hendry* (1893), 62 L.J., Q.B. 388. The distress was not so excessive that this Court will deal with it. The value of the goods is very uncertain. One witness puts a valuation of from $55 to $60 on them: see Halsbury's Laws of England, Vol. 11, p. 198; Foa on Landlord and Tenant, 5th Ed., 561. We were strictly entitled to three months' rent.

Mellish, in reply.

MACDONALD, C.J.A.: I think the appeal must be allowed, and that the plaintiff is entitled to have her furniture returned, or the value of it in case it cannot be returned.

MACDONALD, C.J.A.

Of course, there is the question of damages for detention. After consultation with my learned brothers, we have agreed

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that $5 shall be allowed for the injury to the furniture, and $10 for wrongful detention, making $15 in all, so that the judgment will be that the furniture is to be returned and damages to the extent of $15 paid. The value of the furniture is conceded to be $165.10. The costs, of course, follow the event.

Now I may state very shortly my reasons for coming to this conclusion. It seems to me that the case of *Lee* v. *Gansel* (1774), 1 Cowp. 1, is really not an authority upon this point. That was not a case where the landlord had broken into his tenant's room, but was that of a bailiff breaking into a house in which the lodger had a room, for the purpose of executing legal process. Between an outsider and the occupants of the house, of course, there is the outer door; but between the landlord of an apartment house divided into several separate dwellings, the outer door is not a door which the landlord could break, because he is entitled to use that door. He is in possession of the hall and the other passages which are common to himself and to all his tenants, and there could be no breaking of the outer door by the landlord. The only outer door which bars to the landlord entrance to the apartment is the door from the hall into the apartment. It seems to me that that is the only outer door which can fall within the rule which has been laid down in *Lee* v. *Gansel*.

MACDONALD, C.J.A.

As the door into the apartment was broken, admittedly—in this case by what was equivalent to breaking in, the use of a pass-key by the landlord—it seems to me that the plaintiff has made out a case of trespass and is entitled to the relief which I have indicated.

MARTIN, J.A.

MARTIN, J.A.: This appeal raises the question of what is an outer door in relation to apartment-houses. It is admitted in the dispute note that the plaintiff was a tenant of the defendant of a certain suite of apartments in an apartment-house called Quebec Mansions, in the city of Vancouver, under a monthly tenancy, and it would appear from the evidence, either directly or by inference, that the suite consisted of three rooms, living-room, kitchen and bathroom, with one door opening into the main hall with a stairway and entrance common to the occupants of the other suites. In order to effect a distress the landlord broke open the said door (by means of a pass-key) and it is

admitted that he had no right to do so if it can be called an outer door. The question of "outer door" was luminously considered in general by Lord Justice Bowen in the case of *American Concentrated Must Corporation* v. *Hendry* (1893), 62 L.J., Q.B. 388; 5 R. 335, and his judgment was affirmed by the Court of Appeal. There it was held that the gate of the courtyard into which the plaintiff's warehouse, together with other buildings, opened, must not be considered as the outer door with respect to the plaintiff's warehouse, the door of which was held to be its own outer one. This decision would in general support the plaintiff's contention at bar, and it appears there is no case in England which comes closer thereto. There is, however, one in the United States, a unanimous decision of the Supreme Court of Massachusetts in Term, *viz.*, *Swain* v. *Mizner* (1857), 74 Mass. 182, on separate and distinct residential tenements in a building, wherein it was decided that each of such tenements, or suite of apartments, if complete in itself, and subject to the sole and exclusive use and possession of the tenant, is to be considered in law as a "separate and distinct tenement" constituting the tenant's "dwelling-house; and that it was therefore entitled to the privilege and protection which the law affords to the habitations of men."

The reasoning which supports this judgment so fully represents my views that I think it would be superfluous to enlarge upon it, and I adopt it as my own, only adding that the case of *Lee* v. *Gansel* (1774), Lofft 374, 1 Cowp. 1, upon which the respondent relied, is inapplicable for the reasons pointed out by the Massachusetts Court. The change in the manners of living of the people, of which Courts will take cognizance, is therein well pointed out. The Court in *Swain's* case, *supra,* in remarking upon Lord Mansfield's surprising statement that "whereas the greatest house in London has but one outer door," therefore it would be an "absurdity" to hold that a house "shall have four distinct outer doors," says:

MARTIN, J.A.

"that is not the manner in which, according to our prevailing habits and modes of living, our dwelling houses are here constructed. Many might undoubtedly be found here having four, and it would perhaps be difficult to find a house of any moderate degree of pretension which has less than two outer doors."

In affirmation of this view of the learned Justices in Boston,

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I could hardly refuse to take cognizance of the fact that my own house in Victoria has six doors which come within the category of outer doors, and there are many larger houses than mine in that city.

I agree, therefore, that the door in question was an outer one, which the defendant in question was not entitled to break open, and that the damages for the trespass should be fixed at the sum suggested by my learned brothers, $15.

MARTIN, J.A.

There is a case in Nova Scotia—*Miller et al.* v. *Curry* (1893), N.S. 537—to which we were referred, which supports the above view, according to the note thereon in Geldert's Nova Scotia Digest, 522, but as the report is missing from the library I have been unable to verify the reference.

GALLIHER, J.A.

GALLIHER, J.A. would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should succeed. I wish to say this, though, in regard to the judgment of the learned judge in the Court below, that the learned judge gave careful consideration to the principles of law, and I quite recognize that he met with difficulty in reconciling the authorities.

In *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited* (1915), A.C. 599 at p. 617, Lord Shaw said "the law must adapt itself to the conditions of modern society." Now the conditions of modern society are such that we find in every large city thousands of people living in great apartment-houses. The halls and elevators are nothing more than highways to the various dwellings of the people resident in them; and the door into these separate apartments must certainly be the principal or immediate door of ingress, as the principal door of any dwelling upon the street or upon the land of the proprietor when removed from the street. There was no warrant in law to use a skeleton key and make entry into these apartments in the maner proved in evidence in this case. What was done is repugnant to the law of England. An Englishman's house is his castle, was said by Lord Coke; it is the law today, and it would be a grave matter to break in upon this well-known principle. It would mean breaches of the peace. It is a basic principle to have the law fit in with

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the sympathies, sentiments and notions of the people in regard to how they should live and the privacy of life, and one of the main and proper notions of the British people is that the home is sacred and free from intrusion save in accordance with law. It does not need to be surrounded by a stone wall or anything of that kind; the law gives all proper protection.

There is difficulty in assessing the damages, in that the learned trial judge has not stated what the damages might be if he were in error in the decision which he gave. However, I have fallen in line with what my learned brothers have said, but if I were sitting in first instance in this case, certainly more than $10 would have been allowed for this overt act—this defiance of the law.

MCPHILLIPS, J.A.

Appeal allowed.

Solicitor for appellant: *A. J. B. Mellish.*

Solicitor for respondent: *F. G. T. Lucas.*

REX *EX REL.* DENING v. GARTSHORE.

HUNTER, C.J.B.C. (At Chambers)

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REX v. GARTSHORE

Criminal law—Intoxicating liquor—Sale of—Conviction—Stated case—No direct evidence of delivery by accused—Sufficiency of proof of sale—B.C. Stats. 1916, Cap. 49, Secs. 10 and 28.

Court of Appeal—Old Full Court—Previous decisions—Right of counsel to question correctness of—Overruling of—Appeal—Jurisdiction—Construction of statutes—Court of Appeal Act, R.S.B.C. 1911, Cap. 51, Sec. 6, Subsec. (4) (e).

The accused was charged with selling intoxicating liquor in violation of the British Columbia Prohibition Act. The person to whom the alleged sale was made stated in evidence that the accused told him he could get him some liquor, and witness answered he would take a gallon of Scotch and two bottles of gin. He later gave accused a cheque for $42. He did not know where the cheque was and could not produce it in Court. A week later witness found four bottles of Scotch whisky and two bottles of gin in his house. There was no evidence of who brought it or how it came there. Accused was convicted by the police magistrate and on a stated case the conviction was quashed by HUNTER, C.J.B.C., who held there was not sufficient evidence to prove a sale.

Held, on appeal (reversing the decision of HUNTER, C.J.B.C., MCPHILLIPS and EBERTS, JJ.A. dissenting), that the evidence adduced by the Crown was sufficient to prove a sale of liquor under section 10 of the Prohibition Act.

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Counsel may be allowed to question previous decisions of the Court, but only under very exceptional circumstances. There might be a case where the Court would be right in reversing its own decision or that of the old Full Court, if convinced beyond question that the decision was wrong, that it had gone upon a wrong principle, or contrary to some well-established authority which had not been brought to its attention (MARTIN and MCPHILLIPS, JJ.A. dissenting, holding that counsel should not be heard on the question).

The Court of Appeal has jurisdiction to hear an appeal from the decision of a Supreme Court judge quashing a conviction under the Summary Convictions Act on a stated case by a magistrate.

Rex v. *Evans* (1916), 23 B.C. 128 followed; *In re Tiderington* (1912), 17 B.C. 81 distinguished.

CRIMINAL APPEAL by the informant from the decision of HUNTER, C.J.B.C. on a stated case quashing the conviction by the police magistrate at Vancouver of one Alexander L. Gartshore on the charge that he unlawfully sold intoxicating liquor. It was shewn before the magistrate that in November, 1918, the accused was in the office of one of the witnesses, named S. F. McKenzie, in Vancouver. They talked about liquor. Accused said he could get him some, and McKenzie said he would take a gallon of Scotch and two bottles of gin. McKenzie later gave accused a cheque for $42. The cheque was not produced in Court, McKenzie not knowing where it was. About a week after the cheque was given, McKenzie found four quart bottles of Scotch whisky and two bottles of gin in his house. There was no evidence of how the liquor arrived at his house or who brought it. The accused was convicted by the police magistrate, and a stated case to the Supreme Court was heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 7th of February, 1919.

Statement

Martin, K.C., and *Wilson, K.C.*, for appellant.
Craig, K.C., and *R. L. Maitland*, for respondent.

HUNTER, C.J.B.C.

HUNTER, C.J.B.C.: The defendant was convicted by a police magistrate for the unlawful sale of intoxicating liquor and sentenced to six months' imprisonment. He obtained a stated case, questioning the validity of the conviction on several constitutional grounds, and on the ground that the evidence was not sufficient to prove sale. Regarding the sale, the magistrate stated the case as follows:

"It was shewn before me that in November, 1918, accused was in S. F. McKenzie's office in Vancouver. They talked about liquor, accused said he could get witness some and witness said he would take a gallon of Scotch and two bottles of gin. He paid Gartshore for it about $42 by cheque but does not know where cheque is. About a week after the cheque was given witness found some liquor in his house corresponding to what he bought, namely, four bottles of whisky and two bottles of gin. The following is the evidence as to delivery:

"'After the cheque was given or was it before the cheque was given that you got anything; did you get any liquor? Not direct.

"'You mean not direct from Gartshore? Yes.

"'Did you get it any way, direct or indirect? I found some liquor in the house corresponding to what I bought.

"'When was that? I could not tell you that.

"'How long after? Quite a while.

"'How long do you mean by quite a while? Several days, probably a week.'

"'One day, two days, or three days? About a week.

"'Are you sure it was a week? I am sure, I think pretty near a week.

"'You have no way of finding out I suppose? Not in the slightest.

"'What kind of liquor was it; you said it corresponded with what you ordered; what was it contained in? Four bottles of whisky and two bottles of gin.

"'The four bottles would make up the gallon, is that it? I really cannot tell you that, I didn't measure them.'"

I do not think it necessary to consider the constitutional points raised, as, in my opinion, the evidence was not sufficient to prove the delivery of any liquor by the defendant in consummation of the sale. All that the evidence shews is that the defendant said he could get the witness some liquor; that the witness said he would take a gallon of Scotch and two bottles of gin; that he thereupon paid about $42 by cheque, but whether the cheque was cashed or not does not clearly appear, although I will assume that it was; and that about a week afterwards the witness found liquor in his house "corresponding to what I bought." This last statement amounts to nothing more than that the liquor found might have been what he ordered from the defendant. There is no positive identification of that found with that ordered. The witness had ordered Scotch; he is not even asked whether that found was Scotch. The witness had ordered a gallon; nothing is elicited about the quantity found except that there were four bottles, the size of which is not stated. Not only is there no proper identification, such as is required in a criminal prosecution, but there is

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nothing to preclude the possibility that the liquor found might have been obtained from some other source. The witness was not asked whether he had given a similar order to any other person or whether he had got a similar quantity from any other source. There is nothing to shew what was the rate of consumption, but the witness does state that he had "so many bottles" and that he "emptied" the bottles with his friends. It does not appear how many sessions it took to "empty" them. If there were several persons engaged from time to time in "emptying" bottles, it is obvious that a half a dozen bottles might not have lasted more than three or four days at the most, and therefore it is not an unreasonable possibility that a similar supply to that ordered from the defendant had been obtained elsewhere, either before or after the order was given to the defendant, and that the bottles in question were not supplied by the defendant. Neither is there anything to preclude the possibility that the liquor was brought in by some other member of the household either legally or illegally. It is, in short, quite consistent with the evidence that the defendant had not supplied the bottles in question, or any at all, and that he was either unable to do so or had decided not to do so. The evidence, therefore, while consistent with guilt, is not inconsistent with innocence, and the conviction is in reality based on inferences prompted by suspicion, and not on that certainty of proof which both law and justice require in all proceedings of a criminal nature, and it is idle to suggest that the Legislature intended to empower justices of the peace to convict on evidence which raises suspicion but does not amount to proof. Moreover in view of the fact that the magistrate declared that a *prima facie* case had been established, it seems necessary to reiterate what has often been laid down concerning proceedings affecting the liberty of the subject. The onus of proof is always on the prosecution. There is no such thing as there being a *prima facie* case in such a proceeding. Either the evidence for the prosecution proves the charge or it does not, and there is no *via media* by which the accused may be adjudged guilty for failing to rebut a half-proved charge. Such a proposition has no place in a British prosecution: if it did,

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it is obvious that in the case of justices of the peace it would often lead to the gravest injustice.

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From this decision the informant appealed. The appeal was argued at Vancouver on the 22nd and 23rd of April, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

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Craig, K.C., for appellant.

Martin, K.C., for accused, raised the preliminary objection that there was no appeal from a case stated under the Summary Convictions Act. The accused was tried and found guilty. There was a stated case under section 87 of the Summary Convictions Act. The conviction was quashed, and I contend, under section 92 of said Act there is no appeal. *Rex* v. *Evans* (1916), 23 B.C. 128 is in my way, but when a judgment is clearly wrong it should be overruled. The House of Lords has no hesitation in changing its own decisions. This is a final Court, and will, when convinced that a former decision is wrong, overrule it: see *Gentile* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 307 at pp. 309-10; *McDonald* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 386 at p. 399. On questions of jurisdiction the Court should change its judgments if satisfied it should be done in the interests of justice.

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Argument

MACDONALD, C.J.A.: Mr. *Martin* takes the preliminary objection that there is no appeal to this Court. Finding our decision in the case of *Rex* v. *Evans* (1916), 23 B.C. 128, in his way, he asked to be permitted to argue that that case was not well decided. Now, while we do not sit for the purpose of reviewing previous decisions, yet I do not understand it to be a hard and fast rule of the Court that we will, under no circumstances, give counsel at least an opportunity to state the grounds on which he would found his submission that a previous decision of the Court, or of the Full Court, should not be followed.

MACDONALD, C.J.A.

We have on one or two occasions overruled decisions of the Full Court: *In re Tiderington* (1912), 17 B.C. 81; *In re Rahim, ib.* 276, in which the Court, consisting of IRVING,

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MARTIN, J.A.

MARTIN and GALLIHER, JJ.A., and myself, overruled the decision of the Full Court in *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454, IRVING, J.A. dissenting. In this case, speaking of the rule *stare decisis,* at p. 279 I said:

"While the rule is a salutary one, I think it must yield in some cases to considerations which are paramount to it in importance."

The following cases may also be referred to in the same connection: *McDonald* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 386, wherein my brother MARTIN declined to follow the decision of the Full Court in *Green* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199. See also *Gentile* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 307. In this case, at p. 309, I endeavoured to express my views on the question now before us in these words:

"There might be a case where we should be quite right in reversing a decision of the Full Court, or perhaps of our own, if we were convinced beyond all question that that decision was wrong; that it had gone upon a wrong principle, or contrary to some well-established authority which had not been brought to the attention of the Court. I can quite conceive of a case of that kind, but that is not this case."

My brother MARTIN also said (p. 310):

"I need only say that I remain of the same opinion as I was on the argument of *McDonald* v. *B.C. Electric Ry. Co.*, and I reiterate what I have said in that case."

And my brother GALLIHER also said (p. 310):

"If, speaking for myself, it appears clear to me that the decision of the Full Court is palpably wrong, that is, if it is based on absolutely wrong conclusions, or a misconception probably of some authorities decided by some other Court, then I think that it is not the duty of this Court to perpetuate the error, if that error is manifest; and I think we have good English authority for that proposition."

I agree to a very large extent with what has been said today by my brother MARTIN as to the undesirability of allowing counsel to question previous decisions of the Court. It is only under very exceptional circumstances that that should be allowed. There seems to be a division of opinion at the moment as to whether Mr. *Martin* should be allowed to proceed. I would allow him briefly to state the grounds on which he proposes to ask us to reconsider our decision in *Rex* v. *Evans, supra.*

MARTIN, J.A.: A question of very considerable public importance has been raised and I shall give my views upon it

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briefly. Fortunately we have a guide for our action in the very high authority which my brother McPHILLIPS has drawn to my attention, the case of *Velazquez, Limited* v. *Inland Revenue Commissioners* (1914), 3 K.B. 458, which is an unanimous judgment of the Court of Appeal in England, composed of that very distinguished lawyer the Master of Rolls Lord Cozens-Hardy, and Lord Justice Swinfen-Eady, the present Master of the Rolls. He says (of course he is speaking of the decisions of their own tribunal) at p. 461:

"There is one rule which, of course, we are bound to abide—that when there has been a decision of this Court upon a question of principle it is not right for this Court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law. If it is contended that the decision is wrong, then the proper course is to go to the ultimate tribunal, the House of Lords, who have power to settle the law and hold that the decision which is binding upon us is not good law. That being so [he proceeds to say on page 462, repeating his observations] I do not think it would be respectful or right that I should say more than that I think we are bound to follow [our previous decision]."

The present Master of the Rolls, Lord Justice Swinfen-Eady, says at p. 464 that he was of the same opinion, and put it this way:

"We are governed by [their previous decision in] *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (1901), A.C. 217, which is indistinguishable from the present case, and all we can do is to follow it."

Lord Justice Pickford at p. 465 is of the same opinion:

"It is a matter which cannot be considered in this Court, as this Court is governed by the case of *Danubian Sugar Factories* v. *Inland Revenue Commissioners* [that to which his brother justice referred]."

MARTIN, J.A.

Now, it would be difficult to find a safer guide, one would think, than that.

As to the question of finality, I point out that they refer there to the House of Lords. Of course, there is no House of Lords here, but the three sources of finality that this Court has to regard are the Legislature and the superior Courts: the Legislatures of both Provinces as regards the execution or the discharge of Provincial or Federal duties, and the Courts, consisting of the Supreme Court of Canada, our immediate superior, and the Judicial Committee of the Privy Council. So if anybody complains of our decisions it is very simple to get that corrected by the High Court of Parliament sitting here at Victoria, if the decision affects Provincial legislation, or

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sitting at Ottawa, if it affects Federal legislation. We may, therefore, be subject to be corrected by either or both of these Courts of Parliament; but, short of that, why should there not be finality in this Court? Surely if the finality of the English Court of Appeal may be disposed of by the House of Lords, this may be disposed of by our own Parliament in Canada. And I wish to repeat what I have said during the argument, that it seems a strange thing when this Court, if it is unanimous, has the power of life and death from which there is no appeal to any other Court (I do not, of course, refer to Parliament), if we were unanimous here, have the power of life and death, that the Parliament of Canada has invested us with that supreme power, it does seem to me strange if we cannot have that finality in regard to our own procedure or in regard to our own decision. I shall not elaborate the desirability of finality. Surely if there is desirability in any direction it should be on the two questions which we are met with here, that is to say, a criminal matter and one of jurisdiction. If our word is not going to be final, as to whether we have not the right to decide upon our own jurisdiction—whether having given that decision we ought to abide by it, one does really almost despair of being able to retain the confidence of the community. I repeat again what his Lordship Chief Justice MCCOLL said [in *Jordan* v. *McMillan* (1901), 8 B.C. 27 at p. 29], because he was so distinguished a jurist, that to adopt any other rule would be to lead to the "wildest confusion in the administration of justice." I for one do not propose to say that I sit here at the beginning of this term to make a ruling which sends one man to the penitentiary, and later on in this term or the first of next term make another which frees another man, guilty of exactly the same offence, from the same consequences. On these questions I give one ruling once and for all.

MARTIN, J.A.

GALLIHER, J.A.: I quite realize that it is very desirable that there should be finality in decisions of this Court; at the same time I have expressed my views before and I am still of the same opinion, that where I am convinced that my decision is wrong, absolutely convinced beyond any question of doubt that my decision is wrong, then I think that I should not perpetuate

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that wrong by adhering to a former decision. It strikes me that greater wrong is done in that way than otherwise. I may be wrong in my view of the matter, but I regard it as my duty to set right, if I can, what I have wrongly done before, and if that cannot be done, at least not to hold myself bound in no case to reconsider the point.

McPHILLIPS, J.A.: I am in entire agreement with what my brother MARTIN has said. The matter is not *res integra*. This Court expressly held in *Rex* v. *Evans* (1916), 23 B.C. 128 that there is an appeal. Now we are asked to say that no appeal lies to this Court. I do not think that counsel ought to be admitted to argue the question.

EBERTS, J.A.

EBERTS, J.A.: I am prepared to hear the preliminary objection.

Argument

Martin: The decision in *Rex* v. *Evans* (1916), 23 B.C. 128 is in conflict with *In re Tiderington* (1912), 17 B.C. 81, where the Court held that there was no appeal in a *habeas corpus* proceeding, because, once the prisoner is discharged, he is free, and there is no jurisdiction. There are two points: (1) The Court may overrule itself, and (2) there are two cases irreconcilably against one another. *In re Tiderington*, and *Cox* v. *Hakes* (1890), 15 App. Cas. 506; 60 L.J., Q.B. 89, should be followed. The *ratio decidendi* of these cases is the same as this. *Rex* v. *Evans* does not apply; see also *Re Mackey* (1918), 29 Can. Cr. Cas. 282. The fact that the Court cannot make an order that can be effective is a strong point.

Craig, contra: The distinction is that in this case there is an express provision giving us the right of appeal, namely, subsection (4)(*e*) of section 6 of the Court of Appeal Act.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Mr. *Martin* relies on the cases of *In re Tiderington* already referred to, and *Cox* v. *Hakes* (1890), 15 App. Cas. 506, as shewing that when the accused has been released on *habeas corpus* proceedings no appeal from the order will be allowed. The decision of these cases depended on the interpretation to be placed upon the general words contained in section 6 of our Court of Appeal Act and the corresponding

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words in the English Act, whereas *Rex* v. *Evans* and the case at bar depend, so far as this question of the right of appeal is concerned, on subsection (*e*) of section 6, which, in express and clear terms, gives a right of appeal which the Court cannot exclude by any canon of construction. There is, therefore, no conflict between our decision in *In re Tiderington* and our decision in *Rex* v. *Evans*.

Preliminary objection quashed.

Craig, on the merits: The learned Chief Justice found there was not sufficient evidence to convict, and the case turns on whether there was proof of delivery. The question is, was it right for the Chief Justice to find there was no evidence to go to a jury in such a case: see *Rex* v. *Jenkins* (1908), 14 B.C. 61 at p. 69. The accused called no witnesses and my submission is that in face of the evidence it was not necessary to prove actual delivery.

Martin, K.C.: There is no presumption in criminal cases that makes it necessary for defendant to prove the contrary. You can convict on circumstantial evidence but it must be consistent with the circumstances of the case. There is never a shifting of burden to the defendant. If the evidence is not complete he must be discharged. There must be a sale and there must be delivery before there is a sale. There is no evidence that Gartshore even had any liquor or ever delivered any: see *Titmus* v. *Littlewood* (1916), 1 K.B. 732. All the evidence there is, is that McKenzie found the liquor at his house. The question is, is it a fair inference from the admitted facts?

Argument

Wilson, K.C., on same side, referred to *Rex* v. *Edwards* (1918), 25 B.C. 492.

Proposing to argue constitutional point, the Court adjourned to May the 5th, in order that the Attorney-General of Canada be notified.

5th May, 1919.

Wilson, K.C., stated he did not serve the Attorney-General at Ottawa as it was not for him to serve the Attorney-General, whereupon the Court declined to hear further argument and reserved judgment.

7th May, 1919.

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MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): The answer to the first question is that the evidence adduced by the Crown is sufficient to prove a sale of liquor under section 10 of the British Columbia Prohibition Act.

The case contains three other submissions, each raising the question of the power of the Provincial Legislature to pass the said Act. By section 9 of Cap. 45, R.S.B.C. 1911, it is enacted that the Court shall not adjudicate on such a question until notice to the Attorney-General of Canada, as therein specified, shall have been served upon him. Such notice has not been served, though we adjourned the hearing of the appeal for the express purpose of enabling the respondent's counsel, who desired to argue that the said prohibition legislation is *ultra vires* of the Legislature to pass, to comply with said chapter 45. Upon it appearing that the Attorney-General of Canada had not been notified as required by the Act, we declined to hear argument on the constitutional question, and I therefore do not answer questions 2, 3 and 4 of the case stated.

The result is that the first question is answered in the affirmative, and the other three questions are not answered. The order of the Chief Justice quashing the conviction is set aside and the conviction is restored.

MARTIN, J.A.

MARTIN, J.A. (oral): I am in complete accord with what the Chief Justice has stated about the constitutional question; and also with regard to the other question submitted, and I shall proceed to give my views on the question of the sale as follows:

There is a point involved here which seems to have been overlooked (I would say, with all respect) by the learned Chief Justice HUNTER below, when he overruled the conviction by His Worship Magistrate Shaw; and it is this—that he proceeds upon the assumption that the delivery of the goods was so indefinite that the sale could not be upheld, and therefore as such an element of uncertainty had entered into the matter that the conviction could not be founded upon the evidence.

The sale divides itself into two parts, and here I think is where the distinction occurs; and I presume the learned magistrate has kept this distinction in mind when he convicted. The

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accused undertook to supply the purchaser, McKenzie, with certain liquor, as sworn to by the witnesses, and stated by the magistrate; that is, a gallon of Scotch whisky and two bottles of gin. That is what may be termed a future sale of unascertained chattels, and it will be noticed at once, having regard to the evidence, with which you are familiar, that this sale divides itself into two entirely distinct categories; even on behalf of the accused it must necessarily be advanced; it was not, but it should have been. The gallon of Scotch whisky was not delivered, but four quart-bottles were delivered. I will speak about that in a moment. But what was delivered (and about which there is no doubt at all, and there is absolutely no element of uncertainty whatever) were two bottles of gin, and the fact is that the purchaser paid for two bottles of gin and a gallon of whisky, and he actually received two bottles of gin. That excludes all element of uncertainty; because if I asked a man to undertake to supply me with two sacks of potatoes, if I get two sacks of potatoes delivered to my house, it is absolutely impossible to suggest any uncertainty whatever. And therefore, in following out the well-known rule of criminal law, which is laid down in Crankshaw at pp. 1040 to 1042 (in the note to section 951), "Where an offence is charged and part of it only is proved" it is inevitable that there should have been a conviction for the two bottles of gin alone; because not only does the man say he got two bottles of gin which he ordered, and which corresponded to what he had ordered, but he consumed them. He drank them up with his friends.

MARTIN, J.A.

The case is very clearly stated at p. 1042, and I almost shrink from referring to this point and would not do so were it not for the fact that it seems to have been overlooked by the learned judge below; so I possibly should revert to it, namely:

> "Upon a charge of stealing if any one of the articles enumerated in the indictment be proved to have been stolen by the defendant, it will be sufficient."

So, therefore, if we entertain the opinion that the conviction should have been restricted to the two bottles of gin alone, as to which there can possibly be no doubt at all, I say it with all deference, it would therefore be our duty, under section 1018, to see that the necessary amendments in the conviction were

made, and the conviction reduced to cover the actual proof; as section (*e*) says, "to make such further order as justice requires"; and there would be no necessity under subsection (*c*) of 1018 to direct any change in regard to the sentence, because it is a minimum sentence; and if he were only convicted of selling one bottle of gin the result would be just the same; so it is impossible to interfere with the conviction of the magistrate.

I pass then to the other articles which were bargained for at the time. The witness McKenzie says that what he got was two bottles of gin and four bottles of whisky, and he says that this corresponds with what he bought from the accused. "I found," he says, "some liquor in the house corresponding to what I bought," and this was delivered in a week after the bargain was made. The learned magistrate below has apparently taken the view that there was no element of uncertainty in regard to that either; and in my opinion, I think he was quite right.

The expression is "corresponding to what he bought." It is suggested at bar that we were without assistance as to the meaning of "corresponding with what he bought," but that is not so. It is an expression that has been well known to lawyers for several generations, and is embodied in the Sale of Goods Act. For example, it is referred to in section 21, which says: "Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description"; so he has unwittingly used the very expression which is made use of in the Sale of Goods Act which has a well-defined meaning; and if anyone who doubts it will only turn to such a high authority as Addison on Contracts, 11th Ed., at p. 562, he will find the term used there, and the meaning of those words become quite apparent. There never was any doubt about it to my mind; and it will be seen in the section I have referred to, it deals with the word "corresponding" in the same sense as "answering to," and corresponding with the description, is answering to. "Fairly corresponding" is used synonymously with "fairly answering to."

MARTIN, J.A.

Then we have this state of circumstances, that the man agrees to furnish a certain amount of liquor, and he gets paid for it in

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advance. It is "unascertained," of course—"unascertained goods." He pays for it in advance and it is delivered within a reasonable time at this man's house—"within a week," he says, which would certainly be considered a reasonable time, and a very quick transaction at a time when there were laws prohibiting the sale of it. And these "unascertained articles" having been delivered at this man's house, the question is, does he accept them as such? He does, and in a most distinct way. He speaks of the sale on the 6th of November, and he was examined in January, nearly two months afterwards; and there is not a single suggestion that what he ordered he did not receive. On the contrary, there is no suggestion that they did not correspond with what he ordered; in fact he says that he was so satisfied that they corresponded with what he ordered he drank them up. Under such a state of circumstances, how is it possible to say that there was any doubt at all about the delivery, or acceptance, or anything of that kind? The matter is brought absolutely under the Sale of Goods Act, sections 25 and 26. In dealing with this as "unascertained goods" I will refer to section 25, which says:

"(1.) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

MARTIN, J.A.

And section 26 says:

"When goods are delivered to the buyer on approval, or 'on sale or return,' or other similar terms, the property therein passes to the buyer—(*a*) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction."

How can you adopt or accept a transaction better than when you ask a man to send whisky to your house, and you drink it up, and pay for it in advance?

I think this subject is dealt with very ably by a very eminent judge, Mr. Justice Williams, in his judgment in *Behn* v. *Burness* (1863), 3 B. & S. 751, where he says at p. 756:

"But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or in other words, that the condition expressed in the contract has not been performed. Still if he

receives the thing sold, and has the enjoyment of it [and I think in this case there is no doubt he had the enjoyment of it, and he drank it up with his friends], he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages."

We must bear in mind the additional element here, where you are dealing with prohibited articles the limit of selection given; but all these elements appear. But as his Lordship says in that case that I have just referred to, where he once had the enjoyment of it, the indefiniteness and every uncertainty disappears. So, therefore, I am of the opinion that the conviction of the learned magistrate is one which ought not to have been disturbed.

I omitted to draw attention to section 33 of the Prohibition Act. If I stated in my former remarks the liquor was sold at the time (I do not know whether I did or not), I did not mean to say it was paid for at the time; it was not paid for at the time. The point is this—after he had the liquor delivered to him he paid this sum as stated, of $42.

MARTIN, J.A.

GALLIHER, J.A.: I may say that I have given this matter most serious consideration, but I find myself unable to agree, with all respect, in the judgment of the learned judge below. It follows, therefore, I would answer the question submitted to us affirmatively, and which is the only question remaining for us to answer.

GALLIHER, J.A.

MCPHILLIPS, J.A. (oral): I would answer the question in the negative. I feel we have a grave duty to perform in this case, because it involves the liberty of the subject, which is always a matter of grave concern, and this is a case under a new law and novel in its nature. True, it has been approved of by the people, but public opinion would not appear to be behind its enforcement. Every hour of the day men and women of high moral standing in this country are committing infractions of the Act. That, of course, will not influence the Court. The Court is to see to it, upon a proper case being made out, that the provisions of the law are enforced. In answering the question in the negative, I have given serious consideration to the legal principle involved. The legal prin-

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ciple here is whether there was a sale in law. The Crown has undertaken to assume the responsibility of saying that there was a sale. Counsel representing the Crown frankly states that upon him is the onus of establishing a sale as understood in law. It may not be inappropriate at this stage, perhaps, to remark that there is nothing in the transaction, strictly speaking, to indicate that there was a sale, even a promise to sell; but I approach the question on the assumption that there was a promise to sell. Assume (although one ought not to assume anything when the matter is one of criminality or *quasi*-criminality) that in the language of Lord Loreburn, L.C., in a recent case that it was "a promise to sell unascertained goods," to be later followed by the selection, the appropriation or the delivery of these goods. Now, that is a matter of proof, not as in civil proceedings, based upon the preponderance of evidence, or upon probability, but upon certainty of proof. The police magistrate found that there had been an infraction of the law, but to properly so find he had to find that there was a sale, that is, all elements of a sale had to be present. Now, in my opinion, the requisite elements of a sale, *i.e.*, selection, appropriation or delivery, were absent. It is said, in some way or other, that articles which might correspond with the "unascertained articles" went upon the premises of the buyer. I will only visualize it in a casual way for the moment; if some person had stood by and heard this conversation and he had been an enemy perhaps of the person selling, and later the vendor deciding he would not carry out the promise to sell, that person who overheard the conversation might place the very articles upon the premises to implicate the vendor. I am not saying that was the fact in this case, but it could have been done; therefore the mere finding of the articles on the premises without more, constitutes very unsafe evidence of a completed sale. There must be something more than that. There must be something definite to enable it being said that the defendant placed those articles there. It might not need to be very cogent evidence, but there would need be some evidence; for instance, that the carter got his instructions for delivery from the defendant or some evidence connecting the defendant with the selec-

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tion, appropriation and delivery, but all such evidence is absent. It has been said that in the law of England greater care is taken of property than life and liberty, and I am afraid sometimes it would appear so. Here the liberty of the subject is at stake, that which is alleged is not an infraction of the Criminal Code, but the same exactness of proof is necessary. The Court, after all, is the last bulwark of the people. Parliament passes the law, but the genius of the British people is the same today as years ago; and it is expected of the Court in criminal proceedings or *quasi*-criminal proceedings where life or liberty is at stake, that there shall be certainty of proof. I fail to find it here. The case is one for the application of the rule of *strictissimi juris*. The police magistrate, it is to be noted, upon conviction, even in the case of a first offence, is compelled to impose as a minimum penalty, six months' imprisonment with hard labour. There is no evidence, in my opinion, which entitled the magistrate to convict, and I am in entire agreement with the judgment of the learned Chief Justice of British Columbia which is under appeal, and that being my view, my only answer can be in the negative. Some of my remarks may be said to be extra-judicial, but the case and the circumstances would seem to warrant this departure. My reasoned judgment is in writing, and will in due course be found upon the files of this Court.

MCPHILLIPS, J.A.

The following are the written reasons for judgment of McPHILLIPS, J.A.:

The information laid was "did unlawfully sell intoxicating liquor, to wit, one gallon of whisky and two bottles of gin." It is to be noted that the information laid is confined to selling and not offering to sell. When the evidence is looked at, and with great respect to the learned police magistrate, I cannot come to the conclusion that there was a sale. Admittedly all that can be contended for is that there was a promise to sell unascertained goods. In *Badische Anilin und Soda Fabrik* v. *Hickson* (1906), A.C. 419 at p. 421, Lord Loreburn, L.C. said:

"A contract to sell unascertained goods is not a complete sale, but a promise to sell. There must be added to it some act which completes the sale, such as delivery or the appropriation of specific goods to the contract by the assent, express or implied, of both buyer and seller. Such appropriation will convert the executory agreement into a complete sale."

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In *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler* (1898), A.C. 200 at p. 207, Lord Herschell said:

"Until the goods had been delivered in London there would have been no sale. The property in the goods would not have passed to the purchaser, they would still have been the vendor's goods, and the vendor could not have demanded the price of them from the purchaser, because the sale was not complete."

It is clear that there was not a complete sale upon the facts of the present case. At best it was an executory contract (*Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 438 at p. 449). There had to be something more done—selection or appropriation, approval and delivery. Did that take place? I cannot say that it did. Again, at best, the vendee finds goods upon his premises. In his own words, "I found some liquor in the house corresponding to what I bought." In the absence of it being proved that this was a delivery assented to by the buyer and a delivery by the seller, it could not be said that there was a completed sale. There was no coming together of the buyer or the seller in connection with any delivery of the goods, nor any evidence that the delivery was that of the seller. Here we have no evidence whatever connecting the defendant with the selection, appropriation or delivery of the liquor found upon the premises. That must be established upon legal evidence, and if that evidence is absent, it is the duty of the Court of Appeal to hold that there was no complete sale, and without a complete sale there could not be a valid conviction. Here everything turns upon implication and probability, always frail straws of evidence, but evidence of this character is valueless when that which is to be established is "a complete sale" as understood in the law. It is plain that there is not even a scintilla of evidence that the defendant in any way, in compliance with the promise to sell (if the transaction can be put as high as that), selected, appropriated or delivered the liquor which was found upon the premises of the buyer.

MCPHILLIPS, J.A.

In *Rex* v. *Lee* (1908), 24 T.L.R. 627, a judgment of the Court of Criminal Appeal in England, Lord Alverstone, L.C.J. said at p. 628:

"We are of opinion that this conviction cannot stand. One hopes very much that the passing of this Act [is referring to the Criminal Appeal

Act, 1907] will not lead to any modification of the well-established practice in the administration of the Criminal law that there is a presumption of innocence, which is only to be rebutted by such evidence with regard to the particular offence as leaves no reasonable doubt that the prisoner is guilty."

Then there is this further consideration: the appeal to this Court is from the judgment of the Chief Justice of British Columbia, and the onus was upon the Crown to shew that the learned Chief Justice arrived at a wrong conclusion in quashing the conviction. That onus, in my opinion, has not been successfully discharged. Finally, it is to be remembered that the appeal to this Court is confined, as it was upon the appeal to the learned Chief Justice, to the bare quesion of law as set forth in the stated case:

"Whether the evidence adduced by the Crown was sufficient to prove a sale of liquor under section 10 of said chapter 49?"

MCPHILLIPS, J.A.

That question, in my opinion, can only be answered in the negative, that is, that the determination of the learned police magistrate was erroneous in law, and the judgment of the learned Chief Justice, under appeal to this Court, quashing the conviction should be affirmed.

I would, therefore, dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal allowed,
McPhillips and Eberts, JJ.A. dissenting.

Solicitors for appellant: *Craig & Parkes.*
Solicitor for respondent: *Joseph Martin.*

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CANADIAN PACIFIC RAILWAY COMPANY v. WORKMEN'S COMPENSATION BOARD.

Constitutional law—Workmen's Compensation Act—Foundering of vessel—In territorial waters of Alaska—Crew lost—Compensation to dependants—Ultra vires—B.C. Stats. 1916, Cap. 77, Secs. 8, 9 and 12—B.N.A. Act, Secs. 91, and 92, Clauses 2, 13 and 16—57 & 58 Vict. (Imp.), Cap. 60, Sec. 503—R.S.C. 1906, Cap. 113, Secs. 921-2-3.

The "Princess Sophia," a steamship of the plaintiff Company registered at Victoria, B.C., foundered with all on board in Lynn Canal within the territorial waters of the United States. The Workmen's Compensation Board, constituted for the purpose of the administration of Part I. of the Workmen's Compensation Act, being about to pay compensation to the dependants of the crew of the "Princess Sophia," the plaintiff Company applied for an injunction to restrain the said Board from making such payments on the grounds that sections 8, 9 and 12 of the said Act are *ultra vires* of the Legislature, alternatively that Part VIII. of the Merchant Shipping Act, 1894 (Imp.), applies and said Board is bound to observe the provisions thereof and alternatively that the Workmen's Compensation Act is repugnant and unworkable with section 921, 922 and 923 of the Canada Shipping Act. It was held by the trial judge that the vessel having foundered in Alaskan territory the legal consequences to the plaintiff in the way of liability in respect of the death of those on board would be determined by the law of that territory; that on the evidence there is by the law of the territory a very limited liability in tort to pay damages, there being no legislation akin to the Workmen's Compensation Act creating a liability to pay compensation, and this immunity enjoyed by the plaintiff in respect of its navigation in Alaskan waters is a civil right existing beyond the Province, in derogation of which the Province could not validly legislate.

Held, on appeal, affirming the decision of CLEMENT, J. (MCPHILLIPS, J.A. dissenting), that section 8 of the Act imposes on the employer as an incident of the contract between himself and persons resident within the Province, an obligation to compensate his workmen or his dependants in respect of injury or loss of life suffered outside the Province. The right conferred on the workmen by the Legislature is a civil right but not a civil right in the Province or a matter of merely a local or private nature in the Province. The accident may give rise to civil rights in the country in which it occurred. The right is a substantive one, not merely a legal remedy for a right otherwise recognized. Section 9 of the Act preserved to the workman the right to treat the accident as one giving him a civil right in a foreign country. He may elect to take what the foreign law gives him or take under the Act,

but while the workman's extra-provincial rights are preserved those of the employer are not. He is given no option to have his obligations measured by the foreign law. Section 8 cannot therefore he supported by clauses 13 and 16 of section 92 of the British North America Act.

Held, further, that the Board is merely an intermediary between the employers and their workmen collectively. Its powers are both judicial and ministerial and in exercising the same to levy rates are powers relating to civil rights and cannot be called taxation in order to raise revenue for Provincial purposes within class 2 of section 92 of the British North America Act.

[Reversed by the Judicial Committee of the Privy Council.]

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THE Workmen's Compensation Board is a body corporate appointed by the Lieutenant-Governor in Council and constituted a Commission under section 56 of the Workmen's Compensation Act for the administration of Part I. of said Act. The plaintiff Company, incorporated by an Act of the Parliament of Canada, with head office in Montreal, owns and operates railways and steamships. On the 25th of October, 1918, the steamship "Princess Sophia," owned and operated by the plaintiff and registered at Victoria, B.C., while returning from Skagway, Alaska, to Vancouver, and in the waters of Lynn Canal, which is within the waters and territory of the United States, foundered, with all the passengers and crew aboard. All the members of the crew were employees of the plaintiff under a contract entered into in British Columbia. The Workmen's Compensation Act provides for creating and maintaining an accident-fund, and assessments had been made and collected from time to time from industries in the classes referred to in section 25 of the Act and were collected from the various companies mentioned in class 10, of which the plaintiff was one. The Board has on hand considerable sums to the credit of this accident-fund which were collected from the different classes mentioned, and the Board has been, and was at the time of commencement of proceedings in this action, paying compensation out of the said fund to dependants of the members of the crew of the "Princess Sophia." Assessments had been made by the Board upon the plaintiff under the Act since the loss of the "Princess Sophia," and the Board claimed the right to levy further assessments based upon the pay-rolls of the plaintiff, including the

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pay-rolls of the crews of British ships owned by the plaintiff, and to apply the moneys so levied in payment of claims for compensation of employees or dependants of employees of the companies in class 10, including dependants of the crew of the "Princess Sophia." The plaintiff claims the Board has no right, or power, or jurisdiction to pay compensation out of this fund to dependants of the "Sophia's" crew, and that sections 8, 9 and 12 of the Workmen's Compensation Act are *ultra vires* of the Legislature and invalid; that Part VIII. of the Merchant Shipping Act applies to the "Princess Sophia" and the loss or damage arising from its foundering, and is in force in British Columbia, and the Board should observe the provisions of said Act in respect to payment of compensation; and alternatively, that the Canada Shipping Act applies to the said vessel and is in force here, and the Board is bound to observe the provisions of said Act, especially sections 921, 922 and 923 thereof, in respect to payment of compensation to dependants; that the Workmen's Compensation Act is repugnant to and unworkable with Part VIII. of the Merchant Shipping Act or alternatively with the Canada Shipping Act, and is therefore void to the extent of the repugnancy. The plaintiff asks for a declaration that sections 8, 9 and 12 of the Act are beyond the powers of the Legislature to enact; for an injunction enjoining the defendant from paying compensation to the dependants of the crew of the "Princess Sophia"; for a declaration that they are not entitled to make the assessments aforesaid, and for an injunction restraining them from making such assessments.

Davis, K.C., and *McMullen*, for plaintiff and Attorney-General of Canada.

S. S. Taylor, K.C., for defendant and Attorney-General of British Columbia.

13th March, 1919.

CLEMENT, J.

CLEMENT, J.: Upon consideration, I find myself unable to distinguish the case before me from *Royal Bank of Canada* v. *Regem* (1913), A.C. 283; 82 L.J., P.C. 33. In fact, the position here is stronger in favour of the plaintiff Company.

because the civil right without the Province, in derogation of which the impugned sections would operate, if valid, is the plaintiff Company's own civil right, and not, as in the case cited, the civil right of a third party.

The "Princess Sophia" went down in the territorial waters of the United States in the Territory of Alaska. The legal consequences, therefore, to the plaintiff Company in the way of liability to pay "compensation" or damages in respect of the death of those on board would fall to be determined by the law of the Territory: *The M. Moxam* (1876), 46 L.J., P.D. & Adm. 17. According to the evidence before me, there is by the law of the Territory a very limited liability in tort to pay damages, but there is no legislation akin to the Workmen's Compensation Act of this Province creating liability to pay "compensation." This immunity, enjoyed by the plaintiff Company in respect of its navigation of Alaskan waters, is clearly, in my opinion, a civil right existing beyond this Province, and that civil right would manifestly be rendered a delusion if the plaintiff Company is actually forced to pay compensation in this Province. Action might be brought, or proceedings taken, in Alaska, but, of course, without possibility of success. If action were begun elsewhere than in Alaska or British Columbia, as, for example, in the Province of Quebec, where the head office of the plaintiff Company is situate, the plaintiff Company would have the right to plead the immunity given by the *lex loci*, and that right, again, would be shadow and not substance if, in fact, the Workmen's Compensation Board of this Province proceeds to pay the claims before it. In the case, therefore, of proceedings launched either in Alaska or elsewhere out of this Province, the plaintiff Company would be "precluded," to use the word employed in *Royal Bank of Canada* v. *Regem*, from effectively setting up the right to immunity enjoyed by it, under the law of Alaska, in any forum outside of British Columbia.

CLEMENT, J.

During the argument I stated, with, I trust, due respect for their Lordships of the Privy Council, that I was not satisfied of the soundness of the judgment of their Lordships in *Royal Bank of Canada* v. *Regem*. I am, of course, bound by it, and

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being unable, having regard to the *ratio decidendi* as I gather it from the judgment itself, to distinguish it from the case before me, I must give judgment for the plaintiff Company. But proper respect for their Lordships requires me, I think, to indicate very briefly why I am not satisfied of the correctness of the decision in question. The civil right without Alberta in "derogation" of which, in their Lordships' opinion, the impugned Alberta Act would be operative, if valid, was the right of the bondholders to sue the Royal Bank in the Province of Quebec to recover the moneys deposited with that Bank. I cannot see, with all deference, how the Alberta Act could have any effect in law upon that right. As I read the judgment, the Alberta Act did not in terms touch, or purport to touch, that right at all. If on its proper interpretation it did purport to deal with that right, it would, of course, be void, but *pro tanto* only, and in an action brought in the Province of Quebec by the bondholders, would afford no defence whatever to the Bank against the claim of the bondholders to a return of their deposit. The Bank indeed might have been made bankrupt by the confiscation of so much of the Bank's moneys in Alberta, just as a theft by bank robbers might have rendered the Bank unable to meet its obligations; but I cannot see how the Bank was in any legal sense "precluded from fulfilling its legal obligation to return their money to the bondholders" by any clause of the Alberta Act. I should have thought that the Bank could meet the bondholders' claim, take an assignment of the bonds, and then rely on the guarantee of the Alberta Government. But that, perhaps, is getting away from the real point. Of course, if the moneys which the impugned Act purported to confiscate were, in their Lordships' opinion, not in Alberta, the Act would be *ultra vires* as dealing with property outside the Province; but the judgment is, as I read it, put upon the one ground only, namely, that the Act was legislation in relation to civil rights not within the Province, and there is no pronouncement upon the other point as to the *situs* of the confiscated funds.

CLEMENT, J.

In view of the opinion which I have so far expressed, it becomes unnecessary to pass upon the other contentions raised

in this case. I can only say that, as at present advised, I would resolve them all in favour of the defendant Board, but I have not really given them the careful consideration which they would call for if my decision were to turn upon them.

There will, therefore, be judgment enjoining the Board from paying compensation to dependants of those lost upon the "Princess Sophia." In so far as the Workmen's Compensation Act purports to provide for compensation, on the actual facts of this case it is, I am regretfully constrained to say, beyond the powers of the Provincial Legislature.

If the plaintiff Company asks for costs, that question can be spoken to. Whether the defendant Board is the Crown for the purposes of the Crown Costs Act is perhaps debatable.

From this decision the defendants appealed. The appeal was argued at Vancouver on the 15th of April, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

S. S. Taylor, K.C., for appellants: The Act, in pith and substance, is a law of state insurance protecting resident workmen respecting engagements made within the Province and respecting services performed partly within the Province. Secondly, it is a law of a local and private nature, obviating the necessity of passing poor-laws and the like. It makes certain classes pay a tax in order to insure their workmen. Thirdly, it comes within the British North America Act, section 92, subsections (13) and (16). Fourthly, it is not in conflict with the Canada Shipping Act, nor is it in conflict with the civil rights of the Canadian Pacific Railway in Alaska. Fifthly, the Canadian Pacific Railway can raise no point that cannot be taken by any other member of the class; and sixthly, the learned judge's criticism of the judgment in *Royal Bank of Canada* v. *Regem* (1913), A.C. 283, was erroneous. The important sections of the Workmen's Compensation Act are 6, 8, 25 and 29. As to the nature and scope of the Act see *Fenton* v. *Thorley & Co.* (1903), 72 L.J., K.B. 787 at p. 789. In relation to the extra-territorial effect of the legislation, they contend that the sections referring to accidents

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outside the Province are *ultra vires,* but the fact of death occurring outside the Province is merely an event; the basis of the claim is the contract to work. Shipping is exclusively Dominion, but for taxation it comes within the jurisdiction of the Province: see *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 585. Whenever the exclusive jurisdiction of the Province is exercised it may have an extra-territorial effect or jurisdiction, as in the case of shipping: see *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1897), A.C. 231; *Rex* v. *Lovitt* (1912), A.C. 212. The question is discussed in *Davidsson* v. *Hill* (1901), 2 K.B. 606. A writ can be served in the United States, and there is legislation to that effect: see *McCarthy* v. *Brener* (1896), 2 Terr. L.R. 230; *Stairs et al.* v. *Allan et al.* (1896), 28 N.S. 410 at pp. 418-9; *Macleod* v. *Attorney-General for New South Wales* (1891), A.C. 455 at pp. 458-9; *Jefferys* v. *Boosey* (1854), 4 H.L. Cas. 815. Legislation as to deportation of undesirables bears on the subject and is discussed in *Attorney-General for Canada* v. *Cain* (1906), A.C. 542, and another illustration of extra-territorial effect as with relation to civil rights under a statute is *Bananza Creek Gold Mining Company, Limited* v. *Regem* (1916), 1 A.C. 566 at pp. 583-5; see also *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at pp. 109 to 113; *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Company, Limited* (1914), A.C. 237 at pp. 252-3. The last point that the Act is in conflict with is the Merchant Shipping Act, 1894 (Imp.), and the Canada Shipping Act. The Canadian Act has no application and can be eliminated: see *Macleod* v. *Attorney-General for New South Wales, supra,* and *Jefferys* v. *Boosey, supra.* As to the English Act, section 503 is the only one to be considered. This section is strictly confined to actions for damages: see *The Ettrick* (1881), 6 P.D. 127 at p. 132; *The Hector* (1883), 8 P.D. 218; *The Warkworth* (1884), 9 P.D. 145. The cases in point under Lord Campbell's Act are *The Guldfaxe* (1868), L.R. 2 A. & E. 325 (overruled by *The Vera Cruz* (No. 1.) (1884), 9 P.D. 88); *The Explorer* (1870), L.R. 3 A. & E. 289. As to the scope of the Act see *The Canada Southern Railway Company* v. *Jackson* (1890),

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17 S.C.R. 316; *Washington* v. *Grand Trunk R.W. Co.* (1897), 24 A.R. 183; see also *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907), A.C. 65.

Davis, K.C. (*McMullen,* with him), for respondent: The action is for an injunction, as we are interested in the disposal of money collected under the Act, an assessment having been made on all employers of labour. We cannot trace our money to the dependants of those lost on the "Sophia," but whatever is paid out affects us as all members of our class. The ground is the principle laid down in *Royal Bank of Canada* v. *Regem* (1913), A.C. 283. The Province cannot pass any legislation which will affect the civil rights of any person outside the Province. The evidence shews there is no Workmen's Compensation Act or Employers' Liability Act in Alaska. The only liability there, is original negligence. There would be no liability to workmen or their dependants by the Canadian Pacific Railway in Alaskan waters. The civil rights of the Canadian Pacific Railway in Alaska are entirely changed by section 8 of the Workmen's Compensation Act. This section makes us operate in Alaska subject to the burden placed on us by the Act. Every member of class 10 has the same right of action as section 8 of the Act is bad, and for that reason no person should have to pay out to this accident. The provisions of the Merchant Shipping Act is another ground for contending the legislation is bad. Section 503 of that Act provides for a limitation of liability in case of accidents at sea through negligence. It was passed from the standpoint of public policy. The Workmen's Compensation Act has no limitation, and is therefore *ultra vires*. As to the Act being only a species of taxation see *Southern Pacific Co.* v. *Jensen* (1916), 244 U.S. 205. Under the Merchant Shipping Act the extreme liability in this case would be $175,000. Ten companies pay into class 10 under the Act and the money is worked out according to the number of employees. The money is not individualized in any way. On the question of interference with trade and commerce see *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348.

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Taylor, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: The plaintiff, respondent in this appeal, sues to restrain the defendants, the Workmen's Compensation Board, from paying compensation to the dependants of members of the crew of the "S.S. Princess Sophia" who lost their lives when the ship sank in Alaskan waters in October last. They submit that sections 8, 9 and 12 of the Workmen's Compensation Act, Cap. 77 of the Provincial Statutes of 1916, are *ultra vires* of the Legislature to enact.

It may be useful, first, to refer to some of the provisions of the Act bearing upon the present dispute. Employers are divided into several classes. The respondent is in Class No. 10, and in this class are included six other companies engaged in enterprises wholly or partly within the Province. The appellants were authorized to collect from the members of this class moneys which, when in hand, were to constitute a fund out of which they might pay to a workman, in the employ of any member of the class, compensation for injuries suffered by him arising out of his employment, or to his dependants, as compensation, in case of his death. The Board has collected, pursuant to the Act, a fund out of which they will, if not enjoined therefrom, compensate the said dependants. The fund is obtained by assessments levied on the pay-rolls of the several members of the class. As, in my opinion, section 8, subsection (1)(*b*) of the Act, the section under which the Board asserts the right to pay the compensation in question, was *ultra vires,* it becomes unnecessary to consider other questions raised in argument. That section, so far as it is material to the case, reads as follows:

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"8. (1.) Where an accident happens while the workman is employed elsewhere than in the Province, which would entitle him or his dependants to compensation under this Part if it had happened in the Province, the workman or his dependants shall be entitled to compensation under this Part:—(*b*) If the accident happens on a steamboat, ship, or vessel, or on a railway, and the workman is a resident of the Province, and the nature of the employment is such that in the course of the work or service which the workman performs it is required to be performed both within and without the Province."

The validity of this legislation is maintained by counsel on behalf of the appellants as falling within Provincial legislative

powers under Classes 2, 13 and 16 of section 92 of the B.N.A. Act. Counsel advanced two propositions (1), that the legislation is in respect to civil rights in the Province or of matters of merely a local or private nature in the Province, and (2), that in any case the compensation provided is payable out of the proceeds of taxation for Provincial purposes authorized, under Class 2 of the said section 92. In short, said section 8 imposes on the employer, as an incident of the contract between himself and persons resident in the Province, an obligation to compensate his workmen hired in the Province, or his dependants, in respect of injury or loss of life suffered outside the Province. The fact that they are not to be entitled to compensation unless the workman is required by his contract to perform services within the Province as well as without the Province cannot, I think, affect the question. The right which the Legislature purports to confer on the workman, and his dependants, is unquestionably a civil right, but I cannot think that it is a civil right in the Province or a matter of merely a local or private nature in the Province. The accident out of which the rights of the said dependants spring, may give rise to civil rights in the foreign country in which it occurred. Whether, in this instance, it gave such, under the laws of Alaska or not, cannot, I think, matter, since the rights given by section 8 are given irrespective of country and hence irrespective of foreign laws, which may vary widely in different countries. The right is a substantive one, not merely a legal remedy for a right otherwise recognized. Even when it is a matter of the remedy merely, while suit may be brought in one jurisdiction in respect of a tort committed in another, the action will not be entertained in an English Court if the act complained of were justified under the laws of the foreign country in which it was committed. The Legislature has, by section 9 of the Workmen's Compensation Act, preserved the workman's right to treat the accident as one giving him a civil right in the foreign country. He may elect to take what the foreign law gives him or to take under the Act. Had that reservation not been made, leaving no option but to take under the Act, as is the case when the accident happens within

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the Province, could it be said that the Legislature had not legislated in respect to a civil right which the workman enjoyed or might enjoy under the laws of another country? Now, while the workman's extra-provincial rights are preserved, those of the employer are not. He is given no option to have his obligations measured by the foreign law. I, therefore, think that section 8 cannot be supported by reference to the powers conferred under Class 13 or 16.

This brings me to the second branch of the argument, which was directed to the submission of counsel for the appellant, that the fund in question was the proceeds of direct taxation imposed in order to the raising of a revenue for Provincial purposes pursuant to the powers conferred under Class 2 of section 92 of the B.N.A. Act. To decide this question, one must look at the substance of the legislation. It appears to me that the Workmen's Compensation Board is merely the intermediary between the employers and their workmen collectively. The Board is both judge and sheriff. It pronounces judgment and carries it into execution. It is a new Court in substitution, to the extent of its jurisdiction, of the ordinary Courts, with powers in part judicial and in part ministerial. The powers which it exercises to levy rates are powers relating to civil rights, and cannot, I think, in any true sense of the word, be called taxation "in order to the raising of a revenue for Provincial purposes."

This legislation was compared in argument to enactments of poor laws and also of state insurance. I do not think it is in the nature of either. No doubt the Legislature has power to provide for the support of the needy, whether they lost their means of support in the Province or in a foreign country. Being resident in the Province, the Legislature could make due provision for their wants. Such legislation would not involve interference with civil rights beyond the boundaries of the Province. It would not impose legal obligations of the nature imposed upon the respondent in this appeal, founded, as they are, not on residence or ownership of property in the Province, but on the relationship of master and servant without the Province.

I think the appeal must be dismissed.

[MARTIN, J.A.: In this matter I regret that I have been unable to write a decision, but in view of the request that has been made by both counsel that we should expedite the matter, I have asked my brothers not to delay their decision on that account; but I must say that, as this is a matter which concerns a large section of the community, I regret that I am unable to have the time during the sittings of this Court to devote to it that I should like to, particularly in view of the fact that there is a divergence of opinion. But we work, it may be explained, under very considerable disadvantages here, because the staff here is none too large, if not shorthanded, and in any event, when the five judges of appeal come over here to discharge our duties, as we have to, we find the stenographic and clerical assistance is not increased so as to afford us those additional facilities which would be necessary in order to keep up with our judgments. In order to expedite the matter, one of the members of the Court has retired from the bench to give it that consideration which is very necessary, and I have no doubt that the result of those labours will be as beneficial as they always are. But it is impossible, from a practical standpoint, for all of us to prepare our judgments under such circumstances. More than that, in any event, I do not think, even if the proper clerical assistance and stenographic assistance had been available, that it would have been possible for me to give that consideration to this matter which the subject would require. During the course of the argument, I might say, there were some points of view from which this matter might be considered which would bear, so to speak, a further, if not original investigation, and I regret that I am unable, under the circumstances, to add my own judgment to their Lordships'.

MARTIN, J.A.

We cannot help feeling that it is to be regretted, when it is desired on all hands to have an early determination of this matter, that it could not be taken to the Supreme Court of Canada on an appeal *per saltum*, as it is done when there is seen to be a desire on both sides that they wish to obtain the point of view of the final tribunal, that for that reason, when the appeal books were placed before us, we found they were printed in the manner required by the Privy Council. In

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addition to that, a telegram from the Minister of Justice stated that, whilst he did not wish to appear before this Court, yet he wanted to be informed with regard to the sittings of the Privy Council, I presume for the purpose of appearing before them. I have nothing to say, of course, with regard to that. It was a perfectly proper position for him to take, but we cannot help regretting that the final tribunal for these matters is not in our own country—in Canada—where they could be easily disposed of. I referred to that matter in a considered judgment I gave in *In re Assessment Act and Heinze* (1914), 20 B.C. 149; 7 W.W.R. 78; 29 W.L.R. 438, and it is for that reason that I feel (for the reasons there mentioned) that I feel that it is a matter of great regret that these questions, civil questions, arising here, cannot be finally disposed of by the Courts of Canada, just as well as those matters where the lives of our fellow-men are concerned. I cannot help but feel that surely Canada has arrived at the *status,* the national *status,* when we ought to be able to decide our own matters. There are not six countries in Europe now which cannot do that; and about 150 years ago, when the 13 colonies of America had a population which was less than half of what we have today, they had no doubt of their ability to dispose of the matters in their litigation finally, which was referred to when the opportunity afforded, by such a man as Chief Justice Marshall, only to mention one great conspicuous power of the law. We cannot help regretting that when our sons have shewn that Canada is fit to cope with any nation in the world on the field of war, that certainly the fathers of those sons who have been at the front ought at least to be able to cope with all competitors in the field of jurisprudence. Surely our intellectual development has not been arrested. We are a nation of eight and a half million people, according to the statistics laid before Parliament during the present session, and we ought to be able to dispose of these matters.]

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal for the reasons given by the Chief Justice.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal, it may be said, raises a

question of great public importance and involves the determination of whether the Workmen's Compensation Act (B.C. Stats. 1916, Cap. 77) is *intra vires* of the Legislature of British Columbia in so far as it purports to warrant the payment of compensation to seamen or dependants of seamen for accidents or death by accidents upon ships in foreign waters, and specifically to the dependants of members of the crew of the "Princess Sophia," which foundered in Alaskan waters (U.S.A.), all hands being lost. The Act, in terms, applies to employment outside as well as within the Province (sections 8 and 9), and the cause of the accident need not be one of negligence imputable to the employer (the accident may be occasioned wholly without the default of the employer), and compensation is payable save only that it is provided (subsection (3) to section 6) that

"Where the injury is attributable solely to the serious and wilful misconduct of the workman, no compensation shall be payable unless the injury results in death or serious and permanent disablement."

Nothing turns upon the above-quoted provision, as all suffered death in the accident that calls for consideration in the present case.

The ship went down in Alaskan waters, *i.e.*, waters of the United States of America, the ship there meeting with the mishap which engulfed it, leaving no survivors. Viscount Haldane, in *Canadian Pacific Railway* v. *Parent* (1917), 86 L.J., P.C. 123 at p. 129, said:

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"No doubt the Quebec Legislature could impose many obligations in respect of acts done outside the Province on persons domiciled within its jurisdiction, as the railway company may have been by reason of having its head office at Montreal. But in the case of article 1056 there does not appear to exist any sufficient reason for holding that it has intended to do so, and, by so doing, to place claims for torts committed outside Quebec on a footing different from that on which the general rule of private international law already referred to would place them."

Viscount Haldane in the *Parent* case referred to *Machado* v. *Fontes* (1897), 2 Q.B. 231; 66 L.J., Q.B. 542, but it cannot be said that their Lordships of the Privy Council adopted or approved *in toto* that decision. Rigby, L.J. in the *Machado* case, *supra,* said at p. 544 of the Law Journal report, and the language is applicable to the present case:

"We start, then, with this—that the act is one which is *prima facie*

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actionable here, and the only thing for us to see is whether there is any peremptory bar to our jurisdiction, in that we are dealing with an Act which is authorized or excused in the country where it was committed. We cannot see that, and the appeal must be allowed."

To entitle compensation being given under the Act, it is not essential that a tort should be committed—the accident alone, unaccompanied by any wrongful act is sufficient. Still, were that to be a determining factor, upon the evidence it cannot be said that the accident, the loss of the ship and the death of the workmen was without fault, *i.e.*, it is not common ground, or an assumed fact, for the purposes of this appeal. The head-note to the *Machado* case, as it appears in the Law Journal report, reads as follows:

"In order that an action may lie between parties in this country in respect of an act committed in a foreign country, the act must be one which if committed in this country would be actionable, and one which is not innocent according to the law of the country where it was committed; but it is not necessary that it should be the subject of civil proceedings in that country."

It is not an admitted fact that the happening, the loss of the ship under the circumstances, was an innocent happening according to the law of the United States. Therefore, our premise cannot be that, on that account, there is no liability or compensation payable. The inquiry must proceed, it seems to me, with the assumption that the happening was not an innocent happening abroad and without the Province of British Columbia, and not justifiable under the laws of the United States or the laws of the Territory of Alaska in the United States of America. Of course, the real question is whether the Act in question can be said to be *intra vires* in any respect where the accident has taken place without the Province of British Columbia.

MCPHILLIPS, J.A.

Now, as to this point, it cannot be said that the Legislature of British Columbia did not advisedly, and in apt words, intend to provide for compensation for acts without the Province, therefore the reasoned judgment of Viscount Haldane upon this point when dealing with the Quebec Code in the *Parent* case cannot be said to be in the way of arriving at a contrary conclusion in the present case, *i.e.*, that the British Columbia Legislature has imposed obligations in respect of accidents

occurring outside the Province or "acts done outside the Province on persons domiciled within its jurisdiction" (Viscount Haldane at p. 129 in the *Parent* case, 86 L.J., P.C.). Upon the pleadings, no point is made that the respondent is not domiciled within the jurisdiction of the British Columbia Legislature and the dependants of the crew of the "Princess Sophia" are domiciled in British Columbia. Further as to the respondent, the Canadian Pacific Railway Company, we find that the Company is specifically mentioned in section 25, class 10, of the Act, under the heading of "Accident Fund and Assessments." Therefore, in my opinion, it cannot be said that the *Parent* case is an authority which, with great respect to their Lordships of the Privy Council, should I be in error, precludes it being held that the Act in question in the present case is *ultra vires* of the British Columbia Legislature.

Arriving at that conclusion, I am of the same opinion as Mr. Justice Anglin, as expressed in the *Parent* case, as reported in (1915), 51 S.C.R. 234 at pp. 279 to 282, which reads as follows: [The learned judge, after quoting from the beginning of the last paragraph on p. 279, continued].

(Also see the view of Wightman, J. in *Scott* v. *Seymour* (1862), 1 H. & C. 219 at pp. 234-5 (130 R.R. 470 at pp. 480-1); *Hart* v. *Gumpach* (1873), 42 L.J., P.C. 25 at p. 36; *British South Africa Co.* v. *Companhia de Mocambique* (1893), 63 L.J., Q.B. 90; *Rayment* v. *Rayment and Stuart* (1910), 79 L.J., P. 115 at p. 121; *Phillips* v. *Batho* (1913), 82 L.J., K.B. 882; *Buenos Ayres and Ensenada Port Railway Co.* v. *Northern Railway Co. of Buenos Ayres* (1877), 2 Q.B.D. 210; the dissenting judgment of the Chief Justice of the Court of Appeal for Manitoba in *Couture* v. *Dominion Fish Co.* (1909), 19 Man. L.R. 65 at pp. 70-3; also the dissenting judgment of same learned judge in *Simonson* v. *Canadian Northern Ry. Co.* (1914), 24 Man. L.R. 267 at pp. 276-9. Here we have the intent absent in the Manitoba Act: see judgment of Richards, J.A. in the *Simonson* case at p. 282, and Perdue, J.A. at p. 285, and Cameron, J.A. at pp. 286-9, and Howell, C.J.M. in *Lewis* v. *Grand Trunk Pacific Railway Co.* (1914), 24 Man. L.R. 807 at p. 812, and Cameron, J.A. at pp. 822-3.

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and in the Supreme Court of Canada, see Duff, J. (1915), 52 S.C.R. 227 at pp. 239-40.)

In *Tomalin* v. *S. Pearson & Sons, Limited* (1909), 2 K.B. 61, a case referred to by Lord Atkinson in *Krzus* v. *Crow's Nest Pass Coal Company, Limited* (1912), A.C. 590 at p. 596, it was held that "the Workmen's Compensation Act, 1906, has no application outside the territorial limits of the United Kingdom, except in the case of seamen and apprentices as provided by s. 7." In the present case, the assessments made by the Workmen's Compensation Board are in respect of the claim of the dependants of seamen, and there can be no question that under the British Columbia statute seamen come within the purview of the Act. Further, the express words of the words of the statute cover an accident elsewhere than in the Province (see section 8, subsection (3), Cap. 77, 1916). It will be observed that in the *Tomalin* case, Cozens-Hardy, M.R., at p. 64, puts the question: "What is the ambit of the statute and what is the scope of its operation?" and the decision is upon the rule which the learned Master of the Rolls quoted, namely:

> "In the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom."

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Here, of course, we have the intention clearly expressed. It is to be noted, though, that when reference is made to the claims of seamen covered by the enactment, no suggestion is made of any conflict with the Merchant Shipping Act, 1894. It might well be said that there is given by the Workmen's Compensation Act a civil right (subsection (13) of section 92 of the British North America Act) to workmen against their employers, to be enforced by the Workmen's Compensation Board in respect to employment entered upon in the Province where all parties are domiciled in the Province independent of where the accident occurs, that is, within or without the Province, as the case may be, whether it be upon a ship or railway or otherwise within the provisions of the Act. In this connection it is worthy of consideration to note what Cozens-Hardy, M.R. said in *Schwartz* v. *India Rubber, Gutta Percha and Telegraph Works Company, Limited* (1912), 2 K.B. 299 at p. 302:

". . . . . A British ship may for many purposes be British territory, and for many purposes British legislation would apply to what is done on a British ship. . . . . ."

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In my opinion, the whole matter resolves itself into a determination as to whether we have here that which was absent in the *Parent* case, that is to say, legislation in apt words imposing "obligations in respect of acts done outside the Province on persons domiciled within its jurisdiction" (Viscount Haldane in the *Parent* case (1917), 86 L.J., P.C. 123 at p. 129). That there can be any question of this, it seems to me admits of no doubt; the obligation imposed in the Workmen's Compensation Act is clear and unmistakable in its terms.

Then, of course, there remains the further consideration that the Workmen's Compensation Act is in its nature a scheme of insurance or pension scheme providing compensation to workmen in case of injury and to their dependants in case of death caused by accident quite independent of negligence, and the obligation is imposed at large upon the employers covered by the Act in favour of the workmen and dependants of the workmen defined in the Act. Upon this view, can it be said to be *ultra vires* legislation, the employers and workmen being domiciled in the Province? I canot see upon what principle that it can be said to be *ultra vires* legislation. It amounts to statutory insurance or pension, and is payable to workmen or their dependants by statute, quite independent, so far as they are concerned, of whether the employers pay the assessments into the accident fund or not, and the employers who are called upon to pay the assessments are employers generally, not alone those who are concerned with the accident that gives rise to the compensation payable, and the assessments made as against the employers are not referable to any particular accident. If it be admitted that the subject might enter into such a contract of insurance (and this must be admitted), wherein is there disability upon the Legislature to legislate for the class to be benefited, or any constitutional inhibition to impose the obligation upon any other class? I cannot answer this in any other way than to say that the Legislature is sovereign in the matter. It must be admitted that the Legislature has complete power over property within the Province (*McGregor* v. *Esquimalt and*

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Nanaimo Railway (1907), 76 L.J., P.C. 85 at p. 86), and here we have legislation conferring certain civil rights upon a class coming within the definition of workmen and dependants in the Act, with an obligation upon a certain other class, termed employers, all domiciled within the Province. I cannot persuade myself that the legislation is in any way *ultra vires*. Further, wherein is there the right to inhibit the paying of compensation to the dependants of the crew of the "Princess Sophia" at the suit of the respondent, as quite independent of any payment of any assessment under the Act by the respondent, or for that matter, by any of the employers, under the provisions of the Act the dependants are entitled to be paid compensation? With deference to the learned trial judge, I cannot agree that *Royal Bank of Canada* v. *Regem* (1913), 29 T.L.R. 239 is decisive of the present case. Here it is not the case of a civil right of the respondent outside the Province. The compensation is statutorily provided; no privity nor relationship of any character exists as between the employers and workmen under the Act in consequence of the accident; the compensation is payable by statute, not at the suit of the workmen or the dependants, but by and through the Workmen's Compensation Board. If it is necessary, in view of the opinion at which I have arrived, to pass upon the contention pressed that because of the Merchant Shipping Act, 1894, and the Canada Shipping Act, the legislation is beyond the power of the Legislature, I can only repeat that the existence of these Acts cannot affect the legislative power existent in the Legislature. Further, at most they might have application in the way of limitation of liability, but I express no considered opinion upon that point. As at present advised, I would say that any sums payable by way of compensation under the Workmen's Compensation Act are payable in full.

MCPHILLIPS, J.A.

It follows that, in my opinion, the learned judge erred in declaring that the Workmen's Compensation Act, in so far as it is claimed to warrant the payment of compensation to dependants of the crew of the "Princess Sophia" is beyond the power of the Legislature of the Province to enact, and further erred in enjoining the Workmen's Compensation Board from paying compensation to any of the dependants.

I would allow the appeal, being of the opinion that the legislation is legislation *intra vires* of the Legislature of the Province, and the judgment under appeal should be set aside and the action dismissed.

EBERTS, J.A. agreed with the Chief Justice.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Taylor, Mayers, Stockton & Smith.*
Solicitor for respondent: *J. E. McMullen.*

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SUN LIFE ASSURANCE CO. v. TARDIFF.

MURPHY, J. (At Chambers)
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June 11.
SUN LIFE ASSURANCE CO. *v.* TARDIFF

Practice—Substitutional service—Affidavit in support—Must include clause that it will come to defendant's notice—Marginal rule 49.

The material in support of an application for substitutional service must shew that notice of the writ will probably come to the notice of the defendant.

APPLICATION by plaintiff for substitutional service. The affidavits in support stated that he was unable to obtain any information as to the defendant's whereabouts, but did not include a statement that the form of service applied for would probably come to the defendant's notice. Heard by MURPHY, J. at Chambers in Vancouver on the 11th of June, 1919.

Statement

DesBrisay, for the application: Under the 1919 amendment to Order IX., r. 2, Supreme Court Rules, the order asked for can be made.

Argument

MURPHY, J.: Under the decisions, the material must shew that notice of the writ will probably come to the notice of the defendant: see *Griffin* v. *Blake* (1911), 19 W.L.R. 208; 21 Man. L.R. 547. The language of the amendment does not go far enough to alter the principle of these decisions, if it were intended to do so.

Judgment

Application refused.

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May 14.

BRYDGES v. DOMINION TRUST CO.

BRYDGES v. DOMINION TRUST COMPANY.

Company law—Application for shares—Contract—Transfer of shares held by third person—Rescission—Return of payments—Removal from list of contributories.

The plaintiff applied for shares in the Dominion Trust Company. It appeared from the wording of the application and other documents submitted in evidence that he bargained for original shares in the company, but he was given shares that had previously been issued and held by a third party. In an action to recover the moneys paid and securities given for the shares and for removal from the list of contributories:—

Held, that the contractual relation contemplated was never established and the plaintiff was entitled to the return of the moneys and securities given the company as a result of his application notwithstanding the liquidation of the company, and was entitled to be removed from the list of contributories.

ACTION to recover moneys paid and securities given for shares in the defendant Company and for removal from the list of contributories. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 27th of March, 1919.

Statement

Bucke, for plaintiff.
Gurd, for defendant.

14th May, 1919.

MURPHY, J.: In my opinion, what Brydges bargained for was original shares of the Dominion Trust Company, Limited, and not shares already issued to some one else. In other words, exhibit 3 is an application for shares to be issued direct by the Dominion Trust Company, Limited, and is not an offer to purchase shares already issued and held by someone. I agree that I must exclude any evidence of what was said to him by the agent who solicited him, and I reach my conclusion from an examination of exhibit 3 itself and the subsequent correspondence between plaintiff and the B.C. Securties, Limited, and the Dominion Trust, Limited, and documents executed in consequence thereof. Exhibit 3 is headed "Application for Capital Stock of Dominion Trust Co., Ltd." On the margin

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is Book No. 30—subscription No. 361. Brydges applies for 100 shares of capital stock of the Dominion Trust Company, Limited, the par value of which is stated to be $100 per share, and agrees to pay a premium of $25 per share, the stock to be paid up to $65 per share, making in all $90 per share to be now paid. Certificates are not to be issued or delivered until full payment of said $90 per share. This language is wholly inapplicable, in my opinion, to the transaction of purchasing shares already issued and held by a third party. How, for instance, could anyone but the Company make stipulations as to terms on which shares are to be issued?

A direct request is made to the Dominion Trust Company, Limited, to register Brydges in the books of the Company. Arnold, managing director of the Dominion Trust Company, Limited, is appointed Brydges' attorney-in-fact in reference to all shares that may be allotted or hereafter stand in his name. All cheques are to be made payable to the Dominion Trust Company, Limited. Exhibit 5 bears out this view. It speaks of exhibit 3 as an application for 100 shares of the capital stock of the Dominion Trust, Limited, and expressly states that the B.C. Securties, Limited, are selling agents for Dominion Trust, Limited, stock. Exhibit 14, written by plaintiff, in reference to this purchase, to the B.C. Securities, Ltd., headed "Re my Stock Subscription Dominion Trust Co., Ltd.," is answered by The Dominion Trust Co., Ltd., itself. This, I think, shews that the Dominion Trust Co., Ltd., recognized the B.C. Securities, Ltd., as its selling agents and ratified that Company's statement to that effect contained in exhibit 5. The subsequent documents executed in pursuance of the arrangement, and the account—exhibit 12—all shew, I think, that plaintiff's contention is corerct.

Judgment

I, therefore, think, to adopt, if I may, the language of Duff, J. in *International Casualty Co.* v. *Thomson* (1913), 48 S.C.R. 167 at p. 195, the plaintiff's offer to purchase shares (which was an offer to the Company and was intended by the plaintiff to form the basis of a contract between him and the Company) was never accepted, and no such contractual relation as that contemplated was ever established. It follows, unless plaintiff

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is estopped from setting up this contention, or unless the fact that liquidation has now occurred alters the situation, that the money and securities received as a result of this application were received for a purpose which has entirely failed, and plaintiff is entitled to recover them back, as laid down in the case cited. It likewise follows, plaintiff is entitled to have his name removed from the list of contributories. There is no estoppel, for plaintiff, as soon as he became aware of the facts, took prompt steps. Likewise, since, on the facts, I hold there was no acceptance of his application, and consequently no contract, liquidation does not deprive plaintiff of his remedy: *Western Union Fire Insurance Co.* v. *Alexander* (1918), 2 W.W.R. 546; *Re Pakenham Pork Packing Co* (1906), 12 O.L.R. 112; *Beck's Case* (1874), 9 Chy. App. 392. The plaintiff is entitled to have his name removed from the list of contributories and to have his securities and any money collected returned to him.

I wish to hear further argument on the question of whether the dividends paid to Brydges should be set off, and also on the claim for damages by way of interest.

Judgment for plaintiff.

GREGORY, J. (At Chambers)

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July 5.

LEE v. MANNING.

Practice—Money in Court—Application for payment out to solicitors—Client's consent when over $50.

An application for payment out of Court to solicitors of a sum exceeding $50 must be supported by the client's assent verified by affidavit.

LEE v. MANNING

Statement

APPLICATION by the defendant *ex parte* for payment out of moneys in Court, the plaintiff's solicitors consenting. Heard by GREGORY, J. at Chambers in Vancouver on the 5th of July, 1919.

D. Donaghy, for the application.

Judgment

GREGORY, J.: In all cases for payment out of moneys in Court over $50, if counsel ask that money be payable to the solicitors, they must first obtain the consent of the client, verified by affidavit.

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Interpleader—Bills of Sale Act—Sale of automobile—Receipt—Registration—Automobile remains in possession of vendor—Execution—Seizure—R.S.B.C. 1911, Cap. 20.

H. placed $700 on deposit with T. M. and subsequently gave him a power of attorney, with authority to purchase an automobile from T. M.'s brother, G. M. T. M. purchased the automobile for H. paying $600 therefor, and received a receipt, and a notice of transfer acknowledged before a notary, but the automobile remained in the possession of G. M., who subsequently exercised rights of ownership. The automobile having subsequently been seized by the sheriff under a writ of *fi. fa.* upon a judgment obtained by the defendant against G. M., H. claimed the automobile, and upon the trial of an interpleader issue:—

Held, that the receipt in question was not intended simply as a receipt for payment of the purchase price, but was expected to operate as proof of change of ownership and an "assurance" within the meaning of the Bills of Sale Act, and as the receipt was not registered in compliance with the Act, it fails to protect the automobile from seizure under execution against G. M.

There is nothing in the Bills of Sale Act which requires that verbal sales be evidenced by a written document. A debtor can therefore make a secret verbal sale of his personal property and not be affected by the Act, while, if a sale is made in writing it comes within its purview.

INTERPLEADER ISSUE as to the right of the defendant to seize, under execution, an automobile, as against the plaintiff, who claimed ownership. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 8th of April, 1919. Statement

Rubinowitz, for the petitioner.
J. A. Russell, for the claimant.
Long, for the sheriff.

6th May, 1919.

MACDONALD, J.: In this interpleader issue, plaintiff claims that at the time of the seizure by the sheriff, under a writ of *fieri facias* for costs, in the action of David Laird, defendant herein, against George Maltby, a certain automobile was his property, as against said Laird. There is no doubt that the automobile Judgment

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was, at one time, the property of the said George Maltby, but the plaintiff alleges, that it was purchased for him by Thomas Maltby on the 13th of January, 1919. This was prior to the issuance of the execution under which the sheriff seized, but it was at a time when divorce proceedings were pending, in which the defendant herein was petitioner, and the said George Maltby was co-respondent. In the result of such proceedings, the co-respondent was ordered to pay costs, which were sought to be recovered under such execution.

I had, at the trial, first to determine whether the purchase was, under the circumstances, in good faith. I was satisfied, that the plaintiff placed $700, on or about the 13th of December, 1918, on deposit with said Thomas Maltby and subsequently gave him a general power of attorney, which was sufficient authority for him to have made the purchase in question. Thomas Maltby gave evidence in support of the sale, and it was apparently not intended to call the plaintiff as a witness on his own behalf. When I learned that he was available, I intimated that his absence might have a prejudicial effect, especially in view of the strangeness of the transaction. It appeared peculiar that a party, while still remaining in the city, except for a temporary absence, would thus hand over his money for investment, to another person, who did not even keep a bank account. Plaintiff, on giving evidence, however, removed any doubt as to the transaction, in so far as the deposit of the money is concerned, having taken place. The question, then, remaining to decide was, whether there was a real sale between the two brothers. George Maltby did not give evidence in support of the sale, but Thos. Maltby was supported in his statements, in that connection, by the production not only of a receipt, but also a notice of transfer of the automobile, which Mr. Cowherd, notary public, stated had been acknowledged in his office on the 14th of January, 1919. This purported to be signed by both George Maltby and Alexander Hendry, but the latter signature, it was admitted, was in the handwriting of Thomas Maltby, acting as attorney for Hendry. This notice of transfer, while dated in January, did not come to the knowledge of the proper official in the Provincial police office in

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Vancouver until some time in March. If filed in January, it had apparently been mislaid in the meantime. The fact, that it was not available for the information of the public, up to a date subsequent to the seizure, minimized its effect by way of corroboration. There was, however, a Provincial motor-car revenue receipt produced, which stated that A. Hendry, plaintiff herein, paid the necessary licence fee for the car on the 3rd of February, 1919. It was suggested, that the whole transaction was not genuine, and that Hendry was simply being used as a cloak to protect the property against the creditors of George Maltby, as the real owner. While the absence of George Maltby, as a witness, even after he had come to the Court House, presumably for some such purpose, was not accounted for and gave me consideration, still, I did not feel disposed to find that that transaction was merely a sham, and I so expressed myself at the trial. I left, for further argument, the question as to whether the Bills of Sale Act applied, so as to enable the execution creditor to realize upon the property, otherwise the goods of Hendry should not be applied in liquidation of the debt of George Maltby. Even if the transaction were hit by the Act, it would only operate, to benefit the execution creditor, if the chattels "comprised in such bill of sale . . . . shall be in the possession, or apparent possession, of the person making and giving such bill of sale." The evidence, as to a change of possession, was very meagre. It is clear, however, that, at the time when the sheriff made the seizure, George Maltby, the judgment debtor, was in possession of, and asserted ownership of the automobile. He also made threats to the deputy-sheriff in connection with the matter. After his sale of the property, he seems to have "used and enjoyed" it. There does not appear to have been any formal or visible change of possession, so, if the sale comes within the Act, I think that the motor-car was properly seized under the execution.

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There is an anomalous position with respect to sales of personal chattels. The statute was originally directed against covinous or fraudulent sales or transfers; but there is nothing in the Bills of Sale Act which requires that verbal sales

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should be evidenced by any written document. So a debtor can make a secret verbal sale of his personal property and not be affected by the Act, while, if the sale is made in writing, it comes within its purview. A verbal sale was, on this ground, upheld in *Esnouf* v. *Gurney* (1895), 4 B.C. 144. In that case, there was a receipt given, for a portion of the purchase price, but the decision does not now prove of much assistance, as the Act has since been amended, so as to give a broader definition to a bill of sale. It now includes, *inter alia*, "receipts for purchase-moneys of goods," and then follows the further definition, "and other assurances of personal chattels." The effect of these latter words is referred to in Halsbury's Laws of England, Vol. 3, p. 10, as follows:

"The words 'other assurances of personal chattels,' which control the preceding words of the section, also extend them to documents of the same kind, but not precisely within the earlier expressions."

Then again, Lord Macnaghten, in *Manchester, Sheffield and Lincolnshire Railway Co.* v. *North Central Wagon Company* (1888), 13 App. Cas. 544 at p. 569, refers to the necessity for such receipts being "assurances" as follows:

"And I may add that I see no reason to doubt that 'receipts for the purchase-money of goods' and 'inventories of goods with receipt thereto attached' must be assurances of personal chattels to fall within the category of bills of sale, to which the Act of 1878 applies."

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Here the plaintiff was not even aware, at the time when the property was seized, that Thomas Maltby, as his agent, had purchased the automobile. The solicitor acting for the agent, and without any instructions at the time directly from the plaintiff, in making his affidavit in support of the claim, attached, as proof of the sale, a receipt for the purchase price of the car, which reads as follows:

"Received of Alexander Hendrie the sum of Six Hundred Dollars ($600) being payment in full for Five-passenger Ford Touring Car.

"B.C. Licence No. 15728.

"January 13, 1919.

"George Maltby.

"1022 Kingsway, Vancouver, B.C."

I have to consider, then, the same question, which was discussed by Thesiger, L.J., in *Ex parte Odell; In re Walden* (1878), 10 Ch. D. 76; 39 L.T. 333, as to whether a document, which evidenced the transaction, required registration under the

Act. There was very little evidence given, as to what took place, between George Maltby and Thomas Maltby at the time of the sale. It was not, however, shewn that there was any withholding of the money, until a receipt had been given. The sale, and the payment of the money were apparently simultaneous, and the receipt followed in due course. It is somewhat formal in its nature, when one considers that two brothers were negotiating and dealing with property.

I am referred to *Ramsay* v. *Margrett* (1894), 2 Q.B. 18, as a conclusive authority, in support of the plaintiff's position, once I have found that a real sale took place. Lord Esher, M.R., in that case, at p. 23, after stating that the receipt was not, in fact, "a bill of sale, that is, a document by virtue of which alone the property in goods passes from one person to another" then adds:

"But under certain circumstances such a document is, by s. 4, to be deemed a bill of sale. Under what circumstances? The last authority on the point is the decision of the House of Lords in *Charlesworth* v. *Mills* (1892), A.C. 231. It seems to me that the rule as there laid down by Lord Herschell is this: if a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, whatever the form of the document may be, even if it be only a simple receipt for the purchase-money, it is, by s. 4, to be deemed to be a bill of sale, though it is not so in fact. But, if the document is not intended to be part of the bargain to pass the property in the goods—if the bargain is complete without it, so that the property passes independently of it—then it is not to be deemed to be that which it is not in fact—a bill of sale. That is the test to be applied."

Judgment

The circumstances surrounding the sale were not fully explained, nor the necessity for George Maltby selling to his brother disclosed. According to the statement of Thomas Maltby, he was not aware that there was any probability of an execution being issued against his brother, under which the automobile might be seized. There was no apparent change in the way in which the business was carried on, nor the automobile utilized, so, applying the test referred to, was the document a "simple receipt," or was it intended to pass the property in the goods to the plaintiff? Even if the statement of Thos. Maltby, as to lack of knowledge of the divorce proceedings, and attendant responsibility of his brother, be fully accepted, he might be anxious, as an agent, to secure for his principal a

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document that would not merely be a receipt for the money, but would shew that the ownership had passed to the plaintiff. This aspect of the case was not developed to any extent during the trial, and I think its importance only became apparent to counsel during the argument. The two matters which were more prominently featured were, the *bona fides* of the transaction, and the change of possession. I then turn to an earlier case, in which this difficult situation was discussed by Wills, J. in *French* v. *Bombernard; Tower Furnishing & Finance Co., Claimants* (1888), 60 L.T. 48 at p. 53, as follows:

"The question is, therefore, whether they [receipt with inventory attached] constitute an assurance within sect. 4 of the Bills of Sale Act 1878. The decisions upon this point are difficult to understand, and no wonder, since they all proceed upon the hypothesis rendered necessary by the language of the Act that a receipt, which by no stretch of language can be called an assurance, is under some circumstances to be considered as one. I dare not attempt an exhaustive statement of the tests proposed to decide the question whether a receipt is an 'assurance'; but one thing is abundantly clear, that great stress has been laid upon the fact, wherever it has existed, of whether the receipt has been contemporaneous with the other elements of the transaction—whether there has ever been a period of time when the transaction was complete without it, and was intended to be complete without it. This is, I think, what has been really meant when it has been said that it must have been intended as a 'record of the transaction'—a phrase which is clearly too comprehensive if taken literally. The very object of most receipts is, in one sense, to be a record of the transaction. But I think it is intelligible enough that, if the money never would have been paid down, unless the rest of the connected transactions had been carried through simultaneously, and if the person paying the money would not have trusted the other for an appreciable time without a writing to indicate the fact of payment, and perhaps also the reason why it was paid, or if to the person paying and receiving the money it seemed that that part of their arrangements ought then and there to be recorded in writing, and that they did not care to leave the transaction to take care of itself, and accept the risk of the receipt possibly not being given at all, it is, for their purposes, something more than a simple acknowledgment of money paid, and becomes an assurance. I think that in the present case there is abundant reason for saying that the receipt and inventory fall within the category of an assurance, and that no other decision would be in conformity with the recent cases in the Court of Appeal."

Judgment

Upon considering all the circumstances surrounding the transaction, I have come to the conclusion, that the document, signed by George Maltby, was not an ordinary receipt for money, but was intended as a record, in writing, of the sale. I

think the parties did not care "to leave the transaction to take care of itself," nor accept any risk in the matter. When the seizure took place Thomas Maltby was ready with the document of title, to meet the situation, caused by a lack of change of possession. It was not intended simply as a receipt for payment of the money. It was expected to operate, as proof of the change of ownership: see *Ex parte Odell, supra,* at p. 856:

"It may have been sufficient to shew that one party was transferring, and the other receiving the goods. But, if it did not pass the property at law, beyond all question, in my view, it was sufficient to confer on the person to whom it was given, *i.e.*, Mr. Cochrane, a perfectly good equitable title to the goods, which title he could have enforced in equity if necessary, independently of the statute."

It was, in other words, an "assurance" of a personal chattel. The document thus comes within the Bills of Sale Act. It does not comply with the statute through want of registration and in other respects. It thus fails to protect the property from seizure under execution against George Maltby, and the defendant is entitled to judgment in the issue. I should add that, I have come to this conclusion with some hesitation. It is not based upon the demeanour of witnesses, but on conclusions or inferences drawn from proven facts. Another Court might take a different view of the matter. Bearing this in mind, I think it well, to make it a term of my judgment that, while the order for judgment may be signed and entered, still that there should be a stay of proceedings thereunder for 20 days. In the meantime the plaintiff may, if so advised, launch an appeal and apply for further stay upon such terms as may be imposed.

Judgment

Judgment for defendant.

HOWAY, CO. J. (At Chambers)

1919

June 9.

JOE v. MADDOX & OULETTE.

County Court — Attachment of debt — Debt in partnership name — Not attachable by registrar's order—R.S.B.C. 1911, Cap. 14, Sec. 3—County Court Order XI., r. 1.

JOE v. MADDOX

The word "person" in section 3 of the Attachment of Debts Act and in Order XI., r. 1, of the County Court Rules does not include a partnership and a partnership debt is not attachable by order of the registrar.

Statement

APPLICATION to set aside a garnishee summons issued by the deputy registrar at New Westminster against a partnership. Heard by HOWAY, Co. J. at Chambers in New Westminster on the 13th of May, 1919.

A. M. Whiteside, for plaintiff.
W. H. Johnson, for defendant.

9th June, 1919.

Judgment

HOWAY, Co. J.: After much consideration I have reached the conclusion that neither the Attachment of Debts Act nor Order XI. of the County Court Rules authorizes the registrar to issue an order attaching in the partnership name a debt due by a firm. "Person" mentioned therein does not include a partnership either in its natural meaning or in that given by the Interpretation Act. It is only debts due by a "person" that can be attached by the registrar's order. The application is, therefore, granted, and the attaching order dismissed out of this Court as having been issued without authority.

The applicant will have the costs.

Application granted.

REX v. CARMITO.

MURPHY, J. (At Chambers)

1919

May 13.

REX v. CARMITO

Criminal law—Inland Revenue Act—Still for manufacture of spirits—In possession of accused—Trial by magistrate summarily—R.S.C. 1906, Cap. 51, Sec. 2, Subsec. (h), Sec. 132, Subsec. (b), and Sec. 180—Criminal Code, Sec. 778.

A person accused of unlawfully having in his possession a still and mash suitable for the manufacture of spirits without having first given notice thereof under the Inland Revenue Act may be tried by a magistrate in a summary manner.

APPLICATION by the accused for a writ of *certiorari*, heard by MURPHY, J. at Chambers in Vancouver on the 13th of May, 1919. The information laid was as follows:

"On the 27th day of March, 1919, at the City of Vancouver, not being licensed by the minister of inland revenue, did unlawfully have in his possession a still and mash suitable for the manufacture of spirits, without first having given notice thereof as required by the Inland Revenue Act." Statement

The accused was tried by the magistrate in a summary manner and fined $500, or in default six months' imprisonment with hard labour.

Fleishman, for the accused: The charge is erroneously laid under the Summary Convictions Act. It is provided by section 180 of the Inland Revenue Act, R.S.C. 1906, Cap 51, that any offence committed under the said section shall be deemed an indictable offence, and anyone violating the same is guilty of an indictable offence. Accused, being charged of an indictable offence, could only be tried in a summary manner if he consented to the jurisdiction of the magistrate pursuant to section 778 of the Criminal Code. Argument

Baird, for the magistrate: Under section 132, subsection (*b*), of the Inland Revenue Act, every penalty or forfeiture for any offence against the provisions of this statute may be enforced by summary conviction under Part XV. of the Criminal Code, whether the offence has been declared by this Act to be an indictable offence or not. The magistrate has complete jurisdiction to try the accused in a summary manner.

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Fleishman, in reply: Section 132 applies to cases of excise solely.

MURPHY, J.: Under the combined sections 2, subsection (*h*), and 132, subsection (*b*), of the Inland Revenue Act, the magistrate has jurisdiction to try the accused in a summary manner. The conviction is sustained.

Conviction sustained.

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REX v. IRWIN.

Criminal law—Perjury—"Judicial proceeding"—Evidence of—Jurisdiction —Criminal Code, Secs. 170 and 171.

Upon a trial before the County Court Judge of Yale exercising criminal jurisdiction for perjury alleged to have been committed at a previous trial of the accused before a Court of summary jurisdiction at Princeton of keeping a common gaming-house, there was no evidence shewing that the alleged crime for which he was first tried took place in the County of Yale, there was evidence that it took place in Princeton but none that Princeton was in the County of Yale. On a stated case a question reserved for the opinion of the Court was whether the alleged offence of perjury was committed in a judicial proceeding within the meaning of the Criminal Code,

Held, per MACDONALD, C.J.A. and MARTIN, J.A., that it was open to the magistrate to take judicial notice of the fact that Princeton was in the County of Yale, that it depends on notoriety and if the fact is sufficiently notorious the judge may take judicial notice of it. The question should be answered in the affirmative.

Per MCPHILLIPS and EBERTS, JJ.A.: That on the evidence there was a *coram non judice* and the question should be answered in the negative.

The Court being equally divided the conviction was sustained.

Statement

APPEAL by way of case stated from the decision of BROWN, Co. J., convicting the accused and sentencing him to two years and one month in the penitentiary on a charge of perjury. Accused was charged with committing perjury when on trial at the Court of summary jurisdiction at Princeton on a charge of keeping a common gaming-house, when he swore as follows:

"I have never been in my place when they have been playing for money. I was not playing for money when the police came on the 2nd, and the chips had no value." He was tried by the County judge of the County of Yale, exercising criminal jurisdiction under Part XVIII. of the Criminal Code.

Relating to the speedy trial it was proven by three witnesses for the prosecution that they had played poker with the accused for chips representing money at one of his places of business in the Town of Princeton on the 2nd of February, 1919, the night in question, in a room in the rear of a 15-cent soft drinks store, premises rented by the defendant, but which was managed and run for him by his wife, and one Tom Wilson, the latter living on the premises. The game stopped when the police came in and before the police arrived at the table where accused and others were. The defendant, who is a barber, lives and carries on his trade as a barber on other premises owned by him in Princeton. The charge against the defendant of keeping a common gaming-house was dismissed on the ground that there was no evidence of a rake-off or gain to the accused or that the games played were unlawful. Ernest Waterman, one of the justices of the peace who tried the defendant, testified that there is nothing in the record of such trial shewing the alleged crime took place in the County of Yale. There was evidence to shew that it took place in Princeton, but none that Princeton is in the County of Yale. The evidence of the defendant complained of was given in answer to a question in cross-examination by constable Pritchard, when he said, "I have never been in the place when they were playing for money." The defendant also stated in his direct evidence that freeze-out and other games were played in his presence in the room in question, and that the chips had a monetary value. The evidence was taken down in longhand and signed by the witnesses. The defendant stated in his evidence on this trial that he had not made the statements set out in the indictment, that there had been a discussion between constable Pritchard and justices of the peace Waterman and Thomas, as to what were lawful and unlawful games, and reference was had to a law book on the subject, and when questions were put to him

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in cross-examination he had it in his mind that poker was a lawful game and that he was answering questions about unlawful games, and he wanted it understood that he was not running a common gaming-house, and that the poker game having stopped before the police entered the room, that chips found there had no value.

The questions reserved for the opinion of the Court of Appeal were:

Statement

"1. Was the alleged offence of perjury committed in a judicial proceeding within the meaning of the Criminal Code?

"2. Was the averment in the indictment proved in law?

"3. Was there the necessary corroboration required by section 1002 of the Criminal Code to justify my finding?"

The appeal was argued at Victoria on the 10th and 11th of June, 1919, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

J. A. Russell, for the accused: The gaming-house charge was heard by two justices. I say, first, there was no evidence of jurisdiction; and secondly, no evidence that Princeton was in the County of Yale. The charge is under sections 170 and 171 of the Code. A judicial proceeding is defined and jurisdiction must be proved in order to bring it within the definition. The location of the place where the offence was committed is a material one, and there is no evidence to shew that Princeton is within Yale County: see *Rex* v. *O'Gorman* (1909), 15 Can. Cr. Cas. 173 at p. 180; *Fournier* v. *Attorney-General* (1910), 17 Can. Cr. Cas. 108. If this fact is effective the fact that proceedings were commenced is not sufficient: see *Rex* v. *Rulofson* (1908), 14 Can. Cr. Cas. 253. The two justices, after the evidence was proceeded with, having no jurisdiction, it is not a "judicial proceeding": see *Reg.* v. *Lloyd* (1887), 19 Q.B.D. 213. As to whether the averment was proved in law, there is a discrepancy between the averment and the evidence supporting: see Crankshaw's Criminal Code, 4th Ed., 164; *Reg.* v. *Bird* (1891), 17 Cox, C.C. 387. The discrepancy is between the terms "my place" and "the place." The respondent will rely on *Rex* v. *Legros* (1908), 14 Can. Cr. Cas. 161, but it does not apply, as here there were two places owned by the accused and the difference is material. The only

evidence that Irwin committed perjury was given by Waterman, one of the justices. This evidence is not sufficient: see *Rex* v. *Drummond* (1905), 10 O.L.R. 546; 10 Can. Cr. Cas. 340. The evidence being taken down and signed, it ought to be here: see *Rex* v. *Coote* (1903), 8 Can. Cr. Cas. 199 at p. 203. It must be shewn he knew what he said was false and that it was intended by him to mislead the Court.

Wood, for the Crown: As to whether it was a "judicial proceeding" within the section, it was not necessary to prove that Princeton was within the County of Yale: see *Drew* v. *Regina* (1903), 33 S.C.R. 228; 6 Can. Cr. Cas. 424. This Court may discharge the prisoner or grant a new trial: see section 1018(*d*) of the Criminal Code. The burden is on the appellant to shew the averment was not proved in law, and he has not done so. On the question of the evidence of the proceeding in the first trial see *Rex* v. *Prasiloski* (1910), 15 B.C. 29.

Argument

MACDONALD, C.J.A.: I would not accede to the motion made by counsel for the accused that the case should be sent back to the County Court judge for re-statement. I think to do that would be initiating a bad practice. It is done sometimes where a case is not clearly stated, where the intention is clear enough, but where the question is not properly framed. But here there is no question of that kind arising. To my mind it is perfectly clear that the learned trial judge did not intend to ask this Court any question concerning the admissibility of evidence, and that being so, I do not think we should send it back to have him frame such question.

MACDONALD, C.J.A.

With regard to the merits: The first question reserved for the opinion of this Court is: "Was the alleged offence of perjury committed in a judicial proceeding within the meaning of the Criminal Code?" I would answer that in the affirmative. Even apart from section 171 of the Code, I am clearly of opinion that there was evidence that the magistrates exercised their jurisdiction within their proper territorial limits. The offence was said to have been committed at Princeton. I think it was quite open to the magistrates to take judicial notice of the fact that Princeton was in the County of Yale.

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It is a question which depends on notoriety. If the fact is sufficiently notorious, then the judge may take judicial notice of it. I can conceive of nothing being more notorious in the County of Yale than that Princeton was in that County and was the principal town. I can scarcely imagine persons acting for the Crown ever thinking of raising the question whether Princeton was in the County of Yale or not. They would be just as likely to ask that question of witness as counsel might ask an old grey-haired man whether he was 21 years of age. When I say it is the principal town of Yale, I mean in that southern portion of Yale.

The only way we can answer question 2 is by looking at the statement of fact which the learned judge has submitted to us, and then consider whether that statement of fact justifies the conclusion in law to which the learned judge came. I have no doubt about this question, and I think that question should be answered in the affirmative.

MACDONALD, C.J.A.

As to question 3, "Was there the necessary corroboration required by section 1002 of the Criminal Code to justify my finding?" counsel for the accused has confessed his inability to understand it, and the best I can make out of it is that the learned judge seems to have the same doubt as to whether the evidence of three witnesses on the one point was sufficient corroboration. Of course there can be no doubt about that. It may be that the learned judge thought that the words used by the accused which are complained of in the indictment, should be corroborated by other witnesses, but of course that is not so. There is clear proof of the statement which is alleged to be false, and there is corroborative evidence of its falsity, and it is of this falsity that corroboration is required. Therefore that question (whatever it means) should be answered in the negative.

MARTIN, J.A.

MARTIN, J.A.: I agree with what the Chief Justice has just stated, both with regard to the merits of the case and its not being one where we should, under sections 1017-3, send the case back for re-statement. I wish only to add a few words in regard to the jurisdiction.

It is apparent the learned County judge must have taken knowledge of the situation of Princeton. This is entirely outside of what Mr. *Wood* submitted to us, that in any event that is not open, as the section he quoted would cover the case, and I would point out this, that in all counties these Courts have to take cognizance of all Courts by the Counties Definition Act, and therefore the Court is placed in that regard in a very strong position.

The proposition I felt justified in answering yesterday is this —Where you have a magistrate or judge of an inferior Court exercising jurisdiction within the County in which their commission authorized them to exercise jurisdiction, it is not necessary to prove before them the fact that the town in which they sit is within the scope of their jurisdiction. That is to say, each judge or judicial officer will take cognizance of the boundaries of their county and it should be a case where the magistrate sitting in Princeton for the purpose of hearing a charge made for an infraction of the law in that locality—it should be unnecessary to prove to him that he is in Princeton, sitting within the bounds of his own county. It seems to me preposterous, and it is not the custom of any of the Courts in this Province even in so grave a matter as the sitting in the Assizes, to refer to the county in which they sit. I would refer to the B.C. Gazette, which I have here for 1917, page, 790, giving the terms for the sittings. In not one of them is any reference made to the county. On page 791 the Courts sitting at Yale, and Hope, etc., are set out, and yet it was not considered necessary to say in what county the sittings are supposed to be held. Whatever view may be maintained in other Courts as to what they should take cognizance of, I am not prepared for one moment to say we should apply any narrower rule to this Province.

MARTIN, J.A.

McPHILLIPS, J.A.: I would allow the appeal. (1) I would say *coram non judice*. There may be several Princetons in British Columbia, and I think it is not improbable. (2) The evidence is so scant that I would have been willing to send the case back, but that course did not seem to appeal to my learned brothers, and with all deference, I think it would have been a

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proper case to have sent back. Apart from that, I am of opinion that the averment in the indictment was not proved. There may be a game of cards for money which is not an infraction of the law. I think this is essentially a case where nothing is to be assumed. (3) Again with deference to the contrary opinion of my brothers, I consider there was no corroboration. I consider there should have been corroboration of the statement made.

I would therefore quash the conviction.

EBERTS, J.A.

EBERTS, J.A.: I would answer the first and second questions in the negative and quash the conviction.

The Court being equally divided the conviction was sustained.

Solicitor for appellant: *A. S. Black.*
Solicitor for respondent: *H. S. Wood.*

MURPHY, J. (At Chambers)

1919

May 13.

CREMIDAS v. B.C. ELECTRIC RY. CO.

CREMIDAS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Alien enemy—Right to sue—Fatal accident through collision—Negligence—Action for damages by administrator for benefit of dependant.

An action by the administrator of the estate of a deceased person for the benefit of a dependant of the deceased cannot be maintained in the case of the dependant being an alien enemy.

Dangler v. *Hollinger Gold Mines* (1915), 23 D.L.R. 384 followed.

Statement

APPLICATION by defendant to dismiss the action on the ground that Maria Cremidas, for whose benefit the action was brought, is a subject of the Sultan of Turkey, and resides within the limits of the Turkish Empire and is an alien enemy. The plaintiff is the brother of the late Peter Cremidas, and was

granted administration of his estate. The action is for damages for the benefit of Maria Cremidas, mother and dependant of the deceased, through the negligence of the defendant Company's street-car in running into an automobile driven by the late Peter Cremidas, who was killed. Heard by MURPHY, J. at Chambers in Vancouver on the 13th of May, 1919.

MURPHY, J. (At Chambers)

1919

May 13.

CREMIDAS v. B.C. ELECTRIC RY. CO.

McPhillips, K.C., for the application, cited *Dangler* v. *Hollinger Gold Mines* (1915), 23 D.L.R. 384, and *Porter* v. *Freundenberg* (1915), 1 K.B. 857; 84 L.J., K.B. 1001.

Argument

R. M. Macdonald, contra.

MURPHY, J.: I agree with the reasoning of Sutherland, J. in *Dangler* v. *Hollinger Gold Mines* (1915), 23 D.L.R. 384 and, therefore, hold I am bound to dismiss this action. Section 4 of the Families Compensation Act declares that the right of action given by that statute shall be for the benefit of certain named individuals. The statement of claim shews this action is brought for the benefit of the mother of the deceased. Under *Porter* v. *Freundenberg* (1915), 1 K.B. 857 she is an alien enemy. Admittedly an alien enemy cannot sue in our Courts. It seems self-evident that what a person cannot do directly he cannot procure to be done indirectly, but, if authority is wanted, it is to be found in *Brandon* v. *Nesbitt* (1794), 6 Term Rep. 23. The action is dismissed.

Judgment

Action dismissed.

MURPHY, J.

1919

June 24.

REX v. SAM BOW.

Sunday observance—Work or labour—Farmer—Negative evidence—R.S.C. 1906, Cap. 153—R.S.B.C. 1911, Cap. 219—Criminal Code, Secs. 1124 and 1125(c).

REX v. SAM BOW

Under the provisions of section 1125(*c*) coupled with section 1124 of the Criminal Code no conviction shall be held invalid on *certiorari* for the omission to negative circumstances the existence of which would make the act complained of lawful.

Section 5 of the Lord's Day Act provides 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 hereafter in force, to sell or offer for sale," etc. Under 29 Car. II., Cap. 7 (re-enacted in British Columbia by the Sunday Observance Act), the list of those upon whom restraint is made does not include "farmers."

Held, that "farmers" do not come within the exceptions to section 5 aforesaid as neither the Sunday Observance Act nor 29 Car. II., Cap. 7, has any provision expressly making it lawful for a farmer to work on Sunday.

Statement

MOTION for a writ of *certiorari* to quash a conviction by police magistrate Darling, at Steveston, on the 2nd of June, 1919, whereby the said Sam Bow was convicted for having on or about the 13th of April, 1919, at Lulu Island, unlawfully in connection with his ordinary calling done work or labour on the Lord's Day, commonly known as Sunday, such work not being any work of necessity or mercy. Heard by MURPHY, J. at Vancouver on the 24th of June, 1919.

Argument

Brougham, for the accused: The Crown has failed to prove that the work in question was not an act of necessity or mercy: *Rex* v. *Lee* (1909), 17 Can. Cr. Cas. 190; *Rex* v. *Charron* (1909), 15 Can. Cr. Cas. 241. A farmer cannot be convicted for working on Sunday, as section 16 of the Lord's Day Act exempts any person who could by the provisions of any Act or law relating in any way to the observance of the Lord's Day, in force in any Province in Canada, do work when the Lord's Day Act came into force. The Sunday Observance Act, R.S.B.C. 1911, Cap. 219, did not include farmers: see *Rex* v.

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Silvester (1864), 33 L.J., M.C. 79. It must be an offence against both the Federal and Provincial Acts: see *Rex* v. *Ouimet* (1908), 14 Can. Cr. Cas. 136; *Rex* v. *Walden* (1914), 19 B.C. 539; 22 Can. Cr. Cas. 405.

R. L. Maitland, for Municipality of Richmond: It is unnecessary to prove negatively that which is stated in the information, as a matter of disqualification. He who affirms must prove: see Russell on Crimes, 7th Ed., Vol. 2, p. 1956; *Rex* v. *Turner* (1816), 5 M. & S. 206; *Reg.* v. *Harris* (1867), 10 Cox, C.C. 541; and secton 1125(*c*) of the Criminal Code. The exception contained in sections 5 and 16 of the Lord's Day Act, refers to a specific Provincial enactment, exempting certain classes of work and labour—29 Car. II. does not mention farmers, and this does not amount to an exemption: see *Rex* v. *Dimond* (1916), 23 B.C. 325; *Simpson* v. *Proestler* (1913), 13 D.L.R. 191. The Quebec cases do not apply, as in Quebec the Civil Code, section 4466, supplies this statutory requirement: see *Dupuis* v. *Blouin* (1915), 24 Can. Cr. Cas. 441.

Argument

MURPHY, J.: The objection that the prosecution adduced no evidence to prove that the work done did not fall within the exceptions mentioned in section 12 of the Lord's Day Act, R.S.C. 1906, Cap. 153, fails, in my opinion, in view of the provisions of subsection (*c*) of section 1125 of the Criminal Code, which coupled with section 1124 declares that no conviction shall be held invalid on *certiorari,* for the omission to negative circumstances, the existence of which would make the act complained of lawful, etc.

Judgment

The contention that because of such decisions as *Reg.* v. *Silvester* (1864), 33 L.J., M.C. 79, holding that farmers are not within 29 Car. II., Cap. 7, Sec. 1 (expressly re-enacted in British Columbia by Cap. 219, R.S.B.C. 1911) this case falls within the words "except as provided herein, or in any Provincial Act or law now or hereafter in force," contained in section 5, of the Lord's Day Act, rests, to my mind, on a fallacy. The language of said chapter 219, R.S.B.C., I think, does nothing more than declare that 29 Car. II., Cap. 7, is in force in British Columbia. If so, neither 29 Car. II. nor Cap. 219, R.S.B.C. 1911, has any provision making it lawful for a

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farmer to work on Sunday. The decisions referred to merely declare that such work is not dealt with by said statutes. The consequence is that there is no Provincial statute or law on the subject. Therefore, the provisions of the Lord's Day Act apply. To hold otherwise, would, to my mind, render the whole Act nutagory. Then, it is said, there must be an offence against both Acts before there can be a prosecution under either. Neither section 5 nor section 16 of the Lord's Day Act contains anything that I can see upon which any such contention can be based. I agree with the interpretation placed upon section 16 by MACDONALD, J. in *Rex* v. *Dimond* (1916), 23 B.C. 325, and section 5 says nothing about it being necessary that there be an offence under some Provincial Act or law before prosecutions can take place under the Lord's Day Act. The application is dismissed.

Judgment

Application dismissed.

MURPHY, J. (At Chambers)

1919

May 12.

HUNT v. ROYAL BANK OF CANADA

HUNT v. ROYAL BANK OF CANADA *ET AL.*

Practice—Interim injunction—Restraining defendants from dealing with union funds—Application to set aside—War Relief Act not applicable—B.C. Stats. 1917, Cap. 74, Sec. 8.

The War Relief Act does not apply to an action for an injunction.

APPLICATION by the defendant to set aside an order continuing an injunction until the trial on the ground that the plaintiff had not complied with section 8 of the War Relief Act. The plaintiff issued a writ against the defendants, indorsed as follows:

Statement

"The plaintiff's claim is for an injunction restraining the defendant Bank from honouring or paying any cheque or cheques drawn by Local Union No. 138, Brotherhood of Painters, Decorators and Paperhangers of America, and for restraining the defendant Collard from disposing of or in any way dealing with the funds of the said Local Union."

On the day the writ was issued, the plaintiff obtained an

interim injunction order, and a few days later applied for and obtained an order continuing the injuncion until the trial. Heard by MURPHY, J. at Chambers in Vancouver on the 12th of April, 1919.

MURPHY, J. (At Chambers)

1919

May 12.

HUNT v. ROYAL BANK OF CANADA

Dickie, for the application.
McTaggart, contra.

MURPHY, J.: The War Relief Act does not apply to such a case. The application is refused.

Judgment

Application refused.

WINTEMUTE v. TAYLOR.

CLEMENT, J.

1919

June 6.

WINTEMUTE v. TAYLOR

Landlord and tenant—Trade fixtures—Assignment of tenant's interest—New lease—Further assignments—Reorganizations—Assignment for benefit of creditors—Disclaimer—Removal of fixtures—R.S.B.C. 1911, Cap. 13, Sec. 55(1).

A tenant assigned his interest in a leased premises including trade fixtures to certain parties who later took a new lease of the premises from the owner. The lease with fixtures passed through the hands of several tenants through assignments and "re-organizations." The last tenant assigned for the benefit of its creditors to the defendant who gave notice to the plaintiff that he wished to determine the lease. In an action by the landlord to prevent the removal of the fixtures:—

Held, that the fixtures belonged to the defendant and his disclaimer as assignee had no operation to defeat the right of removal within the three months' delay given by section 55(1) of the Creditors' Trust Deeds Act.

INTERPLEADER ISSUE to determine the ownership of certain fixtures upon the premises of the Eburne Steel Company Limited. The plaintiff is trustee for the bondholders of the Dominion Safe Works, Limited, and under the Creditors' Trust Deeds Act the defendant was appointed assignee of the Eburne Steel Company Limited. The property in question had been leased by the Dominion Safe Works, Limited, to one Walker, who erected on said lands a steam-rolling mill and equipped it. Walker assigned the lease to Messrs. Wilks, Drummond and

Statement

CLEMENT, J.

1919

June 6.

WINTEMUTE v. TAYLOR

Statement

Watts, who on the expiration of the lease obtained a renewal thereof from the plaintiff on the 29th of March, 1916. The premises were destroyed by fire on the 15th of September, 1916, but were rebuilt by the lessees, who subsequently assigned the lease to a company formed amongst themselves, called the Pacific Steel Company, Limited. The assets of this company were subsequently transferred to the Eburne Steel Company Limited, which company later assigned for the benefit of its creditors to the defendant. The defendant claiming the fixtures on the premises, proceeded to remove them, when the plaintiff applied for and obtained an *interim* injunction to restrain their removal. Later an issue was directed to determine the ownership of the fixtures. Tried by CLEMENT, J. at Vancouver on the 21st of May, 1919.

Craig, K.C. (*Robson,* with him), for plaintiff.
Haviland, for defendant.

6th June, 1919.

CLEMENT, J.: When the plaintiff took possession of the premises of the Dominion Steel Company early in 1916, a part of those premises was in the possession of a sub-lessee. The interest of this sub-lessee was purchased by the predecessors of the defendant and shortly thereafter the plaintiff executed a lease to the said predecessors of the defendant of the land, "together with the buildings erected thereon." The offer which preceded the lease is an offer for "the factory building situated at Eburne end of Lulu Island." Under these circumstances, I am of opinion that the trade fixtures did not pass under the lease of the 29th of March, 1916, but passed as parcel of the property purchased from the sub-lessee's estate. From that time on the title to the trade fixtures passed by various mesne assignments to the defendant. From time to time the business was, as the plaintiff puts it, "reorganized" and the plaintiff's assent was in the end given, once impliedly, once expressly, to the assignments necessitated by those reorganizations. There was never any formal surrender of the lease held by any of the tenants. Such surrender as there was was by operation of law only. Under these circumstances, I do not think the right to remove trade fixtures was ever given up or

Judgment

put an end to. In my opinion the circumstances bring this case within the exception suggested in *Leschallas* v. *Woolf* (1908), 1 Ch. 641; 77 L.J., Ch. 345. I am quite sure nothing was further from the desire and intention of the tenants than to make a present to the landlord of the very valuable trade fixtures; and they certainly never signed any document of surrender. In my opinion, all the articles in dispute in this issue are trade fixtures and can be removed without appreciable injury to the freehold.

Apart from the effect of the disclaimer given by the defendant as assignee for the benefit of creditors, the law is, I think, correctly set forth in Halsbury's Laws of England, Vol. 18, paragraphs 880-885. In addition, on the question of the operation of the covenant to deliver up the premises in good repair (as set forth in long form in the Leaseholds Act, R.S.B.C. 1911, Cap. 135), I would particularly refer to the judgment of Armour, C.J. in *Argles* v. *McMath* (1895), 26 Ont. 224, where the authorities are collected. This judgment was unanimously affirmed by the Court of Appeal of that Province: (1896), 23 A.R. 44.

Whether or not the defendant's disclaimer as assignee was strictly in conformity with the Creditors' Trust Deeds Act, it had no operation to defeat the right of removal. Section 55 (1) makes this clear. During the three months' delay given by that subsection, the right to removal subsists. The disclaimer in terms names the 3rd of May, 1919, as the date upon which the lease was to be determined; and we have no provision, like that in the English Bankruptcy Acts, making the determination relate back to any earlier time. In my opinion the rights of the parties here are to be determined as of 7th February, 1919, when the injunction against removal issued.

Judgment

I find, therefore, that the articles in question are not the property of the plaintiff as against the defendant. I am glad that strict law does not compel me to take one company's goods to pay another company's debts.

If the parties consent, this may be treated as disposing of the action. In that event, the plaintiff's action will stand dismissed with costs.

Action dismissed.

MURPHY, J.

1919

May 30.

LYALL SHIPBUILDING CO. v. HEMELRYCK

LYALL SHIPBUILDING COMPANY v. VAN HEMELRYCK.

Practice—Order for service ex juris—Affidavit in support—Application to set aside—Cross-examination on affidavit—Not allowed—Marginal rule 521.

There can be no cross-examination in an affidavit in support of an order for service *ex juris* on an application to set aside the writ where no counter-affidavit is filed.

Statement

APPLICATION by defendant to set aside an order for service *ex juris* on the ground that the contents of the affidavit in support are in controversy, and that under Order XXXVIII., r. 1, they desire to cross-examine on the affidavit. Heard by MURPHY, J. at Chambers in Vancouver on the 30th of May, 1919.

Argument

Armour, K.C., for the application.

Sir C. H. Tupper, K.C., contra, took the preliminary objection that Order XXXVIII., r. 1, only applies to cross-examination on affidavits used in support of the application at bar. The affidavit on which it is sought to cross-examine was used on another application and is not used in any way in support of this application.

Armour, in reply.

Judgment

MURPHY, J.: There can be no cross-examination of an affidavit on which an order to issue a writ for service *ex juris* was made on an application to set aside the writ, at any rate where no counter-affidavit is filed.

Application refused.

ABBOTT v. THE WESTERN CANADIAN RANCHING COMPANY, LIMITED.

COURT OF APPEAL

1919

May 8.

Practice—Change of venue—Expense—View—Discretion of judge—Appeal.

The Court of Appeal will not interfere with an order of a judge changing the place of trial of an action unless satisfied he was clearly wrong.

ABBOTT v. WESTERN CANADIAN RANCHING CO.

APPEAL by plaintiff from an order of HUNTER, C.J.B.C. of the 19th of February, 1919, changing the place of trial of the action from the City of Vancouver to the City of Kamloops. The action was brought for damages for injuries sustained by the plaintiff while in the employ of the defendant Company. He was engaged in feeding hay, tumble grass and weeds into the defendant's silo-cutter machine, which was driven by steam power. The machine became clogged, and in endeavouring to clear it his hand was caught in the cutter and he lost his thumb and three fingers. After receiving medical attention at Kamloops he went to Vancouver for treatment. Vancouver was named the place of trial in the statement of claim. The application for change of venue was supported by an affidavit of Mr. F. J. Fulton, K.C., setting out that the cause of action arose near Kamloops; that the defence required the attendance of at least four witnesses residing near Kamloops and the additional expense of bringing them to Vancouver would be $110; that the plaintiff was attended by medical practitioners in Kamloops whose evidence he could obtain there without the expense of travelling to Vancouver, and that a view of the *locus in quo* would be essential on the trial of the action.

Statement

The appeal was argued at Vancouver on the 8th of May, 1919, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

S. S. Taylor, K.C., for appellant: The plaintiff's doctor who was in Kamloops is now here, and it is equally convenient for the Court to examine a machine that is precisely the same make

Argument

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as the one in question, at Vancouver. On the question of convenience see *Campbell* v. *Doherty* (1898), 18 Pr. 243. We start with the right to select the place of trial, and it is only on substantial grounds that it should be changed: see *Centre Star* v. *Rossland Miners Union* (1904), 10 B.C. 306; *Wheatcroft* v. *Mousley* (1851), 11 C.B. 677; *Power* v. *Moore* (1889), 5 T.L.R. 586; *Shroder, Gebruder, & Co.* v. *Myers & Co.* (1886), 34 W.R. 261.

Argument

Davis, K.C., for respondent: There must be good cause for change of venue. The trial judge has found that there is, and his judicial discretion will not be interfered with. Appellant complains of the necessity of paying counsel for going to Kamloops, but that is not a ground. The substantial ground for the change is not only the expense of witnesses, but the view of the machine and the ground surrounding it is very necessary. As to importance of a view for change of venue see *Jenkins* v. *Bushby* (1891), 1 Ch. 484 at pp. 493 and 495; *Biggar* v. *Victoria* (1898), 6 B.C. 130 at p. 134. On the question of interfering with the discretion of the trial judge see *The Assyrian* (1888), 4 T.L.R. 694; *Thorogood* v. *Newman* (1906), 51 Sol. Jo. 81; 23 T.L.R. 97; *Soley and Co. (Limited)* v. *Lage* (1896), 12 T.L.R. 191; *Foxwell* v. *Van Grutten* (1897), 14 T.L.R. 145.

Taylor, in reply: Every man has a right to select his own counsel for the trial, and it is an item of expense that should be considered.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. I see no reason for interfering with the judicial discretion exercised by the trial judge. When I say this I do not mean to suggest, as Mr. *Davis* has suggested, that we are trammeled to the same extent in a case of this kind, in this country, as they are in England under the English rule. Here the plaintiff is allowed to lay his venue, and has the right to retain that unless substantial justice requires it to be changed. In England, speaking generally, the plaintiff has not such right; the venue is fixed by one of the judges upon application to him, and when he fixes the venue, there is good reason for holding that the Court

will not interfere with his order. I would not interfere with the judgment of the judge below unless fairly satisfied that he was clearly wrong. In this case I am not satisfied the learned judge below was wrong. In fact, I am not satisfied he was not right.

The appeal is dismissed.

GALLIHER, J.A.: I concur. I think there is ample ground for the making of the order made by the judge below. I think Mr. *Taylor* in sub-paragraph (a) of paragraph 3 of the statement of claim, in setting out with great particularity how this occurred, has in reality put himself out of Court in the matter. At all events, it would shew to my mind a very strong reason why there should be a view. That, of course, was before the judge below as before us.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. It means that it will be inconvenient to the plaintiff, and greater expense to have this trial at Kamloops, but we must proceed upon settled practice. The Court of Appeal in England dealt with the point in *Thorogood* v. *Newman* (1906), 51 Sol. Jo. 81. There Farwell, L.J. said that the Court of Appeal ought always to require an overwhelmingly strong case before they interfered with the discretion of a judge in Chambers as to the place where an action should be tried.

MCPHILLIPS, J.A.

I do not feel that a case has been made out for interference with the discretion exercised by the judge below. I think the order of this Court should be to dismiss the appeal.

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

EBERTS, J.A.

Appeal dismissed.

Solicitors for appellant: *Taylor, Mayers, Stockton & Smith.*
Solicitors for respondent: *Fulton, Morley & Clark.*

GREGORY, J.

1919

June 19.

MARITIME MOTOR CAR CO. v. MCPHALEN

MARITIME MOTOR CAR CO., LTD. v. McPHALEN & McPHALEN.

Bond—Amount payable indefinite—Assignment of bond—Insufficient notice of—Refusal to add party after finding notice insufficient.

In an action on a bond for "the sum of two thousand of lawful money of British Columbia" there being nothing in the document to assist in construing these words, it was held that the ambiguity being patent and not curable by extrinsic evidence, the action should be dismissed.

In a notice of assignment of a bond the persons named in the notice as assignees were not the assignees named in the assignment itself and the notice was of an assignment of a bond "bearing date on or about the 18th day of September, 1915," whereas the bond sued on was dated "this eighteenth day of September, one thousand eight hundred and fifteen."

Held, that the notice was not sufficient to enable the assignee to maintain an action in his own name and the Court refused to add the assignor as a party after so finding.

Statement

ACTION against the sureties on a bond given to the sheriff in replevin proceedings and assigned to the plaintiff. The facts are set out in the reasons for judgment. Tried by GREGORY, J. at Vancouver on the 18th of June, 1919.

R. M. Macdonald, for plaintiff.
A. D. Taylor, K.C., for defendant.

19th June, 1919.

GREGORY, J.: This is an action against the sureties on a bond given to the sheriff in replevin proceedings and assigned to the plaintiff.

Judgment

The action must, I think, fail. The bond is for "the sum of two thousand of lawful money of British Columbia." These words are, standing alone, unintelligible and there is nothing in the document to help in construing them. If it is assumed that lawful money of British Columbia means lawful money of Canada, there is still the difficulty of saying whether the words mean two thousand cents or dollars. The ambiguity is patent and therefore cannot be cured by extrinsic evidence, but even

if it were, no such evidence was offered and we have only the bond itself before us.

The case is not like *Coles* v. *Hulme* (1828), 8 B. & C. 568, for there the bond contained recitals setting out different sums of money, expressed £, s. and d., and stating that the bond was given to secure those sums, and the Court held that it could "from the other parts of the instrument collect what was the specie of money which the party intended to bind himself to pay."

It must not be forgotten that the surety is regarded as a favoured debtor, and he is entitled to insist upon a rigid adherence to the terms of his obligation: Halsbury's Laws of England, Vol. 15, par. 914.

It was also objected that the plaintiff could not maintain the action in his own name, no proper notice of assignment having been given to the defendants. The notice given was in the following words:

"Take notice that Sheriff Hall on the 21st day of October, 1918, executed an assignment of the bond made by you to Sheriff Hall for $2,000 bearing date on or about the 18th day of September, 1915. This is to notify you that action will be started upon the said $2,000 bond forthwith as it is now the property of the B.C. Independent Undertakers, Limited, under a settlement made of certain action Maritime Motor Co. v. Hall.

"Our client claims the face of the bond, namely, $2,000 and we beg to inform you that unless this is paid forthwith writ will issue against you by Monday morning next."

Judgment

This is, to my mind, notice of an assignment to the B.C. Independent Undertakers, Ltd., and not notice of the assignment actually made, which was to the Maritime Motor Car Company, Limited. It is also notice of the assignment of a bond "bearing date" on or about the 18th of September, 1915, whereas the bond sued on is dated "this eighteenth day of September one thousand eight hundred and fifteen."

I do not think the case falls within the decision of Mr. Justice Atkin in *Denney, Gasquet, and Metcalfe* v. *Conklin* (1913), 3 K.B. 177, but much more nearly resembles the case of *Stanley* v. *English Fibres Industries, Lim.* (1899), 68 L.J., Q.B. 839.

I cannot accede to the suggestion that I should, of my own motion, after trial and argument and if, after consideration, I come to the conclusion that the notice is insufficient, add the

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1919

June 19.

MARITIME MOTOR CAR CO. v. MCPHALEN

sheriff as a party. How could this be done effectually? I have no right to add him as a plaintiff without his consent, and I cannot make him a defendant unless he refuses to be joined as a plaintiff. What means have I for ascertaining whether he consents or not? I drew Mr. *Macdonald's* attention to this, and he admitted the difficulty, but he still said he relied on the sufficiency of the notice and made no motion for leave to add the sheriff. The sheriff, before being added as a defendant, would have to be asked if he consented to be added as a plaintiff, and before he could be asked to become a plaintiff he should be tendered a bond indemnifying him against any costs which might be recovered against him.

The defendant also contended that no action would lie, because the bond was not under seal and there was no consideration given for it, but it is unnecessary for me to express any opinion on this point.

Judgment

It was strongly urged that the defence had no merits. I cannot agree to this and think it only right that I should say so. The defendants were not the instigators of the original litigation, they were only sureties, and the plaintiff has already recovered from the sheriff the full amount which he could have recovered had the sheriff not taken a defective bond, but had taken one strictly in conformity with the Replevin Act, and an assignment of which he could have forced the plaintiffs to accept without her paying them anything.

There will be judgment for the defendant with costs.

Action dismissed.

MATUSO COMPANY v. WALLACE SHIPYARDS.

MURPHY, J.

1919

May 21.

MATUSO v. WALLACE SHIPYARDS

Practice—Security for costs—Extra-provincial company—Application for further security—Jurisdiction—R.S.B.C. 1911, Cap. 39, Sec. 147—Marginal rule 981.

The Court has jurisdiction to order the furnishing of further security for costs by an extra-provincial company.

APPLICATION by defendant for further security for costs, the $150 furnished as security by the plaintiff on demand in 1918, not being now sufficient to cover the costs incurred. Heard by MURPHY, J. at Chambers in Vancouver on the 21st of May, 1919. Statement

J. K. Macrae, for the application: Under section 147 of the Companies Act, the plaintiff being an extra-provincial company must furnish security.

Housser, contra: Under section 147 of the Companies Act, once security has been given there is no machinery in law whereby application for further security can be made. Marginal rule 981 of the Supreme Court Rules does not apply to extra-provincial companies: see *McClary* v. *Howland* (1900), 7 B.C. 299; *Alaska Steamship Co.* v. *Macaulay* (1901), 8 B.C. 84. Argument

MURPHY, J.: The combined effect of said section 147 and marginal rule 981 is that the Court has jurisdiction to make the order asked for. Judgment

Application granted.

MURPHY, J.

1919

May 23.

PURDY v. PURDY.

Husband and wife—Declaration of nullity of marriage—Bona fide residence —Jurisdiction.

PURDY v. PURDY

A petition by a husband for a declaration of nullity of marriage was dismissed for want of jurisdiction because the evidence shewed he had no domicil in British Columbia. On application for reinstatement it was shewn that residence only is sufficient to found jurisdiction in an action for nullity of marriage as distinguished from divorce actions but such residence must be *bona fide*, the Court finding however on the evidence that the petitioner, as soon as he learned of the position of matters as regards his wife, determined to return to his home in Saskatchewan after remaining in British Columbia only for such length of time as would enable him to have this case settled, refused to reinstate the action.

Statement

APPLICATION to reinstate a petition for declaration of nullity of marriage. Heard by MURPHY, J. at Vancouver on the 20th of May, 1919.

H. I. Bird, for the petition.

No one, *contra.*

23rd May, 1919.

Judgment

MURPHY, J.: At the hearing I stopped the case and dismissed the petition as a result of petitioner's evidence, which shewed he had no domicil in British Columbia. Since then authorities have been cited to me shewing that residence only is sufficient to found jurisdiction in nullity actions as distinguished from divorce actions. In fact, it has been decided in Ontario that Courts not empowered with divorce jurisdiction can adjudicate on nullity actions: *Lawless* v. *Chamberlain* (1889), 18 Ont. 296. In *Roberts* v. *Brennan* (1902), P. 143, Jeune, P. at p. 144 states that "residence—not domicil—is the test of jurisdiction in a nullity case," relying on *Niboyet* v. *Niboyet* (1878), 4 P.D. 1. That case has been practically overruled by *Le Mesurier* v. *Le Mesurier* (1895), A.C. 517, in so far as it founded jurisdiction in divorce actions proper on residence, although, as stated, its doctrine that residence founds jurisdiction in nullity actions still stands. In so far, therefore,

as paragraphs 6 and 7 of the petition filed herein are concerned, the case was rightly dismissed, since they set up grounds which could only result, if proven, in a decree of divorce. In so far, however, as the petition sets up grounds for a declaration of nullity, the dismissal, for lack of jurisdiction, because of want of a British Columbia domicil, was erroneous, and if the case rested there I would order it reinstated for rehearing. But residence, to found nullity jurisdiction, must be *bona fide* residence: *Manning* v. *Manning* (1871), 40 L.J., P. & M. 18, cited and unquestioned in *Armytage* v. *Armytage* (1898), 67 L.J., P. 90, where this whole question is given careful consideration. The judgment therein shews that this matter bristles with difficulties. In my opinion, great care must be exercised in dealing with any question of jurisdiction arising in our Court in the Divorce and Matrimonial Causes class of cases. The case at bar is in this category, as the petition is filed under the divorce jurisdiction, as shewn on its face.

There is apparently no appeal from an adjudication in divorce cases (as distinguished from a dismissal for a want of jurisdiction) except to the Judicial Committee of the Privy Council. These cases are becoming more and more numerous. They are usually undefended. If a decree is made without jurisdiction, the parties may re-marry, issue may be born to them, and in consequence the possibility arises of the stigma of illegitimacy being fastened upon such issue by future Court proceedings, brought probably (on such facts as here exist) in jurisdictions other than our own. I have, therefore, had a transcript of the evidence of petitioner made, and have carefully read it. The only construction I can put upon it is, that whatever may have been his intention had he found all well between his wife and himself, as soon as he learned of the position as set out in his petition, he determined to return to his home in Saskatchewan, deciding to remain here only for such length of time as would enable him to have this case heard. The parties were married in the State of Washington; their matrimonial home is in Saskatchewan, and has never been in British Columbia. The petitioner is, I think, on his evidence, merely a casual visitor here. The wife, it is true, apparently

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PURDY v. PURDY

Judgment

does reside here, but, in view of what is said in the various cases cited, and especially in *Manning* v. *Manning, supra,* I feel, in view of the peculiar condition of divorce jurisdiction in British Columbia, I must decline to reinstate the petition unless directed so to do by a higher tribunal. The decision in *Lawless* v. *Chamberlain, supra,* shews the petitioner is not without redress, as apparently he can apply to the ordinary civil Courts of Saskatchewan.

Application refused.

LAMPMAN, CO. J. (At Chambers)

1919

May 16.

BRETHOUR v. DAVIS AND PALMER

BRETHOUR v. DAVIS AND PALMER

County Court—Jurisdiction—Fraudulent preference—Chattel mortgage—Action to set aside—Waiver—R.S.B.C. 1911, Cap. 53, Sec. 40(12).

An action to set aside a chattel mortgage as a fraudulent preference is not an action for "relief against fraud" within the meaning of section 40(12) of the County Courts Act.

APPLICATION to strike out the action as not being within the jurisdiction of the County Court, heard by LAMPMAN, Co. J. at Chambers in Victoria on the 25th of April, 1919. The action was to set aside a chattel mortgage for $500 given by the defendant Davis to the defendant Palmer, on the ground that the mortgage constituted a fraudulent preference. The defendant Palmer filed a dispute note in which no exception was taken to the jurisdiction.

Statement

D. M. Gordon, for the application: Under section 36 of the County Courts Act the action should be struck out. Under the old Act, it was held that the County Court could not entertain the questions of fraudulent preferences: see *Parsons Produce Co.* v. *Given* (1896), 5 B.C. 58. The only material change in the Act since that decision is the addition of subsection (12) of section 40. But this action is not for relief against fraud.

Argument

Neither at common law nor under the Statute of Elizabeth was it a fraud to prefer one creditor to another: see *Holbird* v. *Anderson* (1793), 5 Term Rep. 235; *Mulcahy* v. *Archibald* (1898), 28 S.C.R. 523; *Turner* v. *Lucas et al.* (1882), 1 Ont. 623; *Richard Beliveau Co.* v. *Miller* (1912), 20 W.L.R. 96. The Fraudulent Preferences Act does not make a preferential transaction fraudulent; it merely declares that such shall be void.

Brethour, contra: This is an action for relief against fraud. The plaint alleges knowledge of insolvency, and fraud. The title to the Fraudulent Preferences Act shews that the Legislature intended to make preferences fraudulent. In any event, the defendant has waived his right to object to the jurisdiction: see *Beaton* v. *Sjolander* (1903), 9 B.C. 439; *Mayor, &c., of London* v. *Cox* (1867), L.R. 2 H.L. 239; *Fry* v. *Moore* (1889), 23 Q.B.D. 395. Argument

Gordon, in reply: The reference in Kerr is to the Statute of Elizabeth, under which actual fraud must be shewn. The plaintiff has relied on the fact of preference. Lack of jurisdiction cannot be waived: see *In re Nowell and Carlson* (1919), 1 W.W.R. 387; *Farquharson* v. *Morgan* (1894), 1 Q.B. 552.

16th May, 1919.

LAMPMAN, Co. J.: The application must be allowed. The action is to set aside a mortgage as a fraudulent preference, and the plaintiff must shew that this is an action for relief against fraud. I do not think it is. This transaction would not have been fraudulent at common law, and the Fraudulent Preferences Act does not make it so; it merely makes it void. The English references cited by the plaintiff are to the Statute of Elizabeth, but that is directed to sham transactions, and it is not alleged that this was a sham. The plaintiff's case is that Palmer obtained a preference. I do not think, therefore, that this is an action for relief against fraud, and I have no jurisdiction to entertain it. It must be struck out. The objection to the jurisdiction could not be waived, but the defendant will not be entitled to any more costs than if he had raised the question at the first opportunity. Judgment

Application allowed.

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May 16.

REX v. POWELL

REX v. POWELL

Criminal law — Seduction — Evidence of deceased person taken on preliminary hearing—Not proved on trial—Read to jury by Crown counsel from appeal book—Prisoner found guilty—Stated case—Criminal Code, Secs. 999, 1002 and 1018.

The prisoner was tried with a jury upon an indictment for, (1) rape, and (2) seduction. After giving evidence at the preliminary hearing the girl upon whom the crime was alleged to have been committed, died. On the trial, counsel for the Crown, without proving the evidence of the girl taken on the preliminary hearing, and without objection from counsel for the prisoner, read to the jury from his brief what purported to be a copy of the girl's evidence. The jury found the prisoner guilty on the first count. On a stated case as to whether the trial judge should have allowed the girl's evidence to be read:—

Held, that though counsel for the prisoner neglects to object, it is the duty of the judge in a criminal case to see that proper evidence only is before the jury, and the prisoner should be discharged.

CRIMINAL APPEAL on a case stated by GREGORY, J., on the trial of the accused with a jury at Vancouver on the 1st of May, 1918, on an indictment charging him with, (1) rape, on the person of Ethel Sims; (2) seduction of the said Ethel Sims, under section 211 of the Criminal Code. Upon the trial it was proved that Ethel Sims died on the 5th of April, 1918, and without objection on the part of counsel for the accused, counsel for the Crown said he proposed to put in the evidence of Ethel Sims, and read from his brief what purported to be a copy of the deposition of Ethel Sims taken at the preliminary investigation before the police magistrate for the City of Vancouver. The original deposition was, at the time of the reading, filed in the Court registry at Vancouver, and actually lying on the clerk of the Court's desk, but the document itself was not filed in evidence or marked as an exhibit in the case. It purported to be signed by the police magistrate, and it stated therein that the deposition was taken in the presence of the accused and that the deponent was cross-examined by counsel for the accused, but no extraneous evidence was offered of

Statement

these facts. There was no suggestion that the copy read by Crown counsel was not accurate. At the close of the Crown's case the defendant was called, gave evidence on his own behalf, and was cross-examined. The Court then adjourned, and on reassembling, counsel for the prisoner objected that there was no sufficient evidence establishing the offence as charged, as the said deposition taken at the Police Court had not been filed in evidence, or proved pursuant to the provisions of section 999 of the Criminal Code of Canada. The question reserved for the opinion of the Court was as follows:

Statement

"In view of the facts hereinbefore stated did I err in allowing the said deposition of the said Ethel Sims to be read in evidence against the accused on the trial of the case?"

The appeal was argued at Vancouver on the 16th of May, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Eyre, for accused: The depositions were not proved, and after evidence for the defence was put in objection was taken that section 999 of the Criminal Code had not been complied with. The case was then submitted to the jury and he was found guilty on the first count. The onus is on the Crown to properly prove its case. Although no objection is taken by counsel for the accused, it is the duty of the trial judge to see that the evidence is properly admitted: see *Rex* v. *Brooks* (1906), 11 O.L.R. 525. The depositions did not go in in any form, but counsel read the evidence from his brief: see Tremeear's Criminal Law, 2nd Ed., p. 785. The document was neither filed, tendered in evidence, nor marked as an exhibit. There is no corroboration, as required by section 1002 of the Criminal Code.

Argument

G. L. MacInnes, for the Crown.

MACDONALD, C.J.A.: I think the conviction must be quashed. It is very unfortunate that the case should have been conducted in the Court below in such a way that persons accused of serious crimes should, if guilty of these crimes, escape punishment because of some omission on the part of those charged with the administration of justice.

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Now, in this case, while counsel for the prisoner did not object to the want of proof of the preliminaries which would make these depositions unquestionably evidence in the case, yet the authorities seem to go very far on that subject. We have had cited to us on other occasions *Regina* v. *Gibson* (1887), 18 Q.B.D. 537; *Reg.* v. *Saunders* (1899), 1 Q.B. 490, and *Regina* v. *Petrie* (1890), 20 Ont. 317. I have always thought that the cases have gone rather far and that there is, notwithstanding what was said in these cases, some duty upon counsel for the accused person, when evidence is being offered which in his opinion is objectionable, to take the objection. In other cases, in capital cases, the Courts have, in aid of the prisoner, who might be represented by inexperienced counsel, declined to accept the failure to object on the part of his counsel, as fatal to an appeal. Now the point that came before the Court of Appeal in Ontario, a very strong Court, too, in *Rex* v. *Brooks* (1906), 11 O.L.R. 525, was practically the same as in this case. There depositions were put in without the necessary preliminary proof being given to make them admissible; and, while the facts in that case were slightly different and perhaps distinguishable from this case, yet the principle laid down by the Court is not distinguishable, that is, it is clearly applicable to the case at bar. This is what the learned judge who delivered the judgment of the Court said on that point:

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> "It was argued that no objection was taken by counsel, and that is true, but if a mistake is made by counsel that does not relieve the judge in a criminal case from the duty to see that proper evidence only is before the jury."

Now, that is precisely this case, and in the interest of conformity in matters of criminal law, the judgments of this Court, as far as possible, should conform to the judgments of other Courts of like jurisdiction in other Provinces, and I think we ought to follow the ruling in this case, though perhaps only a *dictum*.

The order, then, is to quash the conviction and discharge the prisoner.

MARTIN, J.A.

MARTIN, J.A.: I am of the same opinion. I shall only add

that I have been somewhat embarrassed by the way the learned judge states the case, in saying that, "In view of the facts hereinbefore stated, did I err in allowing the said depositions to be read in evidence against the accused?" The trouble is that, as appears from the statement of the facts in the case, he did not, in fact, allow the said depositions to go to the jury, but he irregularly allowed what purported to be a copy of them from counsel's brief to be read to the jury. I just illustrate that as another example of the careless way in which these cases are stated to this Court which we drew attention to recently in the case of *Rex* v. *Fong Soon* [26 B.C. 450]; (1919), 1 W.W.R. 486. As a further illustration of the fact, I draw attention to the strange omission in the same case, that it is not stated whether the accused was convicted or acquitted by the jury, or upon which, if any, of the grounds.

MARTIN, J.A.

I might add that the order that ought to be made under section 1018 is that the accused shall be discharged. That is the form the order should take. We have had so many mistakes in this matter we should at least have the order that this Court makes properly recorded.

GALLIHER, J.A.: Apart altogether from the decision in *Rex* v. *Brooks*, which I think lays down a principle that is applicable here, I would have taken the view that this conviction should be quashed. As to the essential preliminaries to the admission of depositions, I think it is very desirable that counsel for the Crown should prove all matters required at trials as laid down in the Code. The prisoner is entitled to have the case proved against him conclusively to the jury to warrant the jury in coming to the conclusion they do, and where a witness who has given a deposition in another Court is either dead or absent, or too ill to attend, then it is the duty of the Crown to see that the prisoner is not prejudiced in any way by having evidence tendered until it is properly made a part of the case. And in this case, of course, as the charge was rape, and the conviction was for rape, there can be no question of there being prejudice to the prisoner by having testimony read to the jury, because the testimony of this witness was the only testimony, I

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presume, from which rape could be proved. For that reason I am quashing the conviction.

MCPHILLIPS, J.A.: Unquestionably there was a mistrial in this case. The error in law arose by counsel reading evidence from his brief as given upon the preliminary enquiry, no proper proof being given of the authenticity of the evidence. Counsel for the Crown should have put in the evidence in conformity with section 999 of the Code, but this was not done, therefore it was not legal evidence and it went to the jury (see *Jacker* v. *The International Cable Company* (1888), 5 T.L.R. 13).

Now, in this particular case, there is no question of a doubt that evidence was adduced and placed before the jury that it was not legal evidence in the form in which it went to them. That being the case, a mistrial has taken place; and I merely wish to add again, for the sake of having the matter taken notice of by the proper authority (as I submit it ought to be), that in all cases where a judge states a case, that at the earliest opportunity it should be brought to this Court for determination. It is a matter for comment that under the judgment of this Court now given, a man is to go free who should have gone free nearly a year ago.

MCPHILLIPS, J.A.

Conviction quashed.

JOHNSTON v. THE MINISTER OF LANDS.

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JOHNSTON v. MINISTER OF LANDS

Statute, construction of—Coal and Petroleum Act—Prospecting licence—Minister of Lands — Discretion — Appeal — R.S.B.C. 1911, Cap. 159, Secs. 3, 27 and 28—B.C. Stats. 1915, Cap. 48; 1916, Cap. 47; 1910, Cap. 33.

There is no appeal from the discretion of the Minister of Lands in granting or refusing a prospecting licence under section 3 of the Coal and Petroleum Act; the intention of the Legislature is shewn by the substitution of "may" for "shall" in the amendment of that section in chapter 33 of the statutes of 1910.

APPEAL by defendant from the decision of MURPHY, J., of the 1st of November, 1918, granting the petition of the plaintiff by way of appeal from the decision of the Minister of Lands refusing to grant the plaintiff certain licences under the Coal and Petroleum Act. The petitioner staked certain lands under the Act in February, 1918, and after complying with the requirements of the Act, applied for a prospecting licence on the 3rd of April, 1918. The Minister, after consideration, advised that a portion of the lands applied for were already covered by prospecting licences, and that licences would issue to the petitioner only for the area not covered by the prior licences. The prior licences were issued some years previously, and were kept in good standing until 1914, when the fees were not paid. In 1915 the holders thereof applied for relief under chapter 48 of the statutes of 1915. To this application conditions were imposed before relief would be granted, but the conditions were never complied with and the licences lapsed. In March, 1918, the prior licence-holder again applied for relief under the 1916 amendment to the above Act, and on the 31st of May, 1918, an order in council was passed granting the relief prayed for, and the licences were reinstated. The petitioner protested to the Minister, asking for reconsideration of the case, but the department's action was affirmed, and the petitioner appealed by way of petition to a judge of the Supreme Court, under section 28 of the Coal and Petroleum Act.

Statement

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Carter, for the Minister of Lands.

1st November, 1918.

MURPHY, J.: On the first point, I find, as a fact, that the Minister of Lands refused these licences, not in the exercise of any supposed discretion vested in him by statute, but on the ground that the Lieutenant-Governor in council had, under Cap. 48, B.C. Stats. 1915, purported to revive, or was bound by law to revive lapsed licences over the same ground held by other parties. I further think, however, that no such discretionary power as is contended for exists, but that the Minister acts as a mandatory of the statute: *Baker* v. *Smart* (1906), 12 B.C. 129. The argument that this decision does not apply because "may" has been substituted for "shall" in the operative section of the Act is, I think, erroneous, because the decision, as I read it, does not turn on the word "shall," and because in *Mott* v. *Lockhart* (1883), 8 App. Cas. 568, on which, as I read the case, *Baker* v. *Smart, supra,* is founded, the section construed used the word "may," not "shall." If this view is correct, then petitioners had a legal right to obtain their licences before the attempted revival of the lapsed licences, since it is admitted petitioners had fulfilled the statutory requirements to entitle them to such licences. If so, I do not think Cap. 38, B.C. Stats. 1915, confers any power on the Lieutenant-Governor in council to ignore such legal right. The principle involved appears to be that underlying *Woodbury Mines* v. *Poyntz* (1903), 10 B.C. 181. It is true the language of Cap. 48, B.C. Stats. 1915, is broader than that of the statute under consideration in the *Woodbury* case, but it is not broad enough to meet the test in that decision. Farther, to allow holders of lapsed licences to hold back and only make application for revival of such licences, with the legal right that such application must be successful, subject to such terms as the Lieutenant-Governor in council should impose, after other parties had applied for the ground, would largely defeat the primary object of the Coal and Petroleum Act as determined by *Baker* v. *Smart, supra, i.e.,* the development of the coal and petroleum resources of the Province, for such construction of said Cap. 48 would virtually

tie up, so long as said Act remains in force, all areas of the Province held under licence at the time said Cap. 48 was passed. When it is remembered that said Cap. 48 may by Proclamation be extended to any Act of the Provincial Legislature, the far-reaching consequences on the development of possibly all the natural resources of the Province becomes apparent. On the other hand, I think the object of said Cap. 48 is to enable the Lieutenant-Governor in council to assist licence-holders to carry their property during the period the Act is to remain in force. This object can be attained without interfering with the object of the Coal and Petroleum Act as judicially determined in *Baker* v. *Smart, supra,* by the simple expedient of licence-holders taking advantage of the provisions of said Cap. 48 before third parties acquire statutory rights to licences over the areas covered by their licences through compliance with the provisions of the statutes in that behalf.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 23rd of April, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Carter, for appellant: An order in council was passed granting relief to the first licencees on the 31st of May, 1918. The applications of the plaintiffs were made on the 8th of April, 1918, and refused by the Minister on the 29th of April following, and then they protested against the refusal on the 4th of May. The appeal was taken on the 14th of June, and as it must be taken within 30 days it was therefore late. Section 8 of the Act should be read with section 28. The case of *Baker* v. *Smart* (1906), 12 B.C. 129 was before the Act was changed in 1910 (Cap. 33, Sec. 3), the word "shall" being changed to "may." The Minister, I contend, acted within his powers.

Argument

Sir C. H. Tupper, K.C., for respondent: As to the change in the Act see *Macdougall* v. *Paterson* (1851), 11 C.B. 755; *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at pp. 222-3; Halsbury's Laws of England, Vol. 27, p. 171. It never was intended by the statute to cut out intervening applicants: see *Woodbury Mines* v. *Poyntz* (1903), 10 B.C. 181.

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They must put in express words before they can interfere with vested rights: see *Williams Creek Bed Rock Flume & Ditch Co., Ltd.* v. *Synon* (1867), 1 M.M.C. 1; Maxwell on Statutes, 5th Ed., 461; Craies's Statute Law, 4th Ed., 113 and 326. The statute does not exempt him from payment of costs in this case.

Carter, in reply.

Cur. adv. vult.

15th July, 1919.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. This result entails also the decision of two other appeals of the same nature which, by consent of counsel, were to abide the result of this appeal.

MARTIN, J.A.

MARTIN, J.A.: It is submitted that under section 3 of the Coal and Petroleum Act, Cap. 159, R.S.B.C. 1911, there is no appeal from the discretion of the Minister of Lands in granting a prospecting licence. Originally in Cap. 137, R.S.B.C. 1897, Sec. 3, the language employed was that, after certain requirements have been complied with and a report submitted to him,

"the Chief Commissioner of Lands and Works . . . . . shall, if no valid objection has been sustained, grant to such applicant a prospecting licence."

But after the decision thereupon in *Baker* v. *Smart* (1906), 12 B.C. 129; 2 M.M.C. 373; 3 W.L.R. 497, by an amendment in 1910, Cap. 33, Sec. 3, this imperative language was changed to "may," and it was so re-enacted in the Revised Statutes of 1911, Sec. 3, *supra,* so we have the very unusual case of the Legislature deliberately making a change from the "rule of construction" laid down by section 25 (1) of the Interpretation Act, Cap. 1, R.S.B.C. 1911, which provides that

"In construing this or any Act of the Legislature, unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning, or calling for a different construction,—

"(1) The word 'shall' is to be construed as imperative, and the word 'may' as permissive."

While undoubtedly there are cases "calling for a different construction" of "may," some of which have been cited to us, yet none of these approaches the length of justifying such a construction in the face of so remarkable an indication of legislative intention as we are confronted with, nor have I been able

to find one. To use an apt expression of Mr. Justice Street in *Re Dwyer and the Town of Port Arthur* (1891), 21 Ont. 175, there would have, in such circumstances, to be "reasons overwhelmingly strong . . . . to justify me in going to the length of giving to the permissive 'may' the force of the compulsory 'must.' "

In my opinion, such reasons are absent here, and therefore the objection to our jurisdiction should be sustained. I have not overlooked the suggestion that if this construction be correct, then effect cannot be given to section 28 relating to appeals. But that is not the case, for section 27 gives an appeal in "applications" which are outside of section 4 (*e.g.*, those for leases under sections 21 and 26) in the manner "hereinafter provided," *i.e.*, by section 28.

It follows that the appeal [from the Minister of Lands] should be quashed.

GALLIHER, J.A.: If the word "may" had been used in the statute from the beginning I should have held, under the authority of *Julius* v. *Lord Bishop of Oxford* (1880), 49 L.J., Q.B. 577, and other authorities, that there was a duty devolving on the chief commissioner of lands to grant the licence, subject, of course, to the qualification in the Act, "if no valid objection has been substantiated, which would be open to review by us. We find, however, in R.S.B.C. 1897, Cap. 137, Sec. 13, re-enacting section 3 of 1892, Cap. 31, that the words used are "the Chief Commissioner of Lands and Works shall if no valid," etc. The word "shall" was continued in the statutes until 1910, when, by Cap. 33 of that year, section 3 of Cap. 137 of 1897 was repealed and a new section 3 substituted in which the change from "shall" to "may" was made, and we find this change continued in the Revised Statutes of 1911 and up to the present time. It seems to me that this change from "shall," which in its ordinary meaning is imperative, to "may," which in its ordinary meaning is permissive, and continued in the later revision of the statutes, must be taken to mean that the Legislature intended and did grant discretionary powers to the commissioner. The appeal should be allowed.

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What I have said also applies to the cases of *Gillespie* v. *Commissioner of Lands,* and *Harding* v. *Commissioner of Lands.*

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McPHILLIPS, J.A.: I agree in the allowance of this appeal.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellant: *G. L. MacInnes.*
Solicitors for respondent: *Tupper & Bull.*

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WILSON v. MCLENNAN

WILSON v. McLENNAN AND CHOATE.

Evidence—Solicitor and client—Communication when solicitor acting for both parties—Not privileged.

The privilege of a client to object to the disclosure by his solicitor of a confidential communication does not apply when the communication was made by both parties to the action in the form of instructions to their common solicitor.

Statement

APPEAL by defendants from the decision of MORRISON, J. of the 31st of January, 1919, in an action for the rectification of a conveyance brought against the executors of the estate of Duncan McLennan, deceased, the plaintiff claiming that one of the lots which was included in the agreement for sale (*i.e.,* lot 18, subdivision lot 344, and part of lot 341, group 1, New Westminster District, map 1702) was inadvertently left out of the deed. By agreement for sale of the 12th of October, 1910, McLennan agreed to sell to one A. H. Innes a certain tract of land that included the lot in question, and a year later Innes assigned his right under the agreement to the plaintiff. By deed of the 31st of January, 1913, McLennan transferred a portion of the lands under the agreement to Wilson, and by a further deed of the 12th of February, 1913, the remaining por-

tion of the lands were transferred to Wilson, with the exception of said lot 18, the plaintiff claiming that through the error of the solicitor who drew the deed said lot was omitted from it. The plaintiff paid $19,535, being the purchase price mentioned in the agreement for sale. McLennan died in 1914. McLennan and Wilson, on deciding to complete the transaction, went together to the office of Mr. G. E. Martin, a solicitor in New Westminster, who had previously acted as solicitor for McLennan, but on the occasion in question he acted for both parties. On receiving instructions he drew up both deeds of transfer, and the plaintiff claims that the lot in question was left out of the second deed owing to the solicitor's error. The solicitor's evidence as to the transaction was objected to on the trial. The defendants claimed a subsequent agreement had been entered into whereby the lot in question was left out and that the payments actually made by Wilson shewed this to be the case. The learned trial judge found that the full purchase price was paid, and that it was a case where rectification should be made.

Statement

The appeal was argued at Vancouver on the 15th and 17th of April, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Alfred Bull, for appellants: They must prove the full purchase price was paid before they can succeed. The plaintiff's evidence must be corroborated under section 11 of the Evidence Act (R.S.B.C. 1911, Cap. 78). The solicitor's evidence is not admissible, because at the time of the transaction he was acting as solicitor for the person against whom he is now acting.

[*G. E. Martin,* for the respondent, at this juncture asked for an adjournment in order to obtain other counsel, as he was a witness on the trial, which was granted.]

Argument

17th April, 1919.

Bull: The amount actually paid was short $1,200. Mr. Martin, the solicitor, tried to explain this, but I submit his evidence should not be received. It is a professional communication, and the privilege is the privilege of the client: see Taylor on Evidence, 10th Ed., p. 643, par. 911. On the question of admissibility when the retainer is a joint retainer see Phipson on Evidence, 5th Ed., 89; *Doe dem. Peter* v. *Watkins* (1837),

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3 Bing. (N.C.) 421; *Doe dem. Strode* v. *Seaton* (1834), 2 A. & E. 171; *Chant* v. *Brown* (1848), 7 Hare 79. A solicitor in no circumstances can disclose the case of his client: see *Ex parte Campbell. In re Cathcart* (1870), 5 Chy. App. 703. The question is, can he give evidence of any communication he receives from his client in his professional capacity? See *Robson* v. *Kemp* (1803), 5 Esp. 52 at p. 53.

Argument

Whiteside, K.C., for respondent: On the question of corroboration see *Peterson* v. *The King* (1917), 55 S.C.R. 115; *Radford* v. *Macdonald* (1891), 18 A.R. 167. To get the evidence of the full amount being paid you must take the statement of Mr. Martin with the cheques. On the question of solicitor's evidence see Phipson on Evidence, 4th Ed., 184-5; Wigmore on Evidence, Vol. 4, p. 2311; *Weeks* v. *Argent* (1847), 16 M. & W. 817. On the point of privilege see *Walton* v. *Bernard* (1851), 2 Gr. 344 at p. 358; *Fraser* v. *Sutherland, ib.* 442; *Sandford* v. *Remington* (1793), 2 Ves. 189; *Perry* v. *Smith* (1842), 9 M. & W. 681 at p. 682; *Baugh* v. *Cradocke* (1832), 1 M. & Rob. 182; *Bursill* v. *Tanner* (1885), 16 Q.B.D. 1; *Butterley Co.* v. *New Hucknall Colliery Co.* (1908), 78 L.J., Ch. 63. The information obtained from the solicitor in evidence in this case was common to both parties.

Cur. adv. vult.

15th July, 1919.

MACDONALD, C.J.A.

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

MARTIN, J.A.

MARTIN, J.A. This is a suit to rectify a conveyance of land from one Duncan McLennan, deceased, to the plaintiff. McLennan had agreed in writing to sell the lots to one Innes, who assigned to the plaintiff, and when the time came to complete the transaction they both went together to a solicitor and jointly instructed him to carry out that completion by preparing the proper conveyance to Wilson of the lands covered by the agreement, and the balance due thereon was settled at $4,000, for which a promissory note at six months was accepted, and duly paid, the conveyance remaining in a bank in escrow in the meantime. If the joint instructions had been properly carried

out, the conveyance should have included the same number of lots as were in the agreement, but by some slip or clerical error in the solicitor's office one of the lots, No. 18, was omitted from the conveyance. The evidence of the solicitor as to the instructions and his own error was objected to as being privileged, and if it is rejected, there would be no corroboration of the plaintiff's evidence in this action against the deceased's executors. But, in my opinion, it is not a case of privileged communication at all, because the crucial "communication" was in fact made by both parties at the time in the form of instructions to their common solicitor to draw a conveyance to cover the lands in the agreement. If he carried out those instructions in accordance with his duty, the missing lot would have been included. Every "communication" that was essential for the due carrying out of the intention of the parties was made in the presence of themselves and their solicitor at the time. Therefore, how can there now be any privilege *qua* solicitor to prevent a communication which was, in fact, made by both principals nearly five years before this action was begun?

It is, consequently clear to my mind that the error has been established, and the conveyance should be rectified to include the missing lot 18. In such case, of course, there is no question of specific performance, because the corrected conveyance gives the plaintiff all he can pray for.

MARTIN, J.A.

It becomes unnecessary to say anything about the file of papers of the deceased that the solicitor has found containing a memorandum relating to the matter, because the case for rectification is established without it, and once there is rectification, the question of payment is, on the pleadings, immaterial.

With respect to the point raised as to parties under section 60 of the Trustee Act, R.S.B.C. 1911, Cap. 232, I read the words "where, upon the supposition of the deceased being alive, he will be liable to execute a conveyance" as meaning "where, if the deceased were alive he would be liable to execute," etc. Now the facts here are that, to quote the section, the deceased did

"enter into a contract in writing for the sale . . . . . of real estate [lot 18] . . . . . and . . . . . has died . . . . . without providing by will for the conveyance of such real estate . . . . . to the person entitled . . . . . to such conveyance."

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So the deficiency may be supplied by a conveyance by the executors under the section after application, or more cheaply and directly, by rectification *solus*. The appeal, therefore, should be dismissed.

WILSON *v.* MCLENNAN

GALLIHER, J.A.

GALLIHER, J.A.: In my view of the evidence, Mr. Martin was acting for both Wilson and McLennan in adjusting the matter between them, and the memorandum made by him at the time was, I take it, open to both to see, and might, for that matter, just as well have been found in the file of Wilson as in that of McLennan. Under such circumstances, it is not what I would consider a privileged document. Moreover, the other documents in the matter clearly indicate that lot 18 was omitted by inadvertence.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is in small compass if it be that Mr. Martin's evidence was admissible. That this Court may reject evidence which is not legal evidence is clear. The case which establishes this proposition, even where no objection may have been taken in the Court below, is *Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13. In my opinion, what happened was nothing more than a mistake. The parcel of land was omitted through error, an error which was rightly explained by the person who could best speak to it—the solicitor for both parties, who acted personally in the transaction. The parties to the sale, both vendor and purchaser, came together, consulted with and carried out the whole matter in conjunction with the same solicitor, *i.e.*, Mr. Martin. That Mr. Martin should not be allowed to tell all that took place, and speak to the fact that the full consideration for the sale was paid, and how the error happened would be the application of a principle, to the denial of natural justice. There is no difficulty. The privilege of a client is, no doubt, in proper cases, absolute that a solicitor must not be admitted to disclose confidential communications, but this privilege does not extend to the non-admission of evidence within the knowledge of a solicitor acting for both parties to a transaction in respect to facts known to both parties, which is the situation, as I view it, in the

present case. In Phipson on Evidence, 5th Ed., p. 189, we read this:

"When two parties employ the same solicitor, the rule is that communications passing between either of them and the solicitor, in his joint capacity, must be disclosed in favour of the other—*e.g.*, a proposition made by one, to be communicated to the other (*Baugh* v. *Cradocke* (1832), 1 M. & Rob. 182; *Perry* v. *Smith* [(1842)], 9 M. & W. 681); or instructions given to the solicitor in the presence of the other (*Shore* v. *Bedford* [(1843)], 5 Man. & G. 271; *Ross* v. *Gibbs* [(1869)], L.R. 8 Eq. 522); though it is otherwise as to communications made to the solicitor in his exclusive capacity (*Perry* v. *Smith, sup.*; Tay. s. 926; Bray, 427, 442-443)."

The facts of the present case, upon this statement of the law, supported by the authorities quoted, amply warranted the admission of the evidence of the solicitor, especially in view of the latitude always permitted in the giving of evidence relative to the payment of the consideration called for in the deed. In *Perry* v. *Smith, supra,* as reported in 60 R.R. 869, Alderson, B. at pp. 870-71 said:

"It is clear that the communication made to this witness was made to him in his character of attorney for the vendors, on whose part he was applying for payment. If Mr. Alexander's argument were right, the effect would be, that wherever an attorney is employed by both parties, no communication made to him could be admitted in evidence, because they must all be made through the common attorney. The point was expressly ruled in *Baugh* v. *Cradocke* ((1832), 42 R.R. 775; 1 M. & Rob. 182) that where one attorney only is employed, a communication made to him in his character of attorney for both parties may be used against one of them."

MCPHILLIPS, J.A.

(Also see *Pearce* v. *Pearce* (1846), 16 L.J., Ch. 153 at pp. 158-9.) In *Butterley Co.* v. *New Hucknall Colliery Co.* (1908), 78 L.J., Ch. 63 at p. 68 (affirmed (1910), A.C. 381; 79 L.J., Ch. 411), Cozens-Hardy, M.R. said:

"Evidence is admissible to explain the circumstances under which an instrument was executed, including facts known to both parties."

The present case is one where the executor and executrix, the defendants, acting under the will of the late Duncan McLennan, may be rightly called upon to execute a conveyance of lot 18, omitted to be described in the conveyance made by the deceased, as that parcel of land was covered by the agreement of sale, and in support of this obligation it is only necessary to refer to section 60 of the Trustee Act (R.S.B.C. 1911, Cap. 232).

It was strongly pressed, upon the argument at this bar, that

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the corroboration necessary under section 11 of the Evidence Act (R.S.B.C. 1911, Cap. 78) was absent, the action being against the representatives of a deceased person, and whilst I am not of the opinion that the case is one that calls for compliance with this provision, yet, should it be requisite, the evidence adduced at the trial is amply corroborative of the essential facts, notably the production and proof of the cheques that passed, conclusively proving the payment of the full consideration money which would cover the land in question and inadvertently omitted from the conveyance as executed by the deceased (also see, as to corroboration, *Peterson* v. *Regem* (1917), 55 S.C.R. 115, the Chief Justice at p. 116).

I am, therefore, of the opinion that the appeal should stand dismissed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Tupper & Bull.*

Solicitors for respondent: *McQuarrie, Martin, Cassady & Macgowan.*

IN RE ESTATE OF SIR WILLIAM VAN HORNE, DECEASED, AND THE SUCCESSION DUTY ACT. THE ROYAL TRUST COMPANY v. MINISTER OF FINANCE.

HUNTER, C.J.B.C. (At Chambers)

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IN RE ESTATE OF SIR WILLIAM VAN HORNE, DECEASED

Succession duty—Domicil of testator outside Province—Bulk of estate outside Province—Method of taxation on property within—R.S.B.C. 1911, Cap. 217, Sec. 7—B.C. Stats. 1915, Cap. 58, Sec. 4.

In the case of a testator domiciled in the Province of Quebec leaving property both within and without this Province, the duty levied under the Succession Duty Act is on the actual value of the inside property only; but in order to bring inside property otherwise exempt, within the ambit of taxation, the outside property may be considered (MARTIN and MCPHILLIPS, JJ.A. dissenting).

[Reversed by Supreme Court of Canada.]

APPLICATION by The Royal Trust Company, by way of petition, to have the Court fix the succession duty taxable on the deceased's estate. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 14th of March, 1919.

The late Sir William Cornelius Van Horne, formerly of the City of Montreal, in the Province of Quebec, died in the City of Montreal on the 11th of September, 1915, and was at the time of his death domiciled in the Province of Quebec. He made his last will and testament on the 26th of January, 1915, when he appointed The Royal Trust Company, his wife, his son and his daughter, or the survivor or survivors of them his executors. The gross value of the estate within and without the Province of British Columbia at the time of his death was $6,371,374.73, and the gross liabilities were $169,989.56, none of the said liabilities being within the Province of British Columbia. The only property within the Province of British Columbia was 2,000 shares of B.C. Sugar Refinery, Limited, of the par value of $100 each. Statement

For the purpose of the Succession Duty Act the value of the said shares was agreed to between the petitioner and the deputy minister of finance at the sum of $300,000. The said shares in the B.C. Sugar Refinery, Limited, form part of the residuary

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estate, and are divided in equal portions between the widow, the son and the daughter.

The deputy minister of finance taxed the said estate under the Succession Duty Act in the sum of $14,242.10, upon the following basis—using round figures. Assuming the value of the estate is $6,000,000 and the value of the British Columbia assets $300,000, the British Columbia assets being one-twentieth of the whole, the taxes would be one-twentieth of what the taxes calculated under the British Columbia Act would be on the whole estate.

Carter, for the Crown: The words in the statute (Succession Duty Act, R.S.B.C. 1911, Cap. 217, Sec. 7, as amended in 1915, Sec. 4), "Where the net value of the estate exceeds $100,000" mean the net value of the whole estate, not merely of the British Columbia assets. Acordingly, after calculating 1½ per cent. on the first $100,000, that is, $1,500, only one-twentieth of this sum is allotted to the British Columbia assets, or $75. Similarly with regard to the second $100,000, which at 2½ per cent. is $125 against the British Columbia assets. The balance of the whole estate is $5,800,000, on which 5 per cent. is payable, that is $290,000, or against the British Columbia assets one-twentieth of that sum, namely, $14,500, which, with the previous sums of $75 and $125 added, make $14,700, the proportion of the debts chargeable to British Columbia reducing this sum to $14,242.10.

Argument

Wilson, K.C., for The Royal Trust Company: The proper and only way the estate can be taxed under the Succession Duty Act is as follows: Calculated on the sum of $290,463.25, being the value of the British Columbia estate, less proportion of liabilities: 1½ per cent. on $100,000, $1,500; 2½ per cent. on $100,000, $2,500; 5 per cent. on $90,463.25, $4,523.16; total, $8,523.16. It is clear that property without the Province can not be taxed: see *Woodruff* v. *Attorney-General for Ontario* (1908), A.C. 508. The Minister of Finance is treating it as if there were a general trust for conversion and the shares had first to go into a general fund and then the fund was distributed. This is not so. There is no general trust conversion, but simply a specific bequest. If the effect of the interpretation of "net property"

is to impose a tax upon a succession to property within the Province of property locally situate without the Province, the Legislature will simply be doing indirectly that which it is precluded from doing directly. It is undoubted English law, and certainly British Columbia law, that the right to tax is confined to property physically and legally within the jurisdiction, Our legislation destroys the maxim *mobilia sequuntur personam*, and taxes property physically within the jurisdiction, although legally outside the Province. The old law, following the maxim, taxed property legally within, although physically without the jurisdiction: *Blackwood* v. *The Queen* (1882), 8 App. Cas. 82 at pp. 92-97. When our Act speaks of property, surely it means property in respect whereof probate may be granted.

Argument

Carter, in reply: Under the interpretation clause you must consider the value of the whole estate to arrive at the basis for taxing succession duty. The whole intention of the Act was to tax a rich man who left a large estate at a much higher rate than a poor man who left a small estate.

HUNTER, C.J.B.C.

HUNTER, C.J.B.C.: The testator was domiciled in Montreal, and accordingly I think Mr. *Wilson's* contention is correct. The net value of the estate within the jurisdiction, which is the only estate that can be taxed, is to be arrived at by deducting the proportionate amount of the total liabilities, and then the percentages prescribed are to be applied to this net amount. Here the Province has taken into account the total net value of the estate, both within and without the jurisdiction, for the purpose of computing these percentages, but I fail to see what right there is in the Province to take into account the extra-provincial assets belonging to a person not domiciled within the Province, except for the purpose of ascertaining the net value of those situate within the Province. It is obvious that, if the sum levied in respect of the assets within the jurisdiction is made larger than it otherwise would be by taking into account assets without the jurisdiction, then an indirect tax has been levied on the assets without. But the Province can not do *per obliquum* what it cannot do *per directum*.

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From this decision the minister of finance appealed. The appeal was argued at Vancouver on the 15th of April, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

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Carter, for appellant: In Ontario they passed an amendment to the Succession Duty Act in 1899 (Cap. 9, Sec. 12) as to outside property. The case of *Re Renfrew* (1898), 29 Ont. 565 was decided before that amendment was passed, and it was due to this decision that the amendment was passed. This amendment is substantially the same as our Act. The value of the whole estate, irrespective of where it is, should be the basis of taxation in this Province.

Argument

Wilson, K.C., for the respondent: The tax must be strictly brought within the purview of the statute: see *Partington* v. *The Attorney-General* (1869), L.R. 4 H.L. 100 at p. 122. The statute has never imposed the tax. You cannot use as a factor something outside the jurisdiction belonging to one domiciled outside the jurisdiction. The *Renfrew* case (1898), 29 Ont. 565 is in my favour; see also *Thomson* v. *The Advocate-General* (1845), 12 Cl. & F. 1; *Blackwood* v. *The Queen* (1882), 8 App. Cas. 82; *Woodruff* v. *Attorney-General for Ontario* (1908), A.C. 508; *Rex* v. *Lovitt* (1912), A.C. 212.

Carter, in reply, referred to *Attorney-General* v. *Newman* (1899), 31 Ont. 340.

Cur. adv. vult.

15th July, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The deceased was domiciled and died in the Province of Quebec. He bequeathed a large estate, which included personalty in this Province valued at $300,000. The question to be decided is what duties should be levied upon the said property in this Province under and by virtue of the Succession Duty Act and amendments thereto. The decision turns on the true interpretation of section 7 of the said Act as amended by section 4 of the amending Act, 1915, Cap. 58. The deputy minister of finance has, I think, misconstrued the section, which reads as follows:

"7. When the net value of the property of the deceased exceeds twenty-five thousand dollars, and passes under a will, intestacy, or otherwise,

either in whole or in part, to or for the use of the father, mother, husband, wife, child, daughter-in-law, or son-in-law of the deceased, all property situate within the Province, or so much thereof as so passes (as the case may be) shall be subject to duty as follows:

"(*a*) [Not applicable.]

"(*b*.) Where the net value exceeds one hundred thousand dollars but does not exceed two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, and two dollars and fifty cents for every one hundred dollars above the one hundred thousand dollars:

"(*c*.) Where the net value exceeds two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every one hundred dollars of the second one hundred thousand dollars, and five dollars for every one hundred dollars above the two hundred thousand dollars."

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The phrase "net value" in the first line thereof may be assumed to refer to the net value of the whole estate wherever situate (see definition in section 2), but "net value" as used in subsections (*b*) and (*c*), which are applicable to this case, refers to the estate situate within the Province. It is "all property within the Province" which "shall be subject to duty as follows."

MACDONALD, C.J.A.

The appeal should, therefore, be dismissed.

MARTIN, J.A.: In his reasons for judgment the learned judge below decided the question in favour of the respondent, on the ground that to increase the amount of the succession duty payable on property in British Columbia by taking into consideration *ex juris* assets was an indirect tax on such assets, which the Province had no power to impose. This is in direct conflict with the view taken over 20 years ago in Ontario by so able a judge as Mr. Justice Street, who said in *Re Renfrew* (1898), 29 Ont. 565 at p. 569:

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"There is no doubt that it was within the powers of our Legislature to have enacted that the property of a deceased person situate outside the Province should be considered in arriving at this aggregate value."

And he went on to hold that, in the statute before him, the Legislature had not so enacted, taking the statute as a whole. But our Legislature has removed the obstacle encountered by Mr. Justice Street by the definition given to "net value" in section 2, Cap. 217, R.S.B.C. 1911, as follows:

" 'Net value' means the value of the property, both within and without

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the Province, after the debts, incumbrances, or other allowances or exemptions authorized by this Act are deducted therefrom."

The result of this, in my opinion, is that subsection (*c*) of section 7 should, for construction, be taken to read thus:

"Where the net value of the property, both within and without the Province exceeds $200,000," etc.,

which brings the matter within that view of "consideration" about which Mr. Justice Street held, rightly in my humble opinion, "there is no doubt." With all due deference, it is not a matter of indirect taxation at all, but simply the fixing of a basis of domestic assessment in certain varying circumstances, domestic and foreign. Can it be seriously said that, *e.g.*, it would be indirect taxation if our statute declared that where a deceased left property of the net value of $1,000,000 in a foreign country that imposed no succession duty, then his property within this Province should pay 50 per cent. of its net value? Or that if such *ex juris* property were invested in German government securities, then the Provincial property should pay even 99 per cent. duty?

In my opinion the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: It is not the purpose of the Succession Duty Act of British Columbia to impose taxation on property situate without the Province. We have in the case before us $300,000, approximately, of property in the Province liable to taxation. Supposing there was no property outside the Province, this would be taxed as Mr. *Wilson* indicates. All this property is taxable, and to adopt the method pursued by the Government brings about the result that a higher tax is imposed on this particular property by reason of the fact that the deceased also held property outside the Province at the time of his decease. It is true the rate imposed on each $100,000 of property is the same, *viz.*: 1½, 2½ and 5%, but the result is that by applying the proportional system to both inside and outside property, the value of the inside property is enhanced so as to produce a revenue several thousand dollars in excess of what the tax would be if applied directly to the inside property. I do not think the object or effect of the Act was to bring about either of these conditions. I think the more reasonable con-

struction is that where the deceased has property both inside and without the Province, and the property inside would otherwise be exempt from taxation, then for bringing such inside property within the ambit of taxation the outside property may be looked to, but the taxation shall only be on the actual value of such inside property.

I would dismiss the appeal.

MCPHILLIPS, J.A.: This appeal involves the consideration of a very important point. It may be shortly stated to be that where admittedly there is property, the *situs* of which is in the Province, the rate may be imposed as fixed by the Succession Duty Act (R.S.B.C. 1911, Cap. 217, Sec. 2, "aggregate value," "net value," Sec. 7, and Succession Duty Act Amendment Act, 1915, B.C. Stats. 1915, Cap. 58, Sec. 4), taking into consideration the "aggregate value" and "net value" as defined in section 2 of Cap. 217, the interpretation section of the Act. The definitions as contained in the Act read as follows:

"'Aggregate value' means the value of the property before the debts, incumbrances, or other allowances authorized by this Act are deducted therefrom, and shall include property situate without the Province as well as property situate within the Province:

"'Net value' means the value of the property, both within and without the Province, after the debts, incumbrances, or other allowances or exemptions authorized by this Act are deducted therefrom."

The estate of the deceased is shewn to come within subsection (*c*) of section 7 of the principal Act as amended by the Succession Duty Act Amendment Act, 1915, and the amount of duty has been fixed by the Minister of Finance taking into consideration the property of the deceased without the Province, but the taxation is imposed only upon property within the Province, *i.e.*, the property outside the Province is only looked at to determine the aggregate value and net value which must be determined in pursuing and complying with the provisions of the Provincial enactment. The point of law to determine is, can this be said to be *ultra vires* legislation? In *Re Renfrew* (1898), 29 Ont. 565, Mr. Justice Street at p. 569 said:

"There is no doubt that it was within the powers of our Legislature to have enacted that the property of a deceased person outside the Province should be considered in arriving at this aggregate value, and it may also

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be conceded that the language of the sections relied on by the appellant, taken in its ordinary sense, is sufficiently wide to include such property."

But in the result the decision was that the then statute law of Ontario was held to be ineffective. Following this decision legislation was enacted in Ontario to meet the point, that was an Act respecting Succession Duties (62 Vict., Cap. 9), passed in 1899, section 12 reading as follows:

"12. In determining for the purposes of subsections 3 to 6 of section 4 of The Succession Duty Act the aggregate value of the property of any person dying after this section takes effect, the value of his property situate outside of this Province shall be included as well as the value of the property situate within this Province."

Since this enactment it would not appear that the question has been further agitated, save passing reference to it in some cases, notably by Garrow, J.A. in *Attorney-General for Ontario* v. *Woodruff* (1907), 15 O.L.R. 416. At p. 432 he said:

"Subsections 3, 4, 5, 6, 7 of Sec. 4 have to do with the aggregate value (which by 62 Vict. Ch. 9, Sec. 12, is to include the value of property situate within and without Ontario), rates, and further exemptions not now in question."

And at p. 434:

"Such property would by force of the rule be, *prima facie* at least, included in the very wide definition of 'property' contained in Sec. 2, even without the aid of the amendment to Sec. 4 (1) (*a*). But with the aid of that amendment, the rule and the statute agreeing, the case for the Crown becomes as plain as it appeared to be in the *Newman* case, apart, of course, from the circumstance of the settlements, with which I will deal presently. That is to say, if the testator had owned at his decease the property covered by the settlements, it would have clearly fallen within the express words of the statute as amended, and have been liable to the duty, and the question of actual *situs* would have been of no importance."

MCPHILLIPS, J.A.

The *Woodruff* case went on appeal to the Privy Council (see (1908), 78 L.J., P.C. 10), and the judgment of the Privy Council reversed the judgment of the Court of Appeal for Ontario, but, as I read the judgment, in no way passed upon or decided the question we here have to determine. The neat question for decision is, whether or not the British Columbia Succession Duty Act is within or without the powers of the British Columbia Legislature in so far as the scale of taxation is arrived at, taking into consideration in the aggregate value and net value property without the Province. There is no attempt whatever to tax property without the Province; that which is taxed is admittedly within the Province. In effect,

a statutory rule or scale has been laid down to arrive at what is the aggregate value or net value, and can it be said to be *ultra vires* legislation? In my opinion it cannot. The resultant effect of *intra vires* legislation is not for the Court unless satisfied that the Legislature has gone outside its constitutional Province, *i.e.*, beyond the powers conferred upon it by the British North America Act, and as to that, in my opinion, the challenged legislation is effective and the succession duty as claimed is payable. I have given very anxious consideration to the judgment of the learned Chief Justice of British Columbia, from which judgment this appeal is taken, and with great respect to the learned Chief Justice, I am entirely unable to accept the view at which he arrived.

In my opinion, therefore, the appeal should be allowed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

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

Solicitor for appellant: *W. D. Carter.*
Solicitors for respondents: *Wilson & Whealler.*

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COLLISTER *ET AL.* v. REID *ET AL.*

Mining law—Application for certificate of improvements—All requirements completed except affidavit under section 57(g)—Adverse action—Not prosecuted—No further work done—Ground relocated—Validity—R.S.B.C. 1911, Cap. 157, Secs. 49, 50, 52 and 57.

The plaintiffs staked four claims in 1906. They performed the necessary assessment work and in 1914, after having performed all the conditions necessary under the Act with a view to obtaining a certificate of improvements except the filing of the affidavit required under section 57(*g*) they were informed by the mining recorder, when applying for the necessary information to be included in the affidavit, that an adverse action had been filed. They were then unable to make the affidavit required in order to obtain from the mining recorder his certificate in the Form I. The writ was never served on the plaintiffs, and the plaintiffs did no further assessment work but inquired yearly at the office with a view to obtaining the certificate in Form I. The defendants relocated the ground covered by the plaintiffs' claims in 1918. An action for a declaration that the plaintiffs were the owners of the ground in question was dismissed on the ground that the claims were vacant and abandoned under section 49 of the Mineral Act.

Held, on appeal, reversing the decision of GREGORY, J. (GALLIHER, J.A. dissenting), that where the free miner goes before the recorder in a *bona fide* manner and submits such proofs by all documents which it is possible to obtain and otherwise as will shew a genuine and substantial attempt to satisfy the statute, an application is then made as provided by section 57 of the Act and is pending till disposed of and is capable of being supported by such further proof as may be allowed to be submitted by the tribunal whose satisfaction is sought to be obtained.

Statement

APPEAL by plaintiff from the decision of GREGORY, J. of the 20th of January, 1919, in an action for a declaration that they are the owners of four certain mineral claims situated in East Sooke on Vancouver Island. The claims were staked in 1906. The necessary assessment work was done, and in 1914 they took steps to obtain a certificate of improvements. The claims were surveyed and the necessary documents and proofs required by statute were filed with the mining recorder after publication of the proper notice in the British Columbia Gazette and in a

newspaper circulating in the district. The plaintiffs then proceeded to file an affidavit in the Form G (section 57 of the Mineral Act) with the mining recorder, when they were informed an adverse claim had been filed. Neither notice of the adverse claim nor copy of the writ of summons was ever served on the plaintiffs or either of them, but in consequence of the filing of the adverse they were unable to make the affidavit in the said Form G. No further assessment work was done by the plaintiffs, but from time to time they applied for certificates of improvements, but owing to the adverse claim (upon which no action was taken) they were unable to obtain it. In March, 1918, the defendants located claims over the ground in question. The learned judge dismissed the action on the ground that the plaintiffs' locations must be deemed to be vacant and abandoned under section 49 of the Act upon their failure to do the necessary assessment work and obtain a certificate of work after their application for a certificate of improvements in 1914.

Statement

The appeal was argued at Vancouver on the 14th of April, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Armour, K.C., for appellants: My contention is the plaintiffs have complied with the provisions of the Act: (1) they have done everything required to apply for a certificate of improvements, and (2) they did apply for a certificate. One of the Collisters went every year to the office in an endeavour to obtain his certificate of improvements. Those filing the adverse claim took no action and the right of a certificate still exists. The plaintiffs' rights should not be defeated by the filing of an adverse action that is not proceeded with: see *Voigt* v. *Groves* (1906), 12 B.C. 170; *Nelson & Fort Sheppard Ry. Co.* v. *Jerry et al.* (1897), 5 B.C. 396; 1 M.M.C. 161.

Argument

F. C. Elliott, for respondents: No affidavit in the Form G was filed and it was not proved on the trial that the adverse filed was not a valid one. Secondly, no proper plan was filed. The plan shews the plaintiffs' claims but not the defendants, and they have not proved they have any legal claims. There was no application for a certificate of improvements, as it cannot be obtained until applicant obtains Form I from the mining

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recorder. The assessment work must therefore be done annually until any difficulty that arises is settled: see *Troup* v. *Kilbourne* (1897), 5 B.C. 547; 1 M.M.C. 219. They could have perfected their title but neglected to do so: see *Collom* v. *Manley* (1902), 32 S.C.R. 371; 1 M.M.C. 487.

Armour, in reply: Abandonment is a question of intention, and we have the learned judge's findings on this.

Cur. adv. vult.

15th July, 1919.

MACDONALD, C.J.A.: When the owner of a mineral claim under the Mineral Act has complied with specified conditions precedent, and has applied for a certificate of improvements "as provided by section 57 of the said Act," he is relieved from the necessity of doing further work on the claim pending the issue of the certificate of improvements (section 52).

The plaintiffs, the recorded owners of the mineral claim in question in these proceedings, have performed all the conditions set forth in the subsections to said section 57, except subsection (*g*) which required them to file with the mining recorder an affidavit in a form set out in the schedule to the Act, which is an affidavit shewing the performance of the conditions set forth in the said subsection. The plaintiffs were deterred from filing such affidavit by the statement of the mining recorder that an adverse action had been begun, and notice thereof had been filed with him, and this being so, the plaintiffs were not in a position to make the affidavit aforesaid which would contain the statement that they were in undisputed possession of the claim. Whether the affidavit was actually made or not does not clearly appear, but it is certain that it was not filed and that the certificate in the Form I was not issued. The said writ was not served upon the plaintiffs, nor did they enter an appearance gratis.

MACDONALD, C.J.A.

After the expiry of the writ at the end of one year from the issue thereof, the defendants located mineral claims upon the same ground, and the plaintiffs now bring this action for trespass and to restrain the defendants from interfering with their alleged rights.

Two or three years have elapsed since the plaintiffs attempted

to obtain said certificate. They have done nothing in the matter in the meantime except to inquire of the mining recorder from time to time whether or not the obstacle had been removed. I do not think it can be said on the facts that they meant to abandon the interests which they claim, though during these years they have not done and recorded any work upon the claims, no doubt under the belief that the law did not require it. Unless, therefore, they had brought themselves within the benefit of said section 52, their failure to do this work from year to year worked a forfeiture, and the defendants were entitled as against them to relocate the ground.

It was contended by plaintiffs' counsel that what they did before the mining recorder amounted to an application for a certificate of improvements within the meaning of said section 52. Under the Act, it is to the mining recorder that the application is to be made, though it is the gold commissioner who is to issue the certificate. Written application is not required, unless Form G is to be regarded as the form of application, which I hesitate to hold, because if an adverse should happen to be filed before that document is executed, then no application can be made. Now an adverse, as it is called, is for the very purpose of preventing, not the application, but the granting of the application. An application verbally was in fact made to the recorder. Had the affidavit in the Form G been actually made and tendered before the defendant had knowledge of the adverse claim, it could not, I think, be doubted that section 52 would, in such a case, have protected the applicant for a certificate of improvements. While I am not free from doubt, I think I shall not be far astray in giving effect to the spirit of the section, when, to my mind, the letter is not altogether clear. There has been delay, but it is explained, and as the whole trouble has been brought about by the false move of the plaintiffs in the adverse action in whose interests the present defendants are, these defendants are not entitled to the benefit of the doubt.

MACDONALD, C.J.A.

I would allow the appeal.

MARTIN, J.A.: This is an adverse action under section 85 of the Mineral Act, Cap. 157, R.S.B.C. 1911, by which the plaintiffs seek to "establish" their title (section 82) to certain

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mineral claims which they, and associates, located in June, 1906, in Sooke District, Victoria mining division, as the Eureka, Margaret, Copper King, and Copper King Fractional, but which were subsequently over-located in March, 1918, by the defendants as the Safety, Arrow, Trional, and Trional Fraction mineral claims.

Objection was raised to the plaintiffs' map or plan filed with the affidavit under section 85, with the mining recorder, which affidavit is required

"to be made by the person asserting the adverse claim, and setting forth the nature, boundaries, and extent of such adverse claim, together with a map or plan thereof, made and signed by a duly authorized land surveyor, and a copy of the writ in the said action."

The affidavit filed herein sets forth that the plaintiffs located said claims and that they were over-located by the defendants, and asks for possession and a declaration of title thereto as against the defendants, and goes on to say:

"Now produced and shewn to me and marked Exhibit 'B' hereto is a blue-print of a plan prepared by John Hamilton Gray, a duly authorized British Columbia land surveyor, setting forth the nature, boundaries and extent of the adverse claim of the said plaintiffs."

The plan, blue-print, shews sufficiently the situation of the plaintiffs' claims on the slope of Mount Maguire with respect to other surveyed and Crown-granted lands in that locality (the survey being "tied on" to the established one of Crown-granted lot 93) and the boundaries and extent of the plaintiffs' claims, surveyed as lots 138, 139, 140 and 155 respectively, and has this note thereon: "Compiled from official data and certified correct, J. H. Gray, B.C.L.S." This plan, as the evidence of Gray shews, is compiled from actual field notes of surveyors on file in the lands department, thus bringing it within the decision in *Paulson* v. *Beaman* (1902), 9 B.C. 184; 1 M.M.C. 471, even though I may say, with all respect, that it has not been regarded as a satisfactory one by mining lawyers, there being an equal division of the four judges concerned therein, and one of them gave no reasons and another failed to notice that the statute declared a waiver for two things only, *viz.*, failure to commence action or to diligently prosecute the same, but till reversed by a higher Court, the decision must stand while being strictly confined to its facts.

MARTIN, J.A.

It must be borne in mind that in a case like the present, which is one of a complete over-location, the "nature, boundaries and extent" of the adverse claim must necessarily be, on the part of each claimant, to the whole area, and therefore the accuracy of the map or plan is a matter of no practical importance, for it is either "all or none" to each party, whose respective plan must inevitably shew practically the same area which the learned trial judge has rightly found to have been "simply jumped" by the defendants who, it is admitted, restaked over the plaintiffs' lines.

Then it is contended that the original plan, actually signed by the surveyor, should have been filed with the mining recorder, but, in my opinion, the statute is satisfied by an accurate blue-print (as this is on its face, and is not so objected to) which for the purposes of the Act may properly be regarded as a duplicate of the original plan which was put in at the trial. Certain other objections to formalities in location do not require further consideration, for on the facts, they are obviously cured by remedial section 36.

I turn, then, to what is the main and serious point in the case, upon which the learned judge below solely bases his decision, *viz.*, that because the plaintiffs did not obtain and record a certificate of work since the year 1914, the "claims shall be deemed vacant and abandoned, any rule of law or equity to the contrary notwithstanding," under section 49.

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But section 52, which the learned judge has not referred to (nor section 56, of which more hereafter), relieves the free miner from further work or payment if two things happen: (1) If he has done $500 worth of work, or paid that sum in money, and recorded the same; and (2) If he "has applied for a certificate of improvements, as provided by section 57 of this Act." In such case the Act declares that—

"it shall not be necessary to do any more work or pay any more money in connection with such mineral claim, as provided by sections 48 and 51, until the certificate of improvements has been issued. . . . . ."

The policy of the action is clear, that the free miner, having paid for his claim to the equivalent of $500 should not be called upon to pay any more after he has made his election, evidenced by his application, to incur the considerable expense

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of surveying and publication, etc., to obtain the certificate of the improvements and other documents leading up to the issue of the Crown grant under sections 56 *et seq.*, for which he has to pay an additional $25, section 61(*b*). The sum of $500 is fixed by section 56 as the standard value of a mineral claim, because under it "any lawful holder" of such a claim may at any time apply (also under secton 57) for a Crown grant, to which it is declared he "shall be entitled on payment" of $500, or the balance of that sum due after giving him credit for work or payments already done or made under sections 48 and 51. This section 56, even if there were no section 52, confers a vested interest and establishes two things, *viz.*: (1) That once the miner has made such payment (in cash or work) the Government does not expect to get any more money or work from him; and (2) after such payment a right to a Crown grant has actually accrued, to obtain which all he has to do is to take the steps specified by section 57 *et seq.* This right is an addition to, and apart from, that which he obtains under section 52 (which is not a declaration of rights accrued as is section 56, but of exemption from work or payment) and no time is limited within which he may apply for that Crown grant to which he has become "entitled," which is an important concession, in his favour for reasons hereinafter given. And obviously, after he has thus made full payment and acquired such a right under section 56 he cannot be deprived of it by the operation of sections 40 and 49, because section 56 in effect declares that all claims of the Crown for work or payment under sections 48 or 51, therein cited, have been satisfied. The result of this is that the free miner is, solely upon payment of the balance needed to make up $500, freed by section 56 from any further obligation, just as he is freed by section 52 by work or payment plus application. In other words, under the distinct right given by section 56 the making of application is not necessary to relieve him from the obligation to do more work or pay more money, and that section in terms relieves him therefrom, because it provides:

MARTIN, J.A.

"The intending purchaser shall comply with all the provisions of the next following section of this Act, except such as relate solely to the work required to be done on claims."

Here the plaintiffs are admittedly within the scope of this section because they have paid in full the $500 due on each claim by work and money, the last certificates recorded in June, 1913, being for money under section 51. It comes to this, that the only difference between his distinct rights under sections 52 and 56 is the somewhat anomalous one that under the former he must continue to do still further work or make payments till he has actually "applied" under section 57. By section 56 there is given the free miner the additional right of accelerating the acquisition of his claim by discharging the balance due on it at any time either by work or payment, instead of having to wait to record his certificate of work in each successive year as in ordinary cases, though under section 50 he may obtain credit for excess of work. But under either section, once all payments are made, by work or cash, the free miner necessarily and unavoidably acquires the *status* and position of "an intending purchaser" under section 56, and may concurrently invoke his rights simultaneously acquired under both of them. If he were to rely solely on section 52 he would either have to apply or continue to work or pay, both of which might at the time be very inconvenient to the too frequently indigent miner, but he escapes this dilemma by invoking the said concession given by section 56 and standing quiescent upon his acquired rights thereunder till he can raise the considerable sum necessary to support his application for the Crown grant. And it must not be forgotten that it would often be good policy to play a waiting game and not invite the heavy expense, delay and uncertain issues of an adverse action which would be precipitated by the application, when by a delay of a few weeks or months an opposing claim might lapse or be abandoned. "Let sleeping dogs lie," in the shape of conflicting locations which have to be kept alive annually, is often a good mining maxim, and to it the Legislature has left open a door by section 56.

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It follows that, in my opinion, under this important section alone (which I have felt it proper to consider at some length because it was not referred to below, nor in the argument here) the plaintiffs are exempted from any further work or payments, and therefore section 49 has no application and so they are entitled to judgment in their favour.

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This view is singularly clear to me, but if it be erroneous and the plaintiffs be forced to rely upon section 52 only, then, in my opinion, it is as clear that they have in fact made the application, as that they have done their full amount of work or made payment. As has been seen, the language of section 52 is—"and has applied for a certificate of improvements, as provided by section 57." That expression is not very clear, especially when section 57 is examined, but it is equivalent to and means no more than, "as directed by." The first thing that strikes one in section 57 is the omission in direct language of the person to whom the initial application is to be made; it merely says at the beginning in a declaratory way that—

"whenever the lawful holder of a mineral claim shall have complied with the following requirements, to the satisfaction of the Gold Commissioner, he shall be entitled to receive from the Gold Commissioner a certificate of improvements in respect of such claim, unless proceedings by the person claiming an adverse right under section 85 of this Act have been taken."

And it is only by turning to the "Notice of Application," Form F (p. 1871), required to be posted on the claim and in the recorder's office, by subsection (*d*) that it appears the applicant must "apply to the mining recorder for a certificate of improvements, for the purpose of obtaining a Crown grant of the above claim," which further appears by Form G, where the "applicant's affidavit" is set out, and Form I, where the recorder certifies to the "documents relating to your application for a certificate of improvements." So it is beyond question that though eventually the satisfaction of the gold commissioner must be obtained for said certificate (Form H, which does not use the word "application," as does Form I), yet the initial application therefor must be made to the mining recorder, and that initial application must necessarily be the one referred to in section 52, because there is no other "provided by section 57." Form I, issued by the mining recorder under section 58, is really a certificate of compliance with section 57 and shews that the applicant has advanced beyond the first stage of his pending application for a certificate of improvements, and then he enters upon the second stage of the application by going to the gold commissioner under section 59, and, if it is finally granted, then later he may make, within three months, a distinct application for a Crown grant under section 61. Perhaps I

MARTIN, J.A.

may here remark that these distinctions between mining recorder and gold commissioner (who has jurisdiction "for the whole Province" under section 115, and the powers of a mining recorder, section 131) are in practice in local mining divisions largely reduced to theory, because section 130 provides that

"All powers conferred upon Gold Commissioners by any Act may be performed by Mining Recorders with regard to mineral claims within the territory for which they have respectively been appointed."

To resume: There is nothing in the section itself that requires the application to be made in writing, and no hint of such a thing is given in Notice F. It would properly, then, be made verbally in the ordinary way and the applicant would submit in support of it evidence to shew that he had complied with the "requirements" of section 57, and until he satisfies the mining recorder on the points specified in section 58, he cannot obtain the first-stage certificate of compliance thereunder, Form I, *viz.*, that the notice of application has been posted in the recorder's office and the field notes and plan deposited there, and that there has been continuous publication for sixty days as particularized in said form. It has been submitted that there can be no application in a legal sense until the requirements in section 57 have been complied with, and that the words in section 52, "has applied as provided," must be given that limited and restricted construction. But with all due respect, I am unable to take that extreme view. If it is correct, it means that there is the slightest clerical or typographical error in, *e.g.*, the notice, or its publication or in the filed copy of the surveyor's plan, or field notes, in relation to names, dates or numbers, or otherwise, then, there is no application in fact or law—there is no line of demarcation, it must be this or nothing. But this construction fails to distinguish between the application made and the proof adduced in support of it, just as applications are constantly made by motion to this Court which have to be enlarged for further proof, but are still pending in the meantime. Otherwise the result would be that the applicant must stand or fall, once for all, upon the material he hands in at the time he makes his application and the recorder or commissioner would have no power to keep the application pending so that even obvious mistakes could be corrected or the

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proof supplemented in more substantial ways. I cannot think that the section in terms or spirit means thus to deprive the recorder and commissioner of the fair opportunity to reach that "satisfaction" which is contemplated and to deprive the applicant of the means of satisfying it. The proper construction to put upon it is, in my opinion, that there has, at least been an application when the free miner goes before the recorder in a *bona fide* manner and submits such proofs, by all documents which it is possible to obtain and otherwise, as will shew a genuine and substantial attempt to satisfy the statute. Once that is done the application is made and is pending till disposed of, and like all other such applications is capable of being supported by such further proof as may be allowed to be submitted by the tribunal whose satisfaction is sought to be obtained. I can see nothing in the section to support the view that the Legislature intended to exact initial perfection of proof.

It is conceded here that the proof is in order with the exception of the affidavit in the Form G required by subsection (*g*)(1), which the recorder refused to receive from the plaintiffs when they went to him to apply for the certificate on June 6th or 7th, 1914, because an adverse writ had been filed in his office. It is not quite clear whether the affidavit had actually been made at the time of this application, but, at least, the plaintiffs offered to make it and were prepared to do so before the recorder in the usual way, but he says, "I refused to accept the affidavit," and "I told them an adverse had been filed and I told them it [their application] was stopped therefor." As one of the plaintiffs puts it, the recorder "told us there was nothing further to do but to wait until the adverse was removed," and the other says that the recorder shewed him the adverse writ and "I was told there was an adverse claim filed and I could not complete": and "I left then, and went back continually and asked him when we would complete, and he says, well, he says, as long as that remains on you can do nothing."

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This is confirmed by the recorder, who says, p. 58:

"He came and applied for a certificate of improvements and I told him . . . . . an adverse claim had been filed and I shewed him the records and told him the filing of that adverse claim stopped all proceedings in the matter for obtaining a certificate of improvements."

The reason why the recorder refused to accept the affidavit G is that the first paragraph of it requires the applicant to swear that he is "in undisputed possession of the claim," which oath could not be truthfully taken in the face of the adverse writ, but if the affidavit had in fact been made and tendered to him to file, he could not legally have refused to do so; it would have to go on his records for what it was worth. It might, *e.g.*, have been made in perfect good faith after a precautionary search the evening before, and yet the next morning an adverse writ might have been issued and filed just before the applicant reached the recorder's office, or handed to the recorder while he was actually hearing the free miner's application, nevertheless the affidavit, if tendered, would have to be filed, and yet would the application be any stronger in law than it was before? But the recorder, in effect, took the right view, as I understand him, that the application was in fact made but "stopped," *i.e.*, suspended while the adverse action was undisposed of. If he did not take that view and has in effect rejected the application or disposed of it prematurely, then a wrong has been suffered by the plaintiffs for which they are entitled to relief under section 27, *viz.*:

"No free miner shall suffer from any acts of omission, or commission, or delays on the part of any Government official, if such can be proven."

MARTIN, J.A.

The fact that the applicant was prevented by the filing of the adverse writ under section 85 from completing the proofs of his application by filing his affidavit does not detract from the fact of the application (but simply suspends it), any more than if the applicant had brought everything except one of the copies of the Gazettes and newspapers required by the same subsection (*g*)(1) to be "produced for the information of the mining recorder," which he had forgotten. Can it seriously be said that he had not made an "application" in their absence and could not be allowed to go back to his house to bring the missing copy to complete his proofs? I am inclined to think, with every respect, that the chief error which has been fallen into below is in assuming that the statute requires a written application and in regarding Form G as that application, being misled by the merely introductory and general words "application for certificate of improvements," relating to the subject-

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matter, and overlooking the exact heading, "Applicant's Affidavit," which examination shews it to be, and nothing more.

I am of opinion, therefore, that in fact and in law plaintiffs have satisfied the two requirements of section 52 and therefore are freed from the consequences of section 49. And it follows that, if such is the case, no mere delay on their part, short of statutory limitation, through a misapprehension of their right or remedy to free themselves from the adverse action, which had in fact lapsed in 1915, the writ never having been served, would operate to deprive them of their acquired rights, which they had not only no intention to abandon but were awaiting, however illadvisedly, an opportunity to assert, and I can see nothing to prevent their now going before the recorder and continuing the hearing of their long-pending application. It may seem a long time, but there is nothing in the statute to prevent it, and it must be remembered that mining actions have been known to extend over a period of several years before their final determination by their Lordships of the Privy Council, at the end of which time the original locators have been held to be the rightful owners (as here), and it would have been a great injustice if they had to continue to do assessment work in the meantime on a claim for which they had fully paid: it is not a question of exacting further revenue for the State, but of doing justice to its citizens who have paid in full for their mineral claims.

MARTIN, J.A.

GALLIHER, J.A.: I would dismiss the appeal. The point is, have plaintiffs complied with section 52 so as to obviate the effect of section 49? The words are, "has applied for a certificate of improvements as provided by section 57 of this Act" (being Cap. 157, R.S.B.C. 1911). Turning to section 57 we find what is necessary to be done by an applicant before a certificate of improvements will be granted. The application to the mining recorder is not for the purpose of obtaining from him a certificate of improvements, for that is granted by the gold commissioner, but as a step towards procuring the mining recorder's certificate, Form I, to be used on an application to the gold commissioner, and perhaps a step in the application. Section 59 directs within a specified time that an application

GALLIHER, J.A.

shall be made to the gold commissioner for a certificate of improvements, otherwise the mining recorder's certificate, Form I, shall lapse. On the application to the mining recorder the applicant shall file an affidavit in the Form G in the Schedule. This affidavit is the proof produced by the applicant that all the requirements of 57 have been complied with, and without such affidavit there would be nothing upon which the mining recorder could issue certificate I, which certificate shews that the mining recorder has been satisfied. When the applicant came to the mining recorder for this certificate it was found that an adverse had been filed, and it became apparent that the applicant could not make the affidavit, Form G, as he could not swear that he was in undisputed possession of the mineral claims, and the mining recorder so informed the applicant. Although section 52 does not say to whom the application for a certificate of improvements shall be made, I think the application there referred to is the application provided for by section 59. In addition to certifying what is proved by the affidavit, Form G, the mining recorder is by section 58 required to set out in his certificate the name of the owner of the claim at the date of the issue of the certificate. The obtaining of the mining recorder's certificate is a step taken by the applicant to procure a document for use on his application to the gold commissioner, and is just as necessary to the procuring of a certificate of improvements as any proof required by section 57.

GALLIHER, J.A.

I do not fail to note that the Form G is headed, "Application for Certificate of Improvements," or that Form I, mining recorder's certificate, starts out with these words: "I herewith enclose the following documents relating to your application for a certificate of improvements," but the point is, can the application to the mining recorder be regarded as the application referred to in section 52? I note also that Form F, which is published in the Gazette and a newspaper circulating in the district, and which is also posted on the claim and in the mining recorder's office, reads as follows:

"Take notice that I . . . . . Free Miner's Certificate No. . . . . ., intend, at the end of sixty days from the date hereof, to apply to the Mining Recorder for a certificate of improvements, for the purpose of obtaining a Crown grant of the above Claim."

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Now, while this reads "apply to the mining recorder for a certificate of improvements," it is a fact that the mining recorder cannot grant it, but can only issue his certificate, Form I, and an application must later be made to the gold commissioner and this certificate produced. When the applicant comes before the gold commissioner he must shew that all the requirements of section 57 have been fulfilled, and the reference in section 52 to section 57 is, as I view it, on an application to the gold commissioner, and not the mining recorder. If this were not so, it seems to me the mere application to the mining recorder without the proper proofs necessary to obtain his certificate, would stay the effect of section 49 until those proofs were furnished, and that might mean, for instance, that the necessary work had not been done, or that no survey had been made, and in fact any of the requirements called for by the statute. I do not think this can be the intention of the Act.

GALLIHER, J.A.

Moreover, the words "as provided in section 57" must have some application, and if, as I have above outlined, a mere application to the mining recorder, unaccompanied by the necessary proofs, is sufficient, I fail to see in what way they can be applied.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur with the reasons for judgment of my brother MARTIN, and agree in allowing the appeal.

EBERTS, J.A.

EBERTS, J.A.: This action was brought by the plaintiffs against the defendants for a declaration that the defendants, as against them, have no right, title or interest in or to the minerals and mining rights so lawfully held by the plaintiffs by location and purchase in the Eureka, Copper King, Margaret and the Copper King Fraction, in Sooke District, Vancouver Island. As owners of said claims, the plaintiffs, from the time of staking in June, 1906, complied with all the requirements of the Mineral Act, according to section 48 thereof, and in the year 1914 (having before that time duly recorded assessment work, as provided by section 48 of the Mineral Act, equal to $500 on each of said claims) proceeded as they were entitled to under section 57 of that Act, and having complied with all the conditions prescribed by section 57 of the Act, with the exception of the affidavit of the holder of the claim referred to in

subsection (*g*) of said section, duly applied for a certificate of improvements, having complied with all the requirements of the Act to obtain one except the filing of the affidavit in the Form G, appeared before the mining recorder, Mr. Stanton, and who then was also the gold commissioner for the district in the year 1914 and were prepared to file affidavit G. But Mr. Stanton refused to accept the affidavit, stating that "an adverse claim had been filed and that the filing of that adverse claim stopped all proceedings in the matter for obtaining a certificate of improvements" from the fact that the maker of the affidavit G must swear that he is the recorded owner and in undisputed possession of the mineral claims. He could not do this, as an adverse action had been commenced, and a copy of the writ in the adverse action had been filed in Mr. Stanton's registry by persons in no way connected with the defendants in this action, as appears by the record. The writ in the adverse action was never served on any of the defendants, and is still on the files of the mining recorder.

In the year 1918 the defendants located the Trional, Arrow, Safety and Trional Fraction mineral claims, covering the ground of the plaintiffs' locations, and proceeded to comply with the Act for the acquiring of a grant of these locations.

EBERTS, J.A.

The plaintiffs have recorded work on each of said claims to the extent of $500 (in all $2,000), have applied verbally for a certificate of improvements, and have complied with all the requirements of section 57 to entitle them to such certificate, with the exception of affidavit G, which they were prepared to file with Mr. Stanton, but which was refused by him on the ground above mentioned, and refused several times since the year 1914 for the same reason, and has suspended the application of the plaintiffs for the certificate.

True, no certificates of work have been issued on the claims since 1914, but the claims have never been abandoned by the plaintiffs, they no doubt relying on section 52 of the Act, after having made an application for a certificate of improvements.

I am of the opinion the appeal should be allowed.

Appeal allowed, Galliher, J.A. dissenting.

Solicitors for appellants: *Bass & Bullock-Webster.*

Solicitors for respondents: *Courtney & Elliott.*

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July 2.

IN RE JEU JANG HOW

IN RE JEU JANG HOW.

Immigration—Person of Chinese origin—Entry as student—Head-tax—Certificate—Chinese Immigration Act—Arrested as a labourer—Inquiry under Immigration Act—Order for deportation—R.S.C. 1906, Cap. 95, Sec. 8—Can. Stats. 1910, Cap. 27, Secs. 10, 16, 33(7) and 79; 1917, Cap. 7, Sec. 2(B).

A person of Chinese origin, representing himself to be a student, was upon payment of the head-tax of $500, granted a certificate by the Immigration authorities under section 8 of the Chinese Immigration Act, and allowed to enter Canada. Subsequently being found working in a restaurant he was arrested and upon a hearing being had before a board of inquiry under section 33(7) of the Immigration Act he was ordered to be deported. An application for a writ of *habeas corpus* was refused.

Held, on appeal, reversing the decision of MURPHY, J. (GALLIHER, J.A. dissenting), that the Chinese Immigration Act provides a clear procedure for deporting a person of Chinese origin and the repugnancy clause in the Immigration Act disentitles the Immigration authorities to invoke the procedure under that Act against a person of Chinese origin who had gained admission into Canada.

[Appeal to Supreme Court of Canada quashed for want of jurisdiction.]

APPEAL from the decision of MURPHY, J. dismissing an application for a writ of *habeas corpus*, heard by him at Chambers in Vancouver on the 12th of June, 1919. The applicant, a Chinaman, came from China to Canada in February, 1919, claiming to be a student, 17 years of age, and that he was going to school in Alberta in charge of his brother. The controller apparently not being satisfied that applicant was a *bona fide* student, collected the head tax of $500, and granted a certificate under section 8 of the Chinese Immigration Act, leaving it open to applicant to obtain a refund on compliance with the provisions of the Immigration Act. Later, he was found working in a restaurant at Medicine Hat, and after an investigation by a Winnipeg officer of the department of immigration, was arrested and brought to Vancouver, where a hearing was had before a board of inquiry under section 33(7), of the Immigration Act. The board found that he was a labourer, and not entitled to enter Canada (order

Statement

in council, P.C. 1183), and that his entry into Canada had been owing to his misrepresenting himself to be a student.

Alfred Bull, for the application.
Reid, K.C., for Immigration Department.

MURPHY, J.: In my opinion the Chinese Immigration Act is not a code governing the entry of Chinese into Canada, but is an Act imposing added conditions on persons of Chinese origin in reference to entry into Canada over and above the conditions required of all immigrants, which conditions are contained in the Immigration Act. In fact, this is put beyond question by section 79 of the Immigration Act. There is, I think, no conflict between the two Acts as applied to the facts of this case. The applicant herein has obtained a certificate under the Chinese Immigration Act from the controller that he has paid the head-tax. He has not had his *status* as a student fixed under the Chinese Immigration Act either by the controller or by certificate of identity. If he had, other considerations might possibly arise. His case must, therefore, be that because he has paid the $500 head-tax, he is exempt from the operation of, *inter alia,* order in council, P.C. 1183, passed under the provisions of the Immigration Act, prohibiting the entry of labourers into Canada, since to assert the contrary must necessarily bring the two Acts into conflict. The proposition has only to be stated, I think, to carry with it its own refutation. Then, it is said, there must be a conviction under subsection (7) of section 33 of the Immigration Act before a board of enquiry can deal with the matter. But said subsection (7) clearly provides, in my opinion, for arrest and enquiry, apart altogether from prosecution, for an offence under the Act. As to the third point, it is not open in this Court, there being no question raised as to the constitutionality of order in council, P.C. 1183, and it following from what is said *supra* that the board of enquiry has jurisdiction in the premises: *Re Munshi Singh* (1914), 20 B.C. 243. Application refused.

MURPHY, J.

From this decision Jeu Jang How appealed. The appeal was argued at Victoria on the 23rd of June, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

MURPHY, J. (At Chambers)

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July 2.

IN RE JEU JANG HOW

Alfred Bull, for appellant: After having passed Jeu Jang How into Canada, I contend the board, in assuming the right to deport him, acted without jurisdiction. The Chinese Immigration Act is a special Act dealing with a certain class of immigrants, and provides for penalties. The applicant had a right to a judicial inquiry under this Act and to be tried before a magistrate. The authorities acted under section 33(7) of the Immigration Act. The special Act has precedence over the general Act: see *Conservators of the Thames* v. *Hall* (1868), L.R. 3 C.P. 415. The next point is that a certificate was given the Chinaman under section 8 of the Chinese Immigration Act when he entered, and this is *prima facie* evidence of his having complied with the requirements of the Act, and that he is regularly within Canada: see *Rex* v. *Fong Soon* (1919), 26 B.C. 450. Thirdly, there is no evidence to shew that at the time of entry he came under the prohibition sections and no evidence upon which the order could be made: see *Re Munshi Singh* (1914), 20 B.C. 243 at p. 269.

Argument

Reid, K.C., for respondent: The Chinese Immigration Act is not an Act permitting entrance. It is a restrictive Act and the certificate of the controller only refers to that Act. The question was decided in the case of *Wong You* v. *United States* (1910), 181 Fed. 313 as reversed in (1912), 223 U.S. 67, where the statutes are substantially the same. I submit there is no repugnancy between the Acts and the authorities may proceed under either section 7B of the Chinese Immigration Act or section 33(7) of the Immigration Act. The definition of "deportation" is found in section 2(*a*) of the Immigration Act. The jurisdiction here is based on misrepresentation and it was for the board to decide: see *Rex* v. *Chappus* (1917), 28 Can. Cr. Cas. 411. If there is enough evidence to open the door to section 14 the board can act.

Bull, in reply.

Cur. adv. vult.

2nd July, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant was admitted to Canada pursuant to the provisions of the Chinese Immigration Act, as appears by the statement and declaration for registration, dated

February 10th, 1919, and the receipt for head-tax bearing the same date. Some weeks later he was arrested and brought before a board of inquiry and by them ordered to be deported. An appeal was taken to the minister of the interior and dismissed. The appellant then moved for a writ of *habeas corpus* which was refused; whereupon he took this appeal.

One of the grounds of appeal is that there was no evidence before the board upon which appellant could be deported, and it was argued that in the total absence of evidence that the appellant was illegally in Canada the board had no jurisdiction, and that therefore the Court could interfere notwithstanding the provisions of section 23 of the Immigration Act, which purports to take away the jurisdiction of the Court to review, quash, reverse, restrain or otherwise interfere with the decision of the board or of the minister.

But there is another ground upon which I should prefer to rest my decision in this case. I think it right, however, to say that in my opinion no Court of justice could, on the evidence adduced before the board, have made the order which the board of inquiry constrained itself to make. The ground upon which I prefer to rest my decision is based upon the following considerations: The appellant having gained admission to Canada under the provisions of the Chinese Immigration Act can be deported, if at all, only under its provisions. The Act provides clear and explicit procedure for deporting a person of Chinese origin who may be unlawfully in Canada. That procedure is quite different to that invoked in this case, founded as the latter is on the provisions of the Immigration Act, which by section 79 is only to apply to Chinese immigration when not repugnant to the provisions of the Chinese Immigration Act.

MACDONALD, C.J.A.

The Immigration Act confers upon a board of inquiry power to deport, while the Chinese Immigration Act by section 7B as enacted by Cap. 7, Sec. 2, Can. Stats. 1917, provides that:

"Whenever any officer appointed under this Act or under the Immigration Act has reason to believe that any person of Chinese origin is illegally in Canada, he may without a warrant apprehend such person, and, if such person is unable to prove to the satisfaction of the officer that he has been properly admitted into and is legally in Canada, the officer may detain such person in custody and charge him before a magistrate with being illegally in Canada, which charge shall be tried summarily by the magis-

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trate, and the burden of proof of such person's right to be in Canada shall rest upon such person; and, if the magistrate decides that he is illegally in Canada, such person shall be deported, at his own expense if able to pay, and if not, at the expense of His Majesty."

The submission of counsel for the immigration authorities was that either remedy was open to them, but there is nothing in either Act to entitle me to say that the remedies are alternative. On the contrary, the Immigration Act is to be applied only when not repugnant to the provisions of the Chinese Immigration Act. No doubt Parliament could have made it optional with the immigration authorities to take proceedings under one or the other Act, but it has not done so in express terms, and I think the repugnancy clause of the Immigration Act disentitles me to imply an option to the immigration authorities to proceed under the one or under the other as they might see fit.

Mr. *Reid,* counsel for the immigration authorities, referred us to a decision of the Supreme Court of the United States, reversing the judgment of the Circuit Court of Appeals of New York. The cases are very similar in their facts, and our statutes and those in question there are in general much alike. The decision in that case, however, appears to me to have been affected in no small degree by the history of the United States legislation and the rulings of the executive thereunder. That case affords no satisfactory guide to a conclusion based on legislation having a different history and differing also in terms and sequence of dates. Said section 7B is the last word in our legislation on the subject, and is all inclusive in its language, and any other mode of procedure in dealing with Chinese persons unlawfully in Canada must necessarily, I think, be held to be repugnant to that section. Once a Chinese person is admitted into Canada, *i.e.,* passed and allowed to enter, any question afterwards raised as to whether or not he is illegally here must be decided pursuant to section 7B.

MACDONALD, C.J.A.

The appeal should be allowed and the writ should be directed to be issued.

MARTIN, J.A.

MARTIN, J.A.: It is submitted, first, that under section 7B, Cap. 7, of the amendment of 1917 to the Chinese Immigration Act, R.S.C. 1906, Cap. 95, this applicant for a writ of *habeas corpus* was entitled to a trial before a magistrate on the charge

that he was, and is, "illegally in Canada," and that though he may be deported as the result of such trial, the right thereto is not taken away by the provisions of the general Immigration Act, Cap. 27, 1910, and therefore the board of inquiry sitting under that Act which purported to make an order for his deportation had no jurisdiction to do so. Were it not for section 79 of the Immigration Act this view would, in my opinion, hardly be open to controversy, because the Chinese Immigration Act is obviously a special Act and code of procedure dealing with a special class of immigrants, but said section 79, under the heading "Application to Chinese," enacts:

"79. All provisions of this Act not repugnant to the provisions of the Chinese Immigration Act shall apply as well to persons of Chinese origin as to other persons."

So if, in fact, repugnancy be shewn to exist, that excludes the application of the general Act.

A consideration of the different tribunals of deportation under the two Acts shews clearly, to my mind, that there is a repugnancy. Under the special Chinese Immigration Act, section 7B, a "charge" is preferred against the accused before a magistrate, "which charge shall be tried summarily by the magistrate," which means a trial in the ordinary public way of magistrates' Courts and upon the ordinary rules of evidence. But under the general Act, section 13, a very different tribunal is empowered to Act, a board of "three or more officers," which by section 2(*a*) means "any person appointed under this Act, for any of the purposes of this Act," etc., of whom the "immigration officer in charge shall be one," sitting *in camera,* "separate and apart from the public, but in the presence of the immigrant . . . . . whenever practicable," and authorized to "receive and base its decision upon any evidence, considered credible or trustworthy by such board in the circumstances of each case," *i.e.,* in other words in practice, listen to anything or act upon nothing substantial.

These are very grave curtailments of curial rights and it is impossible, in my opinion, to say they do not create a repugnancy: no accused person would wish to be brought before such a tribunal as the latter, if he could avoid it. The

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policy of the Chinese Immigration Act seems to be to carefully protect, by means of judicial trials, the rights of those immigrants who have, like the appellant, obtained a certificate under section 8, which certificate, be it noted, proves not only that the immigrant has paid the $500 tax but that he has also "been permitted to land or enter," because he cannot be taxed before that permission has been given, and "the date of his arrival [and] the name of the port of his landing" must be set out in the certificate, which can only be "contested" at the instance of the Crown and in the manner provided, *viz.*:

"Such contestation shall be heard and determined in a summary manner by any judge of a superior Court of any Province of Canada. . . . ."

So we have in the one case, under section 7B, the trial before a magistrate, and, in the other, under section 8, the trial before a judge of a superior Court.

MARTIN, J.A.

The respondent's counsel, in opposition to this view, relied chiefly upon the case of *Wong You* v. *United States* (1910), 181 Fed. 313; (1912), 223 U.S. 67, decided upon certain American statutes of an analogous kind. It is always a hazardous thing to seek to apply decisions on statutes which are not essentially identical, particularly those of foreign countries, but in any event a close consideration of the judgment of the Supreme Court, delivered by Mr. Justice Holmes, shews that it does not assist the respondent, because it was founded on the fact (p. 70) that—

"The present Act does not contain the clause found in the previous Immigration Act of March 3, 1893, ... that it shall not apply to Chinese persons."

But in the case at this bar, the "present Act" does contain a clause which in effect says it shall not apply where it is repugnant to the special one, and it is repugnant in the respect hereinbefore set out, though in some others it is not.

It follows that, in my opinion, the appeal should be allowed and the application for the writ granted.

GALLIHER, J.A.

GALLIHER, J.A.: I am in agreement with the conclusions reached by MURPHY, J., and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from MURPHY, J., who refused to direct that a writ of *habeas corpus* should issue

and that Jeu Jang How should be accorded his liberty and freed from the order for deportation issued by the board of inquiry under the Immigration Act (Can. Stats. 1910, Cap. 27). In justice to the learned judge, it must be stated that the appeal was argued upon the basis that the Chinaman was granted a certificate under section 8 of the Chinese Immigration Act (R.S.C. 1906, Cap. 95), and that he was allowed to enter and given the certificate upon the representation that he was a student. The learned judge seems to have been under the impression that this was not the case. It is to be remarked, however, with great respect to the learned judge, that there exists no requirement in section 8 (R.S.C. 1906, Cap. 95) for the *status* of the immigrant being set forth. It is to be further observed that the claim may be made, as was made in the present case, that Jeu Jang How was a student, and later a refund could be applied for, *viz.*, within 18 months of arrival in Canada—see section 7 (R.S.C. 1906, Cap. 95). The certificate once granted under section 8 (R.S.C. 1906, Cap. 95) confers *status* and, in my opinion, may only be contested in the manner set forth in section 8. It was strongly urged at this bar that section 79 of the Immigration Act had the effect of applying all the provisions of that Act and would empower the board of inquiry sitting under that Act to make the deportation order. It is to be noted, however, that that section reads as follows:

"79. All provisions of this Act not repugnant to the provisions of the Chinese Immigration Act shall apply as well to persons of Chinese origin as to other persons."

That the board of inquiry should be enabled to make an order of deportation notwithstanding the existence of the certificate granting *status* to the immigrant under the provisions of the Chinese Immigration Act at once indicates repugnancy. That certificate is *prima facie* evidence that the person presenting it has complied with the requirements of the Chinese Immigration Act, and the forum of contestation is defined, namely, in a summary manner before any judge of a superior Court (section 8, R.S.C. 1906, Cap. 95). It is clear that once the immigrant is permitted to land upon a representation then made and a certificate issues, that certificate can only be

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displaced in the exercise of the powers conferred upon a judge of a superior Court. It cannot be rendered nutagory by a board of inquiry acting as it may "upon any evidence, considered credible or trustworthy" (see section 16 of Cap. 27—the Immigration Act, 1910).

In my opinion the board of inquiry was without jurisdiction in the present case (also see *Rex* v. *Fong Soon* [26 B.C. 450]; (1919), 1 W.W.R. 486 at p. 493).

In my opinion the judgment appealed from should be reversed and the appeal allowed.

Appeal allowed, Galliher, J.A. dissenting.

Solicitors for appellant: *Tupper & Bull.*

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

RADOVSKY *ET AL.* v. CREEDEN & AVERY.

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Contract—Sale of Manchurian beans—Tender of beans of another variety—Breach—Damages—Measure of.

The defendants entered into contracts with plaintiffs to supply "Manchurian white beans, handpicked." The defendants tendered beans that the plaintiffs refused to accept as beans of Manchurian origin and brougnt action for damages for breach of contract.

Held, that the burden was on the defendants to prove the beans tendered were of Manchurian origin and having failed in this they were liable in damages for the difference between the market price of "Manchurian white beans, handpicked" at the time of the breach and contract price.

ACTION for damages for breach of contract. The defendants agreed to supply the plaintiffs with 115 tons of Manchurian white beans, handpicked, at $7.90 per 100 pounds and 150 tons at $8.25 per 100 pounds. The defendants tendered certain beans but the plaintiffs refused them, alleging they were a different kind of bean. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 16th, 17th and 18th of June, 1919. Statement

Griffin, for plaintiffs.

Mayers, and *R. Smith*, for defendants.

25th June, 1919.

MURPHY, J.: I find this was a sale by description and not by sample. I find that the term "Manchurian white beans, handpicked" is not a trade name covering a recognized variety of beans, but means, as used in the contracts in question herein, white beans handpicked and grown in Manchuria. The contracts could have been filled by any one of three varieties of beans, *viz.*: Kotenachis, Olenashis or Tolenashis, provided such variety was grown in Manchuria. The defendants were, in my opinion, bound by the contracts to prove that the beans they tendered were of Manchurian origin. This they failed to do. Plaintiffs were not bound to put up a bank guarantee in Vancouver covering the whole amount of their purchases nor could defendants insist that such guarantee be put up before tendering Judgment

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the beans. It follows that defendants committed a breach of contract, and are liable for any damages proven to have resulted. This breach was made final by their letter of the 7th of February, 1917, which would reach plaintiffs about the 12th of February. It would then become plaintiffs' duty to go into the market and purchase the goods, the measure of damages being the difference in the price they would have to pay and the contract price. The contract could have been filled, as I have said, by any one of three varieties. Of these varieties the Kotenachis command a price, according to Mr. Disher's evidence, of from one-half to three-fourths of a cent per pound higher than that paid for Otenashis or Totenashis. These latter varieties, he states, are of about equal price. Mr. J. Y. Griffen sold Manchurian white beans in Vancouver on January the 27th, 1917, at ten cents per pound. I find there was no weakening of the Manchurian white bean market in February, that, if anything, it was an advancing market. True, defendants state they sold beans, such as they had tendered to plaintiffs, at a price lower than the contracts in question herein called for, but I think it is a fair inference, from the evidence, that the reason was they could not prove said beans were of Manchurian origin. The evidence is clear, I think, that beans suspected of being of Burmah origin had to be sold at a lower price and that defendants' beans looked like Burmah beans.

Judgment

I think that a fair measure of damages is the price obtained by Mr. J. Y. Griffen, less three-quarters of a cent per pound, since he sold Kotenachis, and since Mr. Disher's evidence puts the difference in price between Kotenachis and the lower grades (which, as stated, would comply with the contracts in question) at from one-half to three-quarter cents per pound. The price on the first contract was $7.90 per 100 pounds. The market price in February, as determined above, would be $9.25 per 100 pounds. Damages, at the rate of $1.35, are awarded on the contract for 115 tons, dated November 17th, 1916, and at the rate of $1 per 100 pounds on the contract for 150 tons, dated November 18th, 1916, as this contract called for a price of $8.25 per 100 pounds.

Judgment for plaintiffs.

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Municipal law — Widening of street — Expropriation by-law — Insufficient publication—Validity—Compensation paid—Deed to City not registered—Mortgage—Duly registered —Priority — Dedication — R.S.B.C. 1911, Cap. 170, Secs. 54 and 170—B.C. Stats. 1914, Cap. 52, Secs. 54 and 141—R.S.B.C. 1911, Cap. 127, Sec. 72—B.C. Stats. 1914, Cap. 43, Sec. 3; 1918, Cap. 105.

The City of Victoria deciding to widen Pandora Avenue passed an expropriation by-law to acquire the necessary property. Notice of the by-law with statement of its salient provisions and notification that it could be inspected at the City office was published in a daily paper and in the Gazette. One Moody, who owned property on the avenue, was given notice to treat for a strip of land on the front portion of his land. Upon being paid the price set, he gave the City a deed for the strip of land. This deed was never registered. Subsequently to the sale Moody mortgaged his property to the defendant, the description of the property including the strip of land in question. The mortgage was duly registered. After the registration of the mortgage a by-law was passed for the purpose, and the work of widening the avenue so as to include the strip of land in question was duly completed and opened for public use as a street. The evidence shewed the defendant was aware of the actual widening of the avenue and had used the sidewalk constructed on the strip in question without objection until the commencement of this action. Application was then made to register the deed from Moody to the City, but this would only be allowed subject to the defendant's mortgage. In an action for a declaration that the City was entitled to the strip of land aforesaid, it was held by the trial judge that the expropriation by-law was invalid as there was not a sufficient publication thereof to satisfy the statute, but that there had been a dedication by Moody of the strip of land as a public highway to which, on the facts, the defendant gave his assent, and the plaintiff Corporation is entitled to registration of the Moody deed clear of encumbrance.

Held, on appeal, affirming the decision of MURPHY, J. (MACDONALD, C.J.A. and EBERTS, J.A. dissenting), that on the evidence there was dedication of the property in question by Moody, and assent thereto by Bailey, and the appeal should be dismissed.

The defendants counterclaimed for relief from assessments imposed on their land (including the strip in question). Assessment and debenture by-laws were passed for the work on Pandora Avenue and deben-

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tures issued in pursuance thereof were sold by the City and interest paid thereon for one year. It was submitted that as the debentures were issued under the authority of subsequent by-laws, section 170 of the Municipal Act is only applicable to them and not the original expropriation by-law but that by-law being the foundation of the whole undertaking and being invalid all subsequent proceedings are invalid. The counterclaim was dismissed.

Held, on appeal, *per* MACDONALD, C.J.A., that section 170 applied to the debenture by-laws and once the debentures were sold and interest paid for one year, the non-performance of some antecedent obligation is immaterial.

Per MARTIN and MCPHILLIPS, JJ.A.: That the special tribunal of local improvement commissioners under the Victoria City Relief Act, 1918, has jurisdiction in the matters in question and its "report and directions" to the council cannot be questioned here.

Per GALLIHER, J.A.: That section 141 of the Municipal Act is a bar to the counterclaim.

APPEAL by defendant from the decision of MURPHY, J. in an action tried by him at Victoria on the 6th to the 7th, the 12th to the 15th, and the 28th of November, 1918, for a declaration that the City is entitled to a certain strip of land on the north side of Pandora Avenue between Douglas and Amelia Streets. The lot of which this strip formed a portion was owned by one Moody. The City Council, deciding to widen Pandora Avenue, passed an expropriation by-law (No. 1183) on the 22nd of January, 1912, for the purpose of acquiring, *inter alia*, the strip of land in question. Moody was served with notice to treat; he then claimed compensation in $6,260. This sum the City paid him, and on the 23rd of May, 1912, he gave the City a deed for the strip of land. Notice of the expropriation by-law containing some of the main provisions thereof, with statement that it was open for inspection at the City offices, was published in the Victoria Daily Times on the 20th of May, 1912, and in the Provincial Gazette three days later. On the 10th of August, 1912, the City, in pursuance of the Municipal Act, filed an application to register the by-law and the conveyance from Moody in the Land Registry office, but the conveyance was never registered. On the 8th of March, 1913, a mortgage was given by Moody to the defendant Bailey on the whole lot (including the strip in question) to secure a loan of $15,000. This mort-

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gage was duly registered without notice of the conveyance of the strip of land to the City. A by-law was passed authorizing the construction of local improvements, and the work was commenced widening Pandora Avenue in 1914, and completed. Assessment and debenture by-laws were passed and debentures were issued and sold, upon which interest was paid for one year. On the 21st of October, 1914, and after the registration of Bailey's mortgage, the registrar-general of titles notified the City that its application for registration of the deed from Moody was insufficient, and a further application in March, 1917, to register said conveyance was made, when the City was notified it would be only registered subject to the mortgage held by Bailey. The City then applied to Bailey for a release of the strip of land in question from the mortgage, which he refused to give.

R. W. Hannington, for plaintiffs.

McDiarmid, and *J. R. Green,* for defendants.

19th December, 1918.

MURPHY, J.: *City of Victoria* v. *MacKay* (1918), 56 S.C.R. 524 decides that publication is essential to the validity of street widening by-laws. The case does not decide what is publication under the statute. The second paragraph of subsection 176 of section 53, R.S.B.C. 1911, Cap. 170, is what is material, and reads: "Every by-law passed under the provisions of this subsection shall, before coming into effect, be published in the Gazette," etc. What is set up as "publication" under this subsection is Exhibit 4:

"Municipal Act.

"Notice is hereby given that the Municipal Council of the Corporation of the City of Victoria under the authority of the Municipal Act has passed a by-law numbered 1183 and entitled 'A by-law for the widening of Pandora Avenue, from Douglas Street to Amelia Street, and also between Chambers Street and Fernwood Road,' and for that purpose has expropriated certain land and real property in the said by-law more particularly described.

"The said by-law is on file, and may be inspected in the office of the Clerk of the Municipal Council, City Hall, Douglas Street, Victoria, B.C.

"Dated this 18th day of May, A.D. 1912.

"Wellington J. Dowler,
"C.M.C."

In my view, this does not satisfy the requirements of the

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statute. Exhibit 4 is not the "by-law" but a notice that such by-law has been passed. It is very far from setting out all the terms of the by-law. Especially it gives no particulars whatever of the property of which it is proposed to dispossess owners, a factor which looms largely in some of the majority judgments in the *MacKay* case, if I read them aright. To gain such knowledge it imposes on owners the necessity of either personally, or by agent, attending at the City Clerk's office to inspect the by-law. The statute gives the City Council no authority to impose such a requirement. In short, to hold Exhibit 4 to be a compliance with the subsection involves at least the reading into said subsection some such words as "notice of." This would be legislation, not construction. I, therefore, hold the by-law invalid.

The plaintiff Corporation and the Attorney-General then set up dedication of the land in dispute as a highway. In my opinion, although as stated the by-law is invalid, it and all the proceedings carried out under it, including the conveyance by the owner Moody to the plaintiff Corporation, can be looked at as evidence to prove the first essential of dedication, *viz.*, intention to dedicate, by Moody, the owner in fee. If so, I think such intention is clearly expressed in writing, particularly in the recitals of the conveyance. If this is an error, then, I think such intention can clearly be established as against the owner in fee in view of his acts and behaviour in the light of all the surrounding circumstances: Halsbury's Laws of England, Vol. 16, p. 33, par. 42, and authorities there cited.

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In April, 1914, the fences were moved back and during that year a concrete sidewalk was laid over the strip of land in question, which sidewalk has ever since been used by the citizens of Victoria. No steps whatever, on behalf of the owner, so far as the record shews, have been taken against such user. User is evidence of dedication and there is no fixed minimum period which must be proved in order to justify an inference of dedication: Halsbury's Laws of England, Vol. 16, p. 38, pars. 51 and 52. When the surrounding circumstances in this case are considered, *viz.*, the history of this widening, the evidence shews it was and has continued to be a matter of

much public interest in Victoria, *vide* the newspaper exhibits and legislation for the relief of the taxpayers of Victoria in connection with such improvements—the laying of the concrete sidewalk, the situation of Pandora Avenue in the City of Victoria, the uninterrupted user as aforesaid, etc., there is, I hold, ample evidence of dedication by the owner in fee. Acceptance and user is established by the same evidence. I cannot agree that section 13 of the Highway Act abrogates the common-law method of establishing a highway by dedication, acceptance and user. That section clearly, I think, applies merely to the case where the owner of land desires to have the minister of public works establish a highway under the provisions of the Highway Act. If I am correct thus far, the strip of land in dispute is a public highway. If so, by virtue of section 5 of the Highway Act (the City's deed not being registered), the fee is vested in His Majesty and authority is not needed for the proposition that the Attorney-General is the proper official to enforce any public rights in connection with such highway, one of which would clearly be the obtaining of a declaration that the disputed land is in fact a public highway. If this is correct, what is defendant Bailey's position? In the interval between the giving of the deed by Moody and the starting of work in April, 1914, he had obtained and registered a mortgage from Moody, which covered, probably by error, the disputed strip. His contentions, assuming, as I have held *supra,* MURPHY, J. that the land is a public highway by dedication, acceptance and user, are two. First, that user is essential to establish a public highway, and second, that by virtue of the registration of his mortgage before the date of such user, it has priority and in effect destroys such public highway, with the result that he is entitled to enforce his mortgage to the exclusion of such public highway, and to claim damages against the City for trespass. As shewn hereafter, I think the Moody conveyance valid, at any rate apart from the provisions of the Land Registry Act. If so, the defendant must rest his position solely on the fact of the registration of his mortgage. Conflicts based on the Land Registry Act provisions as to charges are essentially different according as such conflicts arise between registered and unregistered charges and between registered charges and

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unregistered ownership of the fee: *Bank of Hamilton* v. *Hartery* [26 B.C. 22]; (1918), 3 W.W.R. 551. Section 34 of the Land Registry Act makes registration of a charge *prima facie* evidence of the mortgagee's estate or interest, subject only to such registered charges as appear existing on the register and to the rights of the Crown. As stated, I think all the proceedings under the invalid by-law, including the Moody deed, may be looked at on the question of dedication. If so, I think they establish intention to dedicate by Moody, and acceptance of such dedication by the plaintiff Corporation prior to the giving of the mortgage by Moody to the defendant. Assuming, without deciding, that user is essential to the establishment of a public highway, the effect of what occurred, prior to the giving of the mortgage, was, I think, to give a right to the plaintiff Corporation to at any time—at any rate, prior to revocation by Moody of his dedication, if that were possible—establish a public highway over the disputed ground by throwing it open to the user of the public. As soon as this was done, if I am correct in the view already expressed, the fee would vest in the Crown until plaintiff Corporation registered its deed. The Crown then, from at any rate the date of the Moody conveyance and the payment of the purchase price by the plaintiff Corporation, had a right *in esse* to the fee, which might at any time be reduced to a right *in esse* by the throwing

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open of the disputed land to the user of the public by the plaintiff Corporation without registration of the Moody conveyance. If such right existed, section 34 of the Land Registry Act expressly preserves it, since registration is made subject to the rights of the Crown. In my opinion, on the facts here, this right did exist in the Crown, and at any rate now that it has been reduced to a right *in esse* by the act of plaintiff Corporation, the Attorney-General is entitled to a declaration that the plaintiff's mortgage is a cloud on the title of the Crown. But if this view is incorrect, and assuming that where a mortgagor is in possession of mortgaged premises, the mortgagee's assent is necessary to a dedication, and further assuming that user is essential to a valid dedication, I hold, on the facts here, the defendant must be held to have given such assent. The inference of assent by a mortgagor cannot,

I think, require more cogent proof than does the inference of dedication by the owner. If so, the evidence (excluding everything that occurred prior to April, 1914), already referred to as establishing dedication by Moody, establishes, in my opinion, assent by Bailey. In addition to this evidence, the record shews that Bailey was throughout this period resident in Victoria, that at any rate some short time after the actual work was entered upon, he devoted particular attention to this property because of default in the payment of interest; that he has personally used the sidewalk built on the disputed land, and that he made no objection until his pleadings in this action were filed. If there was such assent, the Attorney-General's action must succeed.

I am further of the opinion that the plaintiff Corporation is entitled to a declaration that defendant's mortgage is a cloud on its title, and that it is entitled to registration of the Moody deed clear of such cloud. If the deed is valid, plaintiff Corporation, by section 104 of the Land Registry Act, has the right to have same registered. If I am correct, as to Bailey's assent to the Moody dedication, that assent would operate in favour of the plaintiff Corporation, as well as in favour of the Crown, to the extent at any rate of plaintiff Corporation's interest in said public highway. Under section 370 of the Municipal Act, Cap. 170, R.S.B.C. 1911, the possession of public highways within its corporate limits is vested in the plaintiff Corporation, and the possession of the Moody conveyance, by virtue of section 104, as stated *supra,* confers on plaintiff Corporation the right of registration if the deed is valid. Its validity is impugned on the ground that plaintiff Corporation can only acquire real estate under by-law authority, and the by-law being, as I have held, invalid, the deed is void. The original Incorporation Act of plaintiff Corporation, passed in 1867, gives it the general power to hold real estate. In a careful review of all succeeding legislation affecting this statute, Mr. *Hannington* points out that its provisions are only repealed in so far as they are repugnant to or are inconsistent with such after legislation. In all the various Municipal Acts passed since affecting plaintiff Corporation, there is, in my opinion, nothing repugnant to or inconsistent with the general power

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to hold real estate conferred upon it by its Act of Incorporation. What these various Acts do, when they do not expressly confer a general power to hold real estate, is to prescribe particular modes whereby municipalities governed by them may acquire real estate. It cannot, I think, be said, under the wording of the various statutes, that prescribing a particular mode whereby land may be acquired, destroys the capacity plaintiff Corporation had of holding real estate to the extent of making void an otherwise valid deed purporting to convey land to it. I therefore, hold that plaintiff Corporation is entitled to registration of the Moody conveyance freed from any cloud on its title arising by virtue of defendant's registered mortgage.

As to the counterclaim, the disposition of the original action disposes of the trespass claim. In so far as it is thereby sought to attack the various assessment by-laws, I think it is clear such attack, in the form it takes in this action, can only be made by some one having a legal or equitable interest in the property assessed. Defendant Bailey, in his discovery, expressly repudiates any such interest. At the trial I added the other defendant, the Cameron Investment Company, Limited. On consideration, I think this is an error, since whatever instrument of title they possess is unregistered and therefore, by virtue of section 104 of the Land Registry Act, passes to them no interest, legal or equitable. Even if this is incorrect, no evidence of title appears on the record. Title cannot, I think, be proved by Bailey's statement that he had parted with his interest to his co-defendant. But assuming either defendant has a *status* to maintain the counterclaim, I think section 141 of Cap. 52, B.C. Stats. 1914, is, on the facts here, a complete bar to this cause of action. To adopt the narrow application of this section, contended for by counsel for plaintiffs, by counterclaim would, in my opinion, be to invite the very disastrous consequences which their Lordships of the Privy Council, in *Wilson* v. *Delta Corporation* (1912), 82 L.J., P.C. 52, stated it was the object of this and cognate sections to prevent.

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The counterclaim is dismissed.

From this decision the defendants appealed. The appeal was

argued at Vancouver on the 3rd to the 10th of April, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

W. J. Taylor, K.C. (*J. R. Green*, with him), for appellants: The deed from Moody to the City was never registered: see *Plumb* v. *McGannon* (1871), 32 U.C.Q.B. 8. They never registered or published the by-laws. Bailey loaned $15,000 on the mortgage. Interest was paid in 1916. In the following year Child tendered Bailey a release which he refused to execute. By obtaining registration of his mortgage Bailey is protected by the Land Registry Act, as he has priority over the City's unregistered deed. The mortgage covered the whole lot and is described by metes and bounds. They rely upon the principle of dedication, that it is a donation or gift, citing *Rhodes* v. *Perusse* (1907), 17 Que. K.B. 60. The mortgagee must be considered the owner, so that the existence of the deed does not apply. A dedication can be only made by an owner. There must be some evidence of his intention to dedicate, and there being none, dedication cannot be inferred on the ground of user: see *Regina* v. *Petrie* (1855), 4 El. & Bl. 737; *Folkestone Corporation* v. *Brockman* (1914), A.C. 338 at p. 350; *Attorney-General* v. *Sewell* (1918), 35 T.L.R. 193; *Poole* v. *Huskinson* (1843), 11 M. & W. 827. They must shew (1) that Moody dedicated; and (2) that after the mortgage was given Bailey dedicated. The evidence does not bring Bailey within the principles laid down in *Moore* v. *The Woodstock Woollen Mills Co.* (1899), 29 S.C.R. 627. As to dedication see also *Gooderham* v. *Corporation of Toronto* (1891), 21 Ont. 120 at pp. 138-9; *Corsellis* v. *London County Council* (1908), 1 Ch. 13; *Macoomb* v. *Town of Welland* (1907), 13 O.L.R. 335. There was no act of dedication by Moody except the giving of the deed, for which he was paid, and the mortgagee is not bound by what took place between Moody and the City: see *Martin* v. *London Chatham and Dover Railway Co.* (1866), 1 Chy. App. 501. As to a tenant not being able to dedicate see *Trustees of Rugby Charity* v. *Merryweather* (1790), 11 East 375(n.); A. & E. Encycl. of L., 2nd Ed., Vol. 9, p. 29. The owner and mortgagee must both dedicate: see *Farquhar* v.

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Newbury Rural Council (1908), 2 Ch. 586. The security of the mortgagee cannot be curtailed by the mortgagor: see Halsbury's Laws of England, Vol. 21, p. 186, par. 344; *Bradley* v. *Copley* (1845), 1 C.B. 685.

R. W. Hannington, for respondents: The notice to treat, followed by Moody's acceptance of the purchase price and delivery of deed, made it impossible for him to transfer or charge the property. My contention is we did publish the by-law which distinguishes *City of Victoria* v. *MacKay* (1918), 56 S.C.R. 524. Notice giving particulars of the by-law was published and this is, I contend, a sufficient compliance with the Act. The trial judge says it should be published *verbatim,* but I contend this is not necessary to make publication. Notice of where the information may be obtained is sufficient: see *In re B.C. Electric Ry. Co. and City of Victoria* (1917), 24 B.C. 346. The statute does not say "a copy of" or "in full." As to publication see *Bayley* v. *Wilkinson* (1864), 16 C.B. (N.S.) 161; Best on Evidence, 11th Ed., 344. On the meaning of "publication" see *Musselbrook* v. *Dunkin* (1833), 9 Bing. 605, and when publication is required see Dillon on Municipal Corporations, 5th Ed., p. 945, par. 603. Publication is not required in certain cases. If we can pass such by-law under section 145 we are in lawful possession: see *Meldrum* v. *District of South Vancouver* (1916), 22 B.C. 574.

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Section 54 of our Municipal Act is different from the Ontario Act, the British Columbia section not being restrictive: see *Bernardin* v. *The Municipality of North Dufferin* (1891), 19 S.C.R. 581; *Blomfield* v. *Rural Municipality of Starland* (1915), 25 D.L.R. 43. I will argue that although it is insufficient as a by-law it is good as a resolution: see *Alexander* v. *Village of Huntsville* (1894), 24 Ont. 665 at p. 674. The moment we issued debentures and paid one year's interest they were estopped. The validating of the consolidating ordinance validates the prior ordinances. The counterclaim is barred by sections 484-5 of the Municipal Act: see *Arbuthnot* v. *City of Victoria* (1913), 18 B.C. 35; *Wilson* v. *Delta Corporation* (1912), 82 L.J., P.C. 52; *Westholme Lumber Co.* v. *Grand Trunk Pacific Ry. Co.* (1918), 25 B.C. 343; 41 D.L.R. 42. The inspector's certificate approving of the by-law was issued,

and I contend this validates the by-law under section 478 of the Municipal Act. When we obtained the certificate we did everything we could do and we do not come under the *MacKay* case (1918), 56 S.C.R. 524. The by-law has not been quashed: see section 181 of the Municipal Act; see also *Connor* v. *Middagh* (1889), 16 A.R. 356. Notice of action has not been given and this is fatal to the counterclaim: see *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust Commissioners* (1884), 53 L.J., P.C. 59; *Keen* v. *Millwall Dock Co.* (1882), 51 L.J., Q.B. 277. Section 486 of the Municipal Act is a further complete defence, as far as damages are concerned. The jurisdiction of the Court is taken away by section 27 of the Victoria City Relief Act (B.C. Stats. 1918, Cap. 105). After service of the expropriation notice Moody could not dispose of the land: see *Hanna* v. *City of Victoria* (1916), 22 B.C. 555; Cripps on Compensation, 5th Ed., 76; *Metropolitan Railway Company* v. *Woodhouse* (1865), 34 L.J., Ch. 297. It is the statutory removal of the property from the ambit of the Registry Act: see *Dawson* v. *Great Northern and City Railway* (1904), 74 L.J., K.B. 190 at p. 194; *Mercer* v. *Liverpool, St. Helens, and Lancashire Railway* (1904), 73 L.J., K.B. 960; *In re Marylebone (Stingo Lane) Improvement Act. Ex parte Edwards* (1871), L.R. 12 Eq. 389; *Mauvais* v. *Tervo* (1915), 22 B.C. 207; *Wilkins* v. *The Birmingham Corporation* (1883), 53 L.J., Ch. 93. The City has power to hold land without any by-law under the original Act incorporating the City in 1867, and under section 56 of Chapter 94, C.S.B.C. 1877, said Acts are only repealed in so far as they are inconsistent with the subsequent Acts. Registration was applied for under the 1911 revision. It is the duty of the registrar to either accept or reject an application at once: see *Byrnes* v. *McMillan* (1892), 2 B.C. 163. We cannot say there was express notice as we were not on the register, but the Act will not be construed to defeat our position on a mistake made by the registrar: see *Siemens* v. *Dirks* (1913), 14 D.L.R. 149 at pp. 150 and 153; *Kirby* v. *McIntosh, ib.* 698. Section 104 of the Land Registry Act of 1911 must be read with section 34, in which case Bailey would only have a charge *prima facie*: see *Dominion Trust Co.* v. *Masterton* (1914), 20 B.C. 389; 7

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W.W.R. 953. He must rely on section 104: see *Loke Yew* v. *Port Swettenham Rubber Co.* (1913), 82 L.J., P.C. 89. As to Bailey having notice of the widening, he admitted he heard about it. It was in the newspapers and he read them: see Phipson on Evidence, 5th Ed., 131. The newspapers reported a general scheme of widening the street in 1911 and 1912: see *White* v. *Neaylon* (1886), 11 App. Cas. 171. If we had a valid by-law Bailey is bound by it: see *London City* v. *Vanacker* (1699), 1 Ld. Raym. 496; 91 E.R. 1231. As to the effect of notice see *Loke Yew* v. *Port Swettenham Rubber Co.*, *supra*; *Davidson* v. *O'Halloran* (1913), V.L.R. 367. Our case is as near as possible to *Howard* v. *Miller* (1915), A.C. 318. On the question of dedication, you can dedicate by deed or by act: see *Attorney-General* v. *Sewell* (1918), 35 T.L.R. 193. There may be assent that amounts to dedication: see Words and Phrases, Vol. 2, p. 1909. All the evidence leads to the intention to use it as a public street: see *Palmatier* v. *McKibbon* (1894), 21 A.R. 441; *Fraser* v. *Diamond* (1905), 10 O.L.R. 90; *Reaume* v. *City of Windsor* (1915), 8 O.W.N. 505; *McLean* v. *Howland Township* (1910), 16 O.W.R. 608 at p. 614. On the question of public rights, if there was a dedication by Moody nothing that the City can do can prejudice the public right to the property: see Dillon's Municipal Corporations, Vol. 3, p. 1693, par. 1073; *Cincinnati* v. *White* (1832), 31 U.S. 431. As to what will establish dedication see Dillon's Municipal Corporations, 5th Ed., p. 1713, par. 1081; Halsbury's Laws of England, Vol. 16, p. 39, par. 51; *Woodyer* v. *Hadden* (1813), 5 Taunt. 125 and 137.

Taylor, in reply: A prior registerable document unregistered cannot prevail against a subsequent registerable document registered. If the by-law is bad by reason of non-publication, the compulsory element of the Moody transaction disappears.

Cur. adv. vult.

15th July, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This action was brought by the City of Victoria against defendant Bailey to clear the City's title to a strip of land required for street widening. In the course

of the litigation the Attorney-General for British Columbia was, with his consent, added as party plaintiff, and the Cameron Investment Company, Limited, were added as parties defendant.

The action arises out of local improvement proceedings initiated by the City Corporation for the widening, paving and lighting of Pandora Avenue. A by-law, No. 1183, was passed by the Council on the 22nd of January, 1912, expropriating a strip of land of one Moody fronting on said avenue. The statute enacted that the by-law should be published in the Gazette and in a local newspaper. Instead of publishing a copy of the by-law, the City published a notice containing a statement of some of its salient provisions, and it was contended by counsel for the City that this was a sufficient compliance with the statute. I am of opinion that the notice was insufficient publication, and following *City of Victoria* v. *MacKay* (1918), 56 S.C.R. 524, I must hold that the by-law never came into effect.

The City served Moody with a notice to treat and paid him the compensation claimed by him, and thereupon took from him a deed of the strip of land in question. This deed the City neglected to register in the Land Registry office, and about a year later Moody mortgaged his land, including this strip, to the defendant Bailey, who in due course registered his mortgage in the Land Registry office. It was after such registration that the City proceeded with the actual work of widening and improving Pandora Avenue, taking in the strip of land aforesaid.

This action was brought to have it declared that the City is entitled to the said strip of land free from the said mortgage. The Land Registry Act, Sec. 104, declares that persons claiming under unregistered instruments shall be deemed to have no interest in the land affected thereby, either at law or in equity, until the instrument is registered. It is not shewn that Bailey had actual notice of the City's conveyance at the time he took his mortgage. I therefore think his rights must prevail over those of the City in so far as they are governed by the instruments aforesaid.

But it is contended on behalf of the City and of the Attorney-

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General, that the effect of what took place was a dedication of the said strip of land to the public for the purposes of the public street. It is conceded by counsel for the plaintiff that in order to make out such dedication the defendant must have been a party to it. Dedication is a question of agreement, express or implied. The intention to dedicate may be inferred from the conduct of the owner of the land, and I will assume, as was argued, that there may be dedication even where a consideration was paid for the land, but notwithstanding this, I cannot see that Moody had any other intention than that of selling the strip of land to the City—a compulsory sale at that. I am unable to infer that he had the slightest intention of dedicating it to the public so as to vest it in the Province.

Then as to the defendants, or more properly as to defendant Bailey, who was the only one concerned besides the City until the trial, there is no legal evidence to support a finding that he intended to part with any interest he had in the land for the benefit of the public. With deferenece, therefore, to the opinion of the learned trial judge, I think his conclusion on this branch of the case cannot be upheld, and that the plaintiffs are not entitled to the relief they claim in this action.

There remains to be considered the defendants' counterclaim. They ask to be relieved of the assessments imposed on their land, including the strip in question, under by-laws passed in furtherance of said local improvement scheme. By-law 1183 was followed by assessment and debenture by-laws imposing rates, and providing for the borrowing of money to defray the cost of paving and lighting the said street, including the cost of widening it. The defendants rely on the invalidity of the said by-law 1183 as ground for the relief they are claiming. One of the defences to the counterclaim, which I may as well refer to now, was that the defendant Bailey had parted with all his interest in the land, and therefore could not maintain the counterclaim. This objection is answered by what took place at the trial, when the defendants, the Cameron Investment Company, Limited, were added.

MACDONALD, C.J.A.

Coming, then, to the substantial defence hinging on the application of section 170 of the Municipal Act, R.S.B.C.

1911, it is shewn that the debentures issued pursuant to said assessments and debenture by-laws were sold by the City, and that interest was paid thereon for a period of at least one year, and it was admitted by counsel for the defendants that if there had been but one by-law, or to put it more precisely, if by-law 1183 had imposed the rates and provided for the issue of debentures, and had they been issued under it and interest paid as aforesaid, the counterclaim must fail; but they submitted that as the debentures were issued under the authority of subsequent by-laws, section 170 can be applicable only to them, and not to by-law 1183, and that as the latter, as was submitted, was the keystone of the whole structure, the whole must fall with by-law 1183.

This is not my view. By-law 1183 was in aid of the general scheme to widen, pave and light Pandora Avenue. It had to do with the acquisition of the land. The assessment and debenture by-laws had to do with the cost: the debenture by-laws were in themselves not defective. If they were open to attack, it was on the ground that the land, the cost of which, *inter alia,* was imposed on the property owners was illegally acquired. But section 170 does not profess to cure defects in a by-law arising out of the manner in which it was passed, but makes it "valid and binding" on the municipality, and ratepayers thereof, and of all parties concerned, when debentures have been sold under it, and interest paid for a year, and therefore if it be binding irrespective of the character of its defects, the fact that the defect in this case was in the non-performance of some antecedent obligation is, in my opinion, immaterial. The City also relied on the recent statute, Cap. 105 of the statutes of 1918, but after a careful analysis of that Act, I think it inapplicable to this case.

The judgment below should therefore be varied to read: (1) This action should be and the same is hereby dismissed with costs. (2) That the defendants' counterclaim be and the same is hereby dismissed with costs.

The appellants should have the costs of this appeal except of the issue raised by the counterclaim, and they should have the costs of the cross-appeal, and the respondents should have the costs of the issue raised by the counterclaim.

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MARTIN, J.A.

MARTIN, J.A.: Many questions are raised on this appeal, the most important affecting the assessment by-laws, but there is one that arises at the threshold of the counterclaim and must be first answered, because if the respondent's submission is correct, the assessment in question is not open to review. It is based on the Victoria City Relief Act, 1918 (No. 2), Cap. 105, which creates in Part V. a special tribunal of local improvement commissioners for the "Readjustment of Local Improvement Assessments," including those in question. To be brief, it is conceded that unless the plaintiff comes within proviso (*a*) of section 27 then the special tribunal has jurisdiction and its report and directions (section 24) over the "questions of law [which] have arisen, or objections, disputes, or difficulties [which] have been raised, or action brought or proceedings taken in relation thereto" (section 23) are binding upon the Council, and section 25 declares that it is "the duty of the Council to carry out and give effect to" them. The plain object and intention of the statute was to settle quickly and finally just such questions as are before us, and section 31 gives us the rule of construction we are to apply to it, *viz.*, "a liberal and beneficial interpretation," etc.

Section 27 is one of several under "Part VI., Miscellaneous," and it relates solely to the validation of by-laws in general relating to public thoroughfares, which are defective for non-publication only, but it provides that "nothing in this section shall in any way affect" pending litigation. If the language had been "in this Act" the plaintiff's right might have been preserved, though a restricted construction is still open to the section. But exclusive of the operation of section 23, ample effect can in any event be given to it without conflicting with the manifest intentions respecting the special tribunal, by applying it to by-laws other than those of local improvement assessment under section 23, which section clearly confers upon the special tribunal jurisdiction "whether the special assessment roll . . . . has or has not been confirmed, and whether the special assessment therefor has or has not been made or imposed," which embraces the very question of publication. I am, therefore, of opinion that the special tribunal has jurisdic-

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tion in the premises and its "report and directions" to the Council cannot be questioned here or elsewhere.

It follows that the appeal on the counterclaim should be dismissed, and in my opinion there should be the same result as regards the main claim, because, apart from some other more than plausible grounds which have been submitted in support of it, I feel that I should not be justified in disturbing the learned trial judge's conclusion on the evidence regarding the dedication by Moody and Bailey's assent thereto, and also as to the effect of the Victoria Municipal Act, 1867, conferring upon the Corporation the general power to hold estate, which will entitle it to the declaration on registration and title in the judgment below.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the learned trial judge that there was dedication, and assent by Bailey, the mortgagee. This disposes of the counterclaim if I am right, but if in error in that regard, the statute 1914, Cap. 52, Sec. 141, is a bar to the counterclaim. I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I have had the advantage of perusing the reasoned judgment of my brother MARTIN, and in that I entirely agree therewith, I am not of the opinion that anything can be usefully added. I would therefore dismiss the appeal.

EBERTS, J.A.

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

Appeal dismissed, Macdonald, C.J.A. and Eberts, J.A. dissenting in part.

Solicitor for appellants: *J. R. Green.*
Solicitor for respondents: *R. W. Hannington.*

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DE SCHELKING v. CROMIE

de SCHELKING v. CROMIE.

Libel—Privileged occasion—Plaintiff a Russian—Refused admission into United Sates—Communication to his solicitor.

The plaintiff, a Russian, was refused entry into the United States from British Columbia. The defendant, the editor of the "Vancouver Sun," published an article, stating that plaintiff was refused admission into the United States on the ground that he was an alien enemy and that should the authorities here follow the course adopted by the United States he would have to go back to Russia. The plaintiff consulted Mr. Bull, a solicitor, the result of which was an article later by the defendant retracting his former article, but Mr. Bull was not altogether satisfied with this, which resulted in several interviews between himself and the defendant. The plaintiff, who was a journalist then under arrangement with the defendant, wrote certain articles concerning Russia which were published in defendant's paper but later, finding the plaintiff's articles might injure the circulation of the paper on the American side, the publication of the articles was stopped. Meanwhile the defendant was endeavouring to obtain further information regarding the plaintiff and eventually he obtained a document containing the information that plaintiff while attached to the Embassy in Berlin stole moneys from his superior officer and was dismissed, and that he was a German agent whose mission was to spread insidious propaganda in Canada and the United States. The defendant, while in conversation with Mr. Bull, shewed him this document. An action for damages for libel was dismissed.

Held, on appeal (affirming the decision of MORRISON, J.), that the publication of the document in question was made to Mr. Bull in his character as solicitor to the plaintiff; that it was, therefore, privileged and the action was rightly dismissed.

Statement

APPEAL by plaintiff from the decision of MORRISON, J. of the 18th of December, 1918, dismissing an action for damages for libel. The plaintiff, who is a Russian, and a journalist by profession, came to Vancouver, and on later attempting to go over to the United States was stopped by the American authorities. The defendant, who is editor of the "Vancouver Sun," published an article in the issue of the 18th of July, 1918 entitled "May go back to Russia." The article recited that Baron de Schelking came to Vancouver in April; that he was refused admission into the United States and that if the Cana-

dian authorities follow the course adopted by the United States he may have to return to Russia; also that he was in the Russian diplomatic service for 23 years. The plaintiff consulted Messrs. Tupper & Bull in regard to the article, and on the solicitors communicating with Cromie, a meeting was brought about between the parties and an article by way of retraction was published in the issue of the "Vancouver Sun" of the 23rd of July following. Baron de Schelking then wrote some articles that were published in the "Vancouver Sun." Mr. Bull, the plaintiff's solicitor, was not altogether satisfied with the retraction, and he subsequently had several interviews with Cromie on the matter. In the meantime Cromie was endeavouring to obtain what information he could as to the plaintiff, and finding that de Schelking's articles in the paper might injure the "Vancouver Sun's" circulation on the American side, the articles were stopped. Later, having obtained a document which contained certain information about de Schelking, he met Mr. Bull in the Vancouver Club on the 22nd of August following, and while in conversation with him he shewed him the document, which was substantially as follows: "(a) Eugene de Schelking, while in the diplomatic service of the former Imperial Russian Government and while First Secretary to the Russian Embassy in Berlin, embezzled or stole from his superior officer, Count Osten-Sacken, the sum of 72,000 roubles; and as a consequence thereof was dismissed from the diplomatic service of the said Imperial Russian Government. (b) Baron Eugene de Schelking was and is a German agent in the employ of the Government of Germany, and the plaintiff's mission to Canada and the United States is to spread insidious propaganda in the interests of the German Government with a view to an early peace between the German Government and England and the Allies of England. Mr. Bull told de Schelking of the document that was shewn him by Cromie, and this action was commenced. It was held by the trial judge that shewing the document in question to Mr. Bull, who was the plaintiff's solicitor, was clearly a case of privilege, and was done without malice. The plaintiff appealed.

Statement

The appeal was argued at Vancouver on the 9th and 12th of

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May, 1919, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

McPhillips, K.C. (*H. M. Smith,* with him), for appellant: He handed the letter to Mr. Bull and claimed that it being a military matter was privileged. The only defence is privilege, and we say there was no privilege: see *Toogood* v. *Spyring* (1834), 1 C.M. & R. 181 at p. 193; *Stuart* v. *Bell* (1891), 2 Q.B. 341 at p. 345; *Hamon* v. *Falle* (1879), 4 App. Cas. 247 at p. 251; *Macintosh* v. *Dun* (1908), A.C. 390 at p. 399; Odgers's Libel and Slander, 5th Ed., pp. 250-1. There must be a duty. Belief of a duty is not sufficient: see *Hebditch* v. *MacIlwaine* (1894), 2 Q.B. 54. Assuming privilege, the defendant went too far and lost its protection. To say he stole 72,000 roubles in Germany was entirely unjustified: see Odgers's Libel and Slander, 5th Ed., pp. 304-5; Folkard's Law of Slander & Libel, 7th Ed., p. 194; *Huntley* v. *Ward* (1859), 6 C.B. (N.S.) 514 at p. 516. Bull made an entry in his day-book; see also *Simmonds* v. *Dunne* (1871), 5 Ir. R.C.L. 358 at p. 363; *Clarke* v. *Roe* (1854), 4 Ir. C.L.R. 1 at p. 10; *Warren* v. *Warren* (1834), 1 C.M. & R. 250 at p. 252; *McQuire* v. *Western Morning News Company* (1903), 2 K.B. 100 at p. 112; *Laughton* v. *The Bishop of Sodor and Man* (1872), L.R. 4 P.C. 495 at p. 510; *Fryer* v. *Kinnersly* (1863), 33 L.J., C.P. 96 at p. 98; *Senior* v. *Medland* (1858), 4 Jur. (N.S.) 1039 at p. 1040; *Robertson* v. *M'Dougall* (1828), 4 Bing. 670 at p. 682. It is not necessary to send the case back for a new trial: see *Millar* v. *Toulmin* (1886), 17 Q.B.D. 603; Annual Practice, 1919, p. 1091; *Allcock* v. *Hall* (1891), 1 Q.B. 444.

Argument

S. S. Taylor, K.C., for respondent, on the question of privilege, referred to *Harrison* v. *Bush* (1855), 5 El. & Bl. 344. He has to shew unjustifiable publication before he can shew malice. The question is whether the publication is fairly warranted by any reasonable occasion or exigency: see *London Association for Protection of Trade* v. *Greenlands, Limited* (1916), 2 A.C. 15 at p. 22. The law is not restricted to narrow limits on the question. Bull was the only one who saw the publication. It was properly a solicitor's matter that he charged

up in his day book. Bull was not satisfied with the explanation as to the first libel, and it was due to this that the article in question was shewn him. They had talked the matter over on a number of occasions.

McPhillips, in reply.

Cur. adv. vult.

15th July, 1919.

MACDONALD, C.J.A.: The sole question in this appeal is as to whether the publication complained of was privileged. There is no evidence of malice which would destroy the privilege if it existed. At all events, none upon which I can reverse the judgment. Evidence was introduced on defendant's behalf at the trial which I think could well have been omitted, but I cannot say that this circumstance is sufficient ground for interfering with the findings of the learned trial judge. The publication complained of was made by the defendant to Mr. Bull, who at that time was the plaintiff's solicitor. He was acting for the plaintiff in several matters, including one in which the plaintiff was threatening action against the defendant's newspaper for libel of a character, in a general way, similar to that complained of in this action. The injurious reflections on the plaintiff's conduct and opinions go further, it is true, in the publication complained of in this action than in that complained of in the threatened action. The trouble arose mainly out of a controversy as to whether plaintiff should or should not have been admitted into Canada. The first alleged libel appears to have been patched up, Mr. Bull acting for the plaintiff, but the threat was not formally withdrawn, though if no further offence had been given by defendant I think nothing further would have been done.

MACDONALD, C.J.A.

This being the situation, the defendant, at their club, shewed Mr. Bull a written memorandum imparting information which defendant had received from immigation authorities containing the libellous matter complained of. Mr. Bull thought it his duty to communicate this to his client, who thereafter instructed his solicitor to take proceedings in the Courts against one Zurbrick, a foreign immigration official, and one Borlinski, whom

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plaintiff suspected to be defendant's informants. It was only when defendant declined Mr. Bull's request to volunteer his evidence against these men that plaintiff determined to bring this action. It is, I think, to the credit of Mr. Bull that he declined in the circumstances to accept the plaintiff's retainer to bring the action. Mr. Bull evidently thought that the information given him by defendant was communicated to him in his character of solicitor to the plaintiff, since he has made an entry in his docket of what took place in the usual form of solicitors' entries against a client. The defendant did not otherwise publish the memorandum except to his stenographer and clerks in the ordinary course of preparing it, and this, as the authorities shew, is within his privilege. In these circumstances I agree with the learned trial judge. At all events, I cannot say that he came to a wrong conclusion when he held that the publication was made to Mr. Bull in his character of solicitor to the plaintiff.

MACDONALD, C.J.A.

I would, therefore, dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: This case is not altogether free from doubt, in my opinion, but I have reached the conclusion that it is covered in principle by the recent decision of the House of Lords in *London Association for Protection of Trade* v. *Greenlands, Limited* (1916), 2 A.C. 15; 85 L.J., K.B. 698, so the appeal should be dismissed.

Though it does not directly affect the issue, I feel bound to say that in my opinion the objection of Mr. *McPhillips*, plaintiff's counsel, taken below, against the admission in evidence of the scandalous and irrelevant statements made by the defendant to Mr. Bull concerning the plaintiff's wife, should have been sustained by the learned judge.

GALLIHER, J.A.

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

Appeal dismissed.

Solicitors for appellant: *McPhillips & Smith.*
Solicitors for respondent: *Russell, Hancox & Anderson.*

DUNPHY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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DUNPHY v. B.C. ELECTRIC RY. CO.

Negligence — Collision between automobile and tram-car — Contributory negligence—Jury's findings.

The plaintiff was driving his automobile, with a passenger beside him and one behind, northerly on Douglas Road at 8.15 a.m., at about 6 miles an hour. On reaching a point from 30 to 40 feet from the suburban track (running between Vancouver and New Westminster) the passenger in the back seat called "look out for the car," but the plaintiff continued on and struck the front steps of a tram-car coming from Vancouver at about 18 miles an hour. The tram-car's whistle blew on approaching the crossing but there was no bell. The growth of brush close to the track obstructed the view as the tram-car approached the crossing. The plaintiff was thrown out and severely injured. The jury answered questions and found that the defendant's negligence was insufficient precaution in approaching the crossing, considering the conditions existing on the morning in question. By a division of seven to one they found that there was no contributory negligence by the plaintiff, but the next question, "in what did such negligence consist?" was answered, "by not stopping and not taking more precaution after being warned by Mr. Cross" (passenger in back seat of automobile), and damages were assessed at $4,000, for which judgment was entered.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that there was evidence to justify the findings of the jury both as to negligence and absence of contributory negligence, and that the jury's findings were not too vague to support the judgment in favour of the plaintiff.

[Affirmed by Supreme Court of Canada.]

APPEAL by defendant from the decision of MACDONALD, J. and the verdict of a jury of the 25th of February, 1919, in an action for damages for injuries resulting from a collision between the plaintiff's automobile and a car of the defendant Company on the interurban line at Hastings Crossing. On the 7th of September, 1918, at 8:15 a.m., the plaintiff, with one Hammond, in the front seat with him, was driving north towards Vancouver on Douglas Road. Before reaching Hastings Crossing they picked up one Cross (a stranger), who sat in the back seat. When within 30 or 40 feet of the track and

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going at about six miles an hour, Cross called out "look out for the car," but the automobile continued on and struck the fore-part of a tram-car which was going at about 18 miles an hour towards New Westminster. The automobile was overturned and the occupants thrown out, the plaintiff being severely injured. There was evidence of the tram-car whistling before reaching the crossing, but there was no bell. A growth of brush close to the line of the track and along the road obstructed the view when approaching the crossing, and there was a slight mist at the time of the accident. The questions put to the jury, and the answers, were as follow:

"1. Was the defendant guilty of negligence which was the cause of the accident? Yes.

"2. If so, in what did such negligence consist? Insufficient precaution on account of approaching crossing and conditions existing on morning in question.

"3. Was the plaintiff guilty of negligence which contributed to the accident? One, yes; seven, no.

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"4. If so, in what did such negligence consist? By not stopping and not taking more precaution after being warned by Mr. Cross.

"5. After the motorman on defendant's car became aware or ought (if he had exercised reasonable care) to have become aware that a collision was imminent, could he have prevented the collision by the exercise of reasonable care? [No answer.]

"6. If so, in what manner could he have prevented the collision? [No answer.]

"7. Damages, if any? Four thousand dollars (irrespective of damages to automobile)."

The appeal was argued at Vancouver on the 8th and 9th of May, 1919, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

McPhillips, K.C., for appellant: The only finding by the jury was entirely outside the pleadings. The point was not left to them and the answer was vague.

[MCPHILLIPS, J.A. referred to *Baldock* v. *Westminster City Council* (1918), 35 T.L.R. 188.]

Argument

The defendant, driving at six miles an hour, was warned by a man in the back seat of his car, who called "look out for the car" when from 30 to 40 feet away from the track. This man was their own witness, and his evidence was not contradicted. They cannot bring evidence to discredit their own witness. As

to the effect of not calling witness to contradict see *Stanley Piano Co.* v. *Thomson* (1900), 32 Ont. 341; *Sumner and Leivesley* v. *John Brown and Co.* (1909), 25 T.L.R. 745. The evidence of this man proved contributory negligence which entitles us to have the case withdrawn from the jury: see *Harris* v. *Winnipeg Electric Ry. Co.* (1919), 1 W.W.R. 453, and it was so held in this Court in *Shipman* v. *B.C. Electric Ry. Co.*, decided in 1913 (unreported). In this case the jury was improperly instructed, as the answers to questions shewed the number of jurors for and against. I moved for a nonsuit: see *Banbury* v. *Bank of Montreal* (1918), A.C. 626; 44 D.L.R. 234. The evidence shews he ran into us. The answers of the jury were so ambiguous and vague that the acts of negligence alleged stand negatived: see *Antaya* v. *Wabash R.R. Co.* (1911), 24 O.L.R. 88; *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177 at p. 178; *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1 at p. 10; *McEachen* v. *G.T.R. Co.* (1912), 2 D.L.R. 588 at p. 593; *Sawyer* v. *Millett* (1918), 25 B.C. 193 at p. 195; *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512 at p. 538; *Mader* v. *Halifax Electric Tramway Co.* (1905), 37 S.C.R. 94 at p. 98. There must be some specific act of negligence found: see *Farmer* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 423.

Argument

S. S. Taylor, K.C., for respondent: The bushes grow up so close to the tracks that two cars barely pass, and at the point in question an approaching car cannot be seen. Their speed was such that they went 300 feet down the track before they stopped. The appellant is down to one point, *i.e.*, that the passenger in the back seat said "look out." They admit there was ground for finding negligence, but claim there was contributory negligence. My contention is the evidence shews insufficient precaution. There was no bell, only a whistle, and the Act says a bell shall be rung until crossing is passed.

McPhillips, in reply: When the jury's findings are ambiguous and vague the decisions are that all other allegations are negatived.

Cur. adv. vult.

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15th July, 1919.

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

There was ample evidence to justify the findings of the jury both as to negligence and as to the absence of contributory negligence.

Some confusion has arisen because of the manner in which the jury answered the questions. They, in effect, polled themselves, and in their answers shewed how many stood *pro* and *con*. For example, they answered No. 3, "one yes, seven no." This answer is followed by another which must necessarily be the answer of the dissenter only, since an answer of the kind is only to be given if the third question should be answered in the affirmative. This is the second example of this innovation, and in both cases it has given rise to contentious argument, which could not have arisen if the jury had followed the conventional and rational course of answering the questions simply. The verdict is none the less the verdict of the jury when it is the verdict of the majority. Under proper instructions the jury cannot very well make a mistake as to the result of their conclusions in respect of the different questions. There is therefore no reason why they should do more than answer the questions simply, and leave it to the Court, when that course may be thought necessary, to poll them in respect of their answers.

MACDONALD, C.J.A.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should succeed. The jury's findings, in any case, are too vague to support the entry of judgment for the plaintiff. The jury have said "insufficient precaution on account of approaching crossing and conditions existing on morning in question." This cannot be said to itemize or sufficiently indicate the act of negligence. Had the jury brought in a general verdict without answering questions, it would be different: see *Newberry* v. *Bristol Tramway and Carriage Company (Limited)*, 1912), 29 T.L.R. 177; *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512 at p. 538; *Lewis* v. *Grand Trunk Pacific Rway. Co.* (1915), 52 S.C.R. 227 at pp. 231-3; *Sawyer* v. *Millett* (1918), 25 B.C. 193, MARTIN, J.A. at p. 195. Further, vague and insufficient as

the finding of the jury is, in the result all other claimed acts of negligence stand negatived: see *Newberry* case, *supra; Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1 at pp. 10-11; *Lewis* v. *Grand Trunk Pacific Rway. Co.* (1915), 52 S.C.R. *McEachen* v. *G.T.R. Co.* (1912), 2 D.L.R. 588 at p. 593; *Farmer* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 423 at p. 432; *Mader* v. *Halifax Electric Tramway Co.* (1905), 37 S.C.R. 94 at p. 98. The question now is whether it is a proper case for the granting of a new trial, and this has given me much concern, but in view of the fact that according to the cases all the other acts of negligence must be held to be negatived, and it not being shewn that there was the absence of any precaution called for by the Railway Act, under which the railway was being operated, it is difficult to come to the conclusion that a new trial can properly be directed. *Andreas* v. *Canadian Pacific Ry. Co., supra,* seems most explicit on the point.

Had there been, say, a specific finding of the jury upon the question of the non-operation of the automatic bell, and no light, although not called for by any requirement of the Railway Act or order of the board of railway commissioners, but voluntarily installed, then I think, on the authority of *Baldock* v. *Westminster City Council* (1918), 35 T.L.R. 188, such a finding of negligence could have been supported. However, as a further point in my opinion concludes any question of liability upon the appellant, I merely now on this point content myself by saying that I consider it would be within the province of this Court, in view of the special powers capable of being exercised by this Court on appeals, to either direct a new trial or sustain the judgment for the plaintiff in the absence of that specific finding by the jury. In view, though, of *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53, I think the proper course would be the direction of a new trial, and that would have been my decision in this appeal did I feel myself at liberty to do so. The difficulty, however, is this, and it is insuperable in my opinion, and prevents recovery by the plaintiff. A witness was called on the part of the plaintiff who was sitting in the back seat at the time of the accident, and

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this witness gave the following evidence: [after quoting the evidence in full the learned judge continued].

Now this evidence establishes contributory negligence in the plainest possible manner. A motor, capable of being stopped, at the speed at which it was going, almost instantly, at the most in ten or twelve feet, is driven heedlessly and recklessly upon the railway track although the driver thereof (the plaintiff) is warned in precise terms of the oncoming electric-car. It is clear that the plaintiff, knowing that the electric-car was speedily approaching, undertook the risk of an attempt to pass over the level crossing ahead of the electric-car, and was the author of his own injury. It was a case of mistaken judgment, but it is impossible to visit the damages suffered upon the Railway Company. The Railway Company are not insurers, and even if the Railway Company were negligent in any respect, upon the evidence standing in the case no legal liability for the happening can be imposed upon the Railway Company. It is significant that although the plaintiff was called after this evidence was given, no effort was made to introduce evidence in denial of the statement made by Cross that he warned the plaintiff in the manner set forth in the above-quoted evidence. The plaintiff would have been admitted to deny, if able to do so, the statement that he was warned as sworn to by Cross (see Best on Evidence, 11th Ed., 630; and Phipson on Evidence, 5th Ed., as to contradiction of party's own witness, and when allowed, at pp. 468, 470, 477, and *Stanley Piano Co.* v. *Thomson* (1900), 32 Ont. 341). The evidence having been left as we see it, in the present case, an authority which seems to me concludes the question against the plaintiff and any right to recover in the action is *Forget* v. *Baxter* (1909), 69 L.J., P.C. 101. Sir Henry Strong delivered the judgment of their Lordships of the Privy Council and at p. 106 said:

MCPHILLIPS, J.A.

"The respondent gave evidence afterwards and took no notice of Forget's statement, which stands uncontradicted. The inference must be that the respondent knew that the appellants had acted within the terms of their employment."

(Also see *Harris* v. *Winnipeg Electric Ry. Co.* (1919), 1 W.W.R. 453 at p. 458.) The inference in the present case

must be that the plaintiff heard the witness Cross's warning but determined (although he was then in no peril and could have stopped the motor-car) to pass over the level crossing in front of the electric-car. This was reckless conduct which precludes any recovery by the plaintiff even if it be admitted that the facts disclose evidence of negligence on the part of the Railway Company, and even if it be admitted that the jury have made an effective finding of negligence, the contributory negligence of the plaintiff disentitles the plaintiff recovering for the injuries sustained. The question now is, what should be the result? There is no compulsion upon this Court to direct a new trial (see *Winterbotham, Gurney & Co.* v. *Sibthorp and Cox* (1918), 1 K.B. 625 at p. 630). The situation is so unanswerable that it would not be in furtherance of the ends of justice, and in this connection I would refer to the language of Davies, J. (now Sir Louis Davies, C.J.) in *Andreas* v. *Canadian Pacific Ry. Co., supra,* at pp. 15-17. There is considerable analogy in the cases. In the present case a great deal was attempted to be made out of the fact that there was brush near to the place where the accident took place, obstructing the view, but evidently Cross could see the electric-car coming, although sitting in the back seat.

In *Winterbotham* v. *Sibthorp, supra,* Swinfen Eady, L.J. (now the Master of the Rolls) said at p. 630:

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"Although the Court ought to be exceedingly careful in interfering with the verdict of a jury, and still more so in giving a decision contrary to the finding of a jury, yet where it is manifest that all the facts have been ascertained, and that there is only one verdict that can be reasonably given, in my opinion it is the duty of this Court to draw the inference and to decide according to the rights of the parties, and the Court is not confined to sending the case back for a new trial."

(Also see *Banbury* v. *Bank of Montreal* (1918), A.C. 626.)

All the facts of the present case having careful attention, there is but one conclusion to be drawn and capable of being taken by any reasonable jury, and that conclusion is, that the plaintiff was the author of his own injuries. There is no suggestion that the plaintiff's case can be supported by any further evidence, or that all the relevant facts attendant upon the accident were not adduced before the jury. In my opinion, the

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proper course to pursue is to enter judgment for the defendant, notwithstanding the finding of the jury.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McPhillips & Smith.*
Solicitors for respondent: *Taylor, Mayers, Stockton & Smith.*

MURPHY, J. (At Chambers)

1919

June 18.

VAN HEMELRYCK v. NEW WESTMINSTER CONSTRUCTION CO.

VAN HEMELRYCK v. NEW WESTMINSTER CONSTRUCTION COMPANY.

Practice—Order—Settlement by registrar—Referred to judge—Must be set down on Chamber list.

VAN HEMELRYCK v. NEW WESTMINSTER CONSTRUCTION CO.

If the settlement of an order is referred by the registrar to the judge who made it, application must be made to the registry office to set the same down on the Chamber list with payment of the usual fees.

Statement

APPLICATION to settle an order in the above action. Counsel applied to the registrar in the first instance, and he referred same to the judge who made the order. Counsel now wish to speak to same in Chambers, without setting down on Chamber list and paying fee in the usual way. Heard by MURPHY, J. at Chambers in Vancouver on the 18th of June, 1919.

J. H. Lawson, for plaintiff.
Mayers, for defendant.

Judgment

MURPHY, J.: All applications to settle orders or judgments must in the first instance go before the registrar. If referred to the judge who made the order by the registrar, counsel must then apply to the registry office and have same set down on the Chamber list, paying the usual fee, to come before the judge who made the order.

Application refused.

SORENSON v. YOUNG.

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May 13.

SORENSON v. YOUNG

Real property—Easement—Right of way—Reserved in conveyance—Conveyance by purchaser to defendant without reservation—Indefeasible title to defendant—R.S.B.C. 1911, Cap. 127—B.C. Stats. 1914, Cap. 43, Sec. 14.

The plaintiff sold a lot to R., reserving to himself in the conveyance a right of way across the lot. The conveyance was duly registered, and subsequently R. sold the lot to the defendant without reservation. A certificate of indefeasible title was issued to the defendant. After the defendant had purchased, the plaintiff continued to use the right of way for over four years, when the defendant prevented its further use by the plaintiff by fencing it.

Held, that the indefeasible title in fee simple held by the defendant was a bar to any claim by the plaintiff to a right of way over the land.

ACTION for a declaration of right of way and for fraud in seeking to deprive the plaintiff of the right of way and in denying knowledge of its existence and seeking to take advantage of the Land Registry Act, tried at Victoria on the 24th of April, 1919. The plaintiff had formerly owned lots 1 and 2 in a certain block in Victoria. In 1913 he sold lot 1 to one H. Roch, reserving to himself a right of way across lot 1 to lot 2, upon which he lived, and built a garage facing the right of way from the street across lot 1. The conveyance to Roch of lot 1 contained, immediately after the description of the lot, the following words, "save and except a right of way to the said vendor and his successors for all time to come across a strip of land ten feet wide of uniform width across the most southerly portion of said lot." The plaintiff laid down a concrete entrance from the highway to the right of way and made other improvements. In January, 1914, the defendant purchased lot 1 from Roch, but the plaintiff continued to use the right of way until June, 1918, when the defendant erected a fence across the strip of land in front of the garage, preventing the plaintiff from passing over the strip and denying his right of way. The defendant claimed that he purchased lot 1 for value, without notice or knowledge that the plaintiff had a right of way over lot 1, and that he had

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a certificate of indefeasible title to the lot which contained no reservation of any right of way to the plaintiff, and that if the plaintiff had a grant of the right of way it was not registered under the Land Registry Act, and he pleaded the protection of section 104 of said Act.

D. S. Tait, and *J. S. Brandon,* for plaintiff.
Maclean, K.C., for defendant.

13th May, 1919.

MURPHY, J.: By section 25(*a*) of the Land Registry Act, no action for ejectment, or other action for the recovery of lands for which a certificate of indefeasible title has issued, shall lie or be sustained against the registered owner for the estate in respect to which he is registered except as therein specified. Admittedly the case at bar does not fall within such exceptions. Defendant has an indefeasible title in fee simple. "Land," by section 2 of said Act, "means and shall include," *inter alia,* "easements."

The prayer of the statement of claim, as filed, admittedly asks for some forms of relief barred by said section 25(*a*). It is attempted to meet the situation by asking the Court to declare merely that plaintiff is entitled to a right of way over the southerly 10 feet of the lot in question. To do so would, I think, be to ignore the provisions of section 104 of said Act, at any rate where, as here, the "easement" arises by express grant and is not an "easement" of necessity, when it is remembered that "land," as defined, includes "easement." The recent case of *Bank of Hamilton* v. *Hartery,* 58 S.C.R. 338; (1919), 1 W.W.R. 869 shews, I think, that effect must be given to the plain and explicit language of said section 104. Further, I think the action fails by reason of the provisions of section 104, considered in itself, the easement arising by express grant, and section 2 declaring "land" to mean and include "easement." It is argued, in answer, that the deed creating the "easement" is registered. It is in so far as it is a conveyance, but not in so far as it creates the "easement." To adopt this view would, I think, violate the fundamental principle of the Act specially emphasized in subsection (2) of said section 104. For the

Judgment

same reasons, I think section 22 of the Land Registry Act operates to defeat the action. Judgment for defendant.

Action dismissed.

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IN RE L. LUCHETTA, DECEASED.

MURPHY, J. (At Chambers)

1919

June 20.

IN RE L. LUCHETTA, DECEASED

Practice—Letters of administration—Application for—Infant children—Bond required.

On an application for letters of administration where there are infant children, the administrator must provide the usual bond.

APPLICATION for letters of administration of the estate of L. Luchetta. The deceased left no debts, and it was submitted that the usual bond should be dispensed with. The deceased died leaving a wife and three children. Heard by MURPHY, J. at Chambers in Vancouver on the 20th of June, 1919.

Statement

D. W. F. McDonald, for the application.

MURPHY, J.: In all applications for letters of administration where there are infant children, the administrator must put up the usual bond.

Judgment

Order accordingly.

MURPHY, J. (At Chambers)

1919

July 2.

REX v. SMITH.

Criminal law—Offence against Prohibition Act—Two justices of the peace—Jurisdiction—Conditional—Municipal Act, B.C. Stats. 1914, Cap. 52, Secs. 403 and 404.

REX v. SMITH

The accused was convicted at Prince Rupert by two justices of the peace for an offence committed in said city against the British Columbia Prohibition Act. On application for a writ of *habeas corpus*:—

Held, that the conviction was bad because it did not shew on its face that such adjudication took place because of the illness or absence or at the request of the city police magistrate, or that the city had no police magistrate, being the only cases where, under sections 403 and 404 of the Municipal Act, a justice of the peace has jurisdiction in a city.

Statement

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid. The prisoner was arrested without a warrant at Prince Rupert for an infraction of the Prohibition Act and was subsequently released on $300 cash bail. He did not appear for his trial and the two justices of the peace proceeded in his absence, convicted him and sentenced him to six months' imprisonment, and estreated the bail. Smith was subsequently arrested in Vancouver and taken to the county gaol at Okalla. The warrant of commitment was signed by Thomas McClymont and W. E. Collison, who styled themselves "Justices of the Peace for the City of Prince Rupert." Heard by MURPHY, J. at Chambers in Vancouver on the 2nd of July, 1919.

Argument

Brydon-Jack, for the application: The justices had no power to proceed *ex parte* and convict the accused in his absence. The Summary Convictions Act makes service of a summons on accused a condition precedent to such procedure. The justices are improperly styled, and their authority to act must appear on the record. The record cannot be supplemented by extrinsic evidence to shew authority or jurisdiction: see *Rex* v. *Crooks* (1911), 19 Can. Cr. Cas. 150; *Rex* v. *James* (1918), 31 Can. Cr. Cas. 4. If the mayor of a city acts as a justice of the peace, he must disclose his authority for acting: see *Rex* v. *McHugh* (1907), 13 B.C. 224. If a justice of the peace acts in an

incorporated city he must disclose authority for acting, and it must appear on record; or if there is no magistrate they must say they are acting because there is no magistrate: see Municipal Act, B.C. Stats. 1914, Cap. 52, Sec. 403.

Orr, for the Crown, *contra.*

MURPHY, J.: The applicant was convicted at Prince Rupert before two justices of the peace for an offence against the Prohibition Act. The conviction on its face shews that Prince Rupert is a city. By virtue of section 403 of the Municipal Act, no justice of the peace has jurisdiction to adjudicate in a city where there is a police magistrate, except in the case of the illness, or absence, or at the request of such police magistrate. By section 404 provision is made that section 403 shall not apply in a city having no police magistrate. Authority is not necessary for the proposition that the jurisdiction of an inferior Court must be shewn on the face of the record. When this matter was first before me last week, I directed that inquiry be made as to whether there was a police magistrate at Prince Rupert or not. Further consideration convinces me that this was an error. Extrinsic evidence cannot be admitted on *certiorari* proceedings. In view of the sections of the Municipal Act referred to, I think that, in order that a conviction made before a justice of the peace, purporting to adjudicate in a city on an offence committed in such city, may be valid, it must shew on its face either that such adjudication takes place because of the illness, or absence, or at the request of the city police magistrate, or else that the city has no police magistrate. As this conviction does not comply with any one of these alternatives, it must be quashed. The order will contain a provision for the protection of the justices of the peace.

Judgment

Conviction quashed.

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1919

July 15.

WAND v. MAINLAND TRANSFER COMPANY LIMITED.

Trial—Jury—Damages—Excessive—Evidence wrongfully admitted—Item of doctor's expenses included—Appellant partially successful—Costs—R.S.B.C. 1911, Cap. 58, Sec. 55.

WAND v. MAINLAND TRANSFER COMPANY

In an action for damages for injury to an infant whose father was plaintiff as next friend, evidence was admitted as to the father's health on the question of damages.

Held, that, though inadmissible, there was little evidence on the point, having been touched on only in cross-examination without objection, and did not furnish sufficient ground for granting a new trial.

The jury awarded damages in the sum of $18,000, of which $2,000 was allowed for doctor's and hospital fees paid by the father, who was not a party to the action except as next friend to the infant.

Held, that this sum is separable, and should be deducted without affecting the judgment for the balance.

Although the appellant succeeded in reducing the award by an item of damages improperly allowed and wrongly admitted in evidence, it was held that as he had not objected to the admission of the evidence on the trial, he must pay the costs of the appeal pursuant to section 55 of the Supreme Court Act.

Statement

APPEAL by defendant from the decision of MACDONALD, J. and the verdict of a jury of the 27th of February, 1919, in an action for damages for injuries sustained in an accident in a lane between Hastings and Pender Streets running east from Cambie Street. A goose-neck dray of the defendant Company was carrying a load of junk about 2½ tons in weight to a store-house down the lane. The dray went up Cambie Street from Hastings and turned into the lane, the lane having a down-hill grade of about 15 per cent., starting from the sidewalk. When the back wheels were on the sidewalk about two feet from the grade, the driver stopped and proceeded to lock the left hind wheel with a chain. Before he locked the wheel the horses started to slip. He then went forward and turned the horses to the right to jack-knife the front wheels. When doing this, one of the wheels struck a telegraph post on the left, which had the effect of throwing one of the

horses off its feet, and falling, broke the tongue of the wagon. The teamster then went back and put iron plates or radiators in front of the hind wheels. He then came forward, got the horse up, and, unhitching both horses, took them to a vacant space a short distance down the lane. He then went back, and while in the act of putting on the chain-brake, the dray, crushing over the radiators, ran down the hill and struck the plaintiff, a boy of 9½ years, crushing his leg, which subsequently had to be amputated, breaking his hip, and crushing one of his arms. The jury found for the plaintiff in the sum of $18,000 damages. The defendant Company appealed.

Statement

The appeal was argued at Vancouver on the 25th and 28th of April, 1919, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C., for appellant: In stating what the negligence was, the jury found: (1) The dray was not properly equipped for safety owing to absence of brakes; (2) the radiators were not sufficient for blocking, owing to brittleness, and (3) the chain should have been put on the wheel before the horses were removed. My contention is the third reason is the only one that could possibly be supported by the evidence, but it was not pleaded. There is much conflict in the evidence given, and the jury did not believe the plaintiff's story: see *Jones* v. *Spencer* (1898), 77 L.T. 536. The evidence of experts should not be taken as against evidence of actual facts. The damages in any case are excessive. The question of his prospective earning power is indefinite, and there should not be such a sum given as, if invested, would give him in interest the amount he would have earned: see *Johnston* v. *Great Western Railway* (1904), 2 K.B. 250; *Farquharson* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 280; *Taylor* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 109 and 420. On the question of a next friend suing see Sedgwick on Damages, 9th Ed., 2261. As to the Court of Appeal dealing with evidence improperly admitted see *Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13. On the question of improper admission of evidence of the father as to his health being inadmissible, and the evidence in rebuttal with reference to brakes, in neither case should it have been

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admitted: see *Harvey* v. *Canadian Pacific Ry. Co.* (1885), 3 Man. L.R. 266. There was no proper charge on the question of damages.

Cantelon, for respondent: The statement of claim can be amended by this Court now in order to cover the third ground for finding negligence under sections 7 and 8 of the Court of Appeal Act. The evidence was that the type of brake was not efficient for this particular occurrence. The defence have given no explanation for what took place. On the question of excessive damages see *Praed* v. *Graham* (1889), 24 Q.B.D. 53; *Johnston* v. *Great Western Railway* (1904), 2 K.B. 250 at p. 256; *Houghton* v. *Canadian Northern Ry. Co.* (1915), 25 Man. L.R. 311. The hospital charges are properly allowed: see *Scott* v. *Fernie* (1904), 11 B.C. 91. The Court in any case can, if necessary, reduce the damages by the amount improperly allowed (see rule 869a). In regard to the assessment of damages see *Nevill* v. *Fine Art and General Insurance Company* (1897), A.C. 68 at p. 76; *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309; *Cox* v. *English, Scottish, and Australian Bank* (1905), A.C. 168; *Panetta* v. *Canadian Pacific Ry. Co.* (1917), 24 B.C. 249. As to the amendment to the statement of claim being allowed on appeal see *Doe d. Nicoll* v. *Bower* (1851), 16 Q.B. 805; Halsbury's Laws of England, Vol. 23, p. 140; *Jones & Lyttle, Ltd.* v. *Mackie* (1917), 3 W.W.R. 1021. The evidence in rebuttal objected to is of a scientific character and can be allowed at any time: see *Budd* v. *Davison* (1880), 29 W.R. 192.

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Davis, in reply: Before they can amend now they must shew beyond doubt that no question might be raised by us in the way of further evidence.

Cur. adv. vult.

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MACDONALD, C.J.A.: The jury awarded the plaintiff $2,000 for doctors' and hospital fees incurred by his father, who is not a party to this action except as next friend of the infant plaintiff.

MACDONALD, C.J.A.

Counsel for respondent did not attempt to maintain this item in the judgment, and as it is separable from the rest, it may be

deleted without affecting the judgment for the balance. The appeal was not confined to this item of $2,000, but went to the whole judgment.

Apart from negligence, which I think the jury properly found against the defendant, two principal grounds were relied on, (1) that evidence was wrongly admitted as to the father's health, which was calculated, it was argued, to lead the jury to believe that the father's health was a circumstance which they could take into consideration in arriving at the amount of damages; and (2) that in any view of the case, the damages were excessive. There is very little evidence relating to the father's health. It was not objected to at the trial, and the same subject-matter was touched upon in cross-examination of the father. But apart from this, the evidence is of very little consequence indeed, and does not furnish ground in the circumstances for the granting of a new trial.

Then as to the damages. The sum awarded, namely, $18,000, is large, but the injuries suffered by the young boy were serious and painful in the highest degree. His sufferings must have been intense and prolonged; besides the loss of one of his legs, he suffered other major injuries. In fact, the jury may well have considered his condition that of total disability for life. In these circumstances, I think there is no ground for interference. From the said sum of $18,000 must be deducted the $2,000 referred to, and the judgment must be reduced accordingly.

MACDONALD, C.J.A.

Then as to the costs. No objection was taken at the trial to the admission of the evidence on which the $2,000 was awarded. The appellant succeeds only in respect of this item, and must pay the costs on the principle explained by me in *James Thomson & Sons* v. *Denny* (1917), 25 B.C. 29.

It is proper in this connection, I think, to refer to the judgment delivered a few weeks ago by the Supreme Court of Canada in *Gavin* v. *Kettle Valley Rway. Co.* [58 S.C.R. 501] (1919), 2 W.W.R. 612, wherein some observations were made, founded on a misconception of the facts, with reference to the disposition by this Court of the costs of the appeal to us in that case. Mr. Justice Anglin at pp. 616-7 said:

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"The disposition of the costs in question was in no wise in the discretion of the Court of Appeal. They were erroneously disposed of because of a mistake on a matter of law which affected them. . . . . A statutory right [given by said section 55] has been ignored, and a gross error would appear to have been made."

There are two statutory rules governing costs of appeals to this Court. The one enacts that costs shall follow the event unless for good cause the Court shall otherwise order. The other is provided by said section 55, which enacts that when a new trial is ordered on a ground of objection not taken at the trial, the appellant shall pay the costs of the appeal. Now, in the above-mentioned case, a motion was made on behalf of the respondent to this Court for a direction that the respondent should have the costs of the appeal. Three members of the Court then stated that their judgments were founded on a ground in respect of which objection had been taken at the trial, *i.e.*, the ground referred to by my brother MARTIN in his reasons for judgment, whereupon respondent's counsel conceded that section 55 was inapplicable, as indeed it clearly was. Therefore, having regard to the ground upon which the majority of the Court granted the new trial, the judgment as to costs was not only not a "gross error," but was the only judgment which, in the absence of good cause, the Court could pronounce. The Court had no discretion at all, and did not profess to exercise any.

MACDONALD, C.J.A.

MARTIN, J.A.: Several questions are raised on this appeal, the first of which requiring further consideration, being that the verdict cannot be supported by the findings of the jury upon the pleadings. I am unable to take this view, however. The first cause of negligence assigned is that the "dray was not properly equipped for safety owing to absence of brakes." That means "proper brakes in the circumstances," and there was evidence, I think, upon which the jury could reasonably come to their said conclusion.

MARTIN, J.A.

Then as to excessive damages: That subject has been recently considered several times in this Court (*vide Farquharson* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 280; *Taylor* v. *B.C. Electric Ry. Co.* (1912), 16 B.C. 420; 1 W.W.R. 486; 19 W.L.R. 851; and *Panetta* v. *Canadian Pacific Ry. Co.* (1917),

24 B.C. 249), and applying the guides therein laid down, I find it impossible to say that the damages are excessive. The plaintiff's counsel very properly contended that the amounts awarded in these cases are no longer a safe guide owing to the unprecedented advance in the high cost of living since the war, which is still advancing, and juries must deal with the state of the times in which they are called upon to act, but always, of course, taking such a reasonable view of future prospects as is humanely possible.

Third, as to the evidence relating to the damages to the boy's father. It is conceded that he cannot recover on this head, but the evidence was of so slight a nature that I do not think the jury paid any appreciable attention to it. Moreover, it was not only not objected to by the defendant's counsel, but cross-examined upon, which would have the effect of making evidence that which was not properly evidence: *D'Avignon* v. *Jones* (1902), 9 B.C. 359; 32 S.C.R. 650. But in directing the jury upon damages to the boy only (in a charge which I do not think is fairly open to exception as a whole, though exiguous in some respects), the learned judge did not even mention the father to the jury, so I am justified, I think, in regarding this evidence as innocuous.

MARTIN, J.A.

With respect, however, to the sum of $2,000 for hospital and medical expenses paid by the father, it is not disputed he cannot recover them in this action, but they have undoubtedly been included by the jury in their verdict. It follows that there ought to be a reduction in said verdict to that extent, but a difficulty as to costs arises, because the evidence was allowed to go in at the trial without objection: *Cf. Creveling* v. *Canadian Bridge Co.* (1915), 51 S.C.R. 216; 8 W.W.R. 619. Section 55 of the Supreme Court Act, R.S.B.C. 1911, Cap. 58, which relates in strictness of language only to the judge's charge to the jury, may, however, be invoked in principle, in my opinion, to overcome the difficulty. It is an obscure section and has never been considered on this point that I am at present aware of, except when a new trial has been ordered, as in *Blue* v. *Red Mountain Ry. Co.* (1907), 12 B.C. 460; 39 S.C.R. 390; (1909), A.C. 361; 78 L.J., P.C. 107; and *Gavin* v. *Kettle Valley Ry. Co.*

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[26 B.C. 30]; (1918), 3 W.W.R. 385; [58 S.C.R. 501]; (1919), 2 W.W.R. 611. Its general tenor nevertheless does contemplate that a party may succeed in an appeal upon a "ground of objection" not taken before the jury. This "ground of objection" is one clearly to the charge only, either for misdirection or non-direction, as a consideration of the main section shews, what is aimed at being the right of a party to "a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues," which right it is declared by the first proviso "may be enforced by appeal . . . . without any exception having been taken at the trial," and the second proviso deals with the costs in such case "in the event of a new trial being granted." Here, though objection is being for the first time raised to the charge for non-direction as to the defendant's non-liability for the $2,000 (which non-direction here, I think, amounts to misdirection: *Spencer* v. *Alaska Packers Association* (1904), 35 S.C.R. 362 at p. 374), a new trial is not being ordered, but the verdict reduced and judgment entered accordingly, so the section does not in terms apply. Its spirit, however, is clear, and it affords a safe guide for us in the exercise of our discretion "for good cause," under section 28, as amended in 1913, Cap. 13, of the Court of Appeal Act, and therefore I think the costs of the appeal should be paid by the appellant.

MARTIN, J.A.

It is opportune to observe that in the recent judgment of the Supreme Court of Canada upon that section in *Gavin* v. *Kettle Valley Ry. Co., supra,* there is a grave misconception by three of their Lordships as to the course adopted by this Court on that section, which does an injustice to us. In the judgment of Mr. Justice Anglin ([58 S.C.R. at p. 509]; (1919), 2 W.W.R. at p. 614), with which the Chief Justice agrees, it is stated that we "ignored the respondent's statutory right" under that section, "and that a gross error would appear to have been made," and that the

"appellant (plaintiff) was entitled to the costs of the appeal to the Court of Appeal and was wrongfully deprived of them by that Court, either through inadvertence or possibly because the majority of the Court (MARTIN, GALLIHER and EBERTS, JJ.A.) were of the opinion that the ground indicated by Mr. Justice MARTIN, which had been taken by counsel

for the defendant in his objections to the learned judge's charge, sufficed to support the order for a new trial."

And Mr. Justice Mignault proceeds upon a like erroneous assumption and takes us to task ([58 S.C.R. 515]; (1919), 2 W.W.R. at p. 620) for having "disregarded," as he styles it, "the imperative requirement of the statute." The fact, however, is quite the opposite. Not only did we not act either through "ignorance," or "inadvertence," or in "disregard" of the statute, but we carefully considered it on special motion and applied it to the best of our humble ability, and it is as strange as it is regrettable that their Lordships should have fallen into such a "gross error," to adopt their own expression. The judgment, which was pronounced on October 1st, 1918, by a majority of this Court was based upon the fact that three of the justices (*viz.*, my brothers GALLIHER and MCPHILLIPS and myself) were of opinion that there should be a new trial upon a ground which had been duly taken below. Subsequently the question of costs was spoken to in Court by motion on special leave on November 8th, and the respondent moved that the appellant should pay them, and invoked said section 55 in support of his application. Mr. Justice GALLIHER announced that his reasons were the same as mine, and after argument and consideration of said section 55, this unanimous judgment of the Court, extracted from my note-book, was pronounced by the Chief Justice:

MARTIN, J.A.

"*Per curiam*: The application should be dismissed as three justices at least (MARTIN, GALLIHER and MCPHILLIPS, JJ.A.) were of opinion that there should be a new trial on the point which was raised below."

That furnishes a complete answer to the unwarranted reflections made upon us; no other order could legally have been made in such circumstances. I entirely agree with what the Chief Justice of this Court has said in his judgment on this matter, and I confidently expect that their Lordships of the Supreme Court will take the earliest opportunity of doing justice to this Court in the premises and correct their misrepresentation of us, which, while unwitting (as I quite realize) is none the less to be deprecated. We humbly recognize the fact that like all judicial tribunals, we sometimes fall into what their Lordships stigmatize as "gross error," but in a judicial career

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of nearly 21 years I have not heretofore been charged with ignoring or defying a statute.

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MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from the judgment entered upon a verdict of a jury in a negligence action, the personal injuries sustained being very serious, consequent upon a wagon getting out of hand and dashing down a steep incline. The wagon had been left by the teamster upon the highway, facing down the hill. Previously to this one of the horses had slipped and fallen. The teamster had placed at the wheels some old radiators to prevent the wagon slipping down the hill during his absence, he having taken the horses out of the wagon and stabling them nearby. In some way, presumptively because the wagon was not sufficiently braked, it got loose and went down the hill, and in so doing ran over the little boy on whose behalf the action has been brought. The case for the respondent went upon facts which would go to shew that the wagon got away when an attempt was made to take the wagon down the hill without the horses being attached thereto, the wagon with its load weighing six and a half tons, but the evidence for the appellant is to the contrary, that the wagon got away through passing over the radiators before the chain was attached to the wheels, which was the contrivance used as a brake (not a fixed brake). There certainly is great confusion in the evidence, but I cannot but remark that the respondent did not make out the case opened to the jury; rather must it be said that upon the appellant's evidence as to how the accident occurred did the jury proceed. But that is not fatal to the respondent's right of recovery, as the jury were perfectly entitled to act upon all the evidence adduced before them, whether upon the part of the appellant or the respondent, the real question being, was there negligence upon the whole case as put before the jury? Mr. *Davis,* in his very able argument on behalf of the appellant, endeavoured to shew that the respondent did not make out his case and that it was not alleged even, or shewn, that there was no sufficient brake upon the wagon. With deference, I cannot accede to this contention. In the particulars of negligence it was alleged that the wagon was

without a brake, or alternatively, that the brake was defective. It may well be said that the course of the trial proceeded upon the evidence the appellant introduced, that the brake in use was an attachable chain, not a fixed brake, but this would, if not in place, be non-observable, as, according to the evidence, it was carried in the wagon, to be used when the occasion required it, and as a matter of fact had not been placed on the wagon at the time. The rebuttal evidence which was allowed in, in my opinion, was evidence which was admissible to shew that the brake carried was not a proper brake for use in the circumstances, but I think the rebuttal evidence could not be said to have established that the form of brake spoken to was a brake that should necessarily have been in use. I cannot say that it was not legal evidence though, or if I were wrong in this, that it in any way influenced the jury warranting the granting of a new trial. This Court may, if need be, reject the evidence (*Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13), and if of the opinion that upon the whole case but one answer can be given, *i.e.*, that there was negligence in the non-application of the brake provided by the appellant, then it is not a case for a new trial. All relevant facts were in the present case well brought out and well understood, in my opinion, by the jury, and the verdict of the jury should not be disturbed (see *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697). Further, this Court may draw inferences of fact not inconsistent with the findings of the jury, having sufficient material before it, although it is true the Court is not authorized to take questions away from the jury which are questions of fact properly for the consideration of the jury (see Order XL., r. 10, and Order LVIII., rr. 4-8a, and *Royal Mail Steam Packet Co.* v. *George and Brandray* (1900), 69 L.J., P.C. 107). I see no error in law in the present case. The jury have, upon sufficient material, made the requisite finding, *i.e.*, that the appellant was guilty of negligence, and not confining it to the absence of a brake, but expressly finding that the brake the appellant contended for, *i.e.*, the chain, was not put on the wheels of the wagon before the horses were removed. This is a sensible finding upon the facts, as this

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brake (assuming that this form of brake would have been good and sufficient), was not applied, and not being applied, it was the *causa causans* of the accident which ensued. In the words of Sir Arthur Channel in *Toronto Power Company, Limited* v. *Paskwan* (1915), A.C. 734 at p. 739, "that they [the jury] have come to the conclusion which on the evidence is not unreasonable." It would seem to me that the present case can be determined upon this one finding of the jury, "the chain should have been put on wheel before horses were removed." Here is to be found all that is essential to support the judgment as entered for the respondent, and there are no inconsistent findings. What error can there be in law if upon the whole case the jury accept the view of the defence as to the happening? There was negligence upon the part of the defence, upon their own shewing. The brake was omitted to be applied at a time when it was reasonable and proper that it should have been applied, and when it could have been applied. I confess that from whichever way the facts may be viewed, "the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence" (see the judgment of Duff, J. in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53), and the view one is compelled, and irresistibly compelled, to take is that there was negligence in not applying the chain brake in view of all the attendant circumstances. The omission was one of the non-exercise of reasonable and proper care, and in the result a most deplorable accident took place. Therefore, in that no jury, in my opinion, could come to other than one conclusion on the evidence, and the jury that have already passed upon the facts have come to that one conclusion, that the appellant was negligent in the circumstances disclosed, and as there is no suggestion that there is further or other material capable of being adduced to excuse liability for this plain negligent conduct, I cannot see any warrant for directing a new trial. Had there been any insufficient finding, or a finding not supportable upon the evidence led at the trial, the situation would be different, such as defined by Anglin, J. in the *McPhee* case, where that learned judge had occasion to say, at p. 59, that "the jury having failed to deter-

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mine a vital issue with which it was their province to deal, the only course open is to order a new trial." Here the "vital issue" has been found, and could not be found otherwise. That being the case, it would, in my opinion, be not furthering, but delaying, the ends of justice that a new trial should be directed. I am in agreement with my brother the Chief Justice in the reduction of the verdict and as to the disposition of the costs of the appeal. In the result the judgment, in my opinion, should be maintained, but for the reduced amount.

EBERTS, J.A.

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

Appeal allowed in part.

Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *Ladner & Cantelon.*

BROOKS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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BROOKS v. B.C. ELECTRIC RY. CO.

Negligence — Collision between automobile and street-car — Husband and wife—Husband driving automobile—Wife injured—Contributory negligence of husband—Wife's right of action—Evidence—Admissibility—Should be ruled upon—R.S.B.C. 1911, Cap. 152, Sec. 4.

The plaintiff was riding in her husband's automobile driven by him at about 11 o'clock at night as he was going south on the east side of Main Street, South Vancouver. He was following about 30 feet behind a south bound street-car, intending to turn west into 21st Avenue. On nearing 21st Avenue he turned west behind the south-bound car and on reaching the middle of the east track as he crossed was struck by a north-bound car going at a high rate of speed. The plaintiff fell under the street-car and was severely injured. At the trial the jury found the defendant Company negligent and that there was not contributory negligence by the husband, giving damages in $7,000.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that there was evidence to support the finding of negligence on the part of the defendant, but

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the Court was unanimously of opinion that the plaintiff's husband was clearly guilty of contributory negligence.

Held, further (MCPHILLIPS, J.A. dissenting), nevertheless, that the verdict should not be disturbed, as the plaintiff was, notwithstanding the negligence of her husband, entitled to recover against the defendant, the Married Women's Property Act rendering non-existent the common law doctrine of the unity of husband and wife.

Per MACDONALD, C.J.A.: When evidence is submitted, the admissibility of which is questioned, it is the duty of counsel to object to its admission and the duty of the Court to rule as to whether it should or should not be admitted.

APPEAL from the decision of MACDONALD, J. of the 5th of March, 1919, and the verdict of a jury. The plaintiff was in an automobile driven by her husband in the month of May at about 11 o'clock at night, going south on Main Street, intending to turn west on 21st Avenue. He was driving from 15 to 30 feet behind a street-car that was going south on Main Street. As he neared 21st Avenue he turned behind the car in front of him, intending to cross over to 21st Avenue. On reaching the middle of the west track he was struck by a car going north, his car being wrecked. The plaintiff was severely injured. She lost her right foot, her jaw was broken, and she suffered other injuries. The questions put to the jury, and the answers, were as follow:

Statement

"1. Was the defendant Company guilty of negligence which caused the accident? Six of the jurymen find the answer to that question 'yes' and two to the contrary.

"2. If so, in what did such negligence consist? That motorman did not have his car under proper control in view of fact that he was passing a street-car approaching crossing.

"3. Was the plaintiff's husband, as driver of the automobile, guilty of negligence which contributed to accident? Two of the jurymen say 'yes' and six 'no.'

"4. If so, in what did such negligence consist? In not waiting until south bound street-car had gone far enough to give him an unobstructed view of west car track, sufficient to insure his crossing safely.

"5. If after the motorman of defendant's street-car became aware or ought (if he had exercised reasonable care) to have become aware that a collision was imminent, could he have prevented such collision by the exercise of reasonable care? 'He could not.'

"6. If not, was he prevented from so doing by any cause? If so, state it? Yes, his street-car had too much impetus to stop in the distance between his street-car and motor-car.

"7. Amount of damages? $7,000 and costs."

Judgment was entered accordingly for the plaintiff for $7,000 and costs. The defendant Company appealed.

The appeal was argued at Vancouver on the 6th and 7th of May, 1919, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

McPhillips, K.C. (*Riddell,* with him), for appellant: The plaintiff's husband was driving the automobile. If negligence could properly be found against the Company, negligence should be found against the husband. The plaintiff and her husband were "identified" in respect of his negligence, and the action should be dismissed on the ground of contributory negligence. The law settled in *The "Bernina"* (1888), 13 App. Cas. 1, which overruled *Thorogood* v. *Bryan* (1849), 8 C.B. 115, only applied to common carriers, and private vehicles were still governed by the latter case, and *The "Bernina," supra,* did not apply to husband and wife: see the judgment of Bramwell, J. at p. 13; Beven on Negligence, 3rd Ed., p. 178; *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719. As to justification of the jury finding negligence, no street railway is bound to anticipate the negligence of another driving an automobile. On the law, when a jury finds negligence as to one act it negatives all other acts of alleged negligence: see *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1. Even if they found as negligent something which is not negligence in itself, all other alleged acts of negligence would be negatived: see *Newberry* v. *Bristol Tramway and Carriage Company* (*Limited*) (1912), 29 T.L.R. 177 at p. 179; *McEachen* v. *Grand Trunk Railway Co.* (1912), 2 D.L.R. 588 at pp. 593-4. If it is a finding of negligent speed, there is no evidence upon which the finding can be justified, as in South Vancouver the limit of speed is 20 miles an hour: *Lewis* v. *Grand Trunk Pacific Rway. Co.* (1915), 52 S.C.R. 227 at pp. 231 and 233; *Sawyer* v. *Millett* (1918), 25 B.C. 193 at p. 195; *Mader* v. *Halifax Electric Tramway Co.* (1905), 37 S.C.R. 94 at p. 98; *Antaya* v. *Wabash R.R. Co.* (1911), 24 O.L.R. 88 at pp. 93 and 101.

Argument

G. B. Duncan (*Robinson,* with him), for respondent: Before the question of the relationship of husband and wife should be

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argued there must be a finding of negligence against the automobile driver, but there has been no such finding. She is not suing her husband, but another and totally distinct tort-feasor: see Beven on Negligence, 3rd Ed., p. 160. At common law the wife could not have succeeded when her husband had been partly to blame. This is not on account of their "identification," but because the Court could not allow her to succeed and recover damages, as the damages would go, not to herself, but to her husband, who was partly responsible for the injury. Also, under the common law the husband was a necessary party, but now, under the Married Women's Property Act (R.S.B.C. 1911, Cap. 152, Sec. 4), the wife can sue in her own name, and recover for her separate estate: see *Beasley* v. *Roney* (1891), 1 Q.B. 509 at p. 511. On the question of identification see *Platz* v. *City of Cohoes* (1881), 24 Hun. 101; (1882), 89 N.Y. 219; 42 Am. Rep. 286. Suppose the auto had injured a third person, how could the wife be held responsible? All we have to shew is that there was evidence to go to the jury upon which they could reasonably find as they did: see *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152; *Monrufet* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 91 at p. 93; *Astley* v. *Garnett* (1914), 20 B.C. 528 at p. 533; *Cox* v. *English, Scottish and Australian Bank* (1905), A.C. 168. The Court of Appeal will not interfere if there is evidence upon which the jury so find. The automobile was travelling in low gear.

Argument

[MACDONALD, C.J.A.: If evidence is admitted which is not admissible, the Court should pay no attention to it, which is a well-recognized rule, and the judge should be depended upon to recognize what is evidence and what is not evidence, and treat it in a judicial manner. What I had reference to, and I have had occasion to refer to it on more than one occasion, is the disinclination on the part of counsel, when evidence is offered in the Court below to object to it, and the disinclination of the Court to rule upon it. It makes for a slipshod practice, and sometimes brings about unhappy results.]

McPhillips, in reply, referred to *McGregor* v. *McGregor* (1899), 6 B.C. 432. The torts of the husband are the torts of the wife, as they are one.

Cur. adv. vult.

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MACDONALD, C.J.A. The plaintiff was riding in her husband's automobile, driven by him, when she was injured in a collision between the automobile and the tramcar of the defendant.

The jury found the Company negligent, and while I might not have done so, I think there was evidence to support their finding. The jury also found that the driver was not guilty of contributory negligence. In my opinion, that finding is clearly contrary to the weight of evidence. It is hard to conceive of a more pronounced case of contributory negligence than that which was made out against the plaintiff's husband, on his own testimony, and therefore, if the plaintiff is to be identified with her husband's negligence, there ought to be a new trial, as, in my opinion the finding against contributory negligence was perverse.

But if the contributory negligence of the driver is not in law that of the plaintiff, then it would be idle to grant a new trial. Had the plaintiff been an ordinary passenger in a conveyance driven by a stranger, and not under her orders, the case would fall within the rule of law laid down by the House of Lords in *The "Bernina"* (1888), 13 App. Cas. 1, and the contributory negligence of the driver would not be a factor in this case.

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The submission is that because at common law husband and wife are one, his negligence is hers. But for the Married Women's Property Act she might not sue alone. At common law the husband was a necessary party to a suit for injuries to the wife, and he was entitled to the damages recovered. Therefore, at common law damages could not have been recovered in this case because of the negligence of the husband.

The answer, then, to the question under consideration depends upon the extent of the change made in the married woman's *status* by the Act referred to. So far as it affects this case, our Act is the same as the English statute of 1882, and is in effect the same as the legislation of Ontario. I say in effect, because while the Ontario Act was amended by the deletion of the words "in tort or otherwise," yet the Courts of that Province have regarded this as not lessening the married woman's

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status to sue in tort. The decisions, therefore, in the English and in the Ontario Courts are upon statutes which for the purposes in hand are identical with our own.

That the Act gives a married woman the requisite *status* to sue in her own name, and for her own benefit, in respect of a personal injury is not now open to controversy, with this qualification to be found in the Act itself, that she cannot sue her husband for a tort of that nature: Eversley on Domestic Relations, 3rd Ed., 177; *In re Duke of Somerset. Thynne* v. *St. Maur* (1887), 34 Ch. D. 465; *Weldon* v. *Winslow* (1884), 13 Q.B.D. 784; *Spahr* v. *Bean* (1889), 18 Ont. 70. The latter is referred to with approval by Osler, J.A. in *Lellis* v. *Lambert* (1897), 24 A.R. 653 at p. 665. It is also settled law that one or both of two tort feasors may, at the option of the person complaining of an injury to the person arising out of their joint negligence, be sued.

The plaintiff might proceed against one only of the joint tort feasors, as she has done, and, as has already been pointed out, the contributory negligence of the other could be no answer to her claim. If it be an answer in this case, it is solely because the driver was her husband.

The husband has no interest in her cause of action. True he might, but for his own negligence, have had a cause of action of his own arising out of the same tort, but that has nothing to do with the case. In relation to this action, the common law doctrine of the unity of husband and wife is rendered non-existent by the statute. In the eye of the law the wife is a *femme sole.* Bramwell, L.J. in *The "Bernina," supra,* at p. 13 said:

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> "Suppose the owner's wife is a passenger and injured, can she maintain such an action? If not, why not? The driver is not her servant, and she is not responsible for his negligence."

And there is nothing in their Lordships' judgment at variance with what Lord Bramwell said. On the contrary, it seems to me to follow from what their Lordships have said that the relationship which must exist between the passenger and the driver to render the negligence of the driver that of the passenger must be such as either gives the passenger control over the driver or creates a common interest, so that, to quote the words of Lord Herschell, "the acts of the one may be regarded as the

acts of the other." The fact that the wife was, so to speak, the guest of her husband, and not a passenger for hire is, I think, not material to the issue, if, as here, she was not herself guilty of any want of care which contributed to her injury.

In *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719, the deceased was riding on the vehicle with the driver *gratis,* and the jury found that he was negligent in not looking out for an approaching train. Their Lordships appear to recognize, although it was not an issue in the appeal, that the deceased was, in the circumstances of that case, under an obligation to be on the lookout for danger. Their Lordships did not, therefore, criticize the finding that he was guilty of contributory negligence, but gave judgment in favour of his administrator because they thought that in the result the railway company might by care have avoided the collision.

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It was not a ground of appeal, nor was it argued before us that the wife was not entitled to recover the expenses of her treatment, amounting to a large sum, and which formed part of her claim. Primarily the husband is liable for these expenses, but no question based on that obligation is before us. In view of what I have said a new trial ought not to be ordered, and as the verdict cannot be impeached on the other grounds taken, the appeal must be dismissed.

GALLIHER, J.A.: I agree in the reasons for judgment of the Chief Justice.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am not in agreement with my learned brothers as to what should be the disposition of this appeal. With great respect, I am entirely unable to accept the view that the appeal should be dismissed. I cannot persuade myself that negligence upon the part of the Railway Company was established. The speed of the electric-car cannot be said to have been shewn to be greater than say, at the outside, twelve miles an hour, and a speed of 20 miles an hour was permissible in the municipality; this speed, of course, would always have to be guaged by the attendant circumstances.

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The evidence is conclusive that the husband of the plaintiff was guilty of gross negligence in driving close up to the electric-

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car on the one track, then, without opportunity to see whether or no a car was coming down on the parallel track, swinging over and placing his automobile, in which the plaintiff was, directly in front of that car. The accident then was inevitable, and it is not contended that the motorman could then have obviated the impact between the electric car and the automobile. The truth is that the jury were perverse in absolving the plaintiff's husband from the guilt of contributory negligence, and as at present advised, although not without some hesitation, I am of the opinion that the plaintiff is affected by the negligence of her husband—the plaintiff the wife was in law under the protection of the husband. The husband and wife are in theory one person, and in this class of action, the husband being the driver of the automobile, and guilty of contributory negligence, the result in law is that the situation is the same as it would have been if the plaintiff the wife had been driving the automobile and was guilty of contributory negligence, and on this ground alone is disentitled from recovering any damages in respect of the injury sustained. (See Eversley on Domestic Relations, 3rd Ed., pp. 170-181; Lush on Husband and Wife, 3rd Ed., 11-13; *The "Bernina"* (1888), 13 App. Cas. 1 at p. 13, Lord Bramwell, first column, Lord Herschell at pp. 7-8; Beven on Negligence, 3rd Ed., 178.)

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Traction systems are necessary in these modern days. The electric-cars can only traverse the streets upon the steel rails, and whilst the traffic must not be to the public danger, pedestrians, drivers and occupants of vehicles must exercise due and proper care, and not recklessly place themselves in positions of danger and look to the traction companies as insurers. The plaintiff in a negligence action must make out a case of negligence—that is the bounden duty of the plaintiff. Lord Moulton, in *Rickards* v. *Lothian* (1913), 82 L.J., P.C. 42 at p. 47, said:

> "It is for the plaintiff to see that the questions necessary to enable him to support his case are asked of the jury."

Here we have only the following findings: (a) negligence; (b) the motorman did not have his car under proper control in view of the fact that he was passing a street-car approaching a crossing; (c) he (the motorman) could not stop; (d) the

street-car had too much impetus to stop in the distance between his street-car and motor-car. These findings are insufficient, in my opinion, as they do not import negligence in view of the circumstances, as they do not demonstrate that there was negligence in the operation of the street-car. The precipitation of the motor-car—shot out upon the track, coming from behind the other street-car, was such that no control was possible to prevent that which was inevitable accident. There is no finding of excessive speed, nor evidence that there was want of proper control. What occurred shewed there was proper control. The force of the impact was only such as a street-car under proper control would necessarily cause; all the independent witnesses make this clear. I do not consider it necessary to give in detail all this evidence. Now, apart from whether the plaintiff may rightly be said to be affected and bound by the contributory negligence of the driver of the motor-car (her husband), there is no evidence upon which the jury could reasonably find that there was negligence upon the part of the Railway Company. The verdict of the jury is so opposed to the weight of the evidence that it can only be characterized as flagrantly perverse (see *Jones* v. *Spencer* (1897), 77 L.T. 536, Lord Morris at p. 538).

This is not a case of a general verdict. I would refer to what Lord Cozens-Hardy said in *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177 at p. 179: MCPHILLIPS, J.A.

"They [the jury as they have done in the present case] had negatived all the alleged acts of negligence—or at least they had held that no one of these alleged acts of negligence was established to their satisfaction. He thought they, in substance, treated the tramways company as insurers —as being bound to 'ensure' the safety of their passengers [here all vehicular traffic on the street]. In other words, they thought the company ought not to carry passengers [here ought not to run their cars] on the car unless they could carry them safely [here insure all such vehicular traffic], and this without any question of negligence on the part of the company."

In the same case, at the same page, Lord Justice Hamilton, now Lord Sumner, said he

"did not think that a jury could fix a defendant with liability for want of care, without proof given or reason assigned, out of their own inner consciousness and on their own notions of the fitness of things. The

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evidence shewed how the accident happened. It proved a small *residuum* of risk which nobody at present knew how to guard against. The jury were not tramway experts. They might conceive an ideal tramcar [here they might conceive a traction system capable of being carried on without risk to even those who flung themselves or their vehicles in the way of a tramcar as 'a bolt from the blue'] but their hopes and aspirations could not take the place of evidence or support a verdict which rested on no foundation of actuality."

This Court had a case of precisely similar character to the present case before it, where all the evidence is closely scanned (*Tait* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 571), and it was held that there was such contributory negligence as precluded recovery for injuries sustained in consequence of a collision with a street-car. Then the answers returned by the jury are insufficient and vague, and upon this ground alone cannot be given effect to (see *Lewis* v. *Grand Trunk Pacific Rway. Co.* (1915), 52 S.C.R. 227).

In Halsbury's Laws of England, Vol. 21, p. 452, we find this statement of the law:

"He is not identified with the negligence of the driver of the vehicle in which he is, merely because he is travelling in it (*Mathews* v. *London Street Tramways Co.* (1888), 5 T.L.R. 3). The proper test as to the liability in such a case is whether the negligence of the driver of the vehicle which collided with that in which the plaintiff was travelling wholly or in part caused the accident; if so, the plaintiff can recover, and the fact that there was negligence on the part of the driver of the vehicle in which the plaintiff was travelling makes no difference."

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No question was put to the jury to cover this point, and it was the plaintiff's duty to see to its being put, and the requisite answer must be got from the jury (*Rickards* v. *Lothian, supra,* at p. 47; also see *Nicholls* v. *Great Western Railway Co.* (1868), 27 U.C.Q.B. 382). Mr. *Duncan,* the learned counsel for the respondent, frankly stated that the case as presented by the respondent is as complete a case as can be made. In view of this, I do not think it a proper case to direct a new trial, as, in my opinion, one conclusion only is open to a jury upon the facts of this case, and that is that no evidence of negligence upon the part of the appellant has been established, and the proper course to adopt is to enter judgment for the appellant (see *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, Mr. Justice Duff at p. 53; *Hanly* v. *Michigan Central R.W. Co.* (1907), 13 O.L.R. 560

at p. 567; *Antaya* v. *Wabash R.R. Co.* (1911), 24 O.L.R. 88 at pp. 93-101).

I would, therefore, allow the appeal.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McPhillips & Smith.*
Solicitor for respondent: *Hume B. Robinson.*

IN RE PUBLIC INQUIRIES ACT.

Constitutional law—Public Inquiries Act Investigation—Importation of intoxicating liquor—Validity—R.S.B.C. 1911, Cap. 45, Sec. 3; Cap. 110, Sec. 4.

The Public Inquiries Act (R.S.B.C. 1911, Cap. 110) is within Provincial legislative powers under section 92 of the British North America Act. The appointment of a commissioner under the Public Inquiries Act to inquire into the unlawful importation of intoxicating liquor into the Province, by what means such importation was effected, the names of persons or corporations engaged in such importation, the disposition of the liquor so imported, and the unlawful sales of liquor within the Province is *intra vires* of the Lieutenant-Governor in Council.

REFERENCE by the Lieutenant-Governor in Council to the Court of Appeal in pursuance of an order in council approved on the 3rd of May, 1919, and passed under authority of chapter 45 of the Revised Statutes of British Columbia. On the 21st of December, 1918, under section 4 of the Public Inquiries Act, Mr. Justice CLEMENT was appointed sole commissioner to inquire: (a) Whether intoxicating liquor has been unlawfully imported into the Province of British Columbia since the 24th of December, 1917, and if so, in what manner, and by what means or devices such importation was effected; (b) If any intoxicating liquor was so unlawfully imported into the Province of British Columbia, the names of the persons, firms or

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corporations engaged directly or indirectly or in any wise connected with such unlawful importation; (c) Into the disposition of all intoxicating liquor so unlawfully imported; (d) Into all unlawful sales of intoxicating liquor within the Province of British Columbia since the 1st of October, 1917, in respect of which no prosecution has been had under the British Columbia Prohibition Act or under any statute, order in council or regulation having the force of law in British Columbia.

On the recommendation of the Attorney-General and under the powers conferred by section 3 of chapter 45 of the Revised Statutes of British Columbia, 1911, His Honor the Lieutenant-Governor, by and with the advice of his Executive Council, ordered that the following questions be referred to the Court of Appeal for its opinion thereon:

"(1) Is the Public Inquiries Act, chapter 110 of the Revised Statutes of British Columbia, 1911, *intra vires* of the Province of British Columbia?

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"(2) If the said Act is *ultra vires* in any respect, in what respect, and to what extent is it *ultra vires*?

"(3) Is the appointment of the Honourable William Henry Pope Clement, as such Commissioner, for the purposes aforesaid *intra vires* of the Lieutenant-Governor in Council?

"(4) If the said appointment of the Honourable William Henry Pope Clement, as such Commissioner, for the purposes aforesaid is *ultra vires* of the Lieutenant-Governor in Council in any respect, in what respect and to what extent is it *ultra vires*?"

Heard at Vancouver on the 8th of May, 1919, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Craig, K.C., for the Attorney-General, referred to *Kelly* v. *Mathers* (1915), 25 Man. L.R. 580, and submitted his argument in *In re Gartshore* (*ante* 121 at pp. 131-2).

Cur. adv. vult.

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MACDONALD, C.J.A.: The Public Inquiries Act, R.S.B.C. 1911, Cap. 110, empowers the Lieutenant-Governor in Council to appoint a commissioner to inquire into matters connected with the good government in the Province, the conduct of public business, and the administration of justice in the Province.

Pursuant to the Act, an order in council was passed on the 21st of December, 1918, appointing Mr. Justice CLEMENT a

Commissioner to inquire (to put it briefly), whether intoxicating liquor had been unlawfully imported into the Province since the passing of an order of the Governor-General in Council prohibiting such importation, and also whether sales of intoxicating liquor had been made in the Province contrary to the provisions of the British Columbia Prohibition Act.

Action was commenced on behalf of a witness to prohibit the inquiry, but this action was dismissed on technical grounds, whereupon the Lieutenant-Governor in Council referred these questions of law for the opinion of this Court:

"Is the said Act *intra vires*?

"Is the inquiry within the powers conferred on the Lieutenant-Governor in Council by the Act?"

In my opinion, the Act is *intra vires*. Whether the order in council appointing the Commissioner goes beyond the Act is a more difficult question. I may say, at the outset, that I have no doubt his appointment for the purpose of inquiring into breaches of the British Columbia Prohibition Act is not open to objection, and to that extent at least the order in council appointing him is valid; but is that valid which directed him to inquire into breaches of the criminal law of Canada? The inquiry in this respect is not, I think, one connected with good government, or the conduct of public business, and must be supported, if at all, as being connected with the administration of justice in the Province, as that phrase is used in No. 14 of section 92 of the B.N.A. Act. The making of the criminal laws of Canada is assigned exclusively to the Dominion; so is the regulation of procedure in criminal matters. "Criminal matters" are, in my opinion, proceedings in the criminal Courts, and "procedure" means the steps to be taken in prosecutions or other criminal proceedings in such Court. The Commission in question here is extra-judicial. The Commissioner is not a Court, and his proceedings are not proceedings in a criminal matter, or in any matter in the legal sense of the term. Provincial legislation authorizing his appointment is therefore not in conflict with the exclusive legislative authority assigned to the Dominion Parliament by section 91 (27) of the B.N.A. Act. This, however, does not conclude the matter, since what was done may be in conflict with the residium of power vested

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in the Dominion Parliament by section 91 beyond that specified in No. 27. It becomes necessary, then, to ascertain the scope of the words "administration of justice" as used in section 92 (14) of the B.N.A. Act. There is no authority bearing directly on the question now under consideration. In *Kelly* v. *Mathers* (1915), 25 Man. L.R. 580, the decision turned upon the fact that the inquiry was concerning Provincial public business. *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Company, Limited* (1914), A.C. 237, is not in point. The Commonwealth had no legislative power in respect of the matter to be investigated. Here the Legislature may have such power, depending on the interpretation and scope of the language aforesaid.

Under its powers in respect of administration of justice, when crime has been committed the Province puts the machinery of the criminal law in motion. This undoubtedly is one branch of the administration of justice, but the discovery of crime when it is merely suspected may, I think, also fall into that category. Provincial peace officers are charged with that duty, amongst others. A Provincial detective force might, I think, be organized under Provincial laws for the very purpose for which the Commissioner was appointed. Now, if I am right in thinking that investigations, extra-judicially, into the commission of crime, for the purpose of discovering it and by whom committed, are within the subject-matters assigned to the Province under the words "administration of justice," is there anything to prevent the Province from making the investigation effective by imposing on individuals an obligation to give evidence under penalty for refusal? I think not. Such a power is not inconsistent, but consistent with the jurisdiction of the Province to legislate concerning property and civil rights.

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No doubt, to concede the power to the Province to make investigations into breaches of Dominion laws would appear at first blush to be an anomaly, and it might well be argued that the powers conferred upon the Province in respect of the administration of justice ought to be interpreted as conferring merely the duty or obligation to put the machinery of the Courts in motion, and to take the requisite steps to prosecute persons

accused of crime. That narrow construction would, I think, preclude what has been generally recognized as one of the functions of government in the administration of justice, namely, the ferreting out of crime and identification of criminals. There is nothing novel in compelling a witness to give evidence which may tend to incriminate him. That is done in the civil Courts and is the practice in one of the oldest criminal Courts of the Realm, the coroner's inquest. With the justice or expediency of inquiries into crime by an extra-judicial Provincial commission I have not to concern myself. The power to appoint such rests somewhere. It is either with the Dominion or the Province, or with each, and hence it is idle to urge as a reason against the validity of the order in council that it is inimical to the rights of the subject.

MACDONALD, C.J.A.

I would answer the first and third questions (those mentioned above) in the affirmative, from which it follows that the other two require no answers.

MARTIN, J.A.: These are four questions arising out of the Public Inquiries Act, Cap. 110, R.S.B.C. 1911, referred to us by His Honour the Lieutenant-Governor in Council, under the Constitutional Questions Determination Act, Cap. 45, R.S.B.C. 1911, who issued a commission to the Honourable W. H. P. CLEMENT to inquire into four certain matters relating to intoxicating liquor in this Province, and, as section 10 of the Act requires, to make a report thereon to the Legislature of this Province, after completion of the inquiry.

In a decision we gave on April 4th last, *In re Gartshore* [*ante* p. 121], in an application to prohibit the said Commissioner, we held that he was "in no way acting judicially; he was in no sense a Court," and so prohibition would not lie, and it would flow from this that the proceedings before him were not "procedure in criminal matters" within the exclusive competence of the Federal Parliament under section 91 (27) of the B.N.A. Act.

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As to the first and second questions: In my opinion, it is beyond any doubt that the Act is *intra vires*.

As to the third and fourth: Is the appointment of said com-

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missioner for the purpose aforesaid *intra vires* conferred upon the Lieutenant-Governor by said Act, and, if so, to what extent? In my opinion, the appointment is, in all respects, *intra vires*, as at least coming (apart from any other ground) within "the administration of justice in the Province" under section 92 (14) of the B.N.A. Act.

In the light of the decision of the Manitoba Court of Appeal in *Kelly* v. *Mathers* (1915), 25 Man. L.R. 580; 8 W.W.R. 1208; 31 W.L.R. 931; 32 W.L.R. 33, which I adopt (including its view as to the non-application of *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Company, Limited* (1913), 83 L.J., P.C. 154; (1914), A.C. 237), the validity of the inquiry into the fourth subject-matter, *i.e.*, sales of intoxicating liquor within the Province, is hardly open to dispute. I only add to the cases cited that of *Reg.* v. *Coote* (1873), L.R. 4 P.C. 599; 9 Moore, P.C. (N.S.) 463; 42 L.J., P.C. 45, wherein the Privy Council decided that it was within the competency of the Legislature of Quebec to appoint fire commissioners "empowered to investigate the origin of any fires occurring in the cities of Quebec and Montreal, to compel the attendance of witnesses, and examine them on oath, and to commit to prison any witnesses refusing to answer without just cause [p. 600 (*n*)."]

MARTIN, J.A.

The third question, relating to the disposition of such liquor within the Province after unlawful importation, comes, I think, within the same category.

The two other subject-matters relate to the unlawful importation of intoxicating liquor into the Province and the means or devices of such importation and the persons engaged therein, such importation being a breach of the Federal criminal law only. But within the Province the Provincial authorities are primarily charged with the duty of enforcing obedience to all laws, Federal and Provincial, and that duty is part of the "administration of justice," which is a term of very wide significance. It was held by Chief Justice Draper in *Reg.* v. *Reno and Anderson* (1868), 4 Pr. 281; 1 Cartw. 810, that police magistrates "clearly relate to the administration of justice," and their appointment is within the powers of the Provincial

Legislatures, pp. 293-4; and in *Reg.* v. *Bennett* (1882), 1 Ont. 445, the same view is taken, and extended to justices of the peace (though not Queen's Counsel, as being a *status* of more honour and dignity (p. 460) nor the prerogative of mercy—pardoning power; Lefroy on Canada's Federal System, 573, 579); and also in *Richardson* v. *Ransom* (1885), 10 Ont. 387; and *Reg.* v. *Bush* (1888), 15 Ont. 398 (*coram* Armour, C.J., and Street and Falconbridge, JJ.), wherein Street, J. made the following observations at pp. 403-4:

"Now these words, standing alone and without any interpretation or context, appear to me to be sufficient, had no other clause in the Act limited them, to confer upon the Provincial Legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the Provinces, including the appointment of all the judges and officers requisite for the proper administration of justice in its widest sense, reserving only the procedure in criminal matters."

And at p. 405:

"The administration of justice could not be carried on in the Provinces effectually without the appointment of justices of the peace and police magistrates, and the conclusion seems to me to be irresistible that it was intended that the appointment of these and other officers, whose duty it should be to aid in the administration of justice, should be left in the hands of the Provincial Legislatures."

Chief Justice Armour says, p. 401:

"Laws providing for the appointment of justices of the peace are, it is contended, and I think rightly, laws in relation to the administration of justice, for the appointment of justices of the peace is a primary requisite to the administration of justice."

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And it is clear that if the administration of justice cannot be carried on without police magistrates or justices of the peace, much less can it be done without police officers whose duty it is "to aid in the administration of justice," not merely by the apprehension of offenders and the institution of criminal proceedings against them under proper direction and control, but by inquisitorial (using the word in its proper legal sense) means to unearth or investigate real or suspected methods or systems of crime rampant in the community but which, by reason of their secret ramifications, cannot be reached or cured by ordinary inquiry and prosecutions. For example, the great increase in the use of "habit-forming drugs," cocaine, morphine, heroin, etc., attempted to be stringently regulated by sections 29-31 of the Pharmacy Act, Cap. 178, R.S.B.C. 1911, is of a very

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insidious and dangerous nature, notoriously conducted in constant violation of Federal and Provincial laws by "underground" methods which are particularly hard to expose; can it seriously be said that an investigation into such unlawful methods of importation and subsequent harmful consumption does not "relate to the administration of justice" within the Province? Such inquisitions, with the view of detection or, still better, prevention of crime are clearly, in my opinion, an essential part of, or, "in relation to" (as the cases cited put it) the administration of justice, and just as much so if conducted by the ordinary methods of the detective branches of the police service as by the extraordinary one of a commissioner appointed under the Public Inquiries Act, who might be any one (under section 4 thereof) that the Lieutenant-Governor in Council should select for that purpose, *e.g.*, a judge of a County or Supreme Court, or the superintendent of Provincial police himself (Police and Prisons Regulation Act, Cap. 180, R.S.B.C. 1911), who already has, of course, a detective branch under his direction, as may be seen by the vote therefor in the estimates accompanying the Supply Act for the current year, Cap. 78, *sub. tit.*, "Department of the Attorney-General—Provincial Police," pp. 371-2.

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And once the power to so investigate is vested in the Provincial Legislature and Executive, it is difficult, to me, at least, with all due respect for other opinions, to perceive how a limitation practically amounting to impotency can be placed upon it by restricting its scope to volunteer witnesses, and depriving the commissioners appointed thereunder of those compulsory and punitive evidentiary powers which *Reg.* v. *Coote, supra,* decided were possessed by fire commissioners in Quebec. I am not aware of any privilege or principle of evidence that should entitle a private citizen to keep silence when the public welfare, as expressed by the Legislature, requires that he should speak to inform that Legislature before which the report of the commissioner appointed under its said statute (section 10) must be laid. In other words, the imposition of an oath to a witness does not invalidate the inquisitorial power.

It follows that the first and third questions should be answered in the affirmative, and they cover the other two.

GALLIHER, J.A.: I am of the opinion that questions 1 and 3 should be answered in the affirmative for the reasons given by the Chief Justice. I have been unable to find in the authorities or in any judicial dictionary any reference to procedure in matters other than procedure in a Court.

By section 91 (27) of the British North America Act, procedure in criminal cases is reserved exclusively to the legislative authority of the Parliament of Canada. I think the procedure there referred to must be taken to be against some person charged with a crime and called upon to answer. The commission acting here is not a Court. The scope of the commission never reaches the stage where anyone is called upon to answer a charge, although the evidence adduced may lead to a charge being preferred, and until that charge is preferred there is no prosecution initiated and, as I view it, no interference with the exclusive right of Parliament to regulate procedure. The laying of an information has been held not to be the commencement of a prosecution, as the magistrate may refuse a warrant: see *Yates* v. *The Queen* (1885), 54 L.J., Q.B. 258.

GALLIHER, J.A.

Whatever authority there is to hold this inquiry must, I think, be under the head of administration of justice in the Province, which, by section 92 (14) of the British North America Act, is exclusively given to it. As I concur with the Chief Justice, there is little that I can usefully add to his views on this branch of the matter.

MCPHILLIPS, J.A.: In my opinion the Act (the validity of which is called in question) is *intra vires, i.e.,* within the powers of the Legislative Assembly of the Province of British Columbia, and the commission, the validity and scope of which is called in question, has been properly issued and is *intra vires* of the powers conferred upon the Lieutenant-Governor in Council and within the purview of the Act.

MCPHILLIPS, J.A.

Attorney-General for the Commonwealth of Australia v. *Colonial Sugar Refining Company, Limited* (1914), A.C. 237, has been greatly relied upon to establish the *ultra vires* nature of the Act and the commission issued thereunder. With deference to all contrary opinion, I do not consider that that decision

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is at all conclusive or determinative of the question now before this Court. The constitution of the Commonwealth of Australia greatly differs from the constitution of Canada and the Provinces of Canada, as defined by the British North America Act (30 & 31 Vict., c. 3, Imperial). The luminous judgment of Viscount Haldane well portrays this, and it is not a safe course to deduce principles and expositions of the law as contained in the judgment of their Lordships of the Privy Council and apply them to the matter here to be determined. Upon this point it is well to remember what Lord Parmoor said in *City of London Corporation* v. *Associated Newspapers, Limited* (1915), A.C. 674 at p. 704:

"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."

The commission, in terms, may be shortly stated as being a commission directed to inquire into matters relative to the unlawful importation into British Columbia of intoxicating liquor contrary to Dominion orders in council made and passed supplementary to the local law, the disposition of such liquor, and the unlawful sales of intoxicating liquor generally within the Province of British Columbia wherein the same may be contrary to any local law.

It cannot be questioned (it is not, in fact, contended) that the British Columbia Prohibition Act is in any way legislation beyond the powers of the Legislative Assembly of the Province of British Columbia, and this Court has already given its opinion that the passage of the Dominion orders in council is merely supplementary to the local law, and the effect has not been to displace the local law; therefore the inquiry cannot be said to be *ultra vires* in its nature. It is in furtherance of and in aid of the peace, order and good government of the Province, that is, the taking of all such measures as will ensure the government of the Province in accordance with the expressed views of Parliament (see Perdue, J.A., now Chief Justice of Manitoba, in *Kelly* v. *Mathers* (1915), 25 Man. L.R. 580 at pp. 606-9).

MCPHILLIPS, J.A.

Further, in my opinion, the commission is sufficiently supported by section 92 (14) of the British North America Act, which reads as follows:

"(14.) The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

The administration of justice unquestionably may conceivably be furthered by the labours of the learned commissioner in the exercise of the powers conferred upon him, and to deny the exercise of those powers would be the placing of fetters upon the Provincial authority, in plain denial of a conferred and exclusive jurisdiction granted by the Sovereign Parliament to the Legislative Assembly under the terms of the British North America Act.

It cannot be successfully contended that the legislation is in any way "criminal procedure" or that the commission is of that nature.

The *ratio decidendi* of the Manitoba case (*Kelly* v. *Mathers*) supports the opinion here expressed, and can be rightly and usefully referred to, and falls within the language made use of by Lord Parmoor in *City of London Corporation* v. *Associated Newspapers Limited, supra,* at p. 704 (following immediately after that previously quoted):

MCPHILLIPS, J.A.

"So far, however, as it is allowable to be guided by decisions in analogous cases, I agree with Swinfen Eady, L.J."

The analogy of the Manitoba case is, in my opinion, so complete upon the points here submitted that I do not feel it to be at all necessary to further enlarge upon the law governing in the matter, it being ably set forth by the learned judges of the Court of Appeal for Manitoba (*Kelly* v. *Mathers* (1915), 25 Man. L.R. 500).

In the result, my opinion is that questions 1 and 3 should be answered in the affirmative. Answering these questions in the way I do renders it quite unnecessary to answer or refer to questions 2 and 4.

EBERTS, J.A. agreed in the reasons given by the Chief Justice.

EBERTS, J.A.

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IN RE ESTATE OF SIR WILLIAM VAN HORNE, DECEASED, AND THE SUCCESSION DUTY ACT. ROYAL TRUST COMPANY v. THE MINISTER OF FINANCE. (No. 2.)

IN RE ESTATE OF SIR WILLIAM VAN HORNE, DECEASED

Costs—Petition under Succession Duty Act—Appeal by Crown—Dismissed—Crown Costs Act, R.S.B.C. 1911, Cap. 61 — R.S.B.C. 1911, Cap. 217, Secs. 41, 43, 44 and 48.

On appeal from a judge's decision on a petition under section 43 of the Succession Duty Act to ascertain the duty taxable on an estate, the Court is governed by the Crown Costs Act and has no power to order costs against the Crown.

Statement

MOTION to the Court of Appeal by the respondent on the appeal which was dismissed (see *ante* p. 269) for direction that the costs be paid by the Minister of Finance, the appellant, who was the unsuccessful party. Heard at Victoria on the 15th of September, 1919, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Crease, K.C., for the motion: The Crown Costs Act is invoked, but I submit this only applies when there is no other provision, and rely on section 41 of the Succession Duty Act. This was an application by petition under section 43 of said Act. Section 44 gives the Court full discretion as to costs: see *Moore* v. *Smith* (1859), 1 El. & El. 597.

Carter, contra: There is nothing in section 43 as to costs, *i.e.*, the section under which the application is made. I submit section 41 only refers to the preceding sections and has no application to any section that follows. I would refer to section 27 of the Interpretation Act, which excludes the Crown in this matter. In the statute there is no reference made to any fund out of which this could be paid: see *Bainbridge* v. *The Postmaster-General* (1906), 1 K.B. 178; *Bowles* v. *Winnipeg* (1919), 1 W.W.R. 198 at p. 215. Costs cannot be taxed against a minister of the Crown when there is no fund pro-

vided out of which it can be paid. The judgment below does not mention costs.

Crease, in reply.

Cur. adv. vult.

17th October, 1919.

MACDONALD, C.J.A.: Counsel for the respondent in the appeal which was dismissed by the Court on the 15th of July last, now applies for a direction that the costs of the appeal shall be paid by the appellant, the Minister of Finance. It was submitted by Mr. *Carter,* who appeared for the minister, that the Crown Costs Act, R.S.B.C. 1911, Cap. 61, precludes us from giving such a direction. Mr. *Crease,* for the motion, referred us to section 41 of the Succession Duty Act, R.S.B.C. 1911, Cap. 217, which enacts that "the costs of all such proceedings shall be in the discretion of the Court or judge." The proceedings so referred to, must, I think, be held to be those authorized by the preceding sections, which have nothing to do with the proceedings out of which the appeal arose. Following said section 41 is a group of sections under the caption "Additional Remedies." Section 42 gives the Crown the right to recover succession duties by action in the Supreme Court. Section 43 authorizes an application to a judge of the Supreme Court to determine what property, if any, is liable to be assessed. This section is the one under which the proceedings in appeal originated. Section 44 reads:

"Subject to the discretion of the Court as to costs, an action may be brought for any of the purposes in this Act mentioned, notwithstanding the time for the payment of the duty has not arrived."

I refer to this section because of the reference in it to the discretion of the Court as to costs, which respondent's counsel relied on as implying that the discretion given to the Court or judge by section 41 extends to the costs of all proceedings under the Act. Now, it will be noted that section 44 deals with a rather exceptional proceeding. It authorizes the bringing of an action for any of the purposes in this Act mentioned before the time for payment of the duty has arrived. Because of its peculiar nature, the Legislature doubtless intended to provide against the abuse of its provisions by giving the Court discretion in the disposal of the costs of the action.

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But, whatever may be the true meaning of sections 41 and 44, they appear to me, with an exception not relevant to this appeal, to confer powers as to costs on the lower Court only. The order from which the appeal was taken makes no disposition of the costs, and no complaint in that regard was raised before us, as indeed it could not well be in view of the respondent's contention that the costs were in the discretion of the Court. I have, then, to deal only with the costs of the appeal. Section 48 of said chapter 217 enacts that,—

"An appeal shall lie in an action or proceeding brought under this Act wherever an appeal would lie if the action were between subject and subject, and to the like tribunal."

MACDONALD, C.J.A.

Nothing is said as to the costs of the appeal. Now, the Crown Costs Act, *supra,* declares that no Court shall have power to order or direct costs to be paid by or to the Crown, its officer, servant or agent, except under the provisions of a statute expressly authorizing such order or direction. If, then, as I think, said sections 41 and 44 have no application to the costs of the appeal to this Court, it follows that no order can be made in respect of the costs in question.

MARTIN, J.A.: Unless it can be said that the Succession Duty Act, Cap. 217, R.S.B.C. 1911, "expressly authorizes" (to quote the Crown Costs Act, Sec. 2, Cap. 61, R.S.B.C. 1911) this Court to make a direction as to costs against the Crown in favour of the respondent, we have no jurisdiction to do so.

MARTIN, J.A.

The objection of the respondent to the amount fixed by the deputy minister of finance came before the learned judge appealed from by way of a petition as provided by section 43 of the Succession Duty Act, as reported in (1919), [27 B.C. 269] 1 W.W.R. 1101, and the appeal to us from his decision is founded on section 48.

The respondent's counsel submits that the case is governed by section 41 as follows: "The costs of all such proceedings shall be in the discretion of the Court or judge." This section 41 is one of a fasciculus of 20 sections entitled "Procedure to enforce Payment of Duty"; and there are three special kinds of proceedings laid down to which section 41 has application, *viz.,* (1) Under section 33, a direct appeal to this Court from

the report of the commissioner under section 32; (2) Orders made by a judge of the Supreme Court upon summons "upon the application of the minister" for payment of duty under sections 34, 35 and 40; and (3) Orders made by "the Court" for payment of duty, upon the "application of any person interested." These, and these only, are "such proceedings" in which the "Court or judge" is given a discretion by section 41; in the first of them it will be noted that the effect would be to confer upon this Court of Appeal the said discretion as to costs in the case of proceedings so taken.

After careful consideration of sections 42 to 48, under the caption "Additional Remedies," I am unable to take the view that such power is conferred upon us when proceedings come before us under sections 43 and 48 as aforesaid. Nothing is said about the costs of them and they cannot be properly included in the term "such proceedings" as employed in the said antecedent section 41. Section 44 does not, in my opinion, assist the respondent, because it relates only to an "action" of a peculiar and novel kind whereby the Crown is permitted to sue for succession duty "notwithstanding the time for payment of the duty has not arrived." I am quite unable to see how such a specially restricted discretion, obviously conferred upon the trial Court, can be expanded to cover appeals in general.

MARTIN, J.A.

It follows that, in my opinion, we are not "expressly authorized" to make the order and direction for costs asked for: and though it is an anomaly that on appeals under section 33 we have a discretion and have not got it on appeals under section 43, yet this Court is not responsible for a situation so created by the statute, however regrettable it may be.

GALLIHER, J.A. concurred in the reasons for judgment of MACDONALD, C.J.A.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree that there is no jurisdiction in this Court to allow costs. The Crown Costs Act must be given effect to. We have no discretion in the matter.

MCPHILLIPS, J.A.

EBERTS, J.A. concurred in the reasons for judgment of MACDONALD, C.J.A.

EBERTS, J.A.

Motion dismissed.

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ROYAL BANK OF CANADA v. MCLEOD

ROYAL BANK OF CANADA v. McLEOD.

Appeal—Notice of—Application to add ground of appeal.

Mortgage—Held with other securities for bank debt—Promissory notes held by bank covering debt—Equity of redemption acquired by mortgagee—Sale of property—Action on notes for balance—Power of sale—Ineffective after acquisition of equity of redemption.

If a person, first a mortgagee, becomes owner of the mortgaged premises by foreclosure or otherwise and sells to a third party, thereby putting it out of his power to reconvey in case of redemption, he is precluded from suing upon a covenant or other promise to pay for any part of the debt secured by the mortgage or from asserting a proprietary right over any property held by way of collateral security.

The defendant, a customer of the Quebec Bank, had previously by agreement for sale purchased a ranch. The Bank advanced the money for payment of the last two instalments of the purchase price and the defendant assigned to the Bank his interest in the agreement for sale as security. The defendant had other dealings with the Bank, all advances being secured by promissory notes, and other collaterals were deposited as security for the general indebtedness. Subsequently by agreement the Bank acquired title to the ranch from the vendor. Later the defendant, being pressed for payment of his debt to the Bank, in consideration of an extension of time, released by quit claim (delivered in escrow to become absolute in case of non-payment) his equity of redemption to the Bank. The Bank later sold the property realizing only a small portion of the general debt. An action on the promissory notes to recover the balance was dismissed.

Held, on appeal, affirming the decision of CLEMENT, J. (MCPHILLIPS, J.A. dissenting), that the Bank having been a mortgagee and after acquiring the property sold to a third party is not entitled to sue for the indebtedness when the security cannot be restored.

Where an assignment of an agreement for sale as security for a debt contains a power of sale, the power of sale must be exercised before the assignee acquires the equity of redemption or it is of no effect.

The appellant (plaintiff) applied to add a ground of appeal to the effect that a certain portion of the indebtedness sued on was not covered by the mortgage and could therefore be recovered.

Held (MCPHILLIPS, J.A. dissenting), that as the point was not pleaded or raised in the Court below and the parties had throughout the litigation treated the security as one for the whole indebtedness, it should be refused.

Statement

APPEAL by plaintiff from the decision of CLEMENT, J., in an action tried by him at Vancouver on the 19th of March,

1919, to recover the sum of $85,214.60, the amount due on fourteen promissory notes. The first note was dated the 30th of July, 1912, and the last the 30th of November, 1914, all payable on demand, and were duly indorsed and delivered to the Quebec Bank. Under agreement of the 28th of November, 1916, duly approved by order in council pursuant to the Bank Act, the Quebec Bank sold all its assets to the plaintiff Bank. In April, 1911, and prior to becoming a customer of the Quebec Bank, the defendant entered into an agreement with one Fulton for the purchase of 160 acres of land in the Municipality of Chilliwack for $32,000, $14,000 to be paid in cash and three instalments of $6,000 each. The defendant made the cash payment, entered into possession and paid the first instalment. The Quebec Bank advanced the money for the payment of the two last instalments, and to secure the Bank the defendant assigned the agreement to purchase to one Robitaille, the local manager of the Bank, on the 25th of July, 1912. The defendant at the time owed the Bank in respect of other matters, for which the Bank held notes and as further security for the indebtedness delivered to the Bank 346 shares of the capital stock of the Vancouver Carriage and Implement Company, Ltd., and 38,751 shares of the Platinum Gold Fields, Ltd. On the 11th of August, 1913, Fulton made a deed of the property to Robitaille. On the 25th of June, 1914, the defendant entered into an agreement with the Bank in which, after reciting that he owed the Bank $74,557 and that the Bank demanded payment, and that the land above mentioned had been conveyed to Robitaille in trust for the Bank and that the defendant had given certain other security for his indebtedness, in consideration of the Bank extending the time for enforcement of its securities he agreed to quit claim the said lands to the Bank, said quit claim to be held in escrow for three months, within which time, if the defendant paid his indebtedness, the deed was to be delivered to him. The indebtedness not having been paid, Robitaille deeded the property to the Bank in February, 1915, and obtained judgment in an ejectment action against the defendant in June, 1915. The amalgamation between the Quebec Bank and plaintiff Bank took place on the 28th of

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November, 1916, and on the 12th of February, 1918, the plaintiff Bank sold the property to one George Vernon.

Sir C. H. Tupper, K.C., for plaintiff.
J. A. MacInnes, for defendant.

20th March, 1919.

CLEMENT, J.: It seems to me settled law that a person who was once a mortgagee, but who, by foreclosure, decree or otherwise, has become the absolute owner of the mortgaged property, cannot sue for the debt or any part of the debt secured by the mortgage without reopening the foreclosure; and if, by a sale of the mortgaged property to a third party, he has put it out of his power to reconvey that property to the mortgagor upon redemption, "he should," in the language of Idington, J. in *Mutual Life Assurance Co. of Canada* v. *Douglas* (1918), 57 S.C.R. 243 at p. 253, "be restrained from proceeding to enforce that common law right whether by suing upon the covenant" (or other promise to pay) "or in way of asserting a proprietory right over any property he had held by way of collateral security to his mortgage."

The general release clause in the instrument of transfer of the equity of redemption has, in my opinion, no relation to the circumstances here. It was simply intended to make the Bank's title to the mortgaged property more absolute, if that were possible. But the absolute character of the title acquired by a (former) mortgagee does not affect or prevent the reopening of the foreclosure in case the (former) mortgagee afterwards sues for any part of the debt. And, as I have already intimated, where the foreclosure cannot be reopened by reason of the mortgaged property having passed into the hands of a *bona fide* purchaser for value the right to sue is forever gone.

The action must be dismissed with costs and the defendant is entitled to the declaration and injunction asked for in his counterclaim, with costs.

From this decision the plaintiff appealed. The appeal was argued at Victoria on the 9th and 10th of June, 1919, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Sir C. H. Tupper, K.C., for appellant: The notes were not collateral. The debt was $74,000, and the property in question was purchased for $32,000, and there was no contest as to the best possible sale being made. This was not the case of a sale after foreclosure, as there was no foreclosure but a release was given by the defendant of his equity, the property being only one of several securities given for the larger advance: see *Gossip* v. *Wright* (1863), 32 L.J., Ch. 648 at p. 652; *Kinnaird* v. *Trollope* (1888), 39 Ch. D. 636 at p. 644; *Worthington & Co., Limited* v. *Abbott* (1910), 1 Ch. 588 at pp. 591-2; *Rudge* v. *Richens* (1873), L.R. 8 C.P. 358 at p. 361; *Reeve* v. *Lisle* (1902), A.C. 461. These notes are not collateral securities to any mortgage so we are not infringing the rule that we must be in a position to reconvey. The cases of *Lockhart* v. *Hardy* (1846), 9 Beav. 349 and *Walker* v. *Jones* (1865), L.R. 1 P.C. 50, being with relation to collateral securities, do not apply, and this applies to *Mutual Life Assurance Co. of Canada* v. *Douglas* (1918), 57 S.C.R. 243. The intention will not be defeated where there is a power of sale in existence, and such power was vested in the Bank. The Bank may enforce the terms of the contract made with its manager: see Halsbury's Laws of England, Vol. 7, p. 344, par. 711; *Gandy* v. *Gandy* (1885), 30 Ch. D. 57 at p. 73. The conveyance of the fee and the deed carried any benefit under the prior assignments: see *Jones* v. *Gibbons* (1804), 9 Ves. 407; *In re Richards. Humber* v. *Richards* (1890), 45 Ch. D. 589 at p. 596; *Taylor* v. *London and County Banking Company* (1901), 2 Ch. 231 at p. 254. The power is conferred by implication: see *In re Bellinger. Durell* v. *Bellinger* (1898), 2 Ch. 534; *In re Rumney and Smith* (1897), 2 Ch. 351 at p. 360; Hunter's Power of Sale under Mortgage, 2nd Ed., p. 42, par. 48; Farwell on Powers, 3rd Ed., 513. The learned judge overlooked the fact of the power of sale as well as the title by quit claim and the principle laid down in *Kelly* v. *Imperial Loan, &c., Company* (1885), 11 S.C.R. 516; see also Halsbury's Laws of England, Vol. 21, p. 246; *Carver* v. *Richards* (1859), 27 Beav. 488; *Chatfield* v. *Cunningham* (1892), 23 Ont. 153. As to a sale by a mortgagee under

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power of sale see *Deverges* v. *Sandeman, Clark & Co.* (1902), 1 Ch. 579 at p. 598; *Stevens* v. *Theatres, Limited* (1903), 1 Ch. 857 at p. 862. The power of sale can be invoked in support of what was done in accordance with the intention of the parties. I say the mortgage and the subsequent deed did not purport to cover the notes sued on and the notes were not collateral to the mortgage. All the securities were collaterals for the general indebtedness. The sale of the mortgaged property was by authority of the mortgagee under the terms of the documents and by power of sale as part of the security. The principle that one cannot have both the land and the right to enforce the covenant to pay only applies in the case of foreclosure and when the mortgage covers the whole debt and the other security is given as collateral thereto.

J. A. MacInnes, for respondent: The land cost $32,000 and there were improvements aggregating in expenditure $31,000. I rely on the principle that the mortgagee must be in a position to reconvey the property: see Bell & Dunn on Mortgages, 355; *Palmer* v. *Hendrie* (1859), 27 Beav. 349. The case of *Kinnaird* v. *Trollope* (1888), 39 Ch. D. 636 sums up all the cases; see also *Mutual Life Assurance Co. of Canada* v. *Douglas* (1918), 57 S.C.R. 243 at p. 253; *Scottish Temperance Life Assurance Co.* v. *District Registrar of Titles* (1917), 24 B.C. 232. The merger of the fee in the mortgagee extinguished the power of sale. The document to which McLeod and Robitaille were parties is involved, as it provides for future advances under the Act. The power of sale was to Robitaille personally and he had nothing to do with the sale. The title to the Bank was in the short form, which does not include power of sale: see *Re Gilchrist and Island* (1886), 11 Ont. 537. It is a power personal to the original mortgagee: see Fisher on Mortgages, p. 502*b*; *Re Gilmour and White* (1887), 14 Ont. 694. This power cannot be delegated. That the power became merged in the fee and is extinguished see Halsbury's Laws of England, Vol. 23, p. 66, par. 122. Where the mortgagee purchases the equity of redemption it has the effect of extinguishing the debt: see Fisher on Mortgages, Can. Ed. 1910, p. 796*d*; *North of Scotland Mortgage Co.* v. *Udell* (1882), 46 U.C.Q.B. 511; *Walker* v. *Jones* (1865), L.R. 1 P.C. 50.

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Tupper, in reply, on the question of merger, referred to Halsbury's Laws of England, Vol. 21, pp. 318 to 322; *Danjou* v. *Marquis* (1879), 3 S.C.R. 251 at pp. 257-8.

Cur. adv. vult.

15th September, 1919.

MACDONALD, C.J.A.: At the hearing of this appeal counsel for the appellant moved to amend its notice to include a new ground of appeal which would enable it to contend that a portion of the indebtedness sued on was not covered by the mortgage and hence the inability of the plaintiff to restore the security would be no obstacle to judgment in its favour in respect of that part of the indebtedness. It submits that, as the mortgage was given for a then present advance of some $21,000, and was to cover future advances as well as a past indebtedness which existed at the time of the execution of the mortgage, it was entitled to have applied to this alleged state of facts the law as expounded in *The National Bank of Australasia* v. *Cherry* (1870), L.R. 3 P.C. 299. I would dismiss the motion. The point sought to be raised was not pleaded, nor was it raised in the Court below. The security was, by both parties to the litigation, treated throughout as a security for the whole indebtedness sued on. The defendant makes no complaint in respect of the validity of the mortgage as one covering the whole indebtedness, and the plaintiff in answer to interrogatories says that the security was taken for the whole indebtedness.

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It is conceivable that had this issue been raised at the trial, evidence could have been led to shew that it was agreed between the parties, at a time when the advances referred to had become past due, that the security should cover them as well as the other indebtedness. It may be that the evidence before us relating to the subsequent transaction between the parties, *viz.,* the conveyance of the land; the extension of time; and the quit claim deed, amount to such proof, though I am not called upon to express an opinion either one way or the other. It is enough to say that had the issue been raised at the proper time facts might have been proved analogous to those in the above-mentioned case, where the original illegality had been cured.

As regards the appeal, the facts are not in dispute. The defendant mortgaged to the Quebec Bank his interest in an

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agreement of purchase of land. Instalments amounting to $18,000 remained to be paid, and these appear to have been paid out of advances made by the Quebec Bank, whose business and assets the plaintiff has since acquired. Before such acquisition the mortgage had been followed by a conveyance of the fee direct to the Bank from defendant's vendor. Subsequently the defendant in consideration of an extension of time for payment of his indebtedness to the Bank, released, by quit claim deed to the Bank, his equity of redemption. The Bank thereupon became the absolute owner of the land, which, up to this time, admittedly had been held by the Bank as a security for defendant's indebtedness.

Two questions suggest themselves to my mind for consideration. If the release of the equity of redemption was in law tantamount to foreclosure, as the learned trial judge appears to have thought, then unless this is to be regarded as a mortgage out of the ordinary, the mortgagee is not entitled to recover upon the indebtedness when admittedly the security cannot be restored to the defendant. But appellant's counsel contended that this was not the ordinary mortgage nor the ordinary foreclosure. They say that the mortgage was a collateral security, and they suggest that this is a distinction of importance. I must confess that I do not see the force of this argument. To call the

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mortgage a collateral security does not, in my opinion, distinguish it from any other mortgage. If the creditor held other securities this mortgage was an additional one, and in the absence of a special agreement, the creditor might enforce, in accordance with the terms thereof, at its own option, any one or more of its securities. I take it that if a creditor having security for a debt demands an additional security in the form of a mortgage upon real estate, and the debtor accedes to the request and executes a mortgage, it matters not to the remedy whether it be called collateral or whether it be the only security which the creditor holds, and in the absence of a special agreement giving the creditor remedies other than those given by the law, the creditor's remedy is foreclosure and foreclosure alone. In my opinion there is no implied power to sell a security merely because it is, in common parlance, called col-

lateral security. Now there was in fact a power of sale contained in what I shall call the original mortgage, that is to say, the mortgage of defendant's interest under the agreement of purchase. Putting aside questions which have been raised by respondent's counsel as to whether the power of sale could have been exercised by any one other than Mr. Robitaille, who at the time was manager of the Quebec Bank, and to whom it was given, and as to whether, assuming that it could be assigned, it had in law been assigned and become vested in the plaintiff, it appears to me that this power of sale ceased to exist when the defendant parted with his equity of redemption. It would be anomalous to say that when a mortgagee had obtained absolute title, either by foreclosure or by release of the defendant of the equity of redemption, he could still exercise the power of sale contained in the mortgage. The reason for such power would have ceased to exist. It is suggested, however, by counsel for the appellant, that the release of the equity of redemption was given for the purpose of conferring a more absolute or untrammelled power of sale upon the mortgagee. The consequences of so holding would be that the release of the equity of redemption would not destroy the right to redeem and that the property, notwithstanding the release, was still held in mortgage. Seeing that difficulty, counsel for the appellant was obliged to contend that there was some sort of agreement between the parties, that after the said release, the land should be sold and the proceeds applied upon the indebtedness. No doubt the appellant might have by agreement retained the right to enforce payment of the indebtedness, or such portion thereof as might not have been satisfied out of the proceeds of a sale of the property, but there is to be found in the evidence not a suggestion of such an agreement. The sale was made without the knowledge or consent of the respondent, and no agreement, either written or verbal, has been proven substantiating appellant's submission. I think, therefore, that the learned trial judge came to the right conclusion.

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But there is a second point from which this case may be viewed. If the quit claim deed releasing the equity of redemption was not intended merely to obviate the necessity of obtain-

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ing foreclosure, then it must be taken to have been a settlement of the indebtedness. It was in effect a sale of the equity of redemption, and if so, this would extinguish the debt. This I think would follow from the principles laid down in *Vernon* v. *Bethell* (1762), 2 Eden 110; *Ensworth* v. *Griffiths* (1706), 5 Bro. P.C. 184; *Beattie* v. *Fitzsimmons* (1893), 23 Ont. 245. This case is the converse of the second English case just cited. There, after the release of the equities of redemption, the question was as to the right of the mortgagor to redeem. I think the rule to be extracted from these cases is, that where the right to redeem has been lost by reason of the release, the land takes the place of the debt. In the Ontario case it is laid down that the purchaser of an equity of redemption is bound to pay off the encumbrances. Therefore, if the effect of the release in the case at bar was to vest absolutely in the Bank the land free from any right of redemption, and the parties entered into no agreement in respect of the consequences of such release as bearing upon the indebtedness, the indebtedness is extinguished. In my opinion the appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: In the leading cases on the point in question which have been cited to us, *viz.*, *Lockhart* v. *Hardy* (1846), 9 Beav. 349 at p. 355; 15 L.J., Ch. 347; *Palmer* v. *Hendrie* (1859), 27 Beav. 349; (1860), 28 Beav. 341; *Walker* v. *Jones* (1865), L.R. 1 P.C. 50; 35 L.J., P.C. 30; *Kinnaird* v. *Trollope* (1888), 39 Ch. D. 636; 57 L.J., Ch. 905; and *Mutual Life Assurance Co. of Canada* v. *Douglas* (1918), 57 S.C.R. 243; (1918), 3 W.W.R. 529, it has been established that where a mortgagee has foreclosed the equity of redemption, or acquired it by other means, and so united in his own person the two estates, he may nevertheless sue the mortgagor on his covenant for payment, but if he does so he is bound to restore the property to the mortgagor, though failing such restoration the position is as was laid down in *Palmer* v. *Hendrie, supra,* at p. 351 thus:

> "If it appear, from the state of the transaction, that, by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due . . . . . this Court will interfere and prevent the mortgagee suing the mortgagor at law."

This indeed was the view taken by Chancellor VanKoughnet of Ontario in *Burnham* v. *Galt* (1869), 16 Gr. 417 (followed by Chancellor Boyd in *Pegg* v. *Hobson* (1887), 14 Ont. 272) wherein an injunction was issued restraining the sub-mortgagees from proceeding on an action at law against the mortgagor for the balance of the mortgage money, after they had so dealt with the property, with the concurrence of the assignee of his equity of redemption, that they were not in a position to reconvey it. The learned Chancellor says (16 Gr. at p. 419):

"I have found no case exactly in point, and all the cases are, in one way or another, distinguishable from this one; but, the underlying principle of all seems to be, that if the mortgagee parts with the estate (otherwise than under a power of sale or the like), so that it cannot be restored to the mortgagor, or be held in security for him or for his benefit, the latter is discharged from personal liability."

Applying these principles to the facts of the case at bar, the only circumstance which caused me to hesitate in supporting the judgment below was the existence of a peculiar power of sale in the assignment of the Fulton-McLeod agreement to purchase, dated July 25th, 1912, which is, in effect, and has been treated by the parties as, a mortgage of said agreement to the Bank.

It is an unusual thing to insert a power of sale in an assignment of an agreement; and the peculiar feature of this power is that its exercise does not depend upon default, but it is declared "that it shall be lawful for the said assignee at any time or times after the 1st of March, 1913, without any consent on the part of the assignor, to sell the said lands," etc. And it goes on to provide that

"The said assignee shall out of the moneys arising from any such sale, in the first place reimburse himself all expenses . . . . . and in the next place pay all the principal and interest moneys due or intended to be secured by these presents, and shall stand possessed of the balance, if any, upon trust for the said assignor."

It is conceded that if this power had been exercised (and it may be exercised after the usual order *nisi*, and before order absolute, by leave of the Court, *Stevens* v. *Theatres, Limited* (1903), 1 Ch. 857; 72 L.J., Ch. 764) no objection could have been taken thereto, but it was not, and the sale of the property did not take place till after a quit claim deed and release of the equity of redemption from McLeod had been

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delivered and acquired by the Bank, in consideration of and pursuant to, an agreement made on June 25th, 1914, whereby an extension of three months' time had been given to McLeod. In my opinion the power of sale should be viewed in this light, *viz.*, that even if the Bank had been in the position of a mortgagee under an ordinary mortgage with such a power of sale therein, yet if the power had not been exercised and the Bank had acquired the equity of redemption either by foreclosure or by purchase, such power would not have enabled it to have escaped the consequence of such an acquisition of the right of redemption. Apart from this, there are no other circumstances in this case which would take it out of the ordinary rule, and I think the learned judge has taken the correct view of the release clause in said agreement of June 25th, 1914.

I am therefore of the opinion that the judgment below should be affirmed.

In coming to this conclusion, I may say with the Master of the Rolls in *Palmer* v. *Hendrie* (1860), 28 Beav. 341 at pp. 342-3:

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"This is a very unfortunate case, but, upon the facts now proved, there can be no question as to the decree which it is proper to make."

With respect to the application to amend to cover certain notes given on and after August 11th, 1913, I am of opinion that it should not be granted; such a claim was neither made out on the pleadings, nor contested below, and the defendant would be prejudiced by allowing it to be gone into here. It is a question of fact and there is no definite evidence of the payment or non-payment of any one of the various notes in question or of the application of any payments thereto: the said agreement of 1914 recites that it is given "as security for the said indebtedness," which then was $77,557.77.

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MCPHILLIPS, J.A.: The respondent in this appeal would appear to have been indebted to the appellant in a sum of about $95,000, and was sued for the sum of $85,214.73 after crediting $9,000, moneys realized from the sale of a parcel of land held by way of security by the Quebec Bank. The assets, both real and personal, of the Quebec Bank were sold to and acquired by the appellant under the provisions of the Bank Act. The

indebtedness arose by reason of advances made upon promissory notes by the Quebec Bank to the respondent and these promissory notes are now the property of the appellant. The advances were made throughout the years 1912 to 1918. In 1912, the respondent, then being indebted to the Quebec Bank, assigned as a security in respect of the indebtedness, all his right, title and interest in the previously referred to parcel of land, agreed to be sold to him by one Fulton, the Quebec Bank making a further advance of $21,657.18. It may be said in passing that the security could not, of course, under the Bank Act be effective save as to any past due indebtedness. The assignment of the agreement of sale held by the respondent was made to Robitaille, the manager of the Quebec Bank. On the 25th of June, 1914, the indebtedness of the respondent to the Quebec Bank was, it would appear, $75,557.77, and demand was made for payment. This resulted in an agreement of that date between the respondent and the Quebec Bank whereby three months' further time was granted for payment, the respondent to execute a quit claim deed and release of his equity of redemption in the land to the Quebec Bank, to be held in escrow. Default in payment took place and the quit claim deed was delivered up to the Quebec Bank. The quit claim deed had a special provision therein, reading as follows:

"AND THIS INDENTURE FURTHER WITNESSETH that the party of the first part doth hereby release, acquit and forever discharge the party of the second part from all claims, demands, suits, actions, contracts and accounts in respect of the said hereinbefore described lands and premises and of the rents and profits thereof and of all moneys realized by the sale of the said property or otherwise in connection therewith, the party of the first part hereby confirming all proceedings taken by the party of the second part in connection therewith so far as they might affect the party of the first part.

"AND the party of the first part covenants with the party of the second part that he is the sole party beneficially interested in the said lands and premises and he will indemnify and save harmless the said party of the second part from all further demands, costs, or charges in connection therewith."

It is apparent from the reading of this special provision that it was notice to the world, *i.e.*, to all purchasers of the land that the respondent had conveyed and parted with all his interest in the land to the Quebec Bank. It will be observed that in the

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special provision above quoted it was contemplated by the respondent that the land should be sold, and there is no possible doubt that the respondent was a consenting party to the Quebec Bank selling the land as it might see fit, and that the power of sale enured to and was capable of legal exercise by the appellant, the Quebec Bank's rights, title and interest in the land having passed to the appellant, and the appellant did sell the land. There is no question raised that the sale was not for a fair price, but the unconscionable contention upon the part of the respondent is that in selling the land the appellant has by operation of law and the application of legal and equitable principles released the respondent from all his indebtedness to the Quebec Bank, an indebtedness which, as we have seen, passed to the appellant, being payable by the respondent to the appellant. In effect the whole indebtedness of $85,214.73 was released by the course adopted in selling the land described in one security, a partial security only. It was submitted by the respondent, and it was agreed with by the learned trial judge, that the effect of what was done was to bring into operation the same result as if a decree of foreclosure had been obtained in respect of a single security for the whole debt, and the land sold thereby, placing it out of the power of the appellant to revest the title to the land in the respondent if payment of the total indebtedness were made by the respondent. The reasons for judgment (the judgment under appeal) of the learned trial judge are set forth in the following terms: [see *ante* p. 378].

With great respect to the learned trial judge, I am not of the opinion that what took place can be said to be at all analogous to that determined in the *Mutual Life Assurance Co. of Canada* v. *Douglas* (1918), 57 S.C.R. 243. The present case is not one for the application of the principles that govern where foreclosure has been had and the mortgagee has later conveyed away the land. Here we have an express agreement and authorization of sale of the land. The security was only one of a number of securities held by the appellant, and there is no evidence whatever of any intention on the part of the Quebec Bank or the appellant to accept the quit-claim deed in satisfaction of the whole debt; on the con-

trary there is every evidence, so far as the documentary evidence goes, that the respondent transferred all his title in the land and released the Quebec Bank from all requirements to account for any moneys realized by the sale of the land. To give effect to the contention of the respondent and to affirm the judgment of the learned trial judge would appear to me to be in frustration of the plain intention of the parties as evidenced by the documents. It is apparent that the course sought by the respondent to evade liability for this large debt is an afterthought and a most unconscionable afterthought. It is sought to now invoke equitable principles to effectuate the release of a large indebtedness owing to realization upon one minor security, and the realization of about one-tenth of the total indebtedness is to be held to discharge the other nine-tenths. Can this be said to further the ends of justice? No doubt if the position could be said to be that stated by Davies, J. (now Chief Justice of Canada) in *Mutual Life Assurance Co. of Canada* v. *Douglas, supra,* at p. 247:

"He could not have both land and the money secured upon it. If he chose to foreclose and then sell the land or part of it, he would be taken to have elected to take the land for his debt."

It would be idle to contend to the contrary. This language succinctly indicates the law where a particular course is adopted, *i.e.,* foreclosure proceedings adverse to the mortgagor and where no agreement has been come to between the mortgagor and the mortgagee, but the law places no ban upon the parties. It is not a case of election where the mortgagee proceeds in plain compliance with authorization given by the mortgagor, plain consent to a sale being held. There was a power of sale and that power of sale was exercised, and in all such cases after crediting the moneys realized, the mortgagee may hold the mortgagor for the deficiency, and that is the present case.

The present case is not one of suing for the mortgage debt. The land, as we have seen, was one only of several securities held by the Quebec Bank, and at most could only be security for the debt past due when the security was taken, *i.e.,* when the assignment of the agreement for sale to the respondent from Fulton was taken. Then, as I view it, upon the facts of the present case the respondent assented to a sale being held of the

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land, and at most all that can be claimed by the respondent is a reduction of the debt *pro tanto*. Upon this view of the matter, the language of Romilly, M.R. in *Palmer* v. *Hendrie* (1859), 27 Beav. 349 at p. 351 (122 R.R. at p. 428) is instructive:

> "They [the mortgagees] are bound, on payment, to restore the property to the mortgagor, and if it appear, from the state of the transaction, that, by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due, I am of opinion that this Court will interfere and prevent the mortgagee suing the mortgagor at law."

In the present case sale was authorized and contemplated by the mortgagor and in terms assented to by the documents executed and quoted from above. Further, upon the special facts of the present case, it may well be said that the respondent, by his conveyance of the equity of redemption and express authorization of a sale, has precluded himself from calling for a conveyance of the land (see Romilly, M.R. in *Palmer* v. *Hendrie, supra,* at p. 352). Here there is no attempt to hold the respondent for the whole debt. The purchase-money of the land sold has been credited to the respondent, and in this connection the language of Griffith, C.J. in *Fink* v. *Robertson* (1907), 4 C.L.R. 864 at p. 872 is much in point:

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> "There is no reported case shewing the conditions on which the Court would have allowed the mortgagee to enforce his judgment under the circumstances [the C.J. had just previously referred to *Palmer* v. *Hendrie, supra*] whether they would have allowed the mortgagor at his option to treat the foreclosure as a satisfaction of the debt *pro tanto* at the date of the decree, or whether they would have regarded the liability for interest as continuing after the decree, and treated the mortgagee as a mortgagee in possession and liable to account on that basis. But it is inconceivable that, if the mortgagor was unable to redeem, the Court would have allowed the mortgagee to issue execution for the whole amount of the debt and also to retain the land. It follows from what has been said that it is inaccurate to say that a mortgagee by suing upon the covenant in the mortgage opened the foreclosure. His title to the land was, and remained absolute, but the Court of Equity would not allow him to recover the whole amount of the debt without reconveying the land."

It is to be noted that in the *Mutual Life Assurance Co. of Canada* v. *Douglas, supra,* the Chief Justice, Mr. Justice Idington and Mr. Justice Anglin expressed approval of the dissenting judgment of Mr. Justice Higgins in *Fink* v. *Robertson, supra,*

and bearing this in mind it is important to note what Mr. Justice Higgins said at p. 894 in *Fink* v. *Robertson*:

"One curious result of holding that the foreclosure of a mortgage involves the release of the debt is that a mortgagee who has foreclosed one mortgage must discharge, unconditionally, all the securities for the same debt. For instance, if he have a mortgage over Blackacre for £1,000, and if he take an additional security over Whiteacre, worth £200, for the same debt; then, if he foreclose the mortgage over Whiteacre, he can be forced to discharge the mortgage over Blackacre, without any further payment."

I am not unmindful that in the present case there is the difficulty of the land being conveyed away, but can it be reasonably said that because the land covered by one security for the portion of the debt then past due has been conveyed away, the resultant effect is that all other securities and the whole debt stand discharged? This really affronts one, in fact it is a startling effect if that be the law; and particularly startling is it where we have in the present case the documentary assent to a sale being held. Here it is not the same debt, and later I will point out that even should I be wrong in all my reasoning so far, there remains a debt of no inconsiderable amount, that the respondent must, in my opinion, be liable for notwithstanding all that has taken place. In *Kinnaird* v. *Trollope* (1888), 57 L.J., Ch. 905, Stirling, J. said at p. 908:

"On this part of the case *Palmer* v. *Hendrie* [*supra*] again throws some light. It was there held that the mortgagor, on paying off the mortgage debt, was entitled to have the property restored to him unaffected by any acts of the mortgagee unauthorized by the mortgagor. The necessary authority might be derived—as in the case of *Rudge* v. *Richens* [(1873)], 42 L.J., C.P. 127—from the powers conferred by the mortgage deed, or from the direct concurrence of the mortgagor, or possibly otherwise. . . ."

Now, I consider the present case comes within the *ratio* of *Rudge* v. *Richens*. There was the power of sale, the clear and expressed contemplation that there would be a sale, and that there should be no liability to account, and a release to the Quebec Bank "of and from all liability in respect of said lands and premises." *Rudge* v. *Richens* was an action brought on the mortgagor's covenant to pay the debt, the action being brought to recover the balance due to the mortgagee after giving credit for the money realized on the sale of the mortgaged property, the defendant pleaded by way of equitable defence a plea which shewed that the plaintiff had taken possession of the

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mortgaged property and sold the same under the power of sale contained in the mortgage, and had thereby, as the plea alleged, deprived the defendant of his right to have such property reconveyed to him upon payment of the money and interest due on the mortgage, and it was held that the plea was clearly bad, since it did not shew that sufficient had been realized by the sale to satisfy the debt.

In the present case, of course, it is not contended that sufficient was realized to satisfy the debt. It would be idle contention if advanced, as what was realized fell short some $85,000 and more of satisfying the debt, yet it is now confidently submitted that what was done had the effect nevertheless of satisfying the whole debt. With great respect to all contrary opinion, I cannot agree that that is the law. That the sale to the Quebec Bank by the respondent was absolute there can be no question, and what is there in the law to prevent full effect being given to all its terms? In *Gossip* v. *Wright* (1863), 32 L.J., Ch. 648 (139 R.R. 357) Kindersley, V.C. at p. 655 said:

". . . . upon whatever grounds the party who made the conveyance may afterwards challenge the thing, this Court will look with the utmost nicety and care and suspicion, even a jealousy, into every one of those grounds brought forward by the party who complains of the transaction, to see whether upon any one of those grounds there was anything on which the Court should say that the transaction ought not to prevail. But, if, after looking into all those grounds, the Court finds there is nothing of the kind, it will uphold the transaction, and therefore I see no more reason for setting aside this transaction and treating it as a mere mortgage than setting aside any other *bona fide* purchase."

I see no reason in the present case to in any way view the conveyance to the Quebec Bank as other than an absolute conveyance and the bringing to an end of the relationship of mortgagor and mortgagee. The Bank has credited the purchase price of the land to the respondent, and there has been a *pro tanto* reduction made in respect of the debt, only to be met with the unconscionable contention that although the Bank treated the transaction as *bona fide*, which it undoubtedly was, and gave credit for the moneys realized in the way of the reduction of the debt of the respondent, that the resultant effect as contended for is that the whole debt is satisfied. I can only say that I fail to so read the law. To so expound the

law calls for the citation of controlling authorities that I fail to find, and I find myself unable, not with any regret, let it be said, to give effect to a contention so subversive of natural justice, and the ends of justice. Certainly any such holding must be founded upon intractable law, and to find that such is the law would go far to prove that our fond conception that we live in a free country is idle thought and a snare and delusion to the unwary. I would refer to *Lisle* v. *Reeve* (1901), 71 L.J., Ch. 42 at p. 52. Cozens-Hardy, L.J. adopted the language of Kindersley, V.C. in *Gossip* v. *Wright, supra,* and in the language quoted by Cozens-Hardy, L.J. as used by Kindersley, V.C. we have this stated:

"'That the Court will allow the parties by a subsequent arrangement to enter into a transaction by which the mortgagor sells or releases, or conveys or gives up (call it what you will) his equity of redemption, and makes the estate out and out the estate of the mortgagee, is clear.'"

Cozens-Hardy, L.J. went on to say:

"Now applying that principle and in the absence of a particle of either allegation or evidence to shew that the two deeds of June and July, 1898, were part of the same transaction, it seems to me to come simply to an arrangement made after a mortgage security between a mortgagor and mortgagees. And, so far as I know, there is no authority for saying that there is any disability in having a contract for an option made between mortgagor and mortgagee, not as part of the mortgage transaction, but at a subsequent period."

And the decision in *Lisle* v. *Reeve* was affirmed by the House of Lords—see (1902), 71 L.J., Ch. 768. That there was an existent power of sale capable of exercise by the appellant there can be no question, and the exercise of it need not be expressed in the instrument—see *Kelly* v. *Imperial Loan, &c., Co.* (1885), 11 S.C.R. 516 at p. 524. Also see *Stevens* v. *Theatres, Limited* (1903), 72 L.J., Ch. 764.

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Finally, should I be in error in all that I have said, and the resultant effect is, as contended for by the respondent, that the sale of the land by the appellant operated to release the debt, the debt released could at most be the debt existing at the time of the execution of the quit claim deed, *viz.,* the 25th of June, 1914, and after that date further advances were made of about $5,500, and certainly as to these further advances the Bank would be entitled to judgment.

Upon the whole case I am satisfied that the judgment of the

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learned trial judge was wrong, and judgment should be entered for the appellant as claimed for the $85,214.73 with subsequent interest; that is, the appeal should be allowed and the judgment of the Court below as entered set aside.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Tupper & Bull.*
Solicitor for respondent: *J. A. MacInnes.*

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THE "JESSIE MAC" v. THE "SEA LION."

Shipping—Damage to tug—Forced on rock through breaking of boom being towed off shore by another tug—Inevitable accident—"Foul anchorage"—Tugs with tows of booms—Unusual action of tide and current.

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Damage to plaintiff tug by being forced on rock through breaking of boom which was being towed off shore by defendant tug, held to have been caused by inevitable accident, and not by fault of anyone connected with defendant tug; the master of the latter not having failed to take any reasonable precaution which ordinary skill and prudence could suggest.

In certain circumstances where the question of safety to a ship, including her tow, is involved, she is justified in taking that degree of risk which the circumstances may justify; *e.g.*, the rigour of the elements may impose a common risk upon all who seek refuge in a common harbour, and constitute "a cause which a ship could not resist." And in weighing these circumstances there must be considered the facts that tugs with tows of booms are of an unwieldy nature and the booms are easily broken up by rough water, and they cannot face a state of weather which would present no damage to ordinary vessels; and in a haven require a considerable amount of space for a clear anchorage which may not be available in time of danger when many vessels are forced to resort to it for as much shelter as may be possible, in which circumstances it comes down to a question of good seamanship.

A master is entitled to rely upon the ordinary action of tide and current where he has no reason to anticipate that the ordinary risk has been increased.

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ACTION for damages done to the tug "Jessie Mac," owing, as alleged, to the tug "Sea Lion" having given her a foul berth, tried by MARTIN, Lo. J.A. at Vancouver on the 5th and 6th of March, 1919.

Robinson, for plaintiff.
Davis, K.C., for defendant.

8th March, 1919.

MARTIN, Lo. J.A.: This is an action against the tug "Sea Lion" (148 tons net) for damage done to the tug "Jessie Mac" (39 tons net), owing, as alleged, to the former having given a foul berth to the latter, which had a safe one, in consequence of which she was forced up on a rock and suffered considerable damage. It appears, briefly, that owing to a strong westerly wind, with resulting heavy swell, a number of tugs, about ten in all, with their tows of booms of logs, were forced to take shelter in Trail Bay, under the lee of Trail Island, off Sechelt, at various times between March 30th and April 1st, 1918, inclusive, which small bay, it is common ground, is the customary and proper place in that locality to seek refuge in, though it is only of a limited area of safety and unsafe in easterly winds, with the exception, probably, of the inside shore position between the south-west point of the island and a well-known rock, which was taken by the plaintiff tug upon its arriving first in the bay, which position is sheltered to a considerable extent at least from all winds. After it had made fast its boom of nine swifters to the shore by three wire ropes, it took up its position outside its boom, attached thereto by two lines, and later three other small tugs of similar size, with booms, arrived at various times and took up outside positions in like manner, *viz.*, the "Chieftain," the "Stormer," and the "Vulcan," which last had a double boom and lay outside of it like the others. This was the position when the "Sea Lion," a much larger tug, came in with a large triple boom on the early morning of March 31st, and anchored at a spot about 1,000 feet from the rock, which it is clear is the best and safest position for herself for a large tug to take, and up till the afternoon of the next day she lay with her boom out to sea towards the east, and away from the "Jessie

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Mac" under the westerly wind, and I have no doubt that it was not considered an unsafe position by the masters of the other tugs, otherwise they would have warned the master of the "Sea Lion," as the master and pilot of the British Trident did in *The Woburn Abbey* (1869), 38 L.J., Adm. 28; 20 L.T. 621, though this failure is, of course, not at all conclusive. But that afternoon, with the tide flooding and the wind dying down, the "Sea Lion's" boom swung round to the south and west till the end of it touched the shore inside the point which protected the "Jessie Mac," and lay there in a position of no danger on a rising tide, with the expectation that at the change of the tide it would float off with the ebb in the usual way. But contrary to expectation and all experience in the case of a westerly wind, the tide continued to set in towards the shore after the ebb, and at 9.30 the "Sea Lion's" anchor began to drag, which put her in a position of danger to herself and her boom, which, if it were not got off the shore, would be broken up by a change of wind to the east, and therefore she raised her anchor and, heading to the north of east, started to tow the boom off the shore, using the shore end of the boom (which, being a triple one, was very stiff and would bend inappreciably) as a fulcrum in so doing. This manœuvre was, I am satisfied on the evidence, the most proper one to take in the circumstances, and if nothing had happened it would, it is clear, have been successfully carried out without any damage to the adjacent small tugs fastened to the shore. But in the course of it the inmost triple boom, which was made up of two sections of nine and six swifters, broke its fastenings, leaving the inner section of six ashore while the outer swung round and fouled the head of the "Chieftain's" boom, which in turn caused two of the three wire shore ropes of the "Jessie Mac" boom to break, whereupon it swung out and round and forced the "Jessie Mac" upon said rock and damaged her as aforesaid. The breaking of the boom was later found to have been caused by a weak chain in one corner and a weak ring in another. The boom, or its chain or gear, were not owned by the "Sea Lion," nor had she made up the boom, but was simply towing it.

Judgment

The defences set up are that the anchorage taken up by the "Sea Lion" was not a foul one; that there was no negligence

because the extraordinary inset of the ebb tide in a westerly wind could not have been foreseen, and that the breaking of the boom gear was an inevitable accident.

As to the first and second, I am of the opinion that, having regard to the circumstances, the anchorage was not a foul one, and the "Sea Lion" was entitled to take it. Though her boom could in a straight line reach those fastened to the shore, yet it was prevented from so doing in the inevitable course of swinging round with the tide by the point, in ordinary circumstances, and I am unable to find that her master failed to take any reasonable precaution which ordinary skill and prudence could suggest, founded on his intimate knowledge of the locality. He was entitled to rely upon the ordinary action of the tide and current: *The "Rhondda"* (1883), 8 App. Cas. 549; 5 Asp. M.C. 114; and as their Lordships of the Privy Council said in that case, he "had no reason to anticipate" that the ordinary risk had been increased. This is not like the well-known case of *The "City of Peking"* (1888), 14 App. Cas. 40; 58 L.J., P.C. 64; 6 Asp. M.C. 396, wherein their Lordships held that the master should have kept in mind the "undoubted fact" known to mariners and to him, "that in certain states of the weather" the tide at Kowloon is "deflected out of its ordinary course," and "a cautious mariner is therefore bound always to keep in view the possibility of their [currents] being met with." In the case at bar, on the contrary, such a current as caused the boom to stay inshore, instead of floating offshore, was unknown to anyone. See also *Lack* v. *Seward* (1829), 4 Car. & P. 106.

Judgment

On the question of foul anchorage I have this observation to make, that in certain circumstances where the question of safety to a ship, including her tow, is involved, she is justified in taking that degree of risk which the circumstances may justify; *e.g.*, the rigour of the elements may impose a common risk upon all who seek refuge in a common harbour, and constitute "a cause which [a ship] could not resist": *The Innisfail; The Secret* (1876), 3 Asp. M.C. 337; 35 L.T. 819; *The "William Lindsay"* (1873), L.R. 5 P.C. 338; 2 Asp. M.C. 118; *The Maggie Armstrong* v. *The Blue Bell* (1865), 14 L.T. 340; and see *The Annot Lyle* (1886), 11 P.D. 114; 55 L.J., P. 62; 6 Asp. M.C.

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50, on the point of only one course being open for safety. And in weighing these circumstances, there must be considered the facts that tugs with tows of booms are of an unwieldy nature and the booms are easily broken up by rough water, and they cannot face a state of weather which would present no damage to ordinary vessels; and in a haven require a considerable amount of space for a clear anchorage which may not be available in time of danger when many vessels are forced to resort to it for as much shelter as may be possible, in which circumstance it comes down to a question of good seamanship: *Bailey* v. *Cates* (1904), 11 B.C. 62; 35 S.C.R. 293. As to the handling of a tug with a scow in a narrow channel, see *Charmer* v. *Bermuda* (1910), 15 B.C. 506; 15 W.L.R. 132, 13 Ex. C.R. 389; *The King* v. *The Despatch* (1916), 22 B.C. 496 at p. 501; 10 W.W.R. 230; 34 W.L.R. 123; 16 Ex. C.R. 319, and *cf. Paterson Timber Co.* v. *Steamship British Columbia* (1913), 18 B.C. 86; 23 W.L.R. 774.

If, therefore, the anchorage was not, and I so hold, a foul one, then the case resolves itself into one of inevitable accident, and the onus is primarily upon the plaintiff when that defence is set up: *The "Marpesia"* (1872), 8 Moore, P.C. (N.S.) 468; L.R. 4 P.C. 212; 1 Asp. M.C. 261; and it is beyond question here that the damage was primarily caused by inevitable accident, which means, as their Lordships of the Privy Council therein say, that:

Judgment

"We have to satisfy ourselves that something was done, or omitted to be done, which a person exercising ordinary care, caution, and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be."

This definition was adopted by the Court of Appeal in *The Merchant Prince* (1892), P. 9; 7 Asp. M.C. 208; and *The Schwan* (1892), P. 419; 7 Asp. M.C. 347.

Now, it was not even alleged that the breaking of the boom fastenings could be attributed to any want of care on the part of the defendant, any more than was the case in the breaking of the mooring band or the jamming of the windlass in *The "William Lindsay," supra,* and, therefore, it follows that the action cannot be sustained and must be dismissed.

It is not, therefore, strictly necessary to consider the counter-

charges of negligence brought against the plaintiff for tying up four booms together with their tugs inside, except the "Vulcan," but it obviously is an act which might require justification in certain circumstances, though here the damage was done by fouling the second boom, the "Chieftain's." But I think it proper to remark upon the strange fact that there is no evidence shewing exactly how the "Jessie Mac" got aground; no person off her was called to explain it; her master did not know, as he was out working on the end of the fouled boom, trying to free it, and the mate was not accounted for; her master did not know where the mate was, according to his statement to the master of the "Sea Lion," and so far as the evidence shews, no watch was kept on her and no efforts made to take the necessary precautions to protect her after the danger from the fouled boom became apparent. This is a very unsatisfactory state of affairs, and might seriously prejudice the plaintiff's right to recover in any event. See *The Kepler* (1875), 2 P.D. 40; *The Scotia* (1890), 6 Asp. M.C. 541; *The Hornet* (1892), P. 361; 7 Asp. M.C. 262.

Judgment

With respect to the costs, I shall allow them to be spoken to in the light of the practice respecting the same in cases of inevitable accident as set out in *The "Marpesia," supra,* wherein at p. 481 it is laid down:

> "Their Lordships, therefore, conceive that the general rule of the Court of Admiralty is in these cases to make no order as to costs, and that in order to justify an exception to that rule it must be shewn that the action was brought unreasonably and without sufficient *prima facie* grounds."

See also *The Innisfail; The Secret, supra.* How far this practice may be affected, if at all, by the later decisions in England under the Judicature Act, as noticed in Willams & Bruce's Adm. Prac., 3rd Ed., 95, I shall then consider.

Action dismissed.

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Dec. 16.

PACIFIC GREAT EASTERN RY. CO. v. "THE CLINTON"

PACIFIC GREAT EASTERN RAILWAY COMPANY v. THE "CLINTON."

Admiralty law—Ship wrongfully seized by crew—Cause and writ of possession—Possession—Release.

A writ of possession will issue to restore to her owner a ship which has been wrongfully seized by her crew.

MOTION for a writ of possession of the tug "Clinton." Heard by MARTIN, Lo. J.A. at Vancouver on the 16th of December, 1918.

Mayers, for the plaintiff: This is a cause of possession. The plaintiff's tug "Clinton," which has been wrongfully taken possession of by her crew on a dispute concerning wages, was arrested by the marshal on December 13th instant, and I now move that she be released from arrest and that a writ of possession do issue to restore possession to her owner, the plaintiff Company, upon giving such security as the Court may order. I rely on the authority of the Quebec case of *The "Haidee"* (1860), 2 Stuart 25 at p. 30, which supports such an application, not only as between owners, but "at the instance of the real owner against a mere wrong-doer," though I have not found any record of any similar application since that date. No one appears to oppose the motion, but I am authorized to state that it has been consented to by the opposing solicitors that this motion be turned into one for judgment.

Argument

MARTIN, Lo. J.A.: The case cited is a sufficient authority for the application, and the remedy sought is an appropriate one to meet the unusual circumstances. See also Williams & Bruce's Adm. Prac., 3rd Ed., 827, 289, 291(m), 611, 619; Roscoe's Adm. Prac. 3rd Ed., 64, 561, 567, 270. The plaintiff owner is entitled to possession, and a writ of possession directed to the marshal, will issue as prayed, commanding him to deliver possession to it upon giving security, which may be spoken to later. Order accordingly.

Judgment

Order accordingly.

PALMER v. PALMER.

MURPHY, J. (At Chambers)

1919

Oct. 1.

PALMER v. PALMER

Will—Construction—Life estate to widow—Twenty-one year lease given by widow—Power—Settled Estates Act, R.S.B.C. 1911, Cap. 208.

A testator bequeathed to his wife "all my real and personal property as long as she remains my widow. At her death she can divide it as she thinks proper among my children." Upon probate being granted she gave a twenty-one year lease of a ranch property which was part of the estate.

Held, that as she had a life interest subject to its being divested should she remarry and not having remarried she had such an estate as entitled her to give the lease under the Settled Estates Act.

APPLICATION under Order LIVA. of the Supreme Court Rules to determine the right of the widow of William Palmer, deceased, to give a lease of property included in his estate. Heard by MURPHY, J. at Chambers in Vancouver on the 1st of October, 1919. The will of the late William Palmer reads in part:

"I bequeath to my wife, Jane Palmer, all my real and personal property as long as she remains my widow. At her death she can divide it as she thinks proper among my children."

The widow, after probate was granted, gave a twenty-one year lease of a large ranch property, part of the estate. She has never remarried. It was contended on behalf of the widow that she took an estate under the said will and testament as would entitle her to give such a lease under and by virtue of section 48 of the Settled Estates Act. It was urged on behalf of the children that as the widow might become divested of any interest in the estate at any time by remarriage she could not execute such a lease without leave of the Court or without the consent of the children. The question submitted for the determination of the Court was:

Statement

"Has the plaintiff such an estate under the last will and testament of William Palmer, deceased, as to entitle her to give a twenty-one year lease within the meaning of the Settled Estates Act?"

L. B. McLellan, for plaintiff.

J. K. Macrae, for defendant.

MURPHY, J.: I am of opinion that the petitioner is, under the will of William Palmer, entitled to a life interest, subject

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to same being divested should she remarry. That event has not occurred. In the absence of any authority, either cited or that I can find bearing on the matter, I have to decide the question on principle. Viewed as such I answer it in the affirmative. Petitioner has an estate for life in possession. She has, therefore, *in præsenti* such estate as the Settled Estates Act calls for. As the possessor of such an estate she has certain powers under said Act. The language of the Act speaks, *inter alia,* simply of an estate for life without qualification. To say that her powers are cut down because her life estate may be divested in the future by something that may or may not happen, would be, I think, to add words to the Act.

Question answered in the affirmative.

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Sept. 29.
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IN RE PRUDENTIAL LIFE INSURANCE CO.

Practice—Examination of judgment debtor—Execution and return of nulla bona before order.

An order for the examination of a judgment debtor will not be made until execution issue and a return of *nulla bona* is made.

APPLICATION by way of Chamber summons to examine a judgment debtor on a judgment of the Court. Counsel for the judgment debtor took the objection that there was no material before the Court to make the order asked for; that the writ of execution must issue and return of *nulla bona* made by the sheriff before the order as asked for could be made. Heard by MURPHY, J. at Chambers in Vancouver on the 29th of November, 1919.

Johannson, for the application.
MacGill, for the judgment debtor, *contra.*

MURPHY, J.: The objection is sustained. Writ of execution must issue and a return of *nulla bona* made before applying for order.

Application dismissed.

ATMA RAM v. BHANA.

MURPHY, J. (At Chambers)

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Sept. 25.

ATMA RAM v. BHANA

Practice — Chamber summons — Short leave — Indorsement of — Marginal rule 734.

The indorsement of short leave for service of a Chamber summons must shew the time and date within which the summons must be served.

APPLICATION for leave to amend statement of claim. The plaintiff issued a Chamber summons on the 24th of September, and obtained short leave returnable on the 25th of September, 1919. The Chamber summons was indorsed as follows: "Short leave granted September 24th, 1919, returnable September 25th, 1919, 10.30 a.m. D. MURPHY, J." Counsel for the defendant took the preliminary objection that, under the case of *Dawson* v. *Beeson* (1882), 22 Ch. D. 504 at p. 510, the indorsation for short leave must shew time and date on which the summons is to be served, *viz.*, "Short leave granted this 24th day of September, summons to be served this day, returnable tomorrow, September 25th, 1919," otherwise counsel could obtain short leave on a certain day returnable the day following and not serve summons until the eleventh hour. Heard by MURPHY, J. at Chambers in Vancouver on the 25th of September, 1919. Statement

Read, for the application.
Darling, contra.

MURPHY, J.: Preliminary objection sustained. Judgment

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Sept. 15.

WELLINGTON COLLIERY COMPANY, LIMITED, AND CANADIAN COLLIERIES (DUNSMUIR), LIMITED v. PACIFIC COAST COAL MINES, LIMITED.

Trespass—Damages—Taking of coal—Consent of plaintiff—Evidence of—Weight of evidence uncontradicted — Material evidence of deceased person taken at former trial—Refusal of.

WELLINGTON COLLIERY CO. *v.* PACIFIC COAST COAL MINES, LTD.

The plaintiffs' action was for damages being the value of coal taken in trespass from their mine through the defendant's mine adjoining. A former action had been brought for a similar trespass in another portion of the same mine where the two properties adjoined, at the trial of which the trespass alleged in this action was mentioned but not dealt with, the plaintiffs being successful in that action. The first defence raised was that by reason of a mistake of the Government surveyor, the defendant innocently extracted the coal, a subsequent proper survey throwing the dividing line over on the defendant's property. An amended defence was filed and subsequently by leave of the Court a further amendment, in which the defendant pleaded that the plaintiffs were aware of the alleged trespass and had given their consent thereto. On the trial, two witnesses (the manager of the defendant Company and one of the directors) swore that the manager of the Wellington Colliery Company had given his verbal consent to the defendant taking the coal in question. The Wellington Colliery Company's manager, who was alleged to have given the assent, died while this action was pending but before the trial, and application for admission of his evidence taken on the former trial was refused. It was held by the trial judge that the plaintiffs must succeed; that the evidence for the defence could not be accepted in view of all the facts and that his conclusion was not based on the demeanour of the witnesses in the box nor the manner in which their evidence was given.

Held, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that when two witnesses, whose credibility is not questioned, and who are men of standing in their respective callings, give explicit evidence that said plaintiffs' late manager assented to the acts complained of, and that evidence stands uncontradicted by other witnesses and is not rebutted by other fact or document, it must be accepted and the action should be dismissed.

Statement

APPEAL by defendant from the decision of MURPHY, J. in an action tried by him at Victoria on the 15th, 16th and 17th of April, 1919, for damages, being the value of coal taken by the defendant from the plaintiffs' mine known as the Alexandra

Mine, in the Cranberry District, Vancouver Island. The defendant owned what was known as the Richardson and Fiddick mines, adjoining the Alexandra mine on its north side, and the coal in question was taken through the defendant's workings in the Richardson mine at its southern boundary. A previous action was brought in respect of another trespass by the defendant from the Richardson mine into the Alexandra mine, in the course of which a question arose as to whether the trespass sued on in this action, which was to the south and east of the former trespass, was in issue, the trial judge reserving to the plaintiffs the right to bring this action. In the first action the plaintiffs were successful before the trial judge and the Court of Appeal, an appeal pending before the Supreme Court at the time of the hearing of this appeal. The statement of claim was delivered on the 14th of September, 1918, and the statement of defence on the 3rd of October, the main defence being that an error had been made by the Provincial Government surveyors as to the boundary between the properties, and by reason thereof coal had been innocently extracted from the Alexandra mine. The defendant, by leave of the Court, delivered an amended defence on the 21st of December, 1918, in which it first raised the defence that the plaintiffs were aware of the alleged trespass and that they had consented thereto. On the trial one Michener, who had been managing director of the defendant Company at the time of the alleged trespass, and one Hartman, who had been a director at the time, swore that one Coulson, who was at the time managing director of the Wellington Colliery (the former owners of the Alexandra property), had verbally given his consent to the defendant taking the coal in question. Coulson died after proceedings had commenced, but before the trial of this action. The defendant's application to tender the evidence of Coulson taken at the former trial was refused by the trial judge.

Statement

Harold B. Robertson (*Norris,* with him), for plaintiffs.
W. J. Taylor, K.C. (*Brethour,* with him), for defendant.

9th May, 1919.

MURPHY, J.: The contention that the boundary shewn on

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defendant's mine map is not the true boundary was not seriously pressed in argument, and, in my opinion, could not be successfully urged in view of the evidence adduced by plaintiffs. The main defence is that the coal was removed under permission granted by Mr. Coulson, the then general manager of plaintiff Company, now deceased. Two witnesses, Hartman and Michener, swear to this. With reluctance, I hold this defence was not proven. In justice to these witnesses, and that the hands of any appellant tribunal may be perfectly free, I desire to state that my conclusion is not based on their demeanour in the witness-box nor in the manner in which their evidence was given, but because I feel their evidence cannot be accepted in view of all the facts. It is an unfortunate incident that the only man who could contradict their statements died in the interval between the commencement of the action and the trial. This fact, I think, makes it necessary to carefully scrutinize their evidence, both in itself and in the light of surrounding circumstances. The first statement of defence, delivered whilst Coulson was yet alive, and the amended statement of defence, dated the 1st of November, 1918, contain no hint of the present defence. In explanation, it is asserted that the present directorate were unaware of the facts now set up. But Michener was the only person from whom information could be obtained on which to found the allegations in the statement of defence first delivered, and in the amended statement of defence of November 1st, 1918, other than such as were simple denials or such as raised the question of mistaken boundary, as he was defendant's general manager at the time, or if such information was obtainable from another source, no evidence to that effect was given at the trial. Michener's whereabouts was known to the present directorate at the time these statements of defence were delivered, and in view of the suggestion that the present directorate knew nothing of the facts it seems peculiar that enquiry was not made from him as to what defence could be set up. Again, after the judgment in the first trespass action, Michener had a talk with a Mr. Fleming in New York, when Fleming informed him that at the trial, just then concluded, a further trespass to the south and east, involving a great quan-

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tity of coal, had been alleged. The coal in question herein was taken from the south. If, as Michener says, this was taken by permission, it would be natural he would so inform Fleming. Instead, he suggested the matter should be settled. He now explains by saying that Fleming spoke of a taking of one hundred thousand tons, and therefore Michener thought he was referring to some trespass on the east by his successor as general manager, Tonkin, because the amount of coal removed by him under the alleged permission was so small that his mind never adverted to it in view of the figure mentioned by Fleming. But the amount of coal actually removed from the south, under the alleged permission, was shewn in evidence to have been no negligible quantity—indeed, to have been quite a considerable per cent. of the total production under Michener's management. At the time of the alleged trespass defendant Company was in such financial straits that increased output was imperative, and was at the same time short of available coal to mine. Coulson had on several occasions refused to allow defendant Company to take out the coal in the area in question herein. The reasons suggested that he eventually consented to give away for nothing what turns out to be a very considerable tonnage, taking into account what was actually removed and what was left in the pillars, was that he did not think there was much coal in the area. So far as I can see, no satisfactory reason is given for this change of attitude. No evidence was adduced to shew any facts brought to Coulson's knowledge which might lead him to conclude there was little coal in the area subsequently to his repeated refusals to allow defendant to mine the area. On the contrary, at the very interview when he gave the alleged permission, he was told there was a good deal of coal on the boundary, and the map which was then shewn to him shewed a seam 15 feet in thickness in one or two places. Coulson knew, or could easily ascertain, that there were over three and a half acres in this area. Even, if as alleged, he had been of opinion there was little coal in it, would not the fact that such large seams occurred in places at the boundary lead him to change this opinion than to induce him to change his refusal to an acceptance? Wilkinson, a mining man of experience in the locality, thought from 7,000 to

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8,000 tons per acre on the average was to be expected from coal strata in the vicinity. Coulson, if he had not this knowledge, could easily obtain it, and would he not be likely to make such enquiry before giving away his Company's property? If he knew that any such quantity was likely to be obtained, would he not have insisted on at least a royalty? The other suggested reasons for Coulson's change of attitude, such as services by Hartman, or anxiety to promote an exchange of property, which, in fact, never materialized, are, in my opinion, not established by any satisfactory evidence. If this view of the evidence bearing on them is correct, the fact that they were put forward is, I think, a further ground for suspicion as to the *bona fide* of the defence of taking by permission. Further, it is to be remembered that, although admittedly Coulson had practical control of plaintiff's property, this coal area was not his own property, but that of plaintiff Company. His character as a business man is, I think, relevant under the circumstances, and such character, as shewn by the subsequent proved bargains between him and defendant Company, as to mining another area, is difficult to reconcile with what is alleged to have been his action herein. Again, the defendant left the coal pillars where their removal might betray their mining operations by surface subsidence, whilst they removed same where it was improbable surface subsidence of a character likely to be observed would occur.

MURPHY, J.

I do not think the trespass herein in question was an issue in the former trial to the extent necessary to allow me to look at Coulson's evidence given in that litigation. The trespass, the subject-matter of this action, occurred previously to the date set up in their statement of claim delivered in the first action as being the date on or about and subsequently to which the trespass therein complained of took place. Apparently the matter was mentioned during the progress of the first trial, but no amendment was sought, and the Court, in the result, declined to make any order. I therefore do not take Coulson's evidence given in that litigation into account.

Coming now to an examination of the evidence of Michener and Hartman, there is a marked discrepancy in their story on, I think, an important point. Hartman says the express object

of the interview was to obtain confirmation of the permission alleged to have been already given by Coulson, which fact was stated to Coulson, according to Hartman's evidence as to the reason for seeking the interview. But according to Michener, the real object of the interview was to discuss exchange of properties, and the agreement *re* mining the area in question herein came up merely incidentally. Whilst, of course, witnesses will vary in details, in my opinion, the object of seeking this interview, under all the circumstances, would be impressed on Michener's memory as well as on Hartman's.

I think plaintiffs' case is made out that there was a deliberate taking of this coal with knowledge that it was beyond plaintiffs' boundary line. Applying the principle *omnia præsumuntur contra spoliatorem;* I find 25,066.56 tons of coal removed for which damages at $3.25 per ton are awarded. I find that 23,516.64 tons of coal left *in situ* made valueless to plaintiffs, for which damages at 15 cents per ton are awarded.

The appeal was argued at Victoria on the 23rd of June, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. J. Taylor, K.C. (*Brethour,* with him), for appellant: The evidence shews the coal was of no value to them unless worked through the defendant's property. Coulson had authority to grant the defendant permission to work the property: see *Vigers* v. *Pike* (1840), 8 Cl. & F. 562 at p. 650. On the question of accepting the evidence of Michener and Hartman see *McGregor* v. *Topham* (1850), 3 H.L. Cas. 132 at p. 150; *Blatch* v. *Archer* (1774), 1 Cowp. 63 at p. 65; *Whish and Woollatt* v. *Hesse, Clerk* (1831), 3 Hag. Ecc. 659 at pp. 705-6; *The "Gannett"* (1900), A.C. 234 at p. 238. On the question of contradiction see *Sanderson* v. *McKercher* (1886), 13 A.R. 561.

Argument

Armour, K.C., for respondents: The defence of consent was not set up in the first statement of defence; in fact, it was set up by amendment after Coulson's death, the man whom they allege gave the consent. As to acceptance of evidence of a dead man having given leave see *In re Garnett. Gandy* v. *Macaulay* (1885), 31 Ch. D. 1. The Company was financially embar-

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rassed. They had to get out coal, and there was every incentive to take the coal adjoining their property. No person in the plaintiff Company ever heard of Coulson granting leave to take the coal, and it is inconceivable that he should give away his Company's property, especially in face of the fact that the Companies were competitors in the coal business. As to whether this evidence of consent should be given credence evidence of all the surrounding circumstances should be admitted and carefully considered: see *In re Grove. Vaucher* v. *The Solicitor to the Treasury* (1888), 40 Ch. D. 216 at p. 242; *Lucas* v. *Novosilieski* (1795), 1 Esp. 296; *Sellen* v. *Norman* (1829), 4 Car. & P. 80; *Evans* v. *Birch* (1811), 3 Camp. 10. The trial judge should not have refused admission of Coulson's evidence taken at the former trial: see Phipson on Evidence, 5th Ed., 416; *Erdman* v. *Town of Walkerton* (1892), 22 Ont. 693; (1893), 20 A.R. 444; (1894), 23 S.C.R. 352; *Wright* v. *Doe dem. Tatham* (1834), 1 A. & E. 3; *Doe dem. Foster* v. *The Earl of Derby, ib.,* 783. Coulson's evidence shews he took the position he wanted to reserve the coal.

Argument

Taylor, in reply, referred to *The King* v. *The Despatch* (1916), 22 B.C. 496 at p. 502; *Llanover* v. *Homfray* (1881), 19 Ch. D. 224 at p. 228; *North Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited* (1914), A.C. 461 at pp. 464 and 474.

Cur. adv. vult.

15th September, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal on the ground that the respondents consented to the acts complained of. The question is purely one of fact, and when we have the evidence of two witnesses, whose credibility is not called in question by the learned trial judge, and who are men of standing in their respective callings, who gave explicit evidence that the respondents' late manager consented to the acts complained of, his authority to do so not being questioned, and when that evidence stands uncontradicted by any other witness and is not rebutted by any other fact or document put in evidence, there can, in my opinion, be no doubt as to the course which I ought

to pursue. I must either accept the evidence of these two witnesses or in effect declare that they have been guilty of perjury. In the circumstances of the case there was no room for mistake. The consent was either given, as these witnesses have deposed to, or their evidence is false to their knowledge. We were asked to draw certain inferences in rebuttal of their evidence from what took place at an interview between Michener and Fleming, but such inferences are not necessary ones, and cannot, in my opinion, prevail against the positive sworn testimony.

MARTIN, J.A.: Before considering the main question, it is necessary to determine the cross-appeal to admit herein the evidence of W. L. Coulson, who was a witness in the former action of the present plaintiff Company and the Esquimalt and Nanaimo Railway Company against the present defendant, begun on December 15th, 1915. That action complained of a trespass "on or about and since the 8th of March, 1913," after the cessation of a prior arrangement, in writing, to mine on the present plaintiff's property, whereas the arrangement relied upon in this action was a verbal one, alleged to have been made in May, 1911, and I am of opinion that the learned judge below took the right view in excluding Coulson's evidence from consideration. But further, as a matter of precaution, I have read Coulson's evidence, and am satisfied that in any event it would not, if admitted, change the view I am about to express, briefly, upon the main point.

That point is that Coulson had, for divers good reasons of policy, expediency, and mutual interest of coal mine owners, given the defendant Company permission to mine in the area now complained of, and the evidence of Michener and Hartman is relied upon to support that permission. This is a question of inference to be drawn from the evidence of these two men, who are not contradicted by other witnesses. The learned judge says on this point:

"With reluctance I hold this defence was not proven. In justice to these witnesses, and that the hands of any appellate tribunal may be perfectly free, I desire to state that my conclusion is not based on their demeanour in the witness-box nor on the manner in which their evidence was given, but because I feel their evidence cannot be accepted in view of all the facts. It is an unfortunate incident that the only man who could

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contradict their statements died in the interval between the commencement of the action and the trial. This fact, I think, makes it necessary to carefully scrutinize their evidence, both in itself and in the light of surrounding circumstances."

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I first feel compelled to observe, with all possible respect, in connection with the statement of the learned judge appealed from, that he makes a certain finding so "that the hands of any appellate tribunal may be perfectly free," that it is beyond the province of the learned judge to bind or loose the hands of this Court, and its "freedom" in the discharge of its appellate duty to review his judgment is in its own keeping.

Coulson died on October 19th, 1918, and the present defence was set up in his lifetime 16 days before that date by pars. 12 and 13 of the statement of defence, of which 13, in part, follows:

"13. The plaintiffs were at all times aware that the defendant Company was taking coal from the said Alexandra mine and suffered and permitted the coal to be taken in order that the defendant Company would keep up the supply of coal to meet the demands of their patrons. . . . ."

The learned judge therefore appears to be in error in saying that the first statement of defence and the amended one "contain no hint of the present defence," and I cannot but reach the conclusion that his unfavourable opinion has been greatly influenced by this (supposedly) very suspicious circumstance. He also gives further "grounds of suspicion as to *bona fides*," founded on discrepancies and otherwise for his view that the arrangement is against the probabilties in the circumstances, hence I have felt it my duty to carefully consider the evidence, and after having done so am quite unable to reject its positive statements, bearing in mind that the two men, in their conversation with Coulson, had different objects in view, which would lead them to lay stress upon the corresponding phases of it. I am constrained, therefore, to hold that the defence to the alleged trespass has been established by leave and licence, and it follows that the appeal should be allowed.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: As I view this case, either the defendant had leave and licence, as it alleges, or two witnesses have deliberately perjured themselves. There can be no question of mistake or misunderstanding. On reading the evidence and

considering all the probabilities, I cannot bring myself to say that these witnesses have committed perjury. If their evidence is accepted, the plaintiffs' case fails and the appeal must be allowed.

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McPHILLIPS, J.A.: This appeal is one for a rehearing of a question of fact, and upon the authorities it must be shewn that the learned trial judge went wrong in his conclusion that the case established a trespass—the mining of coal without colour of right, *i.e.*, that there was no sufficient evidence before the learned judge entitling him to arrive at the conclusion he did. In arriving at his conclusion the learned trial judge did not take into consideration the evidence in the former action, not admitting that evidence. With the greatest respect to the learned trial judge, that evidence was admissible. It was given in an action of like nature to this action in respect to mining in the same mine, acts of trespass therein, and the evidence was given in an action between the same parties, and the trespass sued for in this action developed and was first discovered at the trial of that action (see *The Town of Walkerton* v. *Eardman* (1894), 23 S.C.R. 352, King, J. at pp. 365-7). However, the evidence the learned judge had before him was sufficient to admit of the drawing of the inferences and finding as he did. I may say that it is without hesitation that I have come to the same conclusion as the learned trial judge. The evidence, in my opinion called for the defence fell very much short of that which must be forthcoming when it is sought to prove consent to the interference with the property of others—trespass thereon and the abstraction of large quantities of coal. At best, all that was contended for was a verbal consent from the then general manager of the respondents (Coulson) to the appellant to mine the coal. That there should be only that form of consent in such an important matter is so unbusiness-like that at once we look for the establishment of such consent beyond a question of doubt, at least something in the nature of later acquiescence, but there is nothing whatever to indicate that the respondents were aware of the mining going on—nothing in the way of corroboration or ratification of the alleged

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consent. There would seem to be some variance of view as to when it first became known to the respondents that the defence would rely upon this alleged consent. So far as I can see, and this is shewn in the pleadings, consent was not specifically pleaded until the 21st of December, 1918. It is evident that it was not until the 24th of December, 1918, that it was made known to the respondents that the consent relied upon to justify the entering in the mine and the abstraction of the coal was an alleged consent of Mr. Coulson, given sometime in the year 1911 to Mr. Michener, the then managing director for the appellant. It is an admitted fact that Mr. Coulson died in October, 1918; therefore the evidence of consent must be looked upon in the light of evidence incapable of being denied, and, further, evidence of which no precise notification was made known until a couple of months after Mr. Coulson's death. Evidence of this class must always be looked upon with suspicion, and when it goes the length of justifying the entry upon the respondents' mine and taking of coal therefrom, the closest scrutiny must be given to it and the greatest of care exercised in arriving at the conclusion as to whether it is worthy of credence or not. When all the attendant facts are looked at in the present case, the course of conduct of Mr. Coulson, where a consent was given to the appellant to mine certain other coal of the respondents, a consent later terminated, and the particulars of that consent we find set forth with great particularity in writing, it would appear to me to be overwhelmingly contrary to probability that Mr. Coulson gave the verbal consent contended for by the appellant; the balance of probabilities is all against any such consent being given. The onus is upon the appellant to establish in the clearest manner that there was authority to do that which it did. It is no light matter to make entry upon the property of another and to abstract therefrom thousands of tons of coal and by the method of work render thousands of tons valueless and a complete loss to the owners. Justification for conduct of this kind requires the clearest proof, and in my opinion the learned trial judge arrived at the right conclusion. He was not satisfied with the defence put forward by the appellant, and I am not satisfied

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with it; it is against all reason. The onus resting upon the appellant has not been discharged. I would make use of some of the language of Lord Brougham in *McGregor* v. *Topham* (1850), 3 H.L. Cas. 132 at pp. 151-2, as well indicating my view in this appeal:

"I therefore leave this supposition entirely out of view, and rest upon the great improbability of the appellant's case. I will not go into the evidence at all, because I am satisfied, for the reason which I have given."

My reason is that upon all the surrounding facts and circumstances a consent such as is alleged is against all probability—would be most unbusinesslike. It does not comport with reasonableness; it is repelled by the course of conduct of Mr. Coulson throughout; in fact, it is unthinkable that any such consent was given. In my opinion, this is not a case where it is possible to "reconcile all the testimony" (see Earl of Halsbury, L.C. in *The "Gannett"* (1900), A.C. 234 at p. 238). The learned trial judge found it impossible to do this. I likewise find it impossible, and the only proper course under the circumstances is to follow and affirm the view arrived at by the learned trial judge unless one were of the opinion that the view of the learned trial judge was wrong and unreasonable upon all the attendant facts. That, though, is not my view. I am satisfied of the reasonableness and correctness of the judgment of the learned trial judge (see Strong, J. in *McKercher* v. *Sanderson* (1887), 15 S.C.R. 296 at pp. 299-301. At p. 300: "The account . . . . an extremely improbable one").

There remains but one point to deal with, and that is whether the assessment of damages was rightly proceeded with and rightly arrived at by the learned trial judge, the contention on the part of the appellant being that it was contemplated and that it was the course of the trial that if the question of damages required to be passed upon, a reference would be directed. Looking at the whole case, the evidence adduced, and the course of the trial (*Seaton* v. *Burnand* (1900), A.C. 135 at p. 145, Lord Morris), the learned trial judge, in my opinion, was well entitled to proceed and assess the damages. All the relevant facts were before him, the situation of the coal, from what section of the mine it was taken, the cost of mining and raising the same, and also the value of the coal rendered valueless con-

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sequent upon the workings of the appellant. Further, it is to be noticed that the learned trial judge really proceeded upon the evidence of the defence as led at the trial in the assessment of damages, and I see no error in the assessment arrived at (*McHugh* v. *Union Bank of Canada* (1913), A.C. 299, Lord Moulton at p. 309).

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

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *W. J. Taylor.*

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

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REX v. SETO KIN KUI

REX v. SETO KIN KUI.

Criminal law—Member of unlawful association—Order in council, 28th September, 1918 (P.C. 2384)—Assent of Attorney-General in each case—Prohibition.

The assent of the Attorney-General, under order in council of the 28th of September, 1918 (P.C. 2384), to the prosecution of a number of men (the names being set out in the one assent) was held to be insufficient on the prosecution of one of those mentioned and a writ of prohibition was directed.

APPLICATION by way of Chamber summons for a writ of prohibition, heard by MURPHY, J. at Chambers in Vancouver on the 15th of September, 1919. On the 22nd of February, 1919, an information was laid by one Malcolm R. J. Reid before H. C. Shaw, police magistrate, and one of His Majesty's justices of the peace in and for the City of Vancouver, charging that Seto Kin Kui, *alias* Seto Gin Kin, *alias* Seto Kin, *alias* Gin Kin, *alias* Seto, did become and continue to be and continues to be a

Statement

member of an unlawful association. On the same day a warrant issued upon the information and Seto Kin Kui was arrested, and on the 4th of September, 1919, tried by the said H. C. Shaw, on the charge as laid in the said information under order in council of the 28th of September, 1918, P.C. 2384 (later repealed by order in council, 11th January, 1919, P.C. 56), whereby the assent of the Attorney-General before prosecution must be formally given. The assent given was as follows:

"In the matter of the regulation approved by order in council of the Dominion Government of Sept. 15th, 1918, as amended by subsequent orders in council of the 7th and 13th of November, 1918, with relation to unlawful associations, publications, etc., and in the matter of regulation approved by order in council P.C. 56-1919, I hereby assent to the prosecution of Chew Shue Yen, Seto Kan Kin, Tsang Chak Chon, No Wey, Yet How, Lon Kee Quen and Gan Y. Gee of Vancouver, B.C., on a charge of being members of an unlawful association, as defined by the said orders in council. Dated at the City of Victoria, Province of British Columbia, this 18th day of February, 1919.

"J. W. deB. Farris,
"Attorney-General of B.C."

Statement

Sir C. H. Tupper, K.C., for the accused: The assent of the Attorney-General, which is necessary before prosecution in this case, under order in council, 28th September, 1918 (P.C. 2384), is insufficient. The assent is too general. There must be a specific consent to this particular case. The consent of the Attorney-General does not mean that he has applied his mind to the merits, but the Court must be satisfied that this particular case came before the Attorney-General and that he dealt with the matter by itself. There is nothing in the assent to shew that the offence was committed in the Province of British Columbia. Further, the assent must shew that he approved of information to be laid by Malcolm Reid, informant in this case (English and Empire Digest, Vol. 1, p. 52; *Rex* v. *Breckenridge* (1905), 10 O.L.R. 459).

Argument

F. R. Anderson, contra.

MURPHY, J.: The document produced as an assent is insufficient and writ of prohibition should issue.

Judgment

Application granted.

MURPHY, J.

1919

Sept. 29.

IN RE WORKMEN'S COMPENSATION ACT AND BLUE FUNNEL MOTOR LINE

IN RE WORKMEN'S COMPENSATION ACT AND BLUE FUNNEL MOTOR LINE, LTD.

Workmen's Compensation Board—Decision of Board—Assessment—Payment of—Notice to quash—Jurisdiction—B.C. Stats. 1916, Cap. 77, Sec. 67.

Where applicants, after hearing and assessment by the Workmen's Compensation Board, have paid the assessment, section 67 of the Workmen's Compensation Act applies, and there is no jurisdiction to quash the assessment.

MOTION for a writ of *certiorari* to quash an assessment made by the Workmen's Compensation Board. The Blue Funnel Motor Line is a company having offices in Vancouver and New Westminster, said offices being used as starting places by a number of men who run motor-cars between the two cities. These men pay a certain sum each month to the Company for the use of said offices, they own their own cars and operate them at their will. The Workmen's Compensation Board assessed the Blue Funnel Motor Line under the Workmen's Compensation Act, B.C. Stats. 1916, Cap. 77, holding they were employers within the meaning of the Act. They were assessed $353.95 for the year 1917, and the assessment was paid on the 28th of February, 1918. Heard by MURPHY, J. in Vancouver on the 29th of September, 1919.

Statement

Craig, K.C., for the motion: There is no evidence that the Company are employers.

S. S. Taylor, K.C., contra: Under section 67 of the Workmen's Compensation Act, the Blue Funnel Motor Line, having been granted a hearing before the Board and assessed for the year 1917, as employers, and having paid the assessment, the Court has no jurisdiction to hear the motion.

Argument

MURPHY, J.: The fact that the Company had, after a hearing, been assessed and paid such assessment in 1917 is some evidence that it is an employer under the Act, and therefore section 67 applies and the Court has no jurisdiction.

Judgment

Motion dismissed.

REX v. SALLY.

MURPHY, J. (At Chambers)

1919

Sept. 17.

REX v. SALLY

Criminal law—Certiorari—Refused—Appeal—Bail pending appeal—Jurisdiction—R.S.B.C. 1911, Cap. 17.

There is jurisdiction in the Supreme Court to order bail pending an appeal from the refusal of *certiorari* on a conviction under section 10 of the British Columbia Prohibition Act.

APPLICATION for bail pending the hearing of an appeal to the Court of Appeal. The accused was convicted on the 11th of August, for selling liquor under section 10 of the British Columbia Prohibition Act. An application made to MORRISON, J. on the 26th of August, 1919, to quash the conviction, was dismissed. The accused then served notice of appeal to the Court of Appeal holden at Vancouver on the 3rd of November. Heard by MURPHY, J. at Chambers in Vancouver on the 17th of September, 1919.

Statement

R. L. Maitland, for the application, relied on the Bail Act, Cap. 17, R.S.B.C. 1911, and *Rex* v. *Iwanachuk* (1918), 30 Can. Cr. Cas. 139, where it is held that there in an inherent power in the Supreme Court to grant bail in such cases.

Argument

G. L. MacInnes, contra: There is no procedure giving power to fix bail in such cases, otherwise the Crown would agree to bail being granted.

MURPHY, J.: There is power to grant bail. Bail is fixed at the sum of $1,000.

Judgment

Application granted.

CLEMENT, J.

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Oct. 3.

NELSON v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

OBLATE ORDER OF MARY IMMACULATE v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

LEFEAUX & CARLISLE v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

NELSON v. PACIFIC GREAT EASTERN RY. CO.

Riparian owner—Tidal waters—Right of access—Railway embankment below high-water mark—Obstruction—Damages—R.S.B.C. 1911, Cap. 194—Arbitration—Award—Appeal.

The defendant Company constructed a railway embankment and railway on the line of and below high-water mark in front of certain lots abutting on tidal waters owned by the plaintiffs. In an action for damages for trespass, judgment was given for the plaintiffs, and it was ordered that compensation be assessed under the provisions of the Railway Act. The arbitrators appointed under the Act assessed damages at $25 per foot frontage, basing their award on the relative value of the lots before and after the embankment was built.

Held, on appeal, that the cost of providing access to the sea is not the true measure of damage, as the relative value of the access afforded and what existed before the railway would then arise, and the arbitrators were properly guided by the evidence of value of the properties before and after the railway was built.

The vague evidence of damage by smoke, noise and unsightliness was properly disregarded by the arbitrators.

Statement

APPEAL by defendant from the award of arbitrators appointed to determine the amount of compensation to be paid by the defendant in pursuance of the judgment in the action of the 28th of April, 1919. The plaintiffs are the owners of certain lots of land abutting on tidal waters in the Municipality of West Vancouver. The defendant constructed a railway embankment and built a railway touching the line of and extending below high-water mark in front of said lots and obstructed the plaintiffs' rights of access from the waters of English Bay. The plaintiffs brought action for damages for trespass in respect of said lots. It was held by the trial judge (MACDONALD, J.) that the plaintiffs were entitled to compen-

sation under the provisions of the Railway Act (R.S.B.C. 1911, Cap. 194) for obstruction of their right of access as such owners to and from the waters of English Bay and for injury caused the said property, and arbitrators (Mr. Justice MURPHY, chairman) were appointed in pursuance of the Railway Act to determine the amount of damages to be paid. The arbitrators, after hearing the evidence and viewing the property, made their award on the 7th of August, 1919, fixing the amount of damages at $25 per foot frontage on tidal waters. The defendant Company appealed on the grounds, first, that the arbitrators should only consider evidence of the cost of the construction of passages through the embankment providing access to the sea; and secondly, that in any case the award was excessive, as on the evidence the arbitrators could not reasonably find the plaintiffs entitled to the amount given by the award. In giving evidence at the hearing certain witnesses based their estimate of damage in part on the effect of smoke, noise and the unsightliness of the embankment. Counsel for the plaintiffs requested the arbitrators to disregard such evidence in fixing the amount of damage, and the chairman stated that in making their finding they would disregard it. On the appeal, counsel for the appellant contended that the evidence of damage was insufficient or improper, as it was impossible for the arbitrators to say to what extent the evidence as to smoke, noise and unsightliness influenced the opinion of the witnesses. Argued before CLEMENT, J. at Vancouver on the 29th of September, 1919.

Statement

W. C. Brown, for appellant.
Dorrell, for respondent Nelson.
D. Smith, for respondent Oblate Order of Mary Immaculate.
Baird, for respondents Lefeaux & Carlisle.

3rd October, 1919.

CLEMENT, J.: Taking Mr. *Brown's* contentions in order: (1) The cost of providing access to the foreshore and the sea is not the true measure of the damage done. It is a very pertinent piece of evidence, of course, but the question at once arises as to the relative value of the access offered and that which existed before the railway was interposed between the proper-

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ties in question and the sea. I think the arbitrators, under the circumstances, were justified in declaring to be decisively guided by the evidence on this head, and in having regard to the evidence as to values before and after the railway was built. (2) The arbitrators, as I gather, avowedly disregarded the rather vague evidence as to the damage done by smoke of trains, etc., all damage, in fact, incidental to the operation as distinguished from the construction of the railway, and at any rate their award is much below the figure at which the damage was placed by those witnesses who were influenced by these improper elements of damage. In the light of other evidence, I think the arbitrators could arrive at the figure they did agree upon, entirely disregarding the objectionable elements; and, of course, I must assume they did so, the award being perfectly good on its face. (3) I have gone through the evidence adduced, and am quite unable to say that the arbitrators have erred as to the amount. I would have to arrive at a clear opinion that they were wrong before I could consider the figure I should award. At that point I have not arrived, and the awards, therefore, must stand.

Judgment

Appeal dismissed and, so far as I have jurisdiction so to determine, with costs. The claimants were entitled to judgment for the amounts respectively awarded them, with costs.

Appeal dismissed.

BRAID v. McDOWELL, BANK OF MONTREAL AND BANK OF TORONTO.

MURPHY, J. (At Chambers)

1919

Oct. 10.

BRAID v. McDOWELL

Mortgage—Redemption—Second mortgage to secure contingent liability—Third mortgagee given additional time for redemption.

In an action by a first mortgagee for redemption it appeared that the second mortgagee held its mortgage not for a present existing indebtedness but for a possible contingent liability. The plaintiff had obtained an order *nisi* giving the defendants (including the second and third mortgagees) six months within which to redeem. The third mortgagees, intending to redeem should the second mortgagees not do so, applied for an extension of the time for redemption.

Held, that in the circumstances the third mortgagees should have an opportunity to redeem in case the second mortgagees are foreclosed and the application was granted.

APPLICATION by defendant the Bank of Toronto for extending the time in a foreclosure action beyond the time fixed by the order *nisi* for redemption. The plaintiff was first mortgagee, the Bank of Montreal held a second mortgage, the Bank of Toronto a third mortgage, and Mrs. McDowell represented the estate of the mortgagor. The plaintiff had obtained an order *nisi* giving all the defendants six months after the date of the registrar's report to redeem, the six months expiring on the 14th of November, 1919. The application by the Bank of Toronto was based upon an affidavit from which it appeared that the Bank of Montreal held their mortgage not as security for any present existing indebtedness, but as security for a possible contingent liability, which might arise out of litigation that had been pending for upwards of three years. The Bank of Toronto accordingly submitted that a successive period of time should be allowed it under the circumstances to redeem, in the event of the Bank of Montreal electing not to exercise its right to redeem by the date fixed. Heard by MURPHY, J. at Chambers in Vancouver on the 10th of October, 1919.

Statement

R. M. Macdonald, for the application: Ordinarily only one time is fixed for all defendants to redeem: *Mutual Life Assurance Society* v. *Langley* (1884), 26 Ch. D. 686. The old rule was that encumbrancers were given successive periods of redemp-

Argument

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tion in the order of their encumbrances: *Beevor* v. *Luck* (1867), L.R. 4 Eq. 537 at p. 548. Successive periods will now be given if specially asked for and reason therefor is shewn: *Smithett* v. *Hesketh* (1890), 44 Ch. D. 161 at p. 164. [He referred to the forms in Seton on Decrees, 7th Ed., pp. 1907, 1911.] If the Bank of Montreal decides not to redeem, but be foreclosed, then the Bank of Toronto wishes to redeem.

C. B. Macneill, K.C., for plaintiff.
Whealler, for Bank of Montreal.

MURPHY, J.: I see no reason why time should be granted to the Bank of Montreal. The plaintiff is entitled to his money and is not concerned with the position of the Bank of Montreal. That Bank, if it so desires, can fully protect its security for its contingent claim by paying plaintiff off on or before the date now set. Its application is refused. On the other hand, I think it equitable to extend the time for redemption by the Bank of Toronto to November 21st, 1919. Plaintiff will not be injured thereby, for I have the undertaking of counsel for the Bank of Toronto that the Bank of Toronto will pay plaintiff's claim in full if the Bank of Montreal is first finally foreclosed. The Bank of Montreal is not injured, for, as stated, if it desires to preserve its security it can redeem plaintiff's mortgage and there can be no question that it will then stand in plaintiff's shoes for the sum paid to effect such redemption. On the other hand, the Bank of Toronto, with some justification, fears legal complications on the question of its priority for the money it will have to pay to redeem plaintiff's mortgage over the Bank of Montreal should it be compelled to make such redemption to save the property before the Bank of Montreal is finally foreclosed. I therefore give the Bank of Toronto until the 21st of November next to redeem plaintiff's mortgage. The amount to be paid to effect such redemption has been agreed upon by the parties, and in pursuance of such agreement is hereby fixed at $8,601.62. Plaintiff to have his costs of the application. No costs to either Bank.

Judgment

Order accordingly.

REX v. GARTSHORE.

HUNTER, C.J.B.C. (At Chambers)

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REX v. GARTSHORE

Habeas corpus—Summary Convictions Act—Order setting aside conviction —Finality of—Court of Appeal Act—Duty of judges to follow decisions of highest Courts—R.S.B.C. 1911, Cap. 51, Sec. 6, Subsec. 4(e)—B.C. Stats. 1915, Cap. 59; 1916, Cap. 49, Sec. 10.

The order of a judge of the Supreme Court on a stated case from a magistrate on a conviction under the Summary Convictions Act, 1915, is final.

The decisions of the Privy Council and the English Court of Appeal are binding on the judges of the Supreme Court of British Columbia and it is their duty to follow and apply the decisions of those Courts in preference to those of the British Columbia Court of Appeal when they are in conflict.

If it appears to a judge on *habeas corpus* that the judgment of the Court of Appeal is void on the ground of total want of jurisdiction, it is his duty to disregard it even though it may have been rendered in appeal from his own judgment.

APPLICATION for a writ of *habeas corpus* to shew cause why the prisoner should not be discharged from custody. On a stated case to the Supreme Court under the Summary Convictions Act, 1915, by the police magistrate at Vancouver from a conviction committing the defendant to prison for unlawful sale of liquor contrary to section 10 of the British Columbia Prohibition Act, 1916, it was held by HUNTER, C.J.B.C. on the 7th of February, 1919, that the offence had not been proven and the prisoner was discharged. The Crown appealed to the Court of Appeal. A preliminary objection as to the jurisdiction of the Court to hear the appeal was overruled and the conviction by the police magistrate was restored (see *ante* p. 175). The accused was again taken into custody. He then applied for a writ of *habeas corpus*. Heard by HUNTER, C.J.B.C. at Chambers in Victoria on the 15th and 16th of October, 1919. Statement

Wilson, K.C., and *Davis, K.C.*, for the motion.
Johnson, K.C., D.A.-G., for the Crown.

HUNTER, C.J.B.C. (At Chambers)

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REX v. GARTSHORE

24th October, 1919.

HUNTER, C.J.B.C.: This is an application for a writ of *habeas corpus* directed to the gaoler of Okalla Prison and to shew cause why the applicant should not be discharged from custody.

The defendant had been convicted by a police magistrate for the unlawful sale of intoxicating liquor in violation of section 10 of the British Columbia Prohibition Act, 1916, and sentenced to six months' imprisonment.

The hearing before the magistrate was concluded on January 22nd, 1919, and sentence was pronounced on January 30th, and the warrant committing the defendant to prison was issued on the same day. He was not, however, lodged in prison pursuant to the warrant, being admitted to bail pending the hearing of a case stated by the magistrate under the provisions of the Summary Convictions Act, B.C. Stats. 1915, Cap. 59, for the opinion of the Supreme Court on, *inter alia*, the sufficiency of the evidence to warrant the conviction. The case was heard by me on the 7th of February, and, after hearing the argument on behalf of the Crown and the accused, I came to the conclusion that, assuming that the defendant had agreed to sell the liquor in question, there was no evidence to shew that he had actually carried it out, whereupon I set aside the conviction.

Judgment

The Crown took an appeal from my order to the Court of Appeal, and that Court, having heard argument and reserved judgment, on May 20th, 1919, set aside my order and affirmed the conviction, stating it to have been made on the 4th of January, 1919, which, of course, was erroneous, as it took place on January 30th.

The case is not yet reported* in the official Law Reports, but I have been furnished with copies of the judgments by the official reporter.

It appears that the defendant's counsel at the hearing of the appeal challenged the jurisdiction of the Court to entertain an appeal and wished to reopen the question which was supposed to have been settled by a former decision of the Court in *Rex* v. *Evans* (1916), 23 B.C. 128.

* Since reported: see *ante* p. 175.

The Court (MARTIN and MCPHILLIPS, JJ.A. dissenting), decided to hear the argument and then reaffirmed the existence of the right of appeal. It does not appear that Mr. Justice EBERTS assented to this decision, but it is clear that the other four judges maintained the right of appeal. They then dealt with the appeal on the merits, and decided (MCPHILLIPS and EBERTS, JJ.A. dissenting) to reverse my order. Two of the three judges who reversed my order did not give any reasons for holding that I was wrong. The third, MARTIN, J.A. did give reasons, but, as it is reasonable to assume in a case concerning the liberty of the subject, that the majority consulted before reversing my order, the inference is that the other two judges were not prepared to adopt the reasons given by MARTIN, J.A. or they would have said so. On the other hand, Mr. Justice MCPHILLIPS gave reasons in his oral judgment, stating that he entirely agreed with me. In fact, I do not see how the matter could be put any more clearly than it was when he said [*ante* pp. 190-1]:

"The mere finding of the articles on the premises without more, constitutes very unsafe evidence of a completed sale. There must be something more than that. There must be something definite to enable it being said that the defendant placed those articles there. It may not need to be very cogent evidence, but there would need be some evidence; for instance, that the carter got his instructions for delivery from the defendant or some evidence connecting the defendant with the selection, appropriation and delivery, but all such evidence is absent."

Judgment

The result, then, of the appeal was unfavourable to the defendant by a majority of one, and he was taken into custody under the warrant which the magistrate had issued, no fresh warrant having been issued, and thence to the Okalla Gaol to serve out the sentence, and now applies for his discharge.

The argument came on to be heard by me on October 15th and 16th, Mr. *Johnson,* Deputy Attorney-General, appearing for the Crown, and Mr. *Wilson* and Mr. *Davis* for the applicant, but inasmuch as the matter presented for my consideration appeared to be of some gravity, I reserved judgment, and in the meantime admitted the defendant to bail, the Crown assenting to that course.

The application for *habeas corpus* and for the prisoner's discharge is based on several grounds. One is that the order

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of the Court of Appeal purported to affirm the conviction alleged to have taken place on the 4th of January, 1919, whereas the conviction in question took place on the 30th of January and not on the 4th, and therefore was not affected by the order of the Court of Appeal. As to this objection, however, while it is true that one paragraph of the judgment purports to affirm a mythical conviction, another paragraph purports to set aside my order of the 7th of February, so that assuming the Court had jurisdiction to entertain the appeal, the order, in my opinion, would, nevertheless, have effectually disposed of the matter adversely to the defendant.

A number of objections were also taken to the legality of the warrant under which the defendant was taken into custody, but as upon a full examination into these points, it might be found that the net result would be that a fresh warrant could lawfully be issued by the magistrate, a discharge based on any such objection might turn out to be illusory, in which case the Court would then no doubt be confronted with the necessity of passing on the main question which has been raised, and which is, that the Court of Appeal had no jurisdiction to entertain an appeal, and if that is the case the defendant has been unlawfully imprisoned.

Judgment

Now, of course, a judge when called on to say that an order of a higher Court is void, ought to consider the matter carefully before taking that course. At first I thought that it might be possible for the defendant to take an appeal to the Supreme Court of Canada, but I find that the door of that Court has been closed by its decision in *In re McNutt* (1912), 47 S.C.R. 259, in which it was held by a majority of the Court that no appeal lies to that Court in a case of this kind. It would also be open to the defendant to bring an action for false imprisonment, and in that way have the validity of the action of the Court of Appeal passed on by the Supreme Court of Canada, but in the meantime he would have to serve out the alleged unlawful sentence, and any damages which he might recover would be a very inadequate remedy, and in any event the object of the *habeas corpus* proceedings, which is to obtain speedy relief from unlawful imprisonment, would be frustrated by

such delay. I think, therefore, that I am bound to consider the point and give my opinion on it.

In order that the nature of the question may be easily understood, it is first of all necessary to set forth the legislation concerning the matter.

By the Court of Appeal Act, being chapter 51 of the Revised Statutes, 1911, section 6, subsection (4) (*e*), it was provided that an appeal should lie to the Court of Appeal from the decision of the Supreme Court or a judge thereof in a case stated under the Summary Convictions Act. By the Summary Convictions Act, being chapter 218 of the Revised Statutes, 1911, section 92, it was provided:

"When a case is transmitted under this Act, the Supreme Court shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm or amend the determination in respect of which the case has been stated, or remit the matter to the Justice or Justices, with the opinion of the Court thereon, or may make such other order in relation to the matter, and may make such order as to costs, as to the Court may seem fit; and all such orders shall be final and conclusive on all parties."

By the Summary Convictions Act, being chapter 59 of the Statutes of B.C. 1915, the last-mentioned Act was repealed, section 92 reappearing with some variations as follows:

"92. (1.) The Supreme Court to which a case is transmitted shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse, or modify the conviction, order, or determination in respect of which the case has been stated, or remit the matter to the Justice with the opinion of the Court thereon, or may make such other order in relation to the matter, and such order as to costs, as to the Court seems fit; and all such orders shall be final and conclusive on all parties."

Judgment

And the question was and is as to whether, this being the last legislative declaration on the subject, it did not abolish the right of appeal which had been permitted by the Court of Appeal Act, 1911, as above stated.

At the outset I think it is unnecessary to do more than state two propositions that are almost axiomatic in their nature. The first is that no appellate Court can usurp a jurisdiction to interfere with the judgment of a competent Court merely by declaring that it has the jurisdiction to do so, and the second is that the right of appeal is not a mere matter of procedure but a substantive right which can be created only by legislative

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authority and cannot be created by the inferior or superior tribunal or by both combined—*The Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 704—and, of course, when granted, can be abolished only by legislative authority. As I have said, the jurisdiction of the Court of Appeal to hear the appeal from my order was upheld by the Court, or at any rate by four of the judges, and they reaffirmed the reasons given in *Rex* v. *Evans* (1916), 23 B.C. 128.

I asked the Deputy Attorney-General if the matter were *res integra,* whether he would be prepared to maintain the jurisdiction of the Court of Appeal, and, with his usual candor, he admitted that he could not, and that he could not see any escape from the conclusion that section 92 of the Summary Convictions Act, B.C. Stats. 1915, being the Act under which the conviction took place, cut off any right of appeal from my order to the Court of Appeal.

Notwithstanding that enactment, the majority of the Court held in the present case that the right of appeal still existed under the provisions already recited of the Court of Appeal Act, 1911. In the *Evans* case the Court held that they had to deal with a conflict between two of the revised statutes, and that inasmuch as the original Court of Appeal Act was passed later than the original Summary Convictions Act, the latter had to give way, but in *Gartshore's* case they held that the passage of the new Summary Convictions Act in 1915 made no change in the situation, although passed long after the Court of Appeal Act in 1911. They undoubtedly professed to apply the principle that where two enactments conflict the later legislation must prevail, a principle which cannot be disputed, but, with great deference to the learned judges of the Court of Appeal, I think they misdirected themselves while endeavouring to apply the principle to the legislation in question by inquiring into the priorities of the statutes which had been repealed.

Judgment

In *Boston* v. *Lelievre* (1870), L.R. 3 P.C. 157, Lord Westbury, in delivering the judgment of the Privy Council, which, of course, binds both the Court of Appeal and myself, said, at p. 162, in dealing with a converse case of a Court of Appeal refusing to hear an appeal on the ground that it had no jurisdiction:

"The question is governed entirely by the language of the Colonial statutes. The Court of Appeal in Lower Canada is the creation of statute, and the subjects upon which appeal lies to that Court are defined with reasonable clearness. The jurisdiction of the Court existed before the consolidated statutes, but the consolidated statutes annulled all the antecedent statutes upon the subject. The consolidated statutes may be treated as one great Act, and their Lordships think it would not be wrong to take the several chapters as being enactments which are to be construed collectively, and with reference to one another, just as if they had been sections of one statute, instead of being separate Acts."

And in *British Columbia Electric Railway Company, Limited* v. *Stewart* (1913), A.C. 816, which was an appeal from the British Columbia Court of Appeal, Lord Atkinson says at page 827:

"The Consolidated Railway Companies Act, 1896, and the Municipal Clauses Act, 1896, were passed in the same session of the British Columbian Legislature, but the latter was chapter 37 of the statutes of that year and the former chapter 55 and presumably later in date. If there is a repugnancy between them, the later statute must prevail: *Rex* v. *Justices of Middlesex* [(1831)], 2 B. & Ad. 818 at pp. 821, 822."

In the *Evans* case, then, it is clear that the method of dealing with the statutes laid down by the Privy Council would have led to the opposite decision, and I must assume that the Court, if these decisions had been brought to their attention, would have decided that the right of appeal no longer existed. But it is not necessary for me to say anything more about the *Evans* case, which, in the view of the Court of Appeal, raised the question of a conflict between two statutes contained in the same consolidation, for in *Gartshore's* case, the case was not that of a conflict between two statutes contained in the same revision, but between the Court of Appeal Act of 1911 and the Summary Convictions Act of 1915, and therefore the decision in the *Evans* case, whether right or wrong, did not necessarily bind the Court in the present case.

Judgment

On the argument in the present case, the case of *Rex* v. *Sit Quin* (1918), 25 B.C. 362 was referred to. In that case the Court of Appeal held that it had jurisdiction to entertain an appeal from a decision of the County Court on an appeal from justices of the peace, under the Summary Convictions Act. With regard to the objection which had been raised to its jurisdiction, the learned Chief Justice, at p. 366 says (MARTIN and MCPHILLIPS, JJ.A. concurring):

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"Then as to the preliminary objection, which we reserved, I see no reason for changing the opinion which I held in *Rex* v. *Evans* (1916), 23 B.C. 128. I do not think that the subsequent re-enactment or consolidation of the Summary Convictions Act affects the principles which we laid down in that case."

But the Summary Convictions Act does not declare the judgment of the County Court to be final and conclusive, as it does the judgment of the Supreme Court, so that the case of *Rex* v. *Sit Quin* was not necessarily governed by the case of *Rex* v. *Evans,* nor did it necessarily govern this case, and whether it is right or wrong does not affect this case, and therefore it is unnecessary for me to consider it further.

So that the position is that the Court of Appeal, on the hearing of the appeal in the present case, were not bound by their decision in the *Evans* case, as the conflict there was between two coeval statutes, they evidently considering that although the Summary Convictions Act of 1915 was passed before the hearing of the *Evans* appeal, which had been taken before its passage, it had no bearing on the question, as they made no allusion to it. Nor were they bound by their ruling in the *Sit Quin* case, as that was the case of an appeal from a County Court and not from the Supreme Court. Nevertheless, they considered that their decision in the *Evans* case governed both the *Sit Quin* case and this case. The Court of Appeal therefore arrived at this result, that although the Summary Convictions Act of 1915 repealed the former Summary Convictions Act of 1911, and undoubtedly by section 92 gave the defendant the right of appeal to the Supreme Court from the decision of the magistrate and by the same section declared the decision of the Supreme Court to be final and conclusive on all parties, it was not, however, effectual to extinguish the right of appeal which had been provided in another statute of 1911.

Judgment

With the greatest deference to the learned judges who so held, I think that they could not eliminate the last declaration of the Legislature in this way, and that the decision is in direct violation of the principles laid down by the Privy Council in *Boston* v. *Lelievre* and in *British Columbia Electric Railway Company, Limited* v. *Stewart,* as already stated. It may be suggested, although the learned Deputy Attorney-General did

not see fit to suggest it, that the phrase in the statute "final and conclusive on all parties" is not to be taken at its face value, but should be understood as subject to an appeal to the Court of Appeal, and the learned judges have, in fact, read into the statute some such expression as "subject to the right of appeal allowed by section 6 of the Court of Appeal Act, 1911"; but this mode of construction has often been condemned by Courts of the highest authority.

In *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, the Privy Council had to construe a Dominion statute which enacted that "the judgment of the Court to which an appeal under this section can be made shall be final." It was argued that this did not necessarily prevent an appeal as of right to the Crown, but Sir Montague E. Smith, in delivering judgment, said at p. 416:

"Then it was contended that if the Parliament of Canada had the power, it did not intend to abolish the right of appeal to the Crown. It was said that the word 'final' would be satisfied by holding that it prohibited an appeal to the Supreme Court of Canada, established by the Dominion Act of the 38 Vict., c. 11. Their Lordships think the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of Canada intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the Court of Queen's Bench to the Queen to remain. Besides the word 'final' has been before used in Colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty (see the Lower Canada statute, 34 Geo. 3, c. 30). Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question to limit the meaning of the word. For these reasons their Lordships think that the judges below were right in holding that they had no power to grant leave to appeal."

Judgment

In *Lock* v. *Queensland Investment and Land Mortgage Company* (1896), A.C. 461 Lord Halsbury says, at p. 466:

"Of course, if you can introduce into the language which the Legislature has used other language which would have a different effect (and that has been practically the argument addressed to your Lordships), you may turn any statute or any section of any statute into an absurdity. But Table A of the 7th section expressly says that 'the directors may, if they think fit,' make such an arrangement as has here been made; and every effort to turn those plain words into something else has resulted, on the part of the learned counsel who argued it, in an admission that, without the addition of some words, they cannot get into that 7th section that which their argument requires."

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In *Salomon* v. *Salomon & Co.* (1897), A.C. 22 the Lord Chancellor, at p. 34, said that he

"must decline to insert into that Act of Parliament limitations which are not to be found there."

In *Bank of New South Wales* v. *Piper* (1897), A.C. 383, Sir Richard Couch, in delivering judgment, says at pp. 388-9:

"It is to be observed that in the first part of s. 7, which relates to the sale or delivery of wool that is under a lien, the words 'with a view to defraud' are introduced as an essential quality of the offence; but in the part of the section which relates to the sale and disposition of sheep or cattle that have been mortgaged these words are omitted. This cannot be considered to be an unintentional omission unless it is shewn to be so by the context of the section. Their Lordships do not see any ground for construing the section as if the words 'with a view to defraud' had been inserted in this part of it. They cannot alter the offence created by the statute by the introduction of words which the Legislature has omitted."

In *Regina* v. *Hunt* (1856), 6 El. & Bl. 408 at p. 413, Erle, J. said:

"I had been for some time in hopes that I might find language to express this meaning; but it is impossible to do so without inserting words in the section; for it is enacted that his 'decision on the reasonableness as well as the legality of the charges shall be final,' and not that his decision on the reasonableness shall be made in the same manner as on the legality of the charges. Neither can I read 'final' as meaning 'final, unless appealed against.' Probably that was the object of the Legislature; but it cannot be done without reforming the words of the statute; and therefore I agree that this rule must be discharged."

Judgment

The decisions of the Courts of highest authority therefore make it clear that the Court erred in coming to the conclusion that the enactment that the decision of the Supreme Court was to be final and conclusive on all parties was to be considered as subject to the right of appeal, although the statute itself provides no such limitation. These decisions are, of course, binding on both the Court of Appeal and myself. In fact, the Privy Council declared in *Trimble* v. *Hill* (1879), 5 App. Cas. 342, that it was the duty of the Colonial Court of Appeal to follow the decision of the English Court of Appeal in preference to its own former decision where they came in conflict, which admonition has been followed by the Court of Appeal for Ontario, *e.g.*, *Mason* v. *Johnston* (1893), 20 A.R. 412. See also *Hollender* v. *Ffoulkes* (1894), 26 Ont. 61. *A fortiori* it is my duty to follow and apply the decisions of the highest

Courts of judicature in preference to those of the local Court of Appeal where they are in conflict.

It is not enough, however, merely to say that the Court had no jurisdiction. An order of a Court made without jurisdiction may be void only if and when it is set aside and declared void by a higher tribunal, as, for instance, where the jurisdiction was conditional on the existence of certain facts or on certain proceedings being taken. Decisions given when the conditions necessary to the existence of jurisdiction did not exist are not necessarily void, especially where the complaining party might have brought the true position to the attention of the Court and failed to do so. But there is a vital distinction between a case where there is a limited or conditional jurisdiction to do a judicial act and the case where, as in this case, there is no jurisdiction to do it under any circumstances. In the latter case it is void in the absolute sense and is just as inoperative for any purpose as if it had never been pronounced. It can establish no right or impose any obligation. It affords no protection to anyone who acts under it. It is, in short, a nullity or, as Chancellor Boyd said in *McLeod* v. *Noble* (1897), 28 Ont. 528, of an injunction which had been issued out of the High Court of Justice with no jurisdiction to do so, "a thing of naught which cannot be disobeyed."

Before taking the step which I am of the opinion I am forced to take, I may say that I have also considered whether or not I should adjourn the matter in order to enable the defendant, with the consent of the Crown, to make another application to the Court of Appeal to reconsider its decision as to its jurisdiction, or, if that were impracticable, then by way of Order of Reference.

Judgment

But apart from the delay which that would involve, one difficulty is that the Court affirmed its jurisdiction on at least two if not three different occasions, although, as already pointed out, the former cases did not conclude the Court in the present case. The other difficulty is that two of the learned judges have already expressed themselves in the present case as opposed to the reconsideration of the question. In fact, Mr. Justice MARTIN said in objecting to rehearing the question of the Court's jurisdiction in the present case:

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"I for one do not propose to say that I sit here at the beginning of this term to make a ruling which sends one man to the penitentiary, and later on in this term or the first of next term make another which frees another man, guilty of exactly the same offence, from the same consequences. On these questions I give one ruling once and for all."

And in his judgment referred to *Velazquez, Limited* v. *Inland Revenue Commissioners* (1914), 3 K.B. 458. With all deference, I am unable to see the justice of sending more men to prison because one man has already been wrongly sent there, nor am I able to see the relevancy of the case cited. It was a taxation case, and examination of it shews that the ground on which the English Court of Appeal refused to overrule their former decision was that that decision had been brought to the attention of the House of Lords on the argument in a similar case and that, as that tribunal did not disapprove of it, it was not for them to unsettle the law.

As a matter of fact, the highest tribunals do not hesitate to overrule their former decisions and those of co-ordinate Courts, whenever they consider it right, and to shew that that is so it may not be amiss to cite the following instances:

In a case involving the question of legislative power to imprison for contempt, the Privy Council in *Kielley* v. *Carson* (1842), 4 Moore, P.C. 63, overruled *Beaumont* v. *Barrett* (1836), 1 Moore, P.C. 59, Baron Parke delivering both judgments.

Judgment

In *Municipal Council of Sidney* v. *Bourke* (1895), A.C. 433 it overruled *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256, on the question of the distinction between misfeasance and nonfeasance.

The United States Supreme Court has frequently overruled former decisions of its own, as, for instance, *Leisy* v. *Hardin* (1890), 135 U.S. 100, overruled *Peirce et al.* v. *New Hampshire* (1847), 5 How. 504, although that decision was the result of full consideration and was the law for forty years. In *Tilghman* v. *Proctor* (1880), 102 U.S. 707, it overruled *Mitchell* v. *Tilghman* (1873), 19 Wall. 287, although the validity of the same patent was in issue in both suits and the patentee was a party to both. In *Kilbourn* v. *Thompson* (1880), 103 U.S. 168, they overruled *Anderson* v. *Dunn*

(1821), 6 Wheat. 204, on the question of the authority of Congress to commit for contempt. In the English Court of Appeal in *In re Dewhirst's Trusts* (1886), 33 Ch. D. 416, Cotton, Lindley and Lopes, L.JJ., overruled the decision of a former Court of Appeal consisting of James, L.J., Baggallay and Brett, JJ.A., in *In re Dalgleish's Settlement* (1876), 4 Ch. D. 143, which had been followed by Jessel, M.R. in *In re Crowe's Trusts* (1880), 14 Ch. D. 304. In *Fowler* v. *Barstow* (1881), 20 Ch. D. 240 they overruled their former decision in *Great Australian Gold Mining Company* v. *Martin* (1877), 5 Ch. D. 1 on one point. In *In re Hallett's Estate* (1880), 13 Ch. D. 696 they overruled the decision of the Court in *Pennell* v. *Deffell* (1853), 4 De G.M. & G. 372 on one point. In *The Bernina* (1887), 12 P.D. 58 they overruled the decision of *Thorogood* v. *Bryan* (1849), 8 C.B. 115. The Divisional Court in *Bowen* v. *Anderson* (1894), 1 Q.B. 164 overruled its former decision in *Sandford* v. *Clarke* (1888), 21 Q.B.D. 398 on a question of law. In *Fortescue* v. *Vestry of St. Matthew, Bethnel Green* (1891), 2 Q.B. 170 they overruled *Vestry of St. Mary, Islington* v. *Goodman* (1889), 23 Q.B.D. 154. And on the hearing of the appeal the learned Chief Justice said (pp. 179-80):

"We have on one or two occasions overruled decisions of the Full Court: *In re Tiderington* (1912), 17 B.C. 81; *In re Rahim*, *ib.* 276, in which the Court, consisting of IRVING, MARTIN and GALLIHER, JJ.A. and myself, overruled the decision of the Full Court in *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454, IRVING, J.A. dissenting."

Judgment

Of course, in considering whether a former decision should be overruled, the Court has always to decide whether the principle of *stare decisis* or that error should not be perpetuated is to prevail, and the principle clearly is that the Court should in each case consider whether it would be less mischievous to adhere to the error and leave it to be corrected by some higher authority or to correct the error. I venture to think that it is less mischievous to refrain from sending men to prison without the authority of law than it is to keep on doing so out of deference to an erroneous view of the law.

To sum up the matter: in view of what has taken place, I do not think that I can reasonably require the defendant to make

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another application to the Court of Appeal to reconsider its decision on the question of its jurisdiction, and therefore I have no alternative but to express my own opinion as to the legality of his imprisonment, and, indeed, I am required to do so on an application for a writ of *habeas corpus,* as pointed out by the House of Lords in *Cox* v. *Hakes* (1890), 15 App. Cas. 506.

The only conclusion I can come to is that the decision of the Court of Appeal in the present case, by which it assumed to set aside my order, was the result of a series of misconceptions and must be regarded as having been given *per incuriam,* especially as the principles laid down by the Privy Council in relation to the interpretation of the statutes were evidently not brought to their attention. If that is so, there is high authority for saying that a decision given *per incuriam* does not bind any Court. In *Sale* v. *Phillips* (1894), 1 Q.B. 349, the Divisional Court overruled its own previous decision in *Lewis* v. *Arnold* (1875), L.R. 10 Q.B. 245, and Lord Coleridge, in delivering judgment, says at p. 350:

Judgment

> "It is clear that the justices were not bound by *Lewis* v. *Arnold.* That case was decided under a misapprehension. The learned judges were not informed that an incorporated statute contained a definition of 'owner' which made the landlord liable."

But even assuming that the judgment was not given *per incuriam,* it is undeniably in the teeth of the statute of 1915, which declared the decision of the Supreme Court to be final and conclusive, which statute is of paramount authority to the decision of any Court.

For these reasons I am of the opinion that it is my duty to order the prisoner's discharge.

Prisoner discharged.

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Shipping—Salvage—Nature of services—Evidence—Ship's log—MS. notes made by master.

An amount was awarded plaintiff trawler against defendant tug on the basis of salvage services (rather than of towage services) as the services, while not in the strict sense unusually hazardous, were skilful, considerable and meritorious.

Certain MS. notes made by the master of the rescuing ship and produced by him at the trial were under the circumstances (set out in the judgment) rejected as evidence as part of the ship's log.

THE "ANDREW KELLY" v. THE "COMMODORE"

ACTION for salvage services, tried by MARTIN, LO. J.A. at Vancouver on the 4th of March, 1919. Statement

Mayers, for plaintiff.
Davis, K.C., and *Pugh,* for defendant.

8th March, 1919.

MARTIN, LO. J.A.: This is an action for salvage services rendered by the steam trawler "Andrew Kelly" (95 registered tons) to the tug "Commodore" (216 registered tons) in the North Pacific Ocean on the Alaskan Coast off Yakutat Bay, in October, 1917. Briefly, it appears that the "Commodore," bound from Valdez to Anyox, B.C., having in tow the barge "St. David," laden with copper ore, while about 60 miles southwest of Yakutat, during a heavy easterly gale had her rudder carried away and two of her four propeller blades broken about four o'clock, a.m., on October 28th, which rendered her practically helpless, and she continued to drift, leaking fast through a damaged stern post or stern bearings, and sending up and flying distress signals, with the leak increasing, and the pumping gear damaged so that the hand pump had to be resorted to, till about noon of the 29th, when the "Andrew Kelly" came to her assistance and finally made fast about 2.15 and began to tow her to Yakutat, but she broke adrift in about half an hour. The "Kelly" made fast again and towed the "Commodore" and barge for about nine hours, at a speed of about three knots, towards Cape Spencer, Cross Sound, in an Judgment

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east by south direction, which was the safest course in the existing heavy sea and wind, which had been moderating before 6 p.m., but increased thereafter, and by midnight the wind had hauled back to the eastward and was blowing a gale. Shortly after midnight, on October 30th, the tug and barge again broke adrift owing to the tug's chain cable having parted. After some inevitable delay in picking up the fouled gear in the darkness, the trawler went after the tug and, picking up her searchlight, reached her about 4.30 o'clock on the 30th and stood by her till daylight (at which time the wind had dropped but the sea was still high), and after sending a lifeboat at the request of the tug, this letter, thrown into the boat in a tin can, was sent by her master to the master of the trawler:

"Dear Captain:

"We are leaking badly, propeller and rudder gone, our main discharge pipe broken and only able to give very little assistance with our engines.

"Weather conditions very unfavourable; we are scared to get on a lee shore and have to abandon the two ships, in our opinion we think it advisable to abandon the barge, whilst you can get the crew off and proceed to some safety with Commodore.

"After reading this please pass it on to the barge Captain also state your opinion on this paper and let Capt. Bistrom add his and bring the paper back.

"[Sgd.] A. J. Bjorne."

Judgment

The master of the trawler decided to make a final effort to tow both the tug and the barge, and made fast again about 8.30, but after towing about 25 minutes towards Yakutat, then distant about 30 miles, they broke adrift again, so he decided it was impossible to tow both and sent a lifeboat to the barge and took the master and seven men off her in two trips and then made fast again to the tug for the fourth time about 2.30, and succeeded in towing her safely into Yakutat that same night about nine o'clock, after having to heave to outside owing to a heavy squall of snow which started about 5.30 off Ocean Cape.

Later the barge with her valuable cargo, worth about $370,000, was picked up by the tug "Daniel Kern," then in Yakutat, in moderate weather, but was lost for some strange reason in coming into Yakutat on a calm night. The 12 fishermen on the "Andrew Kelly" had refused to consent to look for the barge the next morning, October 31st, no more lives being in danger; on the "Kelly" there were 24 souls all told. The

injuries sustained by the "Commodore" were various and serious and were adjusted by the underwriters at $15,934.

The value of the "Commodore," exclusive of the barge, is agreed to be $75,000. A dispute arose as to the value of the "Andrew Kelly." I am of opinion that at the time of the salvage a fair valuation would be $100,000. She had also 40,000 pounds of halibut on board, her full load being 160,000 pounds.

It is not, and could not be disputed on the facts that salvage services had not been rendered, but it was suggested that they were more in the nature of towage. I am unable, however, to take that view; they were, while not in the strict sense unusually hazardous, nevertheless skilful, considerable, and meritorious, and after a careful consideration of all the circumstances, I fix the sum of $4,000 as my view of a just reward therefor.

It was truly submitted by the defendant's counsel that the services here were not of so dangerous or deserving a nature as those before me in *The Vermont Steamship Co.* v. *The Abbey Palmer* (1904), 8 Ex. C.R. 446; 9 Ex. C.R. 1, wherein the leading authorities are cited, and in which the sum of $5,500 was ultimately awarded (after an appeal caused largely, I may say, by an oversight of counsel in omitting to put forward certain items of loss to the salving ship which were not in dispute), the salving ship and cargo, valued at $350,000, having been placed in a hazardous position, yet they were of the nature indicated and the times are considerably more expensive, money, consequently, not having the same value. So I feel that if I have erred it has been on the safe side. Of course, if the barge had been salved a large sum would have been well earned.

Judgment

The award I apportion, in the exercise of my discretion, as follows, on the principles cited in *Vancouver Tugboat Co., Ltd.* v. *The "Prince Albert"* (1913), Mayers's Admiralty Law and Practice 543; 11 Encyclopædia of the Laws of England 377-8; and Kennedy on Civil Salvage, 2nd Ed., 168 *et seq.*:

To the owners (¾ths of total award)	$3,000
To the master (⅓ of the balance)	334
To the pilot, the mate, and the chief engineer, each $90	270

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March 8.

THE "ANDREW KELLY" v. THE "COMMODORE"

To the 2nd and 3rd Engineers, each $65 ..... $ 130
To the 3 firemen, 1 coal passer, 1 cook, 1 deck hand, and Robert W. Thompson, a fisherman who went in the lifeboat and appeared as a witness, in all 7 men, each $38 266

$4,000

A claim in writing has been put in signed by seven of the twelve fishermen (other than said Thompson) who were not members of the crew, asking for $75 per man, not alleging any assistance in salving but simply that they were prevented from fishing for the time occupied in salving, but no one has come forward in support of it, and I am left in the dark as to whether or no during that more or less stormy period fishing operations could have been carried on at all, or to what extent. It does not appear that any of these claimants did in fact give any assistance in the salvage service, which passengers must do before their claims can be recognized: *The Coriolanus* (1890), 15 P.D. 103; 59 L.J., Adm. 59, and moreover, they refused to go out to assist in the salvage of the barge, as above noted, though a large reward would have been reaped if successful, as was most probable. In the absence of any further facts being put forward on their behalf in the usual way (Kennedy, *supra*, 168-9) which would give these claims a meritorious complexion, I do not feel warranted in taking action thereon.

Judgment

There remains a question of evidence regarding the log. No "official log" in the proper sense of the word in the Merchant Shipping Act, Secs. 239-243 (see 8 Encyclopædia of the Laws of England, 90; Halsbury's Laws of England, Vol. 26, p. 82; Marsden's Digest 850) was kept but simply the "ordinary ship's log," section 239(3); (MacLachlan on Merchant Shipping, 5th Ed., 211); which is not evidence for the ship for which it is kept, but against it, though being

"a statement made by the master . . . . at a time being contemporaneous with the event, and, therefore, more likely to be correct it [may be] used for the purpose only of correcting a statement made at a subsequent time":

The "Singapore" and *The "Hebe"* (1866), L.R. 1 P.C. 378 at p. 382; 4 Moore, P.C. (N.S.) 271 at p. 276; *vide* also *The Henry Coxon* (1878), 3 P.D. 156; 47 L.J., Adm. 83; *The*

Earl of Dumfries (1885), 10 P.D. 31; 54 L.J., P. 7, and cases cited in Marsden's Digest, *supra*. In the ship's log in question entitled "Pilot House Log Book," kept by the master, the only entry relating to the salvage is as follows:

"Oct. 29th—10 a.m. Sited [sic] tow. 10.30 a.m. Sited tow boat with barge St. David [sic] in tow with flag at her foremast head for help.

"Oct. 31st—2.45 Left Yakutat."

There is no blank space between said dates, the entries following on, thus omitting any reference to any occurrences between the sighting, and leaving Yakutat. The plaintiff's counsel applies to have three sheets of MS. notes, produced by the master in the witness-box, admitted in evidence as part of the ship's log, on the ground that they were notes made at the time by the officer on the ship who kept the log (here the highest officer, the master), and therefore ought to be incorporated with it.

In *Bryce* v. *C.P.R.* (1907), 13 B.C. 96 at pp. 107-8; affirmed by the Privy Council, C.R. (1909), A.C. 490; 15 B.C. 510, I had to deal with the case of changes in a rough or scrap log of a nature similar to the one in question, made at the time, but what I am now asked to do is to sanction changes, by way of addition, after a lapse of more than a year and four months. Apart from all other aspects of the matter, on this ground alone I must refuse the application, being of the opinion that it would be much too dangerous to open such a door. The master has not even ventured to say that he made these notes at the time, for the purpose and with the intention of adding them to the log at the earliest opportunity; and the way in which the entry is made would discourage such a view of the matter, and this is not a case of rough notes having been mislaid and the entry being left consequentially incomplete. Apart, therefore, from other questions raised in the application of the Act and sections 260, 263-4, I think the said notes cannot be admitted in evidence as part of the log, but only to refresh the witnesses' memory apart from the same.

Judgment

Let judgment be entered in favour of the plaintiffs for $4,000 and costs.

Judgment for plaintiff.

MARTIN, LO. J.A.

1919

May 8.

THE "JESSIE MAC" v. THE "SEA LION." (No. 2.)

Costs—Costs in Admiralty—Rule same as in Admiralty Division of High Court in England—Cases of inevitable accident—Costs following event.

THE "JESSIE MAC" v. THE "SEA LION"

The rule as to costs is the same in the Exchequer Court of Canada in Admiralty as it is in the Admiralty Division of the High Court in England; and under such rule as now established, costs follow the event, even in cases of inevitable accident, where no special circumstances require a departure from such rule.

Statement

FURTHER HEARING at Vancouver on the 9th of April, 1919, on the question of costs reserved in judgment herein reported *ante* p. 394.

Robinson, for plaintiff.
Davis, K.C., for defendant.

8th May, 1919.

MARTIN, LO. J.A.: This is a further hearing on the question of costs reserved in my judgment of March 8th last, reported [*ante* p. 394], wherein the former general rule of the Court of Admiralty, to make no order as to costs in cases of inevitable accident, except where the action was unreasonably brought, is referred to and reserved for consideration.

In 1889, it was decided by the Court of Appeal in *The Monkseaton,* 14 P.D. 51; 58 L.J., P. 52, that, as under the Judicature Acts the Court of Admiralty had become a division of the High Court of Justice, there should be a uniform practice in all the divisions of the Court on the subject of costs, and, therefore, the existing general rule, that, in the absence of special circumstances, costs follow the event, should be extended to cover cases of inevitable accident, where no special circumstances required a departure from said rule.

Judgment

It is submitted by defendant's counsel that, such being the case, the rule was introduced into this Court, in common with other Colonial Courts of Admiralty, by section 2(2) of the Colonial Courts of Admiralty Act, 1900 (Imperial), passed on July 25th, 1890, wherein it is enacted that,

"The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things,

as the Admiralty jurisdiction of the High Court in England . . . . and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations."

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1919

May 8.

THE "JESSIE MAC" v. THE "SEA LION"

Such submission would therefore appear to be correct, and furthermore there is the general rule, No. 132 of this Court, promulgated and approved under section 25 of the Canada Admiralty Act, 1891, Cap. 29 of 54-5 Vict., brought into force on October 2nd, 1891, as follows:

"In general costs shall follow the result; but the judge may in any case make such order as to the costs as to him shall seem fit."

In my opinion, therefore, the rule as to costs is the same in this Court as it is in the Admiralty Division of the High Court in England, and so the costs here should follow the general rule because "there are no special circumstances requiring a departure" therefrom; as I held, *e.g.*, there were in *McArthur* v. *The Johnson* (1913), 18 B.C. 94; 23 W.L.R. 619; 14 Ex. C.R. 321; and as was held in England in *The Batavier* (1889), 15 P.D. 37; 59 L.J., P. 54.

Judgment

AUBIN v. AUBIN.

MORRISON, J. (At Chambers)

1919

Aug. 5.

AUBIN v. AUBIN

Practice—Vacation—Divorce action—Application for directions—Rule 22 of Divorce Rules.

An application for directions under 22 of the Divorce Rules will not be heard in vacation.

APPLICATION for directions as to mode of trial under rule 22 of the Divorce Rules. Heard by MORRISON, J. at Chambers in Vancouver on the 5th of August, 1919.

Statement

Haney, for petitioner.

Rubinowitz, for respondent, took objection that such an application was not of such an urgent character that it should be made in vacation.

Haney, in reply.

MORRISON, J.: This is not a vacation matter. Application dismissed without costs.

Judgment

Application dismissed.

MORRISON, J. (At Chambers)

1919

Aug. 5.

LYALL SHIPBUILDING CO. v. VAN HEMELRYCK

LYALL SHIPBUILDING COMPANY v. VAN HEMELRYCK. (No. 2.)

Practice—Writ—Service of notice of writ in foreign country—Indorsement on writ not necessary—Marginal rule 62.

In the case of service of notice of writ on a defendant, not a British subject, in a foreign country, indorsement on the writ under marginal rule 62 is not necessary.

APPLICATION to a judge at Chambers for a ruling as to the construction of marginal rule 62 of the Supreme Court Rules. The plaintiff obtained an order for service *ex juris* on the defendant, who resides in a foreign country, and under said order the defendant, not being a British subject, was served with notice of writ, and not the writ itself. The defendant failed to enter an appearance within the limited time. Counsel applied at the registry office to enter judgment by default, when the registrar took the objection that the writ would have to be indorsed under marginal rule 62 of the Supreme Court Rules. Heard by MORRISON, J. at Chambers in Vancouver on the 5th of August, 1919.

Statement

Alfred Bull, for the application: The rule only applies to cases where the writ itself is served: see *Fish* v. *Chatterton* (1882), W.N. 145; Annual Practice, 1919, p. 71.

Argument

MORRISON, J.: Indorsement is not necessary.

Judgment

LAMPMAN, CO. J.

1919

Sept. 3.

IN RE DISTRESS ACT

IN RE DISTRESS ACT.

County Court—Sheriff's costs—Bailiff under landlord's warrant—Taxation by deputy registrar—Application to review—Distress Act Amendment Act, 1913, B.C. Stats. 1913, Cap. 17, Sec. 3(3).

A judge of the County Court has no jurisdiction to review by way of appeal a taxation by the deputy registrar of a bill of costs of a sheriff acting as bailiff under a landlord's warrant.

LAMPMAN, CO. J.

1919

Sept. 3.

IN RE DISTRESS ACT

APPLICATION to the judge of the County Court to review a bill of costs taxed by the deputy registrar at Victoria. The costs were incurred by the sheriff acting as bailiff under a landlord's warrant. Heard by LAMPMAN, Co. J. at Chambers in Victoria on the 11th of July, 1919.

D. M. Gordon, for the application.
Bullock-Webster, contra.

3rd September, 1919.

LAMPMAN, Co. J.: This is a motion for a review by me of a taxation of a bill of costs taxed by the deputy registrar. The costs were costs incurred by the sheriff acting as a bailiff under a landlord's warrant, and by section 3(3) of the Distress Act Amendment Act, 1913, Cap. 17, B.C. Stats. 1913, provision is made for the taxation by a registrar or deputy registrar of the County Court. No provision is made for an appeal, but it is argued that the judge of the County Court has power to review. I do not think so. Mr. *Gordon* cited amongst other cases that of *Calgary & Edmonton Railway Co.* v. *Saskatchewan Land and Homestead Co.* (1919), 2 W.W.R. 297, but that was an action to recover costs. In the case before me I should think the matter could be raised by the applicant if the bailiff were suing to recover his costs or in an action by the applicant if he were plaintiff seeking to recover. There is nothing in the case cited to indicate that the question could have been raised on appeal. I think section 161 of the Act gives power to award costs in this matter. The applicant lost and should pay, and I fix the costs at $10.

Judgment

The motion must be dismissed.

Motion dismissed.

MORRISON, J. (At Chambers)

1919

Aug. 5.

WHEELER v. McLEAN.

Practice—Claim for damages—Specific sum—Garnishee—Marginal rules 622 and 622a.

WHEELER v. McLEAN

In an action to recover a specific sum for damages for breach of contract for delivery of goods, the claim comes within the term "debt, claim or demand" in marginal rule 622 and a garnishee order may issue.

APPLICATION for a garnishee order. Plaintiff's action is to recover a specific sum for damages for breach of contract for delivery of a specified quantity of shingles at a fixed price. Plaintiff applied *ex parte* to the registrar for a garnishee order. The registrar refused the order on the ground that the plaintiff's claim being for damages, a garnishee order could not be obtained under the rule. The application was then referred to a judge at Chambers. Heard by MORRISON, J. at Chambers in Vancouver on the 5th of August, 1919.

Statement

J. A. MacInnes, for the application: Under marginal rule 622, where an action is pending for a "debt, claim or demand" the plaintiff, on filing the proofs called for by this rule, is entitled to an order attaching "all debts, obligations and liabilities" owing to the defendant; and, under marginal rule 622a, the terms "debts, liabilities and obligations" are restricted to matters arising out of trust or contract. This restricts the classes of debts, obligations or liabilities which might be garnisheed or attached, but does not restrict the class of debt, claim or demand which might be protected by means of garnishee proceedings.

Argument

MORRISON, J.: The order is granted as applied for.

Judgment

Order granted.

THE VANCOUVER LIFE INSURANCE COMPANY v. RICHARDS.

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Sept. 15.

VANCOUVER LIFE INSURANCE CO. v. RICHARDS

Company law—Insurance company—Subscriber for shares—False representations by agent—Promissory note in part payment—Renewals—Conditions as to payment.

The defendant, on the representation of an agent of the plaintiff Company that the statutory requirements had been complied with to enable the Company to commence business, subscribed for 25 shares, paying $375 in cash and giving a promissory note for $500. The defendant alleged the agent said that demand for payment of the notes was not to be made until the Company commenced business and the note was renewed from time to time on the representation of the agent that owing to war conditions and other circumstances the Company was not in a position to commence business. The last renewal was on the 1st of May, 1916. The action was commenced on the 1st of November, 1916, for payment of the note and the Company went into liquidation on the 24th of September, 1917, without having obtained the necessary licence to commence business. In an action on the note, judgment was given for the plaintiff.

Held, on appeal, reversing the decision of RUGGLES, Co. J. (GALLIHER, J.A. dissenting), that the false representation of the agent that the Company had complied with all requirements to commence business entitled the subscriber to refuse payment of the note and to recover the money advanced in part payment of the shares, and the renewing of the note from time to time did not affect such right when the false representation continued up to the last renewal.

APPEAL by defendant from the decision of RUGGLES, Co. J. of the 3rd of September, 1918, in an action to recover $500 on a promissory note dated the 1st of May, 1916, given for the balance of the cash payment on the purchase price of shares in the plaintiff Company. The Company went into liquidation on the 24th of September, 1917. The defendant alleged that the shares were subscribed for on the representation of the Company's agent that the Company had complied with the statutory requirements necessary to commence business and that business would be started on the 1st of January, 1914. These representations were first made by the Victoria agent of the Company in October, 1913, when the defendant decided to take shares, paying $375 in cash and giving a note for $500

Statement

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Statement

for the balance, the agent stating that demand for payment of the note would not be made until the Company had actually commenced doing business. This note was renewed every three months, the agent representing on each occasion that owing to war conditions and other circumstances the Company had not completed its arrangements to commence business, the final renewal being on the 1st of May, 1916. The statutory conditions precedent to the commencement of business by the Company were never complied with and the Company never actually commenced business. The defendant counterclaimed for the return of the cash payment of $375.

The appeal was argued at Victoria on the 19th and 20th of June, 1919, before GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

E. J. Grant, for appellant: The action was commenced in 1916, and the Company went into liquidation on the 24th of September, 1917. My submission is (1) there was misrepresentation; (2) there was total failure of consideration, and (3) the action was misconceived. After liquidation they got leave *ex parte* to proceed with the action. The renewal notes were not to be paid until a shareholders' meeting. As to misrepresentation, the agent stated the $50,000 deposit required to do business was put up and the proof that they had no licence is sufficient to shew the money was not deposited, as that is the last act before issue of licence. Cannon, who made the representations, was a sub-agent. As to failure of consideration, the provisional directors cannot allot shares and we got nothing for our money. On the question of proper allotment see *In re Homer District Consolidated Gold Mines. Ex parte Smith* (1888), 39 Ch. D. 546; *In re Haycraft Gold Reduction and Mining Company* (1900), 2 Ch. 230. The proper procedure is by the Winding-up Act and not by action: see Winding-up Act, R.S.C. 1906, Cap. 144, Secs. 47 and 49; Lord's Dominion Winding-up Act, p. 109. The representations continued up to the final note: see *S. Pearson & Son. Limited* v. *Dublin Corporation* (1907), A.C. 351 at p. 356; *International Casualty Co.* v. *Thomson* (1913), 48 S.C.R. 167; 11 D.L.R. 634 at p. 637; Kerr on Fraud and Mistake, 4th Ed., 43-4; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187

at p. 201. If a person makes a statement not intended to be fraudulent, if one might reasonably take a certain meaning from it, he is answerable: see *Eisler* v. *Canadian Fairbanks Co.* (1912), 8 D.L.R. 390; *Derry* v. *Peek* (1889), 14 App. Cas. 337. Likewise as to a statement which is unfounded see *Pioneer Tractor Co., Ltd.* v. *Peebles* (1913), 15 D.L.R. 275. As to the influence of the various statements on the mind of the purchaser see *Edgington* v. *Fitzmaurice* (1885), 55 L.J., Ch. 650 at pp. 652-3. As to whether there was merely a promise or a representation see *Clydesdale Bank* v. *Paton* (1896), A.C. 381 at p. 394; *Aaron's Reefs* v. *Twiss, ib.* 273 at pp. 281 and 284. There was failure of consideration: see *Kettlewell* v. *Refuge Assurance Company* (1908), 1 K.B. 545; *Wells* v. *Hopkins* (1839), 5 M. & W. 7; *Hooper* v. *Treffry* (1847), 16 L.J., Ex. 233. With relation to the renewal note, total failure of consideration is a new defence: see *Bullion Mining Co.* v. *Cartwright* (1905), 5 O.W.R. 522; 6 O.W.R. 505; *West* v. *Browning* (1914), 19 B.C. 407.

Craig, K.C., for respondents: As to consideration, there was the application of Mrs. Richards. She concedes she purchased, and if she has the rights and liabilities of a shareholder there is consideration. On the question of fraud see *Nocton* v. *Ashburton (Lord)* (1914), A.C. 932 at pp. 949 and 957-8. It must be remembered this note was renewed every three months for nearly three years. The manager of the Company was in hopes, but he never definitely said they would do business. The evidence that the note was not to be paid at maturity is not admissible. There is no evidence that the $50,000 was not deposited with the Government. As to the contention that Mrs. Richards should have been put on the list of contributories instead of bringing action see *Westmoreland Green and Blue Slate Company* v. *Fielden* (1891), 3 Ch. 15. This was an accrued cause of action and can be proceeded with on leave, and leave was granted. The evidence shews Mrs. Richards knew the true conditions of the Company from the start, and was never deceived in any way.

Argument

Grant, in reply.

Cur. adv. vult.

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15th September, 1919.

GALLIHER J.A.: The evidence of the defendant and her daughter is clear and definite that Cannon, the plaintiff's agent at Victoria at the time the application for shares was made, stated that the $50,000 required to be deposited before a licence would be issued to commence business was actually deposited with the Government; that she could not lose her money, as this money would be returned if they failed to write business and would be available. Cannon was not called at the trial, and there is no contradiction of this. If Cannon had been called and had contradicted this, I would have been inclined to think that Mrs. Richards and her daughter must have been mistaken in their understanding of what was said, as the deposit of this $50,000 was the last thing necessary to be done before procuring licence to do business, but Mr. *Craig,* in his cross-examination of these witnesses, evidently, with that in mind, put it up to the witnesses very definitely as to whether the statement was not "that it had to be deposited," but elicited only further confirmation. I feel that I must accept the uncontradicted statement of these witnesses. I think it is sufficiently proved that no such deposit was at the time made and has not since been made. The statement, therefore, was false and misleading, and was an inducing cause to enter into the contract, according to the evidence.

GALLIHER, J.A.

But there is this further point to consider: the note sued on is a renewal of two notes given some months after the fraud sworn to by Mrs. Richards and her daughter, was perpetrated. These notes were procured by Van Sickle from the defendant through her husband, acting at that time and since as her agent. What took place at that time is set out in the evidence of Mr. Richards, and is in these words:

> "He came and asked if I would obtain from Mrs. Richards two notes for $250 each, representing the sum of $500 which was the balance on an application for some shares which they had obtained from her in the Vancouver Life Insurance Company. The money was to have been paid on the 15th January, 1914, on certain conditions, but the conditions had not been fulfilled and he then wanted to obtain notes for the $500 so that the application might be kept alive, as he explained it to me. He said they had difficulties in completing the organization, but that in another 60 days why they would be fully completed and able to do business."

After taking the application, Cannon seems to have dropped out of it, and all future transactions as to renewals of these notes, of which there were a number, were carried on between Mr. Richards and Van Sickle. Can it be said from the above evidence and the general tenor of the whole evidence, and the conduct of the parties, that Mrs. Richards or her agent were aware that this condition had not been fulfilled at the time these notes were taken or at the time any of the renewals were obtained, and had elected to waive the fraud and go on with the contract? I find some difficulty in deciding this point. The learned trial judge has given no reasons, but I think we must assume that he either found no fraud, or that there was a waiver of the fraud and an election to go on with the contract.

In view of what took place at the time of signing the notes and at the time of the different renewals of same, I cannot rid my mind of the view that the defendant, knowing that the conditions had not been fulfilled, was, like Van Sickle himself, hoping that the necessary subscriptions would be obtained, and elected to keep the contract alive.

As to the representations made by Van Sickle to Mr. Richards. Where it was known, as it was here, that certain sums had to be subscribed and certain amounts paid up before the business of writing insurance could be commenced, or even a meeting of shareholders could be held, and that these sums were dependent on the success of obtaining subscriptions, any statements as to when they would be ready to do business was and must have been known to Mr. Richards to be problematical; in other words, they were not direct statements of a fact, and this is all the stronger from the number of times the original note was renewed. At most, as I view it, it was the expression of a belief, and I see no reason to class that belief as dishonest. Moreover, there is a direct conflict of evidence between Van Sickle and Richards.

As to failure of consideration. The appellant relies (amongst other cases) on *Bullion Mining Co.* v. *Cartwright* (1905), 5 O.W.R. 522, affirmed on appeal to the Divisional Court, 6 O.W.R. 505. In that case there never was any allotment or issue of any of the stock contracted for. In the case at bar the

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stock was allotted, notice of allotment given, and the defendant was entered in the books of the Company as entitled to the stock. It is true no certificate of title to the stock has been issued, but it has been held that stock is issued when allotment is made, notice given and the transaction entered in the books of the Company. The position then is that the defendant purchased stock in the Company and had that stock issued to her. It turns out that the stock is worthless and that the Company failed to qualify to do business, and, in fact, cannot qualify, as the Dominion Government, from which the charter was obtained, have refused an extension of time. I do not think it can be said that the defendant did not get what she purchased. If she did, then there is no total failure of consideration, as argued.

In *Lambert* v. *Heath* (1846), 15 L.J., Ex. 297 at p. 298, on a rule *nisi* for a new trial on the ground of misdirection, Baron Alderson, with whom the other learned Barons concurred, held that the question for the jury was not whether the scrip purchased was genuine, but whether it was the scrip intended to be sold and bought, and made the rule absolute for a new trial.

GALLIHER, J.A.

On the last ground, action was brought before the winding-up proceedings were instituted, and the defendants pressing the plaintiff either to proceed or discontinue, the liquidator applied for and obtained an order to proceed with the action. The parties went to trial, and after judgment an application was made by the defendant to have the official liquidator removed, but no order was taken out, the parties apparently having agreed that the appeal to this Court should be proceeded with and in the meantime the liquidation should be stayed. The appeal books were settled and the matter came on for hearing before us. Under these circumstances I think the objection fails.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal discloses a manifest case of fraud and misrepresentation, and the fraud and misrepresentation continued throughout the whole time and in connection with all the dealings of the agents of the respondent with the appellant. I do not consider it necessary, in view of the patent case of fraud established, to in detail review all the evidence taken, or make any analysis of it, but will content myself with only a

few references. Before I do so, I cannot help remarking upon the effrontery, I would say the temerity, of the respondent in even attempting to recover upon the promissory note sued upon. I can only conclude that the learned trial judge, in giving judgment in the action for the Company (the respondent), must have decided that although there was fraud, that after the knowledge thereof the defendant (the appellant) elected to be bound by the contract to take the shares and had, in some way, by subsequent conduct, precluded objection being taken to the imposition practised upon her by the agents of the Company. The learned trial judge gave no reasons for judgment, and with great respect to the learned judge, I find myself unable to arrive at any such conclusion. The organization of the Company, so far as it went, which was no distance at all (as it never was in the position to have a meeting even of shareholders, nor had it in any way complied with the statutory requirements), was the launching upon the public of a professed company capable of doing business, a wholly fictitious position, and in fraud of the investing public, the appellant being one, moneys were obtained on the sale of shares to the extent of $65,000, of which all, or nearly all, *viz.*, $57,000, was taken by the agents of the Company for commissions, and not devoted to the purpose for which such moneys should have been legitimately devoted, *i.e.*, the establishment of the Company upon the basis called for by statute. The Company never achieved the position of being able to write insurance, and failed to make the necessary statutory deposit which, amongst other things required to be done, was a condition precedent to the commencement of business, although the agents of the Company specifically represented to the appellant time and again that all the statutory requirements had been complied with, and thereby induced the appellant to give the promissory note sued upon as well as the promissory notes which preceded it, the one sued upon being the last renewal, the fraud practised being maintained to the end, and at the end, when the appellant failed to give any further renewal, the action was brought, and the appellant then for the first time became aware of the fraud practised upon her. The Company is now in liquidation, never having arrived at the posi-

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tion of commencing business, the resolution to wind up being passed on the 22nd of September, 1917. The shares, 25 in number, par value of $100 per share, were sold at a premium of $25 per share, and the appellant paid in cash $375, a promissory note being given for $500. The appellant has met the action by the allegation of fraud, and counterclaimed for rescission and delivery up of the promissory note and return of the money paid, and in my opinion the appellant has, upon the facts, established her right to this form of relief (see *International Casualty Co.* v. *Thomson* (1913), 48 S.C.R. 167; 11 D.L.R. 634).

One specific misrepresentation made which induced the giving of the promissory note was the statement that the Company had made the required statutory deposit of $50,000 with the Government. It was strongly pressed at this bar that there was long delay or laches which disentitled the appellant to now set up fraud and ask for rescission, but upon all the facts and circumstances attendant upon this fraudulent transaction and foisting upon the public of this Company and no knowledge of the fraud perpetrated upon her until asked for a further renewal note, I cannot persuade myself that there can be any bar to the giving of the relief claimed by the appellant, and upon this point of laches I would refer in particular to the following cases: *Armstrong* v. *Jackson* (1917), 2 K.B. 822; *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate* (1899), 68 L.J., Ch. 699; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1279.

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As to interference with the judgment of the trial judge, even if it could be interpreted he did not find fraud, or that the judge found there was an election by the appellant to abide by the contract, I would refer to *Barron* v. *Kelly* (1918), 56 S.C.R. 455; *United Shoe Manufacturing Co. of Canada* v. *Brunet* (1909), 78 L.J., P.C. 101 at p. 104.

I would, therefore, for the foregoing reasons allow the appeal, the action to be dismissed, and upon the counterclaim the appellant is entitled to rescission and the delivery up of the promissory note to be cancelled and the return of the money paid,

together with interest thereon from the date of payment, with costs here and in the Court below.

EBERTS, J.A. would allow the appeal.

Appeal allowed, Galliher, J.A. dissenting.

Solicitors for appellant: *Bass & Bullock-Webster.*
Solicitor for respondent: *W. G. Anderson.*

IN RE WINDING-UP ACT AND BANK OF VANCOUVER.

Practice—Company—Winding-up—Change of liquidator's solicitor—Court's approval—R.S.C. 1906, Cap. 144, Sec. 35.

Where a solicitor selected by a liquidator in the work of winding up a company has been acting up to the time of his selection for claimants in the winding-up, his selection may be approved if he first relinquishes acting for such claimants.

In assigning reasons for a change of solicitors, it is sufficient for a liquidator to state that the change is in the best interests of the winding-up.

APPLICATION for approval of solicitor for liquidator under section 35 of the Winding-up Act. Heard by MORRISON, J. at Chambers in Vancouver on the 31st of October, 1919. Statement

Mayers, for the application.
Cowan, K.C., contra.

MORRISON, J.: On the 30th of March, 1915, an order was made by the Chief Justice to wind up the Bank, and Mr. Ewen Buchan was appointed liquidator. Mr. Buchan thereupon, on the same day, selected George H. Cowan, K.C., as solicitor to assist him in the work of winding-up, and applied to the learned Chief Justice for approval thereof, pursuant to section 35 of Judgment

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the Winding-up Act, which order was made. Upon the decease of Mr. Buchan an order was made appointing Mr. Robert Kerr Houlgate as liquidator, Mr. Cowan still remaining as solicitor in the winding-up proceedings. On the 28th of August last began the following correspondence:

[Certain correspondence is here quoted by the learned judge as to the new liquidator's desire to have Mr. Robert Smith act as his solicitor, and as to the handing over of the papers to him on Mr. Cowan's costs being paid, and as to the question of the necessity of the Court's approval of Mr. Smith's appointment.]

This is an application, on behalf of the liquidator herein, to approve the selection of Mr. Robert Smith, a solicitor, to assist him in the performance of his duties as liquidator in place of Mr. Cowan, the gravamen of the material in support being the allegation that it will be in the best interests of the winding-up to have the change effected.

It is alleged in reply that at any rate Mr. Smith may not get the sanction of the Court, inasmuch as he, or the firm of which he is a member, are acting as solicitors for a claimant whose claim is contested by the liquidator. In a case of that kind, the solicitor, before approval, must elect whether he shall relinquish his client and devote his services, at least as regards that claim, wholly to the prosecution of the winding-up. Mr. *Mayers,* on behalf of Mr. Smith and his firm, has done so. The fact alone that a solicitor selected by a liquidator has been acting up to the time of his selection for claimants in the winding-up is, in my opinion, not sufficient ground for the Court to withhold approval. I do not read the judgment of Boyd, C. in *Re Charles Stark Company* (1893), 15 Pr. 471 at p. 472, cited by Mr. *Cowan,* as going so far as to hold otherwise. Nor do I think it is necessary for the liquidator, who is an officer of the Court, to go farther than he does in assigning reasons for a change of solicitors. I fear it would not be in the best interest of the proper winding-up to force the services of a solicitor upon the liquidator. So that the question is not, whether the liquidator may be allowed to change the solicitor, but it is this, whether the solicitor, whom he has designated, shall be the one to succeed Mr. Cowan?

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For the reasons above stated and having regard to the very proper attitude taken by Mr. *Cowan,* as disclosed by the correspondence, I hereby sanction the appointment of Mr. Robert Smith as solicitor to the liquidator.

Application granted.

IN RE LEE QUONG KIP.

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Practice—Security for costs—Appeal—Chinese Immigration Act—Court of Appeal Act—B.C. Stats. 1913, Cap. 13, Sec. 6.

Whether an order should be made under section 29 of the Court of Appeal Act for security for the costs of an appeal is a matter that is within the discretion of the Court.

APPLICATION by respondent, the controller of Chinese immigration, to compel the appellant Lee Quong Kip to furnish security for costs of appeal. Heard by MORRISON, J. at Chambers in Vancouver on the 31st of October, 1919. The appellant is an applicant for admission to Canada as a student. Before leaving China he caused to be deposited with the Immigration Department the sum of $500 head-tax, pursuant to the provisions of the Chinese Immigration Act. A letter of acknowledgment was duly issued by the Immigration Department at Ottawa under date the 27th of May, 1918, and signed by W. D. Scott, Chief Controller of Chinese Immigration, stating that when the appellant arrived at Vancouver or Victoria he would be admitted if found upon examination to be mentally, morally and physically fit. The appellant was examined by immigration officials at the Port of Vancouver on the 25th of April, 1919, and ordered to be deported as being a prohibited immigrant under order in council P.C. 1183, which prohibits the landing at any port of entry in British Columbia of any immigrant of any of the following classes, *viz.*: artisans,

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labourers, skilled and unskilled. An appeal was taken to the Minister of Immigration and dismissed. The appellant then moved for a writ of *habeas corpus,* which was refused by MURPHY, J. He then appealed to the Court of Appeal. The respondent thereupon demanded security for costs, and upon refusal, moved for an order for security under section 29 of the Court of Appeal Act. Counsel for the appellant opposed the motion on the ground that section 29 was not imperative, and that where the liberty of the subject was at stake the Court would not compel security, quoting Lord Esher, M.R. in *Hood Barrs* v. *Heriot* (1896), 2 Q.B. 375.

Reid, K.C., for the application.
J. H. MacLeod, contra.

Judgment

MORRISON, J.: The application is dismissed. The rule is not imperative and in the special circumstances of this case such an order would work a hardship on the appellant, and might deprive him of his rights.

Application dismissed.

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IN RE BEFOLCHI, AN INFANT; BEFOLCHI v. BEFOLCHI.

Husband and wife—Custody of child—Parents living apart—Not voluntarily — Discretion — Equal guardianship of Infants Act, B.C. Stats. 1917, Cap. 27, Secs. 11, 12 and 13.

When parents are living apart without any voluntary arrangement the Court has jurisdiction under section 13 of the Equal Guardianship of Infants Act to make an order as to eusody of an infant.

In making such an order although the Court should have regard to the conduct of the husband and wife respectively, the primary consideration is the welfare of the infant.

Per MARTIN, J.A.: An application under section 13 of the Act should be by notice of motion.

Statement

APPEAL by respondent from the order of MURPHY, J. of the 22nd of May, 1919, on the petition of Amelia Befolchi

under the Equal Guardianship of Infants Act, granting her custody of her child. The petitioner and Dominic Befolchi were married in 1914, and a child was born in December, 1915. The petitioner complained that owing to her husband's misconduct and ill-treatment she left him without his consent, taking the child with her, and the husband later (in January, 1919) took the child away from her and still had the child in his possession at the time of the hearing of the petition. No proceedings had been taken for judicial separation or for divorce.

C. L. Harrison, for the petitioner.
F. C. Elliott, for the respondent.

21st May, 1919.

MURPHY, J.: I have been much puzzled as to what I should de herein. The mother, I think, on all the facts is not entirely justified in refusing to return to her husband, though she has some just causes of complaint. What I have to regard, primarily, is, the welfare of the child. It is very young and needs the care of its mother or of some woman interested in it or who is under the eye of the father, or of some one who is bound to it by ties of blood. The father has only been able to place it with strangers, whom he got in touch with by advertising. On the other hand, the home the mother can give is not without objection. There are but two rooms and these now have four occupants, two children and two adults. After much consideration I have concluded it will be best for the child to have its mother's care. I, therefore, grant her the custody of the child for the present. Liberty is reserved to the father at any time to apply to have such custody transferred to him on his being able to shew that such transfer is for the child's advantage. The father is to have access to the child as often as he desires. If this matter cannot be arranged between the solicitors for the parties, it is to be again spoken to. For their guidance, I state it is the intention of the Court the father should see as much of the child as he desires, consistent with no too great disarrangement of the mother's home affairs.

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From this decision the respondent appealed. The appeal was argued at Vancouver on the 6th of November, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

F. C. Elliott, for appellant: There is want of jurisdiction to make the order. The Court can act with relation to the custody of the children under section 11 only when the husband and wife are living apart voluntarily and, under section 12, in case of a judicial separation or a divorce. There are no grounds for a judicial separation or divorce. The Court can act in case of separation only when there is mutuality. The trial judge refuses to discuss the evidence as to the husband's conduct and the evidence shews she continued to live with him after the alleged acts of infidelity. She later left her husband and refused to live with him. Section 13 is only for the purpose of effectuating sections 11 and 12, and does not extend the jurisdiction.

C. L. Harrison, for respondent, not called upon.

MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): This is an appeal from the order of Mr. Justice MURPHY granting the custody of a child of between three and four years of age, to the mother, the father and mother having separated. It is contended that the separation is not a voluntary one, because the wife left the husband, as she alleges, because of his ill-treatment of her, and if the learned judge believed her story she had ample reasons for leaving him; but it is said that, applying the conditions of the Act passed in 1917, Cap. 27, an Act which is cited as the Equal Guardianship of Infants Act, that the Court has no jurisdiction to make an order of this kind unless it were alleged in the notice of motion, or petition, that the parties were living apart voluntarily. That raises the question which lies at the threshold of these proceedings and involves the consideration of sections 11 and 13 of that Act. I say nothing as to section 12, which has been referred to by counsel, because I think it has no application to this case. It provides for something that the law provided for before the section was passed. It has to do with judicial separations and decrees, either *nisi* or absolute,

in divorce. In such cases the Court had power to deal with the custody of infant children, in such proceedings; therefore, the question is really one of the construction of sections 11 and 13.

Now, it is true that section 11 reads that if the husband and wife are living apart voluntarily they may make an agreement as to the custody of the children, and in the absence of such agreement or on its termination, either the husband or wife may apply to the Court for an adjudication as to the guardianship of the child. As I have already intimated, Mr. *Elliott* contends that because of the use of the word voluntarily, the section has no application to a case where the wife has been compelled by the ill-treatment of the husband to leave him; but whether that be so or not under section 11, as to which I express no opinion, section 13 is not shackled by any such expression as the word "voluntarily." The sections have no direct reference to one another, and while it has been suggested by counsel that they are interdependent, I do not think the true intention of the Act would be given effect to by so reading them. Then, if that be so, there is no difficulty about the question of jurisdiction. If section 13 stood alone, counsel would not, I think, argue that the Court below had no jurisdiction to entertain an application of the kind. I am, therefore, of opinion that the learned judge below had, on the facts of this case, jurisdiction.

The other question involves the correctness of the decision on the merits to which the learned judge came. I have no hesitation at all on this branch of the case. If the wife's story be true, she was quite justified in leaving the husband, and if her story be true, she is a perfectly proper person with whom to leave the custody of the child. If her story be true, the husband is a most improper person to have the custody of the child; and, as I say, the learned trial judge, hearing the witnesses and observing their demeanour in the box, was at liberty to accept her story as against the denial of the husband. But the case does not hinge altogether upon the conduct or morals of the wife or the husband. It hinges primarily on this consideration, is the order made one for the benefit of the infant? That is the question which, under this statute as

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under the law as it stood before, where there were proceedings in Court by way of judicial separation or divorce, the Court has to consider as the primary question. That is the primary consideration, and upon that question the learned judge has expressed himself in very clear and concise terms. He came to the conclusion that it was in the interest of the child that the mother should have the guardianship, and Mr. *Elliott* has not brought to our attention, in my opinion, anything which throws doubt upon the correctness of the conclusion to which the learned trial judge came on that question. That being so, the appeal should be dismissed. Neither upon the question of jurisdiction nor upon that of the merits is the appeal entitled to succeed.

MARTIN, J.A.

MARTIN, J.A.: Since this case is one of wide and special domestic interest as affecting the rights of parents in their infant children, I think it desirable to reduce to writing the reasons which induced me to agree with my learned brothers in dismissing this appeal from the order of Mr. Justice MURPHY, dated the 22nd of May, 1919, made under the Equal Guardianship of Infants Act, Cap. 27, B.C. Stats. 1917, whereby he gave the mother the custody of her only child, a boy, then aged nearly three and a half years, "until further order," with liberty to the father "to have access to the said infant child at all reasonable times." The parties were married on February 15th, 1914, according to the rites of the Roman Catholic Church, and lived in Victoria, and separated on January 20th, 1919, when the wife left her husband finally, after repeated acts (as she alleges for her excuse for so doing) of brutality and immorality, and went to her mother's home, taking the child with her, but a few days after the father came and took the child away, and had the custody of it at the time of said order. On March 3rd last, the wife presented a petition to the Court under the said statute, praying that the custody of the child should be given to her, and after hearing various witnesses at considerable length, the learned judge below made the order above mentioned.

Two questions are raised on this appeal, *viz.*: (1) The juris-

diction to make the order; and (2) If there were jurisdiction, the manner in which the discretion it conferred was exercised.

With respect to the first: That depends upon sections 11 and 13 of the said Act, and it was submitted that where a wife leaves her husband and refuses to return to him, she has no *status* to apply for the special relief thereunder. Section 12, I may here observe, has no application to this case, but refers, perhaps by way of precaution, to the powers the Court already possesses in cases of divorce or judicial separation. Section 11 applies to cases where the "husband and wife are living apart voluntarily" (whatever that expression may be found to mean) and to the arrangements by agreement in writing that may then be made, and also to applications to the Court to terminate such arrangements, or in the absence of them, for an adjudication of guardianship; it has obviously no application to the case at bar, where the voluntary element is absent. But section 13 goes much further, and provides generally:

"The Court may, upon the application of either parent of an infant, make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, or any guardian."

This is a new and wide jurisdiction, unfettered by the question of "living apart" or of agreement under section 11, and confers a very beneficial power upon the Court, which may be speedily and inexpensively exercised by "application" in the usual way, which I remark should be by notice of motion, that being the ordinary and proper way, unless a petition or other proceeding is specially required—*cf.* rule 696. No circumstance has been brought to our attention that would have prevented the learned judge below from entertaining such application and, in my opinion, his jurisdiction is beyond doubt, and entirely distinct from the element of "living apart" voluntarily under section 11, which the appellant's counsel sought to invoke

There being, then, jurisdiction, this brings me to the second point: the exercise of the discretion thereby conferred. The statute gives the Court a very wide discretion, empowering it to "make such order as it may think fit . . . . having regard to the welfare

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of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father . . . ."

The rule is, that where there are "proper materials" before a Court for the exercise of its discretion it should not be interfered with, even in ordinary cases, as the Privy Council decided in *Dominion Trust Company* v. *New York Life Insurance Co.* (1919), A.C. 255; 88 L.J., P.C. 30; (1918), 3 W.W.R. 850, and much less in cases of this description, where, as I read the statute, a specially wide discretion is conferred. Now, it cannot be seriously contended that there were not abundant "materials" before the learned judge below upon which he could have exercised his discretion in the way he has done, and therefore we are not justified in interfering with it when he decided on all the facts that—

"it will be best for the child to have its mother's care. I, therefore, grant her the custody of the child for the present. Liberty is reserved to the father at any time to apply to have such custody transferred to him on his being able to shew that such transfer is for the child's advantage."

MARTIN, J.A.

It was much pressed upon us that sufficient "regard" had not been given to the conduct of the wife in leaving her husband. The learned judge's view upon that point was that though she had "some just cause of complaint" she was "not entirely justified in refusing to return to her husband"; he does not say, nor was he called upon to say, in what respect he thought she had fallen short of entire justification of her refusal, but after reading the evidence it might well be that his conclusion was based upon the view that the highest religious obligations of her church called upon her to endure a little longer the sort of treatment she had undergone. It is not necessary, however, to pursue that subject, because the learned judge has undoubtedly had "regard" to the various elements that the statute requires him to consider, the prime one of which is the welfare of the child in the ever-varying circumstances of each case.

I am, therefore, of the opinion that the order made below should be affirmed and the appeal dismissed.

GALLIHER, J.A.

GALLIHER, J.A. (oral): I agree in dismissing the appeal on both grounds.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I am of the opinion the appeal cannot succeed. The question of the guardianship of infants

is one of long history under the law of England, and one that has had considerable attention in this Province, and this Province is in advance of the mother country and sister Provinces in its legislation. In the Province of British Columbia the Legislature has undertaken to say that up to the age of 21 years the judiciary in this Province shall have discretion as to who shall have the custody of the infant. Under the law of England, in the statute well known to lawyers, Serjeant Talfourd's Act, 2 & 3 Vict., Cap. 54, the discretion of the judiciary of England did not extend beyond the age of 7 years. The law of Ontario came under consideration in the case of *Smart* v. *Smart* (1892), A.C. 425; 61 L.J., P.C. 38, and it was there shewn that the Legislature of the Province of Ontario had advanced the age to 12 years; and, as I have indicated here, our Legislature has advanced the age to 21 years.

Admittedly, this is an infant under the age of 21 years; in fact, only between the age of 3 and 4 years, and section 13 of the Equal Guardianship of Infants Act, Cap. 27, B.C. Stats. 1917, stands as a positive enactment, giving the Court jurisdiction without any indication as to what should be the condition of things, other than infancy.

Now, in this particular matter, it would seem to me that the conduct of the parties (of the father and the mother) can only be looked at with relation to, and with regard to, the welfare of the infant. There is no law that I know of which will compel a husband and wife to live together, although they are married. If it should be that there is a child, as in this case, and there is no law which can compel a husband and wife to live together, necessarily there must be some provision made for the welfare of the infant, and that is that the Court shall take into consideration the welfare of the infant. It is true that in arriving at that decision the Court necessarily has to take into consideration the conduct of the husband and the wife, it is a proper matter for inquiry; and in this particular case the learned trial judge apparently has come to the conclusion, upon the facts, that the custody of the mother is the better custody.

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The tender years of this child (between 3 and 4 years of age)

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is a matter for consideraton. It would take a very strong case indeed for a Court of Appeal to say that the learned judge had come to a wrong conclusion. It is a popular error that the father has the right of absolute custody of the child—it is not now the law. Parliament has declared otherwise. There may be hardship in the matrimonial state incapable of being smoothed over, and it may become a matter of impossibility to continue living together; and if separation takes place it follows that the child's welfare must have consideration, and the question is, what is the best course, considering the welfare of the child?

Now, in *Smart* v. *Smart* (1892), A.C. 425, Lord Hobhouse dealt with the question of law, and at p. 433 said:

"In the next year, the case of *Warde* v. *Warde* [(1849)], 2 Ph. 786, was decided by Lord Cottenham, and it illustrates both the direct and the indirect effect of Talfourd's Act. There the wife had left home, taking her children with her, on account of her husband's misconduct. He applied to the Court to have the children delivered up to him, which Shadwell, V.-C., ordered to be done. There were four children, two above and two under seven years of age, which was the line drawn by Talfourd's Act. On appeal, Lord Cottenham pointed out that the Court had now an absolute authority over the younger children."

MCPHILLIPS, J.A.

And in this Province the Court has absolute authority up to the age of 21 years. Recently, in the Province of Ontario, a case was under consideration where all the authorities were dealt with. It came before Mr. Justice Clute, in *Re Wilkites* (1919), 45 O.L.R. 181; 15 O.W.N. 434. The head-note is:

"Upon a contest between the father and mother of a child, a girl of 11 years, as to her custody, it was *held*, that the mother was justified by the misconduct of her husband, the father, in leaving him, and that, having regard to the welfare of the child, the custody should be awarded to the mother."

Therefore, upon the whole, and considering the facts of this case, it is not one in which I think we should disturb the judgment of the learned judge in the Court below. I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. (oral): I do not think that there is anything I can add to what my brothers have said. I would dismiss the appeal. Although there does seem to be some difference in the power under section 11 and section 13, section 11 deals

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with reference to guardianship of infant children which, under this very Act, is retained under section 24 of the Act:

"Nothing in this Act shall be construed to restrict the jurisdiction of the Supreme Court, or any Judge thereof, with respect to the appointment or removal of guardians of infants."

It is not only the custody of the infants that is taken into consideration but other aspects are taken into consideration also; but I think that under section 13 of the Act passed in 1917, known as the Equal Guardianship of Infants Act, Cap. 27, the Court has a very general and a wide and expansive power with reference to the custody of children; and his Lordship in the Court below has no doubt proceeded under that section, and had the evidence all before him and exercised his discretion with reference to the proper place to put this child, and I for one would think very seriously before I would attempt to override that discretion.

EBERTS, J.A.

Appeal dismissed.

Solicitors for appellant: *Courtney & Elliott.*
Solicitor for respondent: *C. L. Harrison.*

REX v. LOW CHUNG.

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REX v. LOW CHUNG

Constitutional law—Municipality — By-law — Prohibitive, discriminatory and unreasonable—Grounds for declaring by-law ultra vires.

Where express power to pass a by-law is conferred by the Legislature the objection that it is prohibitive, discriminatory and unreasonable must go so far as to establish that the passage of the by-law was brought about, not in good faith as an honest exercise of the power conferred, but in abuse thereof for ulterior purposes and that it goes beyond what was intended to be allowed by the Act.

MOTION to quash a conviction for carrying on the business of a peddler in Vancouver without having first obtained a licence under by-law No. 1361, passed by the City Council on the 27th of May, 1919. It was contended by counsel for the

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motion that the by-law in question was *ultra vires,* on the ground that it was prohibitive, discriminatory and unreasonable. Heard by CLEMENT, J. at Vancouver on the 7th of November, 1919.

R. L. Maitland, for the motion.
Orr, contra.

CLEMENT, J.: Mr. *Maitland* contends that the by-law is *ultra vires.* In my opinion, this contention is not well founded and the motion must, therefore, be dismissed, with costs.

As to the objection that the by-law is prohibitive, discriminatory and unreasonable: Express power to pass such a by-law as the one in question having been conferred by the Legislature, the objection must go so far as to establish that the passage of the by-law was brought about not in good faith as an honest exercise of the power conferred, but in abuse thereof for ulterior purposes. No such suggestion has any support in the evidence before me or in the by-law itself: *City of Montreal* v. *Beauvais* (1909), 42 S.C.R. 211. As Darling, J. expressed it in *Arlidge* v. *Islington Borough Council* (1909), 78 L.J., K.B. 553 at p. 559, one must be driven to say, "this by-law does go beyond what was intended to be allowed by the Act of Parliament under which it purports to have been made."

Judgment

The objection there was as to the unreasonableness of the by-law; but, in my opinion, the principle enunciated by Mr. Justice Darling is the principle underlying all these cases as to prohibitory, discriminatory or unreasonable by-laws. It is a question of *intra* or *ultra vires.*

There is, in my opinion, nothing in the point that section 2 of the by-law is not in terms limited as to its operation to the City of Vancouver. By law it is so limited, just as the operation of an Act of our Provincial Legislature is limited to this Province.

A number of the provisions of the by-law were attacked as *ultra vires,* but, without suggesting that the objections were well founded, I need only say that the various impugned clauses are, in my opinion, severable from the main enacting clause,

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and cannot affect its validity. None of those clauses touch the present case.

Like the learned magistrate, I have been troubled only by the question as to the delegation to the licence inspector of the power to grant or refuse licences in the first instance; but, on consideration, I agree that the by-law works no real delegation: *Elves* v. *McCallum and City of Edmonton* (1916), 28 D.L.R. 631.

The absence of any definite by-law as to the office of licence inspector does not invalidate this by-law. The provision for such a by-law is permissive merely, and does not operate to take away the ordinary power of the Council to appoint, by resolution or otherwise, the necessary administrative officials for carrying on civic business: *Bernardin* v. *The Municipality of North Dufferin* (1891), 19 S.C.R. 581.

Judgment

On the whole, the motion fails, and must be dismissed, with costs.

Motion dismissed.

BROWN v. DELMAS.

CAYLEY, CO. J.

1919

Nov. 19.

BROWN v. DELMAS

Landlord and tenant—Unfurnished house—Habitable condition—Express warranty—Implied warranty—Right to rescind.

The plaintiff and his wife entered an unfurnished house with a view to renting it and finding the owner's daughter house-cleaning on the premises, asked her if the house was clean, to which she replied, that it was. Being then told that the house could not be held for them, they decided to take it at once and paid down a month's rent. They entered into possession but two days later, finding there were bugs in the house, they left the premises and the husband brought action for return of the rent and expenses incurred in moving.

Held, that the answer to the plaintiff's question as to cleanliness only amounted to a statement that the premises had been swept and scoured after the outgoing tenants had left and was too indefinite to base a claim for express warranty.

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Held, further, that in the absence of express warranty, in the renting of an unfurnished house there is no implied warranty that the premises are free from bugs.

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ACTION for the return of rent paid for a house on a monthly tenancy and for expenses incurred in moving to and from the premises. The plaintiff rented the house in question, which was unfurnished, at $18 per month, and paid the first month's rent in advance. He entered into possession and two days later, finding there were bugs in the house, quitted the premises. Tried by CAYLEY, Co. J. at Vancouver on the 19th of November, 1919.

Statement

G. L. MacInnes, for plaintiff.
Downie, for defendant.

CAYLEY, Co. J.: In the pleadings it was claimed by the plaintiff that defendant's agent had represented that the premises were clean and in a habitable condition. I do not find this borne out by the evidence. The plaintiff and his wife had been house-hunting, and on looking at this house both liked the appearance, and finding the defendant's daughter house-cleaning on the premises, asked her to hold it for them until they made up their minds. This defendant's daughter refused to do, whereupon the plaintiff, apparently fearful of losing the opportunity, paid $18 cash down and took the house. The plaintiff, or his wife, asked if the premises were clean (whether before or after the payment was made does not appear), and defendant's daughter told them they were clean. This would only amount to a statement that the premises had been swept and scoured after the outgoing tenants had left. It is too indefinite to base a claim for an express warranty upon, much less a representation inducing the plaintiff to lease. There was no written lease.

Judgment

The evidence as to bugs was as follows: The plaintiff found on the first night of sleeping in the house that there were bugs on the ceiling and wall. He left precipitately. The house was bought two or three months later by a Mr. Blake, who testified that on taking possession he found two bugs on the ceiling

or wall. Having killed the two bugs, the purchaser, who had at the time of the trial been occupying the house with his family for two months, found no further trace of bugs. This leaves it doubtful whether the house could be said to be "infested" by bugs. But I do not think it necessary to decide this question, as, in the absence of express warranty, the decided cases do not seem to support the view that in renting an unfurnished house there is any implied warranty or contract that the premises are free from bugs. The only case which would seem to support this view is *Smith* v. *Marrable* (1843), 12 L.J., Ex. 223, which was the case of a furnished house. Parke, B. decided in that case that there was an implied condition that the house was in a habitable state. He based his decision on *Edwards* v. *Etherington* (1825), Ry. & M. 268, and *Collins* v. *Barrow* (1831), 1 M. & Rob. 112. Afterwards, in *Hart* v. *Windsor* (1843), 12 M. & W. 68, he said that he and the other judges felt satisfied that *Edwards* v. *Etherington* and *Collins* v. *Barrow* were not law, and that his judgment in *Smith* v. *Marrable* could not be supported on the authority of these two decisions. He further says in *Hart* v. *Windsor, supra,* that *Smith* v. *Marrable* was the case of a demise of a ready-furnished house for a temporary residence at a watering place, thus throwing further light on the reason of the decision in *Smith* v. *Marrable;* also at p. 86 (*Hart* v. *Windsor*):

Judgment

"There is no implied warranty on a lease of a house, or of land, that it is, or shall be, reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property."

In *Sutton* v. *Temple* (1843), 12 M. & W. 52 at p. 60, Lord Abinger, C.B. explains the reason for the decision in *Smith* v. *Marrable,* that the letting was of a house and furniture, and in such case the contract is for a house and furniture fit for the lessee. Baron Parke, in the same case, explains that the bargain is not so much for the house as the furniture.

In *Wilson* v. *Finch-Hatton* (1877), 46 L.J., Ex. 489 at p. 494, Kelly, C.B. distinguishes clearly between the letting of a furnished and an unfurnished house, holding that in the case of a furnished house it is an implied term that the house shall be "reasonably fit for habitation from the very first day of the

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term," an implication not incident to the letting of an unfurnished house.

Bunn v. *Harrison* (1886), 3 T.L.R. 146: There was an express warranty. Here I hold there was no express warranty. Judgment must, therefore, be for the defendant.

Judgment for defendant.

MURPHY, J.

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Nov. 25.

HORSNAIL v. SHUTE

HORSNAIL v. SHUTE.

Vendor and purchaser — Negotiations by correspondence — Agreement for sale in contemplation—Convenience—Contract—Special case.

When the correspondence in negotiations for the sale of land contains all particulars essential to a final and complete contract it is binding, although it appears from the correspondence that the parties desired an agreement in writing for the purpose of convenience.

APPEAL by defendant from the decision of MURPHY, J. on a special case agreed to by the parties in an action for specific performance of an agreement for the sale of certain orchard lands at Day Lake, near Penticton, B.C., tried at Vancouver on the 29th of September, 1919. The defendant, the owner of the lands, who resides at Yarmouth, Nova Scotia, advertised the property for sale in a Penticton paper, and the plaintiff, who resided in Penticton, seeing the advertisement, commenced a correspondence with the defendant with a view to purchasing. The letters relevant to the issue were as follows:

Statement

"Penticton, B.C.,
"May 30th, 1918.

"Dear Sir,—In reply to your letter dated Jan. 23rd *re* your orchard at Day Lake, Penticton. I have just seen Mr. Burpee who very kindly shewed me over the orchard, and gave me particulars *re* varieties, etc. The irrigation rates have now gone up to $42 per year and rates about $25. Mr. Burpee also informed me that out of the 163 pear trees 130 are D'Anjou Pear which have never had any fruit, they blossom but never come to anything and practically only 50 pear trees are bearing. The best terms that I could make an offer to you on should I decide upon

yours as I have the offer of several in the market here and would give you an answer one way or another about 10 days to a fortnight after the receipt of your letter in answer to this. The following terms proposed: Cash $400; Jan., 1919, $400; Jan., 1920, $400; Jan., 1921, $400; Jan., 1922, $400; Jan., 1923, $400; Jan., 1924, $400; Jan., 1925, $400; Jan., 1926, $300; total, $3,500.

"If all deferred payments are paid up by Jan., 1922, a rebate of the last $300. The above terms to include all work that has been done upon the orchard up to date. Of course if I should be in a position to pay off more than the $400 per year you can rely upon my doing so as it would be my one object to have it cleared as soon as possible.

"Your early reply will greatly oblige.

"Yours truly,

"E. J. Horsnail."

"F. Shute, Esq."

"June 8th, 1918.

"E. J. Horsnail, Esq.,

"Penticton, B.C.:

"Dear Sir,—I beg to ackowledge receipt of your letter of May 30th. I am willing to favourably consider the terms you proposed providing all payments (except the cash payment) bear interest at the rate of 6% per year until paid and I will agree to rebate the 1926 payment of $300 with interest on it providing that all the deferred payments with interest are paid up by the end of January, 1922. If you care to have the agreement for sale drawn up as per your letter please do so and forward it here. I shall submit it to my solicitors and have them complete same. If you require the deed sent for inspection I can arrange to send it to The Bank of Montreal, Penticton, B.C. and can arrange to have the deed and agreement for sale deposited there during the next few years. This offer will hold during the month of June, 1918.

"Yours truly,

"F. Shute."

Statement

"Penticton, B.C.

"June 19th, 1918.

"Dear Sir,—Many thanks for yours of 8th inst., which I did not receive until the evening of the 17th owing to a large land slide this side of the Rockies delaying all mail for three or four days. I am seeing my solicitor today to prepare agreement for your completion. I was under the impression that I mentioned 6% would be paid on all deferred payments, however, I certainly agree to that. I will have agreement of sale forwarded on to you without delay.

"Yours truly,

"E. J. Horsnail."

"F. Shute, Esq.,

"Yarmouth, N.S."

The action was commenced on the 23rd of August, 1918, and by a conveyance executed on the 12th of September, 1918, and registered on the 5th of October following, the defendant conveyed the lands in question to one William G. Boskin.

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On the special case agreed to by the parties the following questions were submitted for the opinion of the Court:

"(1) Whether the aforesaid advertisement of sale and letters and telegrams do or do not constitute an agreement for sale of the said lands binding on the defendant with sufficient particulars to comply with the requirements of the Statute of Frauds?

"(2) If the answer to the aforesaid question be in the affirmative, did the defendant break or repudiate the agreement or disable himself from performing the same?

"If the Court shall be of opinion in the affirmative of the said questions, then judgment shall be entered for the plaintiff for damages to be determined by the registrar of the Court, together with costs. If the Court shall be of opinion in the negative of the said question (1), then judgment shall be entered for the defendant with his costs of defence."

Griffin, for plaintiff.
Alfred Bull, for defendant.

10th October, 1919.

MURPHY, J.: I would answer both questions in the affirmative. The letter of May 30th, 1918, taken in conjunction with the previous correspondence, constitutes, I think, a clear-cut offer outlining all essential terms. The letter of June 8th, read as a whole accepts, with one addition, this offer. The reply of June 19th, 1918, agreed to this addition, and as a result a binding contract came into existence. I do not agree with the contention that the offer of June 8th, 1918, would only be accepted by forwarding the acceptance in the form of an agreement for sale. The reference to having an agreement for sale drawn up and forwarded was, I think, merely a suggestion as to the manner of speedily closing the matter if the offer was accepted.

MURPHY, J.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 25th of November, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Alfred Bull, for appellant: The essential elements of a contract are entirely absent. There was no definite offer; and secondly, there was in answer a variation of the terms: see *McMillan* v. *Cameron* (1917), 24 B.C. 509; *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311. The learned judge takes the

Argument

letter of the 30th of May as a binding offer, but it is not: see Halsbury's Laws of England, Vol. 7, pp. 345-6; *Oppenheimer* v. *Brackman* (1902), 9 B.C. 343; 32 S.C.R. 699. The letter of the 30th of May is purely tentative. As to variations in terms see *Hyde* v. *Wrench* (1840), 3 Beav. 334; *Winn* v. *Bull* (1877), 7 Ch. D. 29 at p. 32; *Conley* v. *Paterson* (1912), 2 W.W.R. 34 at p. 35. There was no agreement as the parties had in contemplation a formal agreement. There was a clear intention that they were not to be bound until the formal agreement was assented to: see *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124 at p. 1149. Matters were still in negotiation.

Griffin, for respondent: The three letters constitute an agreement. The agreement for sale was necessary only for registration purposes. The letter of the 30th of May contains all the ingredients of an offer. The law supplies the incidents of the contract on a sale of land. The letters contain all the necessary terms: see *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295 at p. 303; *North* v. *Percival* (1898), 2 Ch. 128; *Love and Stewart (Limited)* v. *S. Instone and Co. (Limited)* (1917), 33 T.L.R. 475 at p. 476.

Argument

Bull, in reply: There was no acceptance in the letter of the 19th of June.

MACDONALD, C.J.A.: In my opinion the questions should be answered as they were answered by the learned judge from whom this appeal is taken. In general, I agree with the reasons of Mr. Justice MURPHY. Without agreeing altogether with what he says with respect to the letter of the 30th of May, my opinion is this, that taking the letter of the 30th of May and the one of the 8th of June, and the letter of the 19th of June together, and perhaps we might include in that, the letter of the solicitors of the 19th of June, they constitute a binding contract, and that all the terms which are essential to a valid sale of land are contained in that contract. So that if the matter had ended on the 19th of June, and the plaintiff had then brought his action upon this contract, he would have been entitled to specific performance. But it is said that because the parties apparently contemplated the execution of a formal contract, the agreement aforesaid cannot be given effect to.

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Now, while such formal contract was drawn up, it was not executed. I think the facts bring this case within *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124, wherein Lord O'Hagan said at p. 1149:

> "But where an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made."

The correspondence with reference to the formal contract shews that it was to be made for the purpose of convenience. The parties desired a formal contract no doubt for the purpose of registration, which is important in this Province, particularly as the parties did not contemplate an immediate conveyance. Mr. *Bull* urged strongly that because this was a sale in which the purchase-money would be payable in instalments, that the English cases did not apply, that a distinction should be drawn between cases where the purchase-money was to be paid by instalments and where a sale was made for cash. I do not see that there is any such distinction, where the correspondence, as in this case, sets forth specifically the date of payment, and the amount of the instalments. I see no reason for drawing such distinction in such a case.

MACDONALD, C.J.A.

If I am right in this, then the mere fact that a mistake was made by the solicitor in using the word "June" instead of "January" as the month in which payment of the instalments was to be made, in the draft formal contract, has no bearing on the question at all.

The appeal is dismissed.

MARTIN, J.A.

MARTIN, J.A.: I agree in dismissing the appeal and adopt the expressions of Lord O'Hagan which have just been stated in this case, and are referred to in *McMillan* v. *Cameron* (1918), 1 W.W.R. 836 at p. 838.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in dismissing the appeal. Counsel are not at variance in the law, on the points raised, and therefore the whole question is to determine whether or not, on the letters, there was a concluded agreement, and in my view of

those letters, there was no need for a written agreement, and I would therefore dismiss the appeal.

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McPHILLIPS, J.A.: In my opinion the appeal cannot succeed. After all, what the Court has to determine is the intention of the parties, and that in this case has to be gathered from the correspondence. No question of non-compliance with the Statute of Frauds arises. Apparently all the essential terms of a contract for the sale of land are here, and it is what is understood in law as an open contract for the sale of land. I adopt in full the language of Lord Loreburn in *Love and Stewart (Limited)* v. *S. Instone and Co. (Limited)* (1917), 33 T.L.R. 475 at p. 476:

"It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of further terms."

Further he says:

MCPHILLIPS, J.A.

"It seemed also that they intended to make a firm bargain and not to make it conditional upon the completion of the formal document."

In this case it seems to me the intention was to make a firm bargain. Lord Loreburn further says:

"The inclusion of such a term would make no difficulty, if it could be said that by usage or by previous dealing or by law these parties, in binding themselves to a strike clause, bound themselevs to something certain, because *id certum est quod certum reddi potest.* But no one said, and no proof was given, that it was so. There might be various kinds of strike clauses."

I can see nothing upon which we could declare that the Court below had gone wrong, and that is what we have to find to allow the appeal. I would, therefore, dismiss the appeal.

EBERTS, J.A.: In my opinion there was a contract embodied in the letters of the 30th of May and the 8th of June and the 19th of June between the parties, and I would therefore dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitor for appellant: *Alfred Bull.*

Solicitor for respondent: *W. E. Haskins.*

MORRISON, J.
(At Chambers)

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SUTOR v. McLANE.

Practice—Examination for discovery—Appointment—Registry of issue—Marginal rule 370f.

SUTOR
v.
McLANE

Appointment for examination for discovery must be taken out in the registry of the county in which the party to be examined resides.

APPLICATION to dismiss action on the ground that plaintiff failed to attend on appointment for examination. Heard by MORRISON, J. at Chambers in Vancouver on the 25th of November, 1919.

Statement

The writ was issued in the Vancouver registry, the plaintiff being a resident of Chilliwack. The defendant took out an appointment in the Vancouver registry to examine plaintiff for discovery and plaintiff failed to attend.

Congdon, K.C., for the application.

Argument

Matheson, contra, took the preliminary objection that under marginal rule 370f, Supreme Court Rules, the defendant should take out appointment in the registry where plaintiff is residing, in this case New Westminster.

MORRISON, J.: I think marginal rule 370f is explicit. A party wishing to examine must take out appointment in the county where the party resides. Preliminary objection sustained.

Judgment

Application dismissed.

BANK OF MONTREAL v. CRUICKSHANK.

MORRISON, J. (At Chambers)

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BANK OF MONTREAL v. CRUICKSHANK

Practice—Pleading—Counterclaim—Marginal rule 288.

Where an action is brought against a defendant personally, he may counterclaim in his representative capacity as assignee of an estate, provided the counterclaim can be conveniently disposed of in the action.

APPLICATION by plaintiff to strike out certain paragraphs of the defence and the counterclaim. Heard by MORRISON, J. at Chambers in Vancouver on the 19th of November, 1919. Statement

Symes, for the application.
Armour, K.C., contra.

MORRISON, J.: The Bank of Montreal made certain advances to one Fraser, carrying on business at Alberni as a timber manufacturer, and took, as security for these advances, logs felled and bucked in the woods. Pursuant to the agreement, giving such security, the plaintiff, on the 18th of November, 1918, seized and took possession of the said logs, etc. On the 30th of November, Fraser assigned for the benefit of his creditors to the defendant Cruickshank, who also proceeded, in due course, to fell and buck logs alleged to belong to the plaintiff, as above, and to convert them to his own use. The plaintiff commenced this action, claiming $15,000 damages from the defendant. The defendant pleads in paragraphs 4 and 5 that anything he did, respecting the property in question, he did as assignee for Fraser and he counterclaims against the plaintiff for compensation alleged to be due him owing to the conduct of the plaintiff in obstructing and interfering with his carrying on the operations of the mill and on other grounds, all alleged as arising out of and pertaining to the security given by Fraser to the Bank for the advances. The plaintiff now applies to strike out paragraphs 4 and 5 of the defence, as well as the counterclaim, Order XXV., r. 4, and relies on *Macdonald* v. *Carington* (1878), 4 C.P.D. 28. As Judgment

MORRISON, J. (At Chambers)

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Judgment

I take the argument of counsel, the struggle centred around the question as to whether the defendant could counterclaim except where the claim against the plaintiff arises against him in the same right as that in which he sues.

"The general spirit of the Judicature Acts is to prevent multiplicity of litigation, and especially to prevent multiplicity of procedure, and to enable parties to settle, so far as may be, by one hearing and one judgment, all questions in controversy between them":

Fry, J. in *Beddall* v. *Maitland* (1881), 17 Ch. D. 174 at pp. 181-2. You may raise almost any claim you like as a counterclaim, and it need not be connected with the plaintiff's claim provided it be one which can be conveniently disposed of in the pending action, thus obviating the necessity of bringing a separate action: Order XIX., r. 3; *Beddall* v. *Maitland, supra.* That being so, I do not think that *Macdonald* v. *Carington, supra,* relied upon by Mr. *Symes* for the plaintiff, applies to the circumstances of this application. Since the offending paragraphs are not to be struck out, I refrain from making any statements as to their cogency as a defence. Application refused, with liberty to all parties to amend to meet the exigencies of the case, if so advised.

Application dismissed.

LAMPMAN, CO. J.

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Nov. 25.

REX v. LEE DUCK

REX v. LEE DUCK.

Criminal law — Appeal — Prohibition Act — Conviction by magistrate — Having liquor in wagon for delivery—Liquor incased in boxes—No knowledge of contents of boxes—B.C. Stats. 1916, Cap. 49, Sec. 41.

The accused at the request of another Chinaman took two cases of Chinese liquor in his wagon, intending to deliver them at another Chinaman's house in Chinatown, Victoria. The liquor was found in the wagon when in his possession on the street. The uncontradicted evidence of the accused was that he had no knowledge of the contents of the boxes. Accused was convicted of having liquor in a place other than his private dwelling-house.

Held, on appeal, that under section 41 of the British Columbia Prohibition Act when the prosecution proved that accused had in his wagon the cases of liquor it could rest and then if the accused offered no evidence

he might be convicted but if he did offer evidence which shews his innocence, the section appears to be framed for the double purpose of making convictions easy and acquittals of the innocent possible. The accused having proved his innocence, the appeal should be allowed.

LAMPMAN, CO. J.

1919

Nov. 25.

REX v. LEE DUCK

APPEAL by accused from a conviction for having liquor in a place other than a private dwelling-house in contravention of the provisions of the British Columbia Prohibition Act. Argued before LAMPMAN, Co. J. at Victoria on the 15th of September, 1919.

Statement

Lowe, for the accused.
C. L. Harrison, for the prosecution.

25th November, 1919.

LAMPMAN, Co. J.: Lee Duck, who is the driver of an express wagon, appeals against his conviction for that he did on the 30th of June last have liquor in a place other than his private dwelling-house, to wit, in a wagon in Cormorant Street, contrary to the provisions of the British Columbia Prohibition Act.

The accused had, at the request of another Chinaman, brought two cases of Chinese liquor from Parsons Bridge to town, to be delivered to the other Chinaman's house in Chinatown. I do not think the house was a private dwelling-house. There were no marks on the boxes to indicate the nature of the contents, and I can see no good reason for disbelieving the statement of the accused that he was not aware of the contents. The question then arises, must he nevertheless be convicted? Mr. *Harrison* contends that guilty knowledge is not necessary. Whether it is necessary or not depends, of course, on the construction of the whole Act, and while I am inclined to think that guilty knowledge is not necessary, I do not think that it follows that an accused must be convicted when guilty knowledge is negatived. There is a very wide distinction between the two propositions.

Judgment

In *Cundy* v. *Le Cocq* (1884), 13 Q.B.D. 207, it was held in the prosecution under the Licensing Act, 1872, of a publican for selling intoxicating liquor to a drunken person, that the prohibition imposed by the statute was absolute, and that knowledge of the condition of the person served with liquor was not

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necessary to constitute the offence. [The learned judge quoted the judgment of Stephen, J. at p. 209 down to the word "sober" in the fifth line on p. 210, and continued]:

It will be observed that there, in the case of a *bona fide* mistake, the magistrate could make the punishment fit the crime. In our Prohibition Act he must be fined at least $50 if found guilty. But our Act contains a section which is unlike any under consideration in *Cundy v. Le Cocq* and the other cases following along the same lines. I refer to section 41, which is as follows:

"If in the prosecution of any person charged with committing an offence against any of the provisions of this Act in selling or keeping for sale or giving or keeping or having or purchasing or receiving of liquor, *prima facie* proof is given that such person had in his possession or charge or control any liquor in respect of or concerning which he is being prosecuted, then, unless such person prove that he did not commit the offence with which he is so charged, he may be convicted accordingly."

This seems to me to exactly fit the case here. When the prosecution proved that accused had in his wagon the cases of liquor it could rest, and then if accused offered no evidence he might have been convicted. But he did offer evidence which shewed his innocence. The section seems to me to have been framed for the double purpose of making convictions easy and acquittals of the innocent possible.

Judgment

This seems to me a reasonable construction, for otherwise the most appalling things might happen. Suppose, for instance, a man finds a package on the street and picks it up and on opening it a bottle of whisky is revealed, has he committed an offence for which he is liable to a fine of $50? If the contention of the prosecution is correct, he has.

In my opinion, the accused has proved his innocence, and his appeal must be allowed, with costs, which I fix at $25 and disbursements.

Conviction quashed.

THE KING v. BARTON.

MURPHY, J.

1919

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THE KING v. BARTON

Distress—Seizure—Sheriff's costs—Charges for man in possession—Actual possession—R.S.B.C. 1911, Cap. 65, Sec. 21—B.C. Stats. 1913, Cap. 17, Sec. 3.

Under section 3 of the Distress Act Amendment Act, 1913, the sheriff is not entitled to charge for a man in possession where goods are distrained under a distress warrant, unless he has remained in actual possession.

Lumsden v. *Burnett* (1898), 2 Q.B. 177 applied.

MOTION for a writ of *certiorari* to remove into the Court a record of taxation by the deputy registrar of the County Court at Victoria, whereby a bailiff's costs for levying distress, under distress warrants given by Frederick Norris and W. J. Palmer against the goods and chattels of one George D. Davis, were taxed, and for an order that the taxation be quashed. On the taxation, the deputy registrar allowed a claim for a man remaining in possession of the goods when in fact no person was left in actual possession after seizure. An application had previously been made by Palmer in the County Court for a review of the taxation on the 11th of July, 1919, when it was held by LAMPMAN, Co. J. that there was no appeal (see *ante* p. 446). The motion for the writ was heard by HUNTER, C.J.B.C. on the 17th and 23rd of October, 1919, when he held, following *Reg.* v. *Saunders* (1854), 3 El. & Bl. 763 and *Rex* v. *Woodhouse* (1906), 2 K.B. 501, and disapproving *The King (War Sec.)* v. *Goff* (1905), 2 I.R. 121, that the deputy registrar had acted in a judicial capacity and *certiorari* was the proper remedy. An order absolute was made for the writ to issue. After issue of the writ and return thereto on the 17th of November, 1919, Palmer obtained from MURPHY, J. an order *nisi* to quash the taxation and the registrar's certificate in so far as it allowed possession money to the sheriff, made returnable on the 24th of November, 1919, when the motion was heard at Victoria by MURPHY, J. Statement

D. M. Gordon, for the application.

Bullock-Webster, contra.

25th November, 1919.

MURPHY, J.: *Lumsden* v. *Burnett* (1898), 2 Q.B. 177 decides that by the Distress (Costs) Act, 1817 (57 Geo. III., Judgment

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c. 93), the collector who distrains has no right to the statutory charge for a man in possession unless he has remained in real possession. It is contended that the *ratio decidendi* of said case is to be found in the concluding words of the section there discussed:

"No person or persons whatsoever shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule, unless such act shall have been really done."

Section 21 of the Distress Act, R.S.B.C. 1911, Cap. 65, concludes thus:

"No person shall make any charge for anything mentioned in the said Schedule, unless such thing has been really done."

By section 3 of Cap. 17, B.C. Stats. 1913, said section 21 was repealed and the following (so far as relevant here) substituted:

"No person shall be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto, other than those specified in and authorized in Schedule A to this Act."

The omission of the words providing that no charge is to be made for anything mentioned in the schedule "unless such thing has been really done" it is argued, renders *Lumsden* v. *Burnett* not applicable. A careful study of section 21, as re-enacted, makes me conclude these words were omitted because they would be redundant. Said section prescribes (a) fees, charges or expenses for levying a distress; (b) fees, charges or expenses for doing any act or thing in relation thereto. This case does not, I think, fall within (a), for levying a distress which necessarily imports impounding the goods may be accomplished and continued without a man always remaining in possession of the goods (*Jones* v. *Biernstein* (1899), 81 L.T. 553). Here no man was in actual possession. If the collector is entitled to the disputed charges he must be so under (b), for said section 21 expressly prohibits any allowances not therein set forth. Now, fees, charges or expenses under (b) must be for doing any act or thing in relation to levying a distress. What act or thing did the collector do entitling him to make a charge for a man in possession? He clearly, on the evidence, abstained from actually putting anyone in possession.

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On the language of section 21, therefore, I am of opinion that these charges questioned are illegal, and must be disallowed.

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NASH v. CITY OF VICTORIA

Damages—Negligence—Collision—Highway—City fire-truck—Right of way—On wrong side of road—Motor-traffic Regulation Act, R.S.B.C. 1911, Cap. 169, Secs. 36 and 37.

A city fire motor-truck driving south on Moss Street in the afternoon to a fire on Fairfield Road, on nearing Fairfield Road swung over to the right side of Moss Street to make the turn into Fairfield Road easterly. The plaintiff's son was driving an automobile easterly on Fairfield Road and on turning north on Moss Street was immediately after turning struck by the fire motor-truck. The driver of the fire-truck was sounding a siren and had slowed down to make the turn. The driver of the automobile swore he did not hear the siren as he was sounding his own horn at the time and his attention was directed to another truck coming north on Moss Street.

Held, that the accident was due to the defendant's driver having swung over to the wrong side of the road contrary to section 36 of the Motor-traffic Regulation Act and that the driver of the automobile was not guilty of contributory negligence.

A by-law under section 37 of the Motor-traffic Regulation Act providing that the driver of a vehicle shall in approaching any street intersection give the clear right of way to a person driving a vehicle and approaching such intersection from the left, does not entitle a person so approaching from the left to the right of way if he is not complying with the requirement of section 36 of said Act that he drive on the left hand side of the road.

ACTION for damages through a collision between a fire motor-truck of the City of Victoria and an automobile belonging to the plaintiff. The facts are set out fully in the head-note and reasons for judgment. Tried by MACDONALD, J. at Victoria on the 19th of September, 1919. Statement

J. R. Green, for plaintiff.
Pringle, for defendant.

27th November, 1919.

MACDONALD, J.: Plaintiff complains that, on the 5th of June, 1919, the firemen, in charge of defendant's motor truck, negligently collided with his automobile, causing it serious damage. It appears that, on the afternoon in question, a fire motor-truck was being driven along Moss Street, in the City of Judgment

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Victoria, towards a fire on Fairfield Road. Arthur Nash, son of the plaintiff, was driving his automobile at the time, in an easterly direction along Fairfield Road, and the accident occurred while he was turning into Moss Street.

Various grounds of negligence were alleged against the defendant Corporation, which admitted its liability for the actions of the employees in charge of the truck. As to such employees not giving warning of their approach, I find that they sounded a siren for some considerable period, before reaching the corner, where the collision occurred. Further, that they were not disregarding the legal rate of speed at the time of the collision. I am satisfied, however, that such motor-truck was, in breach of the statute, on the wrong side of the road when the collision occurred. In coming down Moss Street with the intention of turning the corner and going easterly along Fairfield Road, I think the driver of such truck, with a double purpose, lessened the speed. First, to enable him more easily to turn the corner, which was greater than a right angle and thus not difficult. Then, for convenience, to allow the men, on the rear of the truck, to couple the hose up with the hydrant near the corner of Fairfield Road and Oscar Street. To accomplish these objects, he swung over from his proper side of Moss Street, beyond the middle of the road, to the right hand side. The Motor-traffic Regulation Act (R.S.B.C. 1911, Cap. 169) provides, by section 36, that every person having charge, or control, of a motor on any highway shall "drive always on the left-hand side of the road." There is no qualification to this enactment. Even if this rule of the road be not inflexible, so as to completely govern all accidents on the streets, where negligence is in question, still, it imposed a duty to be more careful. I do not think it should be deviated from, when approaching an intersection of streets, except where absolute necessity arises. In my opinion, there was no necessity for the driver of the motor-truck to break the rule, as he could, without undue difficulty, have kept to the proper side of the highway, as he was about to turn to his left up Fairfield Road. It was not a case of simply "cutting the corner." There was an absence of reasonable care on his part amounting to negligence, which contributed to the accident.

It is contended, that the motor-truck should not have been driven, or used, on the highway at the time, and was virtually trespassing, as it had not been registered and licensed in pursuance of the Motor-traffic Regulation Act. This latter allegation was a fact, and the section enacting this provision, as to user of a motor, is as follows:

"(9) No person shall have, drive, or use a motor on or along any highway unless such motor has been registered and licensed pursuant to this Act. . . . . ."

The City of Victoria is a "person" within the Act, and is not exempt from licensing its motors. Dealing generally with the contention, if it be accepted as the law, and there is certainly authority, under a similar statute, to support it, the result is, that in the event of a collision on the streets, the rights of redress would be affected, not only of the owners of motor-cars who have failed to obtain licences, but also the large number who neglect to renew their licences for a month or more at the advent of a new year. See, in this connection, *Etter* v. *City of Saskatoon* (1917), 3 W.W.R. 1110; 39 D.L.R. 1. However, it is unimportant for me to expressly decide this particular point, as in the face of my finding, that the defendant's motor-car was being unnecessarily and negligently driven on the wrong side of the road, at the time of the accident, it would not add any weight to the liability of the defendant to hold that the car should not, without being licensed, have been in use on any portion of the highway.

It was submitted that, even if negligence were found against the City, still, that the conduct of Arthur Nash, the plaintiff's son, in driving his motor, at the time of the accident, was such as to constitute contributory negligence and relieve the defendant from liability. It was argued that he had failed to comply with the provisions of the Streets By-law of the City of Victoria and should have given the clear right of way to the fire motor-truck. This by-law provides, that every person driving any vehicle or motor-vehicle, upon the streets shall, in approaching any intersection, or junction of another street, give the clear right of way to any person driving any vehicle approaching such intersection from the left side of such first-mentioned person. This precaution, in different language, is termed "pro-

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tecting parties approaching on the left." The by-law was passed under section 37 of the Motor-traffic Regulation Act, which expressly provides that any by-laws passed thereunder, regulating traffic and motors on highway, are subject to the rules of the road as defined in such Act. Thus, in construing the by-law, as to the duty of a person so approaching an intersection of another street, I think that he is only required to observe the rights of those who are approaching him on the left and lawfully using the highway. As the driver of the motor-truck was not complying with the rules of the road, I do not think he was entitled to the right of way. The provision is a good one, and tends towards safety in motor traffic. The party approaching the intersection is able to see a motor coming up on his left on the opposite side of the street he is approaching, but, as in this case, if such motor be driven on the wrong side, his view would be obstructed until the corner was reached. So, in my opinion, the by-law has no application in this case.

Then, was Arthur Nash so careless, when he approached the corner, as to relieve the defendant? It is improbable that he would turn the corner and meet the heavy motor-truck on this narrow street, if he had seen it in time to avoid the collision that would most likely occur. It appears that as he proceeded down Fairfield Road, he had not fully determined, whether he would reach his destination by crossing Moss Street, or turn to the left and pursue another course. He observed a car, driven by one, Racher, coming up Moss Street on the right, and being in doubt whether such motor would obey the by-law, and give him right of way or not, he made up his mind not to cross in front of such car, but to turn up Moss Street. The corner is a most dangerous one, being at a very acute angle, and his view on the left, as he approached the corner, was obstructed by a board fence and then a small shack, to within five or seven feet of the corner. He was sounding his horn, and, coupled with the noise of the car, it is quite likely he did not hear the siren of the fire motor-truck, as it approached the intersection. He lessened the speed of his car to avoid any collision with the Racher car, and, in applying his brakes the car skidded forward and inclined towards the curb. Then,

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when he made up his mind to proceed, it is contended that he was negligent in not observing the motor-car coming down Moss Street on his left. His attention was directed towards the Racher car and he was doubtless busy releasing his brakes, so as to carry out his intention of turning the corner. The pavement on Moss Street, where the accident occurred, is only 28 feet in width, but I am satisfied that the turn round the corner, required to be made by Nash, could, considering his slow rate of speed, even in this narrow space, have been accomplished so as to avoid another motor-car coming down Moss Street on the proper side of the street. In this connection, as to what should be present to the mind of a driver of a motor, under such circumstances, I may appropriately, by transposing the names of persons and streets, adopt a portion of the judgment of Robson, J. in *Toronto General Trusts Corporation* v. *Dunn* (1911), 20 Man. L.R. 412; 15 W.L.R. 314 at p. 320, as follows:

"Nash, then, had a right to expect that any person driving an automobile along Moss Street would comply with the statute and otherwise exercise a proper degree of care."

Nash says he did not see the motor-truck coming until he was making the turn, and the substance of his evidence, on this point, is that the accident occurred so suddenly, that he could not avoid the collision. There was some conflict in the evidence as to facts surrounding the collision, the sounding of the horns, the speed of the cars and their location from time to time, and particularly their position just prior to the accident. I have already dealt with some of these points, but the last important one was covered by Wm. Grotchell, a witness for the defence. He is in business on Fairfield Road, and saw both cars before and at the time of the accident. He had previous experience with street traffic, through having been at one time a point policeman in London, England. On that account, he was probably not excited at the time, and should be able to give an accurate account of what took place. He says, there was no excuse for either party not seeing one another, but they were too close to avoid the accident. He was viewing the occurrence from across the street at an angle, and while he doubtless, with every honest intention, estimated, with some degree of certainty, the distance covered by Nash, prior to his slowing up and his car

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skidding, still, it did not fully satisfy me that there might not be an element of error, as to the point at which Nash stopped, prior to his determining to turn the corner. Young Nash impressed me favourably, and I accept his statement that he knew he was required to use every precaution, and as he approached the corner, looked from side to side, to see if any one was coming. Further, that while turning the corner, and on his proper side of the road, he encountered the motor-truck. I do not think that the onus of shewing contributory negligence, on the part of the plaintiff, which rests upon the defence, has been satisfied. The fault of the employee of the defendant caused the accident.

Judgment

Plaintiff is entitled to damages, and a fair amount to allow would be $700. There will be judgment accordingly for the plaintiff, with costs.

Judgment for plaintiff.

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O'BRIEN v. KNUDSON *ET AL.*

Mortgage—Money borrowed by an unincorporated Order—Personal covenant to pay by trustees—Action on covenant—Defence of mutual mistake—Evidence—Rectification.

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The defendants acting as trustees for an unincorporated Order, executed a mortgage on the Order's property, under a covenant in which they rendered themselves personally liable for payment of the debt. In an action by the mortgagee on the covenant to pay the three defendants testified (in which they were corroborated by the secretary of the Order who was present) that when about to sign the mortgage in the office of the mortgagee's solicitor in the presence of the plaintiff, the solicitor assured them that they were not to incur personal liability for the debt. The solicitor died prior to trial and the plaintiff at the time was residing in the United States, her evidence not having been obtained. Judgment was given for the plaintiff and a counterclaim for reformation of the mortgage was dismissed.

Held, on appeal, reversing the decision of BLACK, J., *pro tem.* (MCPHILLIPS, J.A. dissenting), that as the plaintiff was not called, though she might have been heard at the trial or examined on commission, and the

evidence of the three defendants corroborated by another witness stands uncontradicted, a clear case of mutual mistake has been made out, and while persons who sign an instrument are not to be excused from its performance because they misunderstood it, yet, when they have been induced by the opposite party to sign on the footing that the instrument means what the parties have agreed to, they may properly be granted reformation.

Wilding v. *Sanderson* (1897), 2 Ch. 534 followed.

APPEAL by defendants from the decision of BLACK, J. (*pro tem.*) in the Territorial Court of the Yukon, of the 31st of December, 1918, in an action for foreclosure or sale of certain mortgaged property and for judgment for $8,149.16 on the personal covenant of the defendants for payment of the mortgage debt. The defendants were the trustees of Dawson Lodge No. 1393, Loyal Order of Moose (unincorporated), all the property of the lodge being registered in the names of said trustees. By resolution of the lodge the trustees were authorized to borrow on its behalf $8,000 and to give such mortgages on its property as was necessary to secure the advance. The plaintiff advanced the money and was given a mortgage on the realty and a chattel mortgage on the personal property of the Order. In both instruments the covenant to pay was a personal covenant. The defendants raised the defence that when in the office of the mortgagee's solicitor and about to execute the mortgages they were assured by the solicitor (Mr. C. W. C. Tabor) in the presence of the plaintiff that in signing the instruments they would not render themselves personally liable for repayment of the money advanced. This the three defendants swore to positively and they were corroborated by the evidence of the secretary of the "Order of Moose," who was present when the mortgages were signed. The plaintiff was in the United States when the action was tried, her evidence not having been taken on commission, and Mr. Tabor died before the trial. The defendants counterclaimed for rectification of the mortgages so as not to render them personally liable, on the ground of mutual mistake. It was held by the trial judge that the defendants were personally liable for the debt and the counterclaim was dismissed. The defendants appealed.

Statement

The appeal was argued at Victoria on the 12th of June, 1919,

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before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Congdon, K.C., for appellant: This is a mixed question of law and fact. The evidence of the three defendants, corroborated by the secretary of the Order, is uncontradicted. They say Mr. Tabor told them they were not to be personally liable, and Mr. Tabor undoubtedly make a mistake in drafting the mortgages. On the question of mistake see *In re Jones's Estate* (1914), 1 I.R. 188 at p. 192; Fry on Specific Performance, 5th Ed., 390; Benjamin on Sales, 5th Ed., 91, 113 and 437; *Galloway* v. *Galloway* (1914), 30 T.L.R. 531; *Manser* v. *Back* (1848), 6 Hare 443 at p. 447; Halsbury's Laws of England, Vol. 21, pp. 4 and 7; *Wake* v. *Harrop* (1861), 6 H. & N. 768; (1862), H. & C. 202 at pp. 204-5; *May* v. *Platt* (1900), 69 L.J., Ch. 357; Stephen's Commentaries on the Laws of England, 15th Ed., Vol. 2, pp. 99-100; *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149 at p. 170; and *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181 at p. 190, where there is a review of the cases; see also *Robson* v. *Roy* (1917), 35 D.L.R. 485; *M'Carthy* v. *Decaix* (1831), 2 Russ. & M. 614; *Wilding* v. *Sanderson* (1897), 2 Ch. 534; *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108 at p. 119; Dart on Vendors and Purchasers, 7th Ed., 1050; Smith's Equity, 5th Ed., 224 and 235; *Cowie* v. *Witt* (1874), 23 W.R. 76; *Guardhouse* v. *Blackburn* (1866), 35 L.J., P. 116 at p. 119. Using the word "trustee" does not exempt them from personal liability: see Chitty on Contracts, 16th Ed., 288. Again on the question of mistake see *Earl Beauchamp* v. *Winn* (1873), L.R. 6 H.L. 223 at p. 234. As to solicitor's view of the effect of the document see *Stone* v. *Godfrey* (1854), 5 De G.M. & G. 76 at p. 90. On the question of admissibility of oral evidence of mistake see *Murray* v. *Parker* (1854), 19 Beav. 305 at p. 308. On the question of receiving wrong information as to the contents of a document see *Bagot* v. *Chapman* (1907), 2 Ch. 222 at p. 228; *Hobbs* v. *Hull* (1788), 1 Cox 445 at p. 446; *Carlisle and Cumberland Banking Company* v. *Bragg* (1911), 1 K.B. 489 at p. 496; *The British Workman's and General Assurance Company (Limited)* v. *Cunliffe* (1902), 18 T.L.R. 502. That the docu-

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ment renders them liable only as trustees of the estate see *Bank of Ireland* v. *M'Manamy* (1916), 2 I.R. 161 at p. 172; *Mathew* v. *Blackmore* (1857), 1 H. & N. 762; *Re Robinson's Settlement—Gant* v. *Hobbs* (1912), 28 T.L.R. 298.

Luxton, K.C., for respondent: That Tabor made the statement alleged must be proved beyond question: see *Johnston* v. *Finch* (1916), 23 B.C. 472; *Fowler* v. *Fowler* (1859), 4 De G. & J. 250 at pp. 264-5. The evidence of the defendants in such a case must be viewed with extreme caution and the submission is that it is not sufficient. There must be an actual concluded contract antecedent to the execution of the instrument before there can be rectification: see Halsbury's Laws of England, Vol. 21, p. 21. There is no proof of any concluded arrangement before the signature. The previous mortgage paid off by the loan in question contained a similar covenant rendering the trustees personally liable. The words "as trustees" being in the instrument do not relieve them: see *Watling* v. *Lewis* (1911), 1 Ch. 414; Maclaren on Bills, Notes and Cheques, 5th Ed., 167. The Order is unincorporated. The members authorized the loan and all the members who initiated and approved of the loan are personally responsible, which includes the defendants: see *Pears* v. *Stormont* (1911), 24 O.L.R. 508; Coote on Mortgages, 8th Ed., 10. On the question of the defendant's knowledge or ignorance as to the instrument see *Howatson* v. *Webb* (1907), 1 Ch. 537; (1908), 1 Ch. 1. There is not one of the witnesses who says he would not have signed if he had known the covenant was there. The whole position now is an afterthought by the defendants as to personal liability. Parol evidence should not be admitted to restrain the effect of the instruments: see *Weston* v. *Emes* (1808), 1 Taunt. 115.

Argument

Congdon, in reply.

Cur. adv. vult.

15th September, 1919.

MACDONALD, C.J.A.: The learned judge of the Yukon Court held, as I understand his reasons for judgment, that the principle of *Watling* v. *Lewis* (1911), 1 Ch. 414 was applicable to the facts of this case. With respect, I do not think so. Assum-

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ing that case to have been well decided, it goes no further than this, that on the facts there the covenant for non-liability was inconsistent with and therefore repugnant to the antecedent obligation to pay. There is nothing anomalous in a mortgage in which the personal covenant of the mortgagor to repay the loan has been omitted or limited.

A covenant in a mortgage by trustees expressed to be made by them "as trustees but not otherwise" will, in the absence of other controlling words, be held to limit their liability to the repayment of the money out of trust estate and will not render them personally liable therefor: *Per* Lord Cairns in *Muir* v. *City of Glasgow Bank* (1879), 4 App. Cas. 337 at p. 361; and Buckley, L.J. in *In re Robinson's Settlement, Grant* v. *Hobbs* (1912), 1 Ch. 717 at pp. 728-9.

If, therefore, it shall appear that the parties agreed that the defendants were to pay as trustees and not otherwise, and failed to express that intention in the instrument, it ought to be reformed. The uncontradicted evidence of several witnesses is to the effect that before the execution of the mortgage the defendants were assured in the most explicit terms by the plaintiff's solicitor, and in her presence, that they were not to incur personal liability for the debt, but were to obligate themselves merely as trustees. What then took place amounted to a distinct agreement between the parties to that effect. The plaintiff gave no evidence on her own behalf, though there appeared to be no impediment to her doing so, either in Court or on commission. The evidence of Mr. Tabor, her solicitor, was not obtainable owing to his death before the trial of the action.

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There is nothing in the circumstances of the case inconsistent with the evidence of the defendants that it was agreed that they should not be under personal liability. Their evidence standing as it does uncontradicted, I am not embarrassed by any doubt as to whether or not that clear case has been made out, of mutual mistake, which must be made out in order to induce the Court to order reformation of a deed.

Now, while a person who signs an agreement is not to be excused from its performance because he misunderstood it,

through no incapacity to read or understand its terms, yet, when he has been induced by the opposite party to sign on the footing that the instrument means what the parties have agreed it shall mean, and it has not that meaning, he may, I think, properly be granted reformation of the instrument when the circumstances do not call for rescission. The present is not a case for rescission either on the pleadings or on the facts. It appears to me to be a clear case of a mistake in draughtmanship. Mr. Tabor, whose good faith was not questioned, may have thought that as the defendants were trustees in fact and were executing the mortgage as such, no liability would attach to them except to repay the loan out of trust funds available therefor. He failed to aptly express what the parties had agreed to. The mistake was not, in strictness, a mistake of law at all. It was a mistake on the part of the solicitor in not correctly expressing the agreement which had been come to. To say that Mr. Tabor merely expressed his opinion of the legal effect of the deed, or, to put it in another way, his interpretation of the personal covenant, does not, in my opinion, meet the substance of the defendant's case. Suppose there had been an antecedent agreement in writing containing a stipulation that the mortgage should contain a covenant limited to an obligation on the part of the mortgagors to repay the loan out of trust funds and nevertheless the mortgage executed in pursuance of the agreement contained the covenant which this mortgage contains contrary to the intention of all parties, could the deed not be reformed? I think it cannot be doubted that it could. The case is not, in my opinion, distinguishable in principle from *Wilding* v. *Sanderson* (1897), 2 Ch. 534. The mortgage should therefore be reformed so as to limit defendants' liability as intimated above.

MACDONALD, C.J.A.

We are not, I think, concerned on these pleadings with the plaintiff's rights, if any, against the society of which the defendants are trustees. It may be that, as borrowers, the society is under obligation to pay their debt, but as to this I express no opinion.

GALLIHER, J.A.: The covenant to pay contained in the mortgage is a personal covenant, but I think we must hold,

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upon the evidence, that there was, prior to signing the mortgage, an agreement concurred in by both parties, that the defendants were not to be made personally liable. If that is so, then the covenant does not express the true agreement between the parties and it is a proper case for rectification. I have read the reasons for judgment of the Chief Justice, and am in agreement with them.

MCPHILLIPS, J.A.: There is no question that the mortgage as executed imposes a personal liability upon the mortgagors for the payment personally of the money borrowed. The mortgage followed the passage of resolutions of Dawson Lodge No. 1393, Loyal Order of Moose. To support rectification upon the ground of mistake all that the Court below had before it was evidence of a general and somewhat ambiguous nature, that at the time of the execution of the mortgage, Mr. Tabor, K.C., of the Yukon Bar, now deceased, said that there would be no personal liability upon the mortgagors in executing the mortgage, that they (the mortgagors) were simply signing as trustees. It was also sworn to that Mrs. O'Brien, the mortgagee, was present when this statement was made, but no evidence establishing that Mrs. O'Brien heard the statement or knew its purport. Of course, what Mr. Tabor said or did in pursuance of his duty as her solicitor would be binding upon Mrs. O'Brien, but it is a very serious onus that rests upon the mortgagors to make a case for rectification against the plain legal effect of the document. The mortgage was placed in the hands of the mortgagors and was read or was capable of being read by the mortgagors before execution. Further, it is to be remembered that fraud is not set up or that there was any misrepresentation. It comes to this, that a gentleman of high standing and experience in the profession of the law, in whom apparently all the parties had confidence, is said to have made a statement as to the effect of the mortgage which is in contradiction to its terms. Further, a mortgage without personal liability upon the mortgagors to repay the money advanced would be a most unusual transaction, and it is to be noted that the previous mortgage in its terms imposed personal liability. Such a contract needs cogent evidence for its establishment.

MCPHILLIPS, J.A.

The unfortunate situation is that Mr. Tabor is dead, and it is now sought to make out a case for rectification upon these sworn statements, no documentary evidence of any nature or kind lending any corroboration to the statements made, statements that in their nature reflect upon the legal ability and acumen of the late Mr. Tabor, and certainly all in the interest of those who make them, and it is to be observed that the exact words used by Mr. Tabor are not sworn to but their effect only. I attach little or no value to this evidence, and certainly do not value it to the degree of entitling it to bring about rectification. The learned trial judge has given careful attention to the evidence which was advanced before him, he having the opportunity of seeing the witnesses and observing their demeanour, and although we have no observations from the learned trial judge thereon, it may be fairly inferred that the evidence was not so cogent in its nature or so satisfactory as to warrant it being taken against the writing, the solemnly executed mortgage, taking into consideration all the attendant facts and circumstances. There is no corroboration of any nature or kind as against the deed and its plain legal effect. I fail, therefore, to see that it has been made out that the learned judge has erred either in fact or law. The decision is one that could be reasonably come to—that the appellants have failed to discharge the onus that was upon them, and failing in this, no rectification could be granted. I have no hesitation in arriving at the conclusion that the evidence falls far short of establishing a case for rectification, and in this connection, upon the point that the mortgagee, Mrs. O'Brien, was present when the alleged statements were made, it is to be remembered that Mrs. O'Brin was not present at the trial, being out of the country at the time this was stated at this Bar by counsel, and further the rectification claimed in the pleadings was set up in October, a time when the Yukon Territory is practically closed to the outside world. Of course, it was the mortgagee who brought the action to trial. Had Mrs. O'Brien been present in Court when the statements were made and not denied them, the case might have assumed another complexion (see *Forget* v. *Baxter* (1900), 69 L.J., P.C. 101 at p. 106). With-

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out rectification, of course, it is common ground that there is liability upon the appellants upon the personal covenants contained in the mortgage. It is instructive upon the point of what evidence should be forthcoming to bring about rectification to read what the Lord Chancellor (Lord Chelmsford, L.C.) said in *Fowler* v. *Fowler* (1859), 4 De G. & J. 250 at pp. 264-5.

I am not of the opinion that this appeal requires further elaboration. I content myself by saying that it has not been established that the learned trial judge was wrong in arriving at the conclusion which he did, *i.e.*, that no sufficient case was made out for rectification, a conclusion with which I entirely agree, I will merely refer to the following additional authorities in support of the judgment under appeal relied upon by the learned counsel for the respondent: *Howatson* v. *Webb* (1907), 1 Ch. 537, affirmed by the Court of Appeal (1908), 1 Ch. 1, and *Pears* v. *Stormont* (1911), 24 O.L.R. 508 (Boyd, C.).

MCPHILLIPS, J.A.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellants: *F. T. Congdon.*
Solicitor for respondent: *C. B. Black.*

MAPLE CRISPETTE CO. v. NATIONAL BROKERAGE.

MORRISON, J. (At Chambers)

1919

Nov. 27.

MAPLE CRISPETTE CO. v. NATIONAL BROKERAGE

County Court—Jurisdiction—Want of—Prohibition—Transfer of plaint—R.S.B.C. 1911, Cap. 53, Secs. 68, 126, 127 and 128.

In an action in the County Court where want of jurisdiction appears on the face of the proceedings, prohibition will lie.

APPLICATION for a writ of prohibition. The facts are set out in the judgment. Heard by MORRISON, J. at Chambers in Vancouver on the 27th of November, 1919.

Harper, for the application.
Gibson, contra.

MORRISON, J.: The plaint herein shews clearly, on its face, want of jurisdiction, stating, as it does, that the plaintiff Company has its head office in Quebec and carried on business as well in Victoria, and that the subject-matter of the action arose in Victoria outside the jurisdiction of the County Court of Vancouver. The rules make ample provision in cases of this kind to be remedied expeditiously and inexpensively before the tribunal in which the proceedings are commenced: section 68 of the County Courts Act. Instead of invoking this provision the defendant applied for prohibition, and on the return of the motion the situation is that the plaintiff has withdrawn his plaint and only the academic question as to the defendant's right to prohibition in the circumstances remained, involving necessarily a consideration of the question of the costs of such application. I think the plaintiff had the right to apply for prohibition under sections 126, 127 and 128 of the County Courts Act in the circumstances of this case: *Camosun Commercial Co.* v. *Garetson & Bloster* (1914), 20 B.C. 448. As to whether he should have done so rather than apply to the County Court judge for a transfer of the motion, can now only arise upon a question as to the costs. I associate myself with Middleton, J., who, in the course of his judgment in *Walker* v. *Wilson* (1914), 16 D.L.R. 853 at p. 854, says that:

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"It is manifestly most inconvenient that a motion of this type, where the expense is entirely disproportionate to the amount involved, should be launched, where the Division Court will, without expense, set the matter right."

Were it not that Mr. *Harper* impressed me that he made his application advisedly and that he thought there is a question whether the County Court judge could make an order, transferring this particular case, I would be disposed to consider whether I should, if I had the right, deprive him of his costs. The application is granted with costs.

Application granted.

CLEMENT, J.

1919

Nov. 28.

MATSUI & CO. v. BROWN

MATSUI & COMPANY v. BROWN *ET AL.*

Contract—Purchase of goods—Consigned to Japan from Vancouver—Agreement to repurchase if shipping space not obtained in one month—Rising market until armistice four months later—No request to repurchase until after armistice.

The plaintiffs purchased an engine from the defendants alleging an agreement that the defendants would buy it back if shipping space to Japan was not secured within one month from its arrival in Vancouver. The goods arrived in Vancouver towards the end of July, 1918, and after the expiration of one month the plaintiffs' agent continued to urge the defendants to secure shipping space, at the same time using his best efforts to secure space. There was no evidence of extending the obligation to repurchase and no request was made by the plaintiffs to repurchase until towards the end of November and after the armistice. In an action to enforce the agreement to repurchase:—

Held, that it was for the plaintiffs to shew, despite a rising market, that they had made a demand for repurchase and that any extension of the time within which space was to be secured was accompanied by a clear stipulation, express or by necessary implication, that the time within which a request to repurchase should be communicated should likewise be extended. The plaintiffs appeared to have refrained when the market was rising from making any request for repurchase, but with the armistice and the consequent break in the market they endeavoured to throw the loss on the defendants. The action should therefore be dismissed.

Statement

ACTION to enforce an agreement to repurchase an engine with accompanying material. The plaintiffs claimed they had

purchased the goods from the defendants, the defendants agreeing to repurchase if shipping space for Japan was not secured within one month after the arrival of the goods in Vancouver. The facts are set out in the reasons for judgment. Tried by CLEMENT, J. at Vancouver on the 7th of November, 1919.

Griffin, and *Montgomery,* for plaintiffs.
L. J. Ladner, and *Cantelon,* for defendants.

28th November, 1919.

CLEMENT, J.: The agreement to buy back the engine, etc., in question here if shipping space for Japan were not secured within one month from the arrival of the goods in Vancouver manifestly was optional so far as the plaintiffs were concerned. In other words, it would be for the plaintiffs to notify defendants that the plaintiffs wished defendants to buy back. And, it seems to me, such notification would have to be made promptly upon the expiration of the month; more particularly in view of market conditions. From the date of the original sale in July down to the announcement of the armistice the market was decidedly a rising market; afterwards, very naturally, the market "slumped." The engine, etc., arrived in Vancouver towards the latter end of July. The month would expire towards the end of August. As to what occurred between that time and November 27th (the date of the next written communication) the evidence is very unsatisfactory, and I cannot find that any request was made by the plaintiffs to the defendants to buy back the engine, etc. It is true that the witness Suge—plaintiff's manager at Vancouver—does say that he kept urging defendants over the 'phone to secure shipping space; that while he, himself, was using his best endeavours to secure space, he did so "without relieving the defendants of their obligation." But he does not say that he requested the defendants to repurchase, and I cannot find that the election to repurchase upon request was distinctly extended; certainly there was no express extension, and the evidence is not sufficiently clear to warrant a finding of an implied extension. And when written communications again begin, the first letter from plaintiffs to defendants contains the rather strange enquiry:

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"Kindly let us know what prospect you have of disposing of the same for us," "the same" referring to the engine, etc., in question in this action. In my opinion, it was for the plaintiffs to make out unequivocally that, despite a rising market, they had made a demand or request for a repurchase and that any extension of the time within which space was to be secured was accompanied by a clear stipulation, express or by necessary implication, that the time within which a request to repurchase should be communicated should likewise be extended. It seems to me that the plaintiffs refrained, when the market was rising, from making any request for repurchase, but that with the armistice and the consequent break in the market they now endeavour to throw the loss upon the defendants.

Judgment

For these reasons, I think the action must be dismissed, but, in view of the defendants' denial of the agreement to repurchase, and of Capt. Brown's unsatisfactory evidence upon that point as well as others, the dismissal will be without costs.

Action dismissed.

MACDONALD, C.J.A. (At Chambers)

1919

Dec. 15.

LANGAN v. SIMPSON

LANGAN v. SIMPSON.

Appeal—Notice of—Given by litigant in person—Application to strike out—At Chambers—Jurisdiction—Address for service omitted—Validity not affected.

Applications in the Court of Appeal should, where there is jurisdiction, be disposed of at Chambers except when it is proposed to interfere with the list during the sittings, in which case motion must be made to the Court.

A solicitor's retainer in the Court below does not entitle him to take an appeal to the Court of Appeal, and where an unsuccessful litigant has not employed a solicitor after the disposition of the case in the Court below he may file a notice of appeal in person and his neglect to give an address for service does not affect the validity of the notice.

Statement

APPLICATION to the Court of Appeal at Chambers by the defendants (respondents) to strike out the notice of appeal,

otherwise regular, on the ground that it was given by the plaintiff in person and not by his solicitor of record in the Supreme Court. Heard by MACDONALD, C.J.A. at Chambers in Vancouver on the 10th of December, 1919.

MACDONALD, C.J.A. (At Chambers)

1919

Dec. 15.

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Wood, for the application.
Pattullo, K.C., contra.

15th December, 1919.

MACDONALD, C.J.A.: My jurisdiction to hear this motion is not questioned by counsel on either side, but, nevertheless, I think I should satisfy myself that I have jurisdiction, otherwise I should adjourn the application into Court. The Court, however, should not be troubled with motions, which can be disposed of at Chambers, except when it is proposed to interfere with the list during the sittings. In such a case, we have made a rule that the motion must be made to the Court. This motion is not within the rule, and while I might find it easier to let the parties go to the Court, which is now sitting, yet if I have jurisdiction, I think I ought to decide this case here.

Section 10 of the Court of Appeal Act defines the powers of a single judge. The first part of the section is general in its terms, save one limitation, that is to say, that the question shall not involve the decision of the appeal. The second part of the section imposes a further limitation which has no bearing on this motion.

Judgment

It, therefore, appears to me that a single judge may give any direction incidental to an appeal not involving the decision of the appeal, and not within the limitation contained in the second part of the section. To give a "direction" must, I think, mean to make an order. A single judge represents the Court within the ambit of his authority, and may make such orders as the Court itself could make so long as he shall keep within the limitation of the jurisdiction conferred upon him by section 10 or by any other statute or rule.

Now the notice of appeal is the initial step in the appeal, and even an irregular notice may be sufficient to bring the matter into this Court: *Wilson* v. *Henderson* (1914), 19 B.C. 45.

In my opinion, however, the notice of appeal in question here is not even irregular. Therefore, there can be no question, if

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I am right in this, of the jurisdiction either of the Court or of a single judge within his powers to entertain this motion.

It is conceded that, in this Province, the solicitor's retainer in the Court below does not entitle him to take an appeal to the Court of Appeal. Without instructions, amounting to a new retainer, the solicitor of record in the Supreme Court could not properly give a notice of appeal. The fact that such a notice is to be filed in the Supreme Court registry, as well as in the registry of the Court of Appeal, does not, in my opinion, affect the question. If the solicitor cannot give the notice, in the absence of instructions, who can? The rules do not prohibit the client from giving it, and, as in these circumstances, the appellant had no solicitor in the new proceedings which he proposed to initiate, it must be that he may take the proceedings in person if he chooses to do so. The fact that the style of the notice is in the Supreme Court and that the notice must be filed in the Supreme Court advances the matter no further. There is no solicitor of record to style or file the notice in any Court.

Judgment

The suggestion that there is no address given by the appellant for service on him does not, it appears to me, affect the validity of the notice. If he ought to have stated his address and has not done so, he must take the risk of having process served otherwise than upon him personally, if the other party be entitled to do that in the circumstances of this case, a question with which I am not concerned.

The application is dismissed, with costs.

Application dismissed.

BUSCOMBE SECURITIES COMPANY LIMITED v. WINDEBANK *ET AL.*

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1919

Sept. 15.

BUSCOMBE SECURITIES CO. *v.* WINDEBANK

Practice—Action for foreclosure—Order nisi obtained and accounts taken—Second action for same debt to enforce further securities—Application for consolidation.

A mortgagee having obtained an order *nisi* for foreclosure and taken accounts thereunder should not be allowed to consolidate the action with a second action for the same debt claiming foreclosure of the same mortgage together with other collateral securities (MARTIN and MCPHILLIPS, JJ.A. dissenting).

APPEAL by defendants Windebank and the Mission Water, Light & Power Company, Limited, from the order of HUNTER, C.J.B.C. of the 28th of March, 1919, consolidating two actions. The first action commenced on the 14th of February, 1916, was for foreclosure of a mortgage of the 29th of June, 1914. A decree *nisi* was obtained on the 31st of March, 1916, directing a reference to the registrar to take accounts, and after the accounts were taken no further proceedings were taken in the action. A second action was commenced on the 9th of May, 1918, for the same debt, and in default of payment for foreclosure of the mortgage referred to in the first action, and in addition two further mortgages and four agreements for sale, that were assigned to the plaintiff as collateral security to the first mortgage.

Statement

The appeal was argued at Victoria on the 9th of June, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers (*Darling,* with him), for appellants: In the first action an order *nisi* was granted. The registrar made his report and the time for redemption had expired for some time before the second writ was issued to enforce all the securities for the original debt. I contend he cannot consolidate two actions, one of which has gone to judgment: see *Dominion Trust Co.* v. *New York Life Insurance Co.* (1918), 88 L.J., P.C. 30 at p. 31; (1919), A.C. 254; *Smith* v. *Davies* (1886),

Argument

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Argument

31 Ch. D. 595. The learned judge followed *Bake* v. *French* (1907), 1 Ch. 428.

Armour, K.C., for respondent: The consolidation is proper as it is all one transaction. All the mortgages including the one in question are collateral to the debt. He has the right to enforce all his securities. An order *nisi* is not final. *Bake* v. *French* (1907), 1 Ch. 428 is in point; see also *Matthews* v. *Antrobus* (1879), 49 L.J., Ch. 80; *Stevens* v. *Theatres, Limited* (1903), 1 Ch. 857 at p. 860.

Mayers, in reply, referred to *Dominion Trust Co.* v. *New York Life Ins. Co.* (1916), 23 B.C. 343.

Cur. adv. vult.

15th September, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff, in 1916, having obtained an order *nisi* for foreclosure of a mortgage, and having proceeded and obtained the registrar's report, and after the day named for redemption had passed without payment of the mortgage moneys by the defendants, issued in 1918 a writ against the same defendants claiming a foreclosure of the same mortgage, together with other securities for the same indebtedness not referred to in the first action. After a defence was filed the plaintiffs made application to a judge to consolidate the two actions. The order of consolidation was made, and provided that the consolidated action should proceed as upon the statement of claim filed in the second action.

It may be that the order is not *ultra vires* of the judge to make (*Dominion Trust Company* v. *New York Life Insurance Company* (1918), 88 L.J., P.C. 30), but while it may not be *ultra vires* it may nevertheless be wrong. That case does not decide that an order which the Court has power to make must necessarily stand. The order made in this case is appealable, and while the judicial discretion of the learned Chief Justice who made it ought not lightly to be interfered with, yet as the order was made, as I think, in error, it ought to be set aside. To consolidate an action in which judgment has been entered, with one which has just been commenced would, apart from the anomaly created, give rise to confusion and injustice. What was sought here in a clumsy fashion could, I think, have been accomplished in another way, if any relief at all ought to have

been granted, *viz.*, by discontinuance by order of the Court. Such a course would have enabled the Court to save the just rights of the plaintiff and, at the same time, do justice to the defendants in the matter of costs and terms.

The authorities relied on by the respondent are not in point. *Bake* v. *French* (1907), 1 Ch. 428 decided only that in a like case the defendant was not entitled to a stay of the second action. The consolidation, which was made in that case, was made by consent of the parties only, which is a very different thing to making an order of consolidation without consent. The effect of this order of consolidation is to set aside the judgment on the merits in the first action. The action was tried; the liability of the mortgagor was found; the mortgagee's right to foreclosure declared. In other words, the substantial question in the action was tried and disposed of. Under this order it has to be tried again, along with other questions. That means that the judgment of the Supreme Court is in effect set aside by a judge of the same Court, something entirely contrary to law, but even if it were not so, there is no practice, either here or in England, to justify such an extraordinary exercise of the power of consolidation.

MACDONALD, C.J.A.

The appeal should be allowed.

MARTIN, J.A.: In view of the recent decision of the Privy Council upon our peculiar rule 656 in *Dominion Trust Company* v. *New York Life Insurance Co.* (1918), 88 L.J., P.C. 30; 3 W.W.R. 850; (1919), A.C. 254, I feel it is impossible to say the learned judge below did not on the facts have power to make the order for consolidation. Their Lordships say:

"The rule of the British Columbian Court is absolute, and seems to their Lordships to leave the matter, so far as *ultra vires* is concerned, entirely in the hands of the judge."

MARTIN, J.A.

And herein also I think "there was proper material before the Court on which a judgment on the facts could be given."

It is said in the Yearly Practice, 1919, p. 755, after a collection of the cases on consolidation and the review of them in Archbold's Q.B. Practice, 1885, Vol. 1, pp. 407-8 that

"the cases as to when consolidation will be granted or refused seem to disclose no principle, and the decisions depend mainly upon the special circumstances of each case."

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In *Teale* v. *Teale* (1882), W.N. 83, on a bill for administration and subsequent partition actions, the Court went so far as to order a consolidation of distinct claims of different plaintiffs and different defendants.

While I would be disposed to agree with the submission of appellants' counsel that "causes" does not include for consolidation purposes those which have already been finally determined, yet the first "cause" here has not got beyond the taking of an account under an order *nisi* for an account, payment, and, in default, foreclosure of the mortgaged premises, and while that order is not "for the purpose of determining the time for appealing from it" an interlocutory order, as decided in *Smith* v. *Davies* (1886), 31 Ch. D. 595; 55 L.J., Ch. 596, yet it is not an order of final determination for the purpose of consolidation.

And in *Blake* v. *Summersby* (1889), W.N. 39, it was held on a motion for foreclosure absolute on a question raised of giving notice of intention to proceed, by Mr. Justice Kay that "anything that precedes the final judgment, or order is, in my opinion, a 'proceeding' in the action."

The case at bar cannot, I think, be distinguished from that of *Bake* v. *French* (1907), 1 Ch. 428; 76 L.J., Ch. 299, where an order for consolidation was made after the usual order *nisi* for foreclosure, pending the taking of the account therein directed, to include an additional, and sixth charge on the same security which had been overlooked in the original proceedings.

MARTIN, J.A.

What is sought to be done here is to include additional securities covered by the original loan, and there can be no difference in principle between consolidating several securities under one loan, and several loans on one security. It was suggested that in *Bake* v. *French, supra,* the order for consolidation was made by consent; but while it is true that the mortgagee did agree to that course, yet nevertheless Mr. Justice Warrington held, as I understand him, that he would have been compelled to do so, because the applicant to stay proceedings

> "is entitled to require him [the mortgagee] to [consolidate] under the circumstances. It would be a denial of justice if I did not allow him to raise the point that, although the first five charges do not give him a lien for his professional charges and disbursements, the sixth charge does so."

In my opinion, therefore, the order for consolidation was rightly made, and the appeal should be dismissed.

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

MCPHILLIPS, J.A.: One action has been carried to an order *nisi* for foreclosure, it is then found that other collateral mortgage securities are held and it is desired to proceed in like manner in respect of them, *i.e.*, for foreclosure. An application was made to the learned Chief Justice of British Columbia and he consolidated the action later brought with the first in which the order *nisi* for foreclosure had been made, and it is from this order this appeal is brought. In my opinion the matter is a very simple one and the order was made with jurisdiction, and further was, in my opinion, a very proper order to make. The opening of even the foreclosure absolute is a matter wholly in the discretion of the Court. That there should be any doubt about the power to reopen the order *nisi* rather puzzles me, when one considers the long course of practice in dealing with all foreclosure proceedings, "with liberty to apply" so well understood. It was laid down in *Campbell* v. *Holyland* (1877), 7 Ch. D. 166 that the order for foreclosure absolute being final in form only can be reopened in the discretion of the Court, having regard to all circumstances of the case. In passing, it may be said that a judgment for foreclosure does not discharge other collateral securities which the mortgagee may have, but in realizing on collateral securities after foreclosure the foreclosure is reopened and a new right of redemption is given the mortgagor. Now, upon the facts of the present case, as the other securities are being enforced, it is just and convenient that there should be consolidation (see *Lockhart* v. *Hardy* (1846), 9 Beav. 349; *Palmer* v. *Hendrie* (1859), 27 Beav. 349; (1860), 28 Beav. 341; *Walker* v. *Jones* (1865), L.R. 1 P.C. 50; *Kinnaird* v. *Trollope* (1888), 39 Ch. D. 636).

MCPHILLIPS, J.A.

Further, to see that the order of the learned Chief Justice was made with jurisdiction it is only necessary to turn to marginal rule 656 (Order XLIX., r. 1), which reads as follows:

"1. 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."

If any authority is necessary to establish that an action

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which has proceeded only to order *nisi* for foreclosure comes within the meaning of "causes," I would refer to Annual Practice, 1919, at p. 1179 and *Blake* v. *Summersby* (1889), W.N. 39 where it was held in England (Kay, J.) that an order for foreclosure preceding final judgment is a "proceeding" within Order LXIV., r. 13, B.C. Supreme Court Rule 973, which reads as follows:

"13. In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this Rule."

Mr. Justice Kay (afterwards Lord Justice Kay) in his judgment said "anything that precedes the final judgment or order is in my opinion a 'proceeding' in the action. You must give a month's notice to the defendant before moving for an order for foreclosure absolute."

MCPHILLIPS, J.A.

Then we have had the recent pronouncement of their Lordships of the Privy Council as to the extent of the jurisdiction which has been committed to the judge under the British Columbia Rule 656. (Also see *Bake* v. *French* (1907), 76 L.J., Ch. 299; *Stevens* v. *Theatres, Limited* (1903), 72 L.J., Ch. 764; *Halkett* v. *Dudley* (*Earl*) (1907), 1 Ch. 590; 76 L.J., Ch. 330).

I have no hesitation whatever in coming to the conclusion that the order of the learned Chief Justice was made within the discretionary authority conferred by the express language of rule 656, and was an order which in no way offended against the long course of practice well understood in like cases: further, it was an order rightly made under the circumstances.

I would, therefore, dismiss the appeal with costs here and in the Court below to the respondent.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

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

Solicitors for appellants: *Taylor, Mayers, Stockton & Smith.*
Solicitors for respondent: *Davis, Marshall, Macneill & Pugh.*

DOWDING v. BROWN.

CLEMENT, J.

1919

Dec. 4.

DOWDING v. BROWN

Sale of land—Lot, 25-foot frontage—Interim receipt reciting 33-foot frontage—Falsa demonstratio—Compensation not allowed.

On the sale of a lot which was generally referred to by the house number, an *interim* receipt issued by the vendor's agent recited "East 33 ft. A," the lot in fact having a frontage of 25 feet only. The evidence shewed the vendor knew nothing of the dimensions of the lot and the deed which he signed and sent to his agents recited 25 feet frontage.

Held, that the phrase "East 33 ft. A" was a *falsa demonstratio* and must be discarded, as no importance was attached to the frontage, the subject of the sale being generally referred to by the house number, and an action for compensation should be dismissed.

Held, further, that the purchaser by entering into possession, having the house moved forward and making other improvements had so dealt with the property as to preclude herself from the right to compensation.

ACTION for compensation for deficiency in frontage of a lot purchased by the plaintiff. The defendant, who lives in Scotland, had some years previously to the sale in question made investments in Vancouver through his brother, Julius A. Brown, of Los Angeles, California, who held his power of attorney, the brother employing one Robert Grant, of Vancouver, as his local agent. The defendant originally held a mortgage on the lot in question, known as No. 2922, 3rd Avenue West, but subsequently he became owner, and through Grant a certificate of indefeasible title was issued in his name. In January, 1919, Grant obtained instructions from Brown in Los Angeles to realize on the defendant's properties at best possible prices, and Brown listed the lot in question with Banfield & Co., stockbrokers, who again listed it with one Bayliss, who negotiated a sale with the plaintiff, a war widow, the purchase price being $2,800. On the 3rd of April, Banfield & Co. issued an interim receipt as follows: "Received from Fred Bayliss the sum of one hundred and fifty dollars being deposit on account of purchase of 2922 3rd Ave. W. lot E. 33ft. A, block 28, subdivision 192, for the sum of $2,800," etc. Subsequently the full purchase price was paid and the plaintiff entered into pos-

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session. While moving a house on the lot forward, and making other improvements, she discovered the lot had a frontage of 25 feet only. The defendant knew nothing of the dimensions of the property, never having seen it, and the deed of transfer to the plaintiff which was sent the defendant for his signature recited a frontage of 25 feet only. From the evidence it appeared that the error as to frontage arose in the office of Banfield & Co. Tried by CLEMENT, J. at Vancouver on the 27th of November, 1919.

Arnold, and *J. A. McInnes,* for plaintiff.
R. M. Macdonald, and *J. E. Bird,* for defendant.

4th December, 1919.

CLEMENT, J.: There was no contract between plaintiff and defendant touching compensation, so that the plaintiff's claim must, if well founded, be founded on the equitable principles laid down in the cases which deal with that topic. One of the principles so laid down is that, in the absence of express stipulations as to compensation, it is too late to put forward such a claim after the transaction has been closed or practically carried into effect in such fashion that the parties cannot be put in their previous position. I speak, of course, of a case where, as here, no claim to fraudulent misrepresentation is put forward. The facts here are that about the end of April, 1919, the plaintiff being told that the defendant had confirmed the sale of the property at the price offered, paid the entire balance of the purchase price over and above her original deposit and was told that she could take possession, and that the papers would be turned over to her when The Royal Trust Co. had honoured the plaintiff's order on that Company. The plaintiff at once entered into possession, had the house moved forward some 17½ feet, and made some other improvements. The placing of the house in alignment with the two houses on either side would, one would naturally suppose, draw sharp attention to the amount of vacant space between the houses, and the slightest attention to that feature, had the plaintiff thought of it as at all material, would suffice to tell the plaintiff that by no possibility could there be 33 feet of frontage for house No.

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2922, 3rd Ave. W., the house she had just bought. At all events, she so dealt with the property as to now, in my opinion, preclude herself from successfully putting forward any claim to compensation: *Besley* v. *Besley* (1878), 9 Ch. D. 103; *Allen* v. *Richardson* (1879), 13 Ch. D. 524; *Clayton* v. *Leech* (1889), 41 Ch. D. 103; *Jackson* v. *Irwin* (1913), 18 B.C. 225. The deed of the property, I may add, has actually been executed by defendant, and was to be held by his agents until The Royal Trust Company honoured the plaintiff's order, whereupon it was to be surrendered to the plaintiff.

The plaintiff is claiming upon the basis that defendant, through his agents, had agreed to sell her 33 feet. There is absolutely no evidence that any such sale was ever confirmed by the defendant; nothing to suggest that he ever saw or was informed of the "Interim Receipt" which contains the phrase "East 33 ft. A," upon which the plaintiff's whole case is based. The deed which he signed and which his agents were to "surrender" to the plaintiff as mentioned above is admittedly of 25 feet only.

It is not necessary to decide whether the requirements of the Statute of Frauds are met by an oral confirmation. There was no confirmation here, written or oral, or by conduct. But, aside from the above reasons, it seemed to me at the trial, and still seems to me after consideration, that the phrase "East 33 ft. A" is clearly a *falsa demonstratio,* and must be discarded. All the facts in evidence, except what was said by Capt. Bayliss, shew that the subject-matter of the sale was the house property 2922 3rd Ave. W. The second receipt is of equal evidential value, so far as the Statute of Frauds is concerned, with the interim receipt, and it describes the property by the house number only. I discard Capt. Bayliss's story that he pointedly drew the attention of defendant's agents to the question of frontage. I do not think Capt. Bayliss was deliberately telling an untruth, but I do think that in his anxiety to help the plaintiff he persuaded himself that the question of the exact frontage was present to his mind when, in my opinion, the whole facts of the case shew that no importance whatever was attached to the question. The property bought was there

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before their eyes when the plaintiff decided to buy it, if she could get it for $2,800. Looking at the interim receipt, I do not think the phrase in question was other than an indication of location. It is manifestly a false indication in so far as the words "33 ft." are concerned. The other description is true. The false description must be discarded: Norton on Deeds, 213; *Morrell* v. *Fisher* (1849), 4 Ex. 591.

On the whole it would, in my opinion, be unconscionable to award compensation to the plaintiff: *Earl of Durham* v. *Legard* (1865), 34 L.J., Ch. 589; *Rudd* v. *Lascelles* (1900), 69 L.J., Ch. 396. And see also *Hansen* v. *Franz* (1918), 57 S.C.R. 57.

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The action is dismissed, with costs.

Judgment for defendant.

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BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA.

Municipal law — Taxation — Church property — Exemptions — Statutes— Strict construction—Retroactive—R.S.B.C. 1911, Cap. 170, Sec. 228— B.C. Stats. 1913, Cap. 47, Sec. 16; 1914, Cap. 52; 1919, Cap. 63, Sec. 9.

The Province may tax church property. The right having been properly transferred to municipalities, exemptions created by statute must be strictly construed.

Section 228 of the Municipal Act (R.S.B.C. 1911) exempts from taxation "every building and the site thereof set apart and in use for the public worship of God." Section 16 of the Municipal Act Amendment Act, 1913, amends section 228 by striking out the words "and the site thereof."

Held, that section 228 as so amended does not exempt the land on which the building stands.

Section 241 of the Municipal Act (B.C. Stats. 1914), as re-enacted by section 9 of the Muncipal Act Amendment Act, 1919, providing for the recovery of taxes by action is retroactive so as to give the right to recover taxes in arrear at the time of its passing.

[Reversed by Court of Appeal.]

Statement

ACTION to restrain the City of Victoria from selling certain lands belonging to the plaintiff for arrears of taxes, on the

ground that the taxes were not lawfully imposed. The City counterclaimed for payment of the taxes. Tried by MACDONALD, J. at Victoria on the 23rd of September, 1919.

F. A. McDiarmid, and *Miss Ringland,* for plaintiff.
Harold B. Robertson, and *H. S. Pringle,* for defendant.

28th November, 1919.

MACDONALD, J.: Plaintiff was authorized by statute, as a Corporation sole, *inter alia,* to acquire real estate, and, in 1913, became the registered owner of lots 9, 10, 11, block 12, Victoria City, upon which is erected a building, known as the St. Andrew's Cathedral. Defendant Corporation assessed these lots, and levied taxes thereon, for the years 1914 to 1918, amounting to $10,068.11 for general taxes and $2,961.65 for local improvement taxes. Such taxes not having been paid, defendant advertised the property for sale on the 26th of May, 1919. Prior thereto, plaintiff obtained an injunction restraining, until the trial of the action, the sale of the Cathedral. This involved a postponement of the sale of the lots in question.

It is contended, by the plaintiff, that such taxes were not lawfully imposed and that the defendant was not entitled to sell the property. The first ground taken by the plaintiff is, that these lots are exempt from taxation by statute. Prior to 1913, the Municipal Act (R.S.B.C. 1911, Cap. 170) as to taxation and exemptions therefrom, was as follows:

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"228. Rates and taxes may be settled, imposed, and levied upon land or upon improvements within a municipality by the Council thereof, subject to the following exemptions, that is to say:—

"(1) Every building and the site thereof set apart and in use for the public worship of God."

Then, in 1913, by section 16 of the Municipal Act Amendment Act of that year, this exemption was amended to the following effect:

"Subsection (1) of section 228 of said chapter 170 [of the Municipal Act] is hereby amended by striking out the words 'and the site thereof.'"

Notwithstanding this amendment, it is contended that the land, as well as the Cathedral, are not legally taxable, and that the exemption theretofore existing, as to the "site," still remains. In considering this question, it must be borne in mind, that "exemptions are to be strictly construed and embrace

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only what is within their terms": *Les Commissaires, &c., St. Gabriel* v. *Montreal* (1886), 12 S.C.R. 45 at p. 54. Compare other cases in Weir on Assessment, p. 27. The American decisions in this respect are epitomized in Dillon's Municipal Corporations, 5th Ed., Vol. 5, par. 1401, as follows:

"As the burden of taxation ought to fall equally upon all, statutes exempting persons or property are construed with strictness, and the exemption should be denied to exist unless it is so clearly granted as to be free from fair doubt. Such statutes will be construed most strongly against those claiming the exepmtion."

Compare Cyc., Vol. 37, p. 891:

"A grant of exemption from taxation is never presumed; on the contrary, in all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favour of the taxing power, and the burden is on the against those claiming the exemption."

Then again, as to the strictness of construction required with respect to exemptions from taxation, Ritchie, C.J. in *Dame Mary Wylie* v. *City of Montreal* (1886), 12 S.C.R. 384 at p. 386, says as follows:

"I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed."

Applying this statement of the law, as to exemption from taxation, has the plaintiff satisfied the onus thus imposed of shewing not only an exemption from general taxation, but also, from local improvement taxes in the year 1914 and subsequently thereto?

Judgment

Prior to the time of coming into force of the Revised Statutes of British Columbia, 1911, the legislation, as to exemption of church property, was the same as at present. In the revision of the statutes, the wording of the clause, in this respect, was varied by inserting the words "and the site thereof," and the provision for such exemption remained in this condition until the amendment in 1913. I think the first impression one receives from a reading of the present legislation as to this exemption is, that on its face, it does not assist the plaintiff. It is not a clear and unambiguous exemption from taxation, as to the land, upon which the Cathedral is erected. If you consider the trend of the legislation, it would appear that the provision was intended simply to exempt a church building, irrespective

of its value, from taxation. It is, however, contended that, in determining the effect of such exemption, I should not be controlled, nor influenced, by previous statutory provisions. Further, that the authorities, as to the construction to be placed upon an existing statute, based upon changes in legislation, should not be invoked as a guide. It was submitted that the following sections of the Interpretation Act govern the situation, *viz.*:

"21. The repeal of any Act or part of an Act shall not be deemed to be or to involve a declaration that such Act or the part thereof so repealed was or was considered by the Legislature to have been previously in force.

"22. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was or was considered by the Legislature to have been different from the law as it has become under such Act as so amended.

"23. The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law."

These sections are not contained in the English Interpretation Act. While these provisions require consideration, still, I do not think they destroy all the principles, that can be of assistance, in arriving at the construction of statutes and the intention of the Legislature, as outlined in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, &c.* (1898), 67 L.J., Ch. 628 at p. 631. The Lord Chancellor, in that case, quotes, with approval, an extract from Lord Justice Turner's judgment in *Hawkins* v. *Gathercole* (1855), 24 L.J., Ch. 332; 6 De G.M. & G. 1, that the intention of the Legislature is collected

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" 'sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances' (thereby meaning extraneous circumstances), 'so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.' "

Then a portion of Lord Blackburn's judgment in *River Wear Commissioners* v. *Adamson* (1877), 47 L.J., Q.B. 193; 2 App. Cas. 743, is quoted as follows:

" 'In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view.' "

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Here, I have to determine, what was the object sought to be attained by the Legislature, and I am entitled to consider surrounding circumstances. If the Legislature intended, not only to exempt a church or a place of worship, but also the land upon which it was situate, it could have easily so expressed itself, as has been done in other Provinces, *e.g.,* Ontairo: see R.S.O. 1897, Cap. 224, Sec. 7, par. 3, and Saskatchewan, see R.S. Sask. 1909, Cap. 89, Sec. 13. The wording to effect this object was quite clear and sufficient if it had remained as it was in our revised statutes. No circumstances have been suggested which would indicate, on the part of the Legislature, an intention to extend the exemption beyond the building itself. I think it should not be presumed. It was, however, strongly contended, that to simply exempt the building, used as a place of worship, and not the site as well, would be unworkable, in the sense that proceedings, taken to sell the land for non-payment of taxes, would involve the sale of the building as well. The Municipal Act provides, that land and improvements are required to be assessed separately, so that if the site of a church is to be exempt because such a "building" has that privilege, then, it might well be argued that, where, as in the case of many municipalities, the improvements are exempt from taxation, the land, in arrears for taxes, could not be sold for non-payment of taxes, as it would involve the sale of the building thereon.

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The statute does not purport to secure the church building to the owners in any event, but simply relieves it from bearing general as well as local improvement taxes. I do not think that this contention has any weight, in support of such an interpretation being placed upon the section in question. There were no English or Canadian authorities cited in support of the position assumed by plaintiff in this connection, but I referred to two American cases bearing upon the point.

Trinity Church v. *Boston* (1875), 118 Mass. 164: In this case, it was decided that, under a statute exempting from taxation "houses of religious worship when owned by a religious society or held in trust for the use of religious organization," that the lands, upon which such houses were erected, were also exempt from taxation. In this judgment, it was stated, that

the purpose of the statute was to relieve such organizations from the burden of taxation upon property devoted to public uses and that, as the land upon which the building stands is essential to the existence of the structure, it could fairly be presumed that it was the intention of the Legislature to include it, in the provisions of the statute by the phrase "houses of religious worship." While the purpose of the Legislature may be to relieve a religious institution from the full burden of taxation to be borne by ratepayers generally, I do not agree with the conclusion arrived at in that case, nor do I consider that it can be fairly presumed that it was intended, that the exemption from taxation should extend beyond the literal meaning of the words expressing such exemption. To state it more broadly, I do not think a presumption arises in favour of exemption from taxation or, as was stated by Taschereau, J. in *Les Commissaries, &c., of St. Gabriel* v. *Montreal, supra,* at p. 54: "Exemptions are to be strictly construed and embrace only what is within their terms." I think that where the exemption is specific, as indicating simply a house or "building," that instead of such exemption being impliedly extended, so as to include something additional, that the contrary course should be pursued, so that the exemption is confined to the property expressly and clearly indicated as obtaining the privilege.

In *Lefevre* v. *Mayor, &c., of Detroit* (1853), 2 Mich. 586, under a similar statute, it was decided, on the contrary, that the exemption only covered the church, and not the land upon which it was situate.

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While it is apparent that the legislation in this Province was intended to assist churches, still, the privilege of exemption need not necessarily be extended to the land, as well as the church itself. It is true that the land is necessary for the use of the church, still, treating the church property as a whole, the assistance by way of exemption might quite reasonably be intended to be limited to either the building or the land. The Legislature might even have enacted that the exemption applied only to one half the assessed value of the land, in addition, say, to the exemption of the building. In this connection, as evidencing the segregation of land from improvements in

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the scheme of taxation, by section 232 of the Municipal Act, it is provided that the Council may, in its discretion, levy a rate on improvements up to 50 per cent. of the assessed value thereof. It may also exempt such improvements altogether.

Then again, the position of the plaintiff is weakened when you consider the other exemptions referred to in this section of the Municipal Act, and the manner in which the Legislature has specifically exempted the land, which was deemed necessary for hospital and orphanage purposes. In my opinion, the statutory exemption claimed by the plaintiff, with respect to the land, does not exist. I think I might well adopt, with a slight addition, the words of Lord Herschell in *Commissioners of Inland Revenue* v. *Scott* (1892), 2 Q.B. 152 at p. 160, in interpreting a statute, as to exemption, as follows:

"The only safe course to take is to follow the ordinary and natural meaning of the words that are used. If we depart from them we may run the risk of not carrying out that which was intended by the Legislature, and it seems to me that it would be a departure from the ordinary and natural sense of the language used if we held"

that this provision for exemption, referring only to a "building," also included the site thereof.

Aside from the contention, that the land is exempt from taxation by statute, it was submitted that a municipality in this Province has no power to tax church property. This means that every building set apart for the public worship of God, as well as the site thereof, even without statutory exemption, differ from the rest of the real property in the Province, and are relieved from taxation. As there is no established church in Canada, if this privilege existed, it would necessarily apply to the churches of all denominations. It is a novel proposition and I should not, unless I were thoroughly satisfied, accede to its correctness. A decision along these lines would, in effect, be a declaration, that the municipalities have improperly collected taxes on the land used for church purposes. In support of this contention, reference is made to English authorities, but I do not think that they have any bearing upon the rights of the defendant Corporation in this Province. While the legislation, providing for taxation, is not imperative in its terms, still, if the power existed in the Province to confer such a right upon

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the municipality, with respect to all lands, then I think that the wording of the statute is quite sufficient for that purpose. I have no doubt that the Province has the right to tax church property in common with other property within its jurisdiction. It received, under section 92 of the British North America Act, exclusive powers, *inter alia,* to make laws as to "(8) Municipal institutions in the Province;" "(13) Property and civil rights in the Province;" "(16) Generally all matters of a merely local or private nature in the Province."

It was stated in the *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), A.C. 437 at pp. 441-2 as follows:

"The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial governments to a central authority, but to create a Federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the Provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the Provinces; so that the Dominion Government should be vested with such of these powers, property, and revenue as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of Provincial government. But in so far as regards those matters which by sect. 92 are specially reserved for Provincial legislation, the legislation of each Province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act."

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Then follows a pertinent quotation from *Hodge* v. *Queen* (1883), 9 App. Cas. 117:

"When the British North America Act enacted that there should be a Legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion."

Lord Watson then adds:

"The Act places the constitutions of all Provinces within the Dominion on the same level; and what is true with respect to the Legislature of Ontario has equal application to the Legislature of New Brunswick."

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The extent of the power possessed by the Provincial Legislature, which can be delegated to a municipality, is emphasized in the judgment of Willes, J. in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1 at pp. 18, 19 and 20, referred to by Duff, J. in *Weyburn Townsite Co.* v. *Hensberger* (1919), 3 W.W.R. 783 at p. 791, as follows:

"We are satisfied . . . . that a confirmed act of the local Legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."

Then again, Lord Haldane, in referring to the British North America Act, when delivering the judgment of the Privy Council in *In re The Initiative and Referendum Act* (1919), 3 W.W.R. 1 at p. 5 says:

"Subject to this [the qualification has no bearing on the present discussion] each Province was to retain its independence and autonomy, and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this *status*, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867."

Judgment

I think the power of taxation, vested in the Province, has been properly transferred to the municipalities, and that the land in question was liable to taxation without a positive enactment as to taxing church property.

Although the taxes were thus, in my opinion, lawfully imposed upon these lots, and were in arrears, still, the defendant Corporation has not been able to realize by the tax sale, and now seeks to recover the amount by way of counterclaim. It is contended, that it is debarred from pursuing this remedy, and that it must confine itself, in collecting the taxes, to a sale of the property, in pursuance of special legislation enacted for that purpose. I think that the taxes in arrears constitute a debt created by statute and that they may be recovered by action. The remedy by a sale of lands, being provided, should not destroy the right of action, unless the Legislature clearly indicated such intention. In any event, provision was made in 1919, by section 9, Cap. 63, B.C. Stats., for the recovery of

taxes by action. It is contended, that this legislation is not retroactive, so as to cover the arrears of taxes in question. It is worded as follows:

"241. (1) Any person whose name appears on the assessment roll of the municipality in any year as the owner of any land or improvements, or any taxable interest therein, within such municipality shall be liable to the corporation for:—

"(a) All taxes imposed by the corporation, under this Act or under any Municipal Act formerly in force, upon such land or improvements during such year, and all such taxes imposed in any previous year and remaining unpaid:

"(b) All taxes or rates imposed under any by-law passed pursuant to the Local Improvement Act or local improvement provisions formerly incorporated in any other Act and falling due during such year, and all such taxes or rates which have fallen due in any previous year and which remain unpaid.

"(2) The liability imposed by this section shall be a debt recoverable by action brought by the corporation in any Court of competent jurisdiction; and the production of a copy of so much of the collector's roll as refers to the taxes or rates payable by such person purporting to be certified as a true copy by the clerk of the municipal Council shall be *prima facie* evidence of the debt.

"(3) The liability imposed by this section shall not be enforced by action against any person whose name appears upon the assessment roll, by reason of the fact that he is an executor, administrator, or trustee of any estate or of any deceased person, except to the extent and value of the assets of such estate or deceased person which shall have come into his hands."

Judgment

This enactment is broad enough to cover taxes lawfully imposed and in arrears. I think its terms are sufficiently clear to shew, that it was intended to be retroactive in its effect, so as to give to the defendant Corporation the right to recover the amount alleged to be due in its counterclaim.

The action of the plaintiff is dismissed, with costs, and there will be judgment for the defendant upon the counterclaim, with costs. Stay of proceedings is granted for 30 days.

Action dismissed.

MARTIN, LO. J.A.

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Aug. 21.

CLAYOQUOT SOUND CANNING COMPANY, LIMITED, *ET AL.* v. S.S. "PRINCESS ADELAIDE."

Admiralty law—Salvage services.

CLAYOQUOT SOUND CANNING CO. *v.* S.S. "PRINCESS ADELAIDE"

Award made for salvage services in transferring passengers, baggage and mail from steamer which had run aground on a reef in a fog to another steamer. Essentials to constitute salvage service considered, and review of authorities.

ACTION for alleged salvage services, tried by MARTIN, Lo. J.A. at Victoria on the 25th of June, 1919.

Beckwith, for plaintiffs.
McMullen, for defendant.

21st August, 1919.

MARTIN, Lo. J.A.: This is an action for alleged salvage services rendered by the plaintiff's auxiliary gasoline schooner "Iskum" (registered tons 42.44; length 68 feet, 6 inches) to the defendant ship "Princess Adelaide" (registered tons 1,910; length 290 feet) on October 13th, 1918, at the northern entrance to Active Pass, where the "Princess Adelaide" had run aground on a reef near the lighthouse at Georgina Point in a dense fog. For the purpose of this case the fair value of the "Iskum" may be taken to be $17,000 and her cargo of salmon cans, $1,130; and of the "Princess Adelaide," $360,000. The services rendered consisted in transferring 310 passengers and their baggage and 61 bags of mail from the "Princess Adelaide," when aground, to the steamer "Princess Alice" during the fog. The "Iskum," like the "Adelaide," on her way from Vancouver to Victoria, sighted the "Adelaide" about 3.20 p.m. slightly on her port bow in the fog and went on into the Pass to determine her position and then returned to her in about half an hour, at which time it was arranged between the masters of the two vessels that the "Iskum" was to transfer the passengers, baggage and mail to the "Princess Alice," which had been summoned by the following wireless from the "Adelaide's" master to her owners at Victoria:

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"Ashore at Georgina Point at top of high water 12 feet of water on main reef amidships. Fuel oil tank leaking. Send boat for passengers," and was expected to arrive in about a couple of hours, depending on the fog, and she did arrive about five o'clock, and anchored out in the channel about three cables from the "Adelaide." In the interval the "Iskum" had come alongside the "Adelaide" and was taking the baggage on board when the "Alice" arrived, and in the course of four trips between the two vessels she transferred all the passengers, baggage and mail as aforesaid to the "Alice," and left for Victoria at 7.30 p.m. The "Iskum's" master, S. B. Wells, says that during the operation of transferring the baggage, which came first, he could see the two vessels, but when it came to the passengers the fog was so thick that he could only see the vessels occasionally and never clearly, and in this he is confirmed by his mate, Larsen, while the master of the "Adelaide," R. B. Hunter, says that he saw the "Alice" during the whole of that time. I have no reason to believe there is here an intentional misstatement, but I think the difference in view may be explained from the very much greater height of the bridge of the "Adelaide," from which objects might be more clearly seen than from the lower elevation of the "Iskum."

The position and condition of the "Adelaide," and state of the weather and tide, as they appeared to her master on the day of the "Iskum's" services may best be gathered from the following wireless messages he sent that day to her owners:

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"(1) 310 passengers. No small steamers. Will have to transfer with boats large amount of baggage. When will Tees be up? Fuel all spoiled only one tank which won't last long. Weather calm, thick fog. When will Alice arrive?

"[Sgd.] Hunter."

[The Tees was a special salving steamer.]

"(2) Schooner Iskum arrived alongside. Will take passengers and baggage to Alice. Will have to make three trips. Will take too long to go to Mayne Isl'd. Wharf. Alice will be here in about half an hour.

"(3) Star. side bow 30-feet sloping to 27-feet at gangway door. Still shoaling to 14 feet at after gangway doors. Forward end of dining room 12 feet deepening to 15 feet under stem. Port side 30 feet at stem shoaling to 20 feet at forward gangway doors. Gradually shoaling to 9 feet at after gangway carrying 12 feet right aft. Ships head S.S.W. Lighthouse right abreast the stern.

"(4) No. 2 oil tank full of water. (Salt). No. 3 oil tank (port) full of water. No. 3 oil tank (starb.) leaking slightly able to use oil. No. 4

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oil tank (port) full of water. No. 4 oil tank (starb.) leaking slightly. No. 5 oil tank full of water, bilges dry, also tunnel."

At the time of the arrival of the "Iskum" arrangements were in progress to transfer the passengers to the "Adelaide's" boats by means of a special gangway and thence to the island shore within a distance of 100 feet, but these were discontinued. It would also have been possible, if nothing intervened, caused by accident, weather, or atmosphere, to transfer by rowboats the passengers, baggage, and mails to the "Alice," but it would have taken several hours (being at best a cumbrous process), not less than four, I am inclined to think, beginning at 5 p.m. and soon extending into darkness, whereas the "Iskum," which lay alongside from 3.30 to 5 p.m., when she made her first trip to the "Alice," had finished the transfer in time to leave for Victoria at 7.30, as aforesaid. I am clearly of opinion that it would have been inexcusable in the circumstances if the master of the "Adelaide" had failed to avail himself of the first opportunity to transfer so large a number of passengers, because, as Dr. Lushington said in *The Thomas Fielden* (1862), 32 L.J., Adm. 61 at p. 62, the paramount consideration is risk to human life, thus expressing it:

"Is it possible to contend for a moment that the property was not in very great danger, and that, to a certain extent, at a certain period, there was risk to human life, and that to the extent of nineteen men at least? The time is of no consequence. I have ever held the opinion that, when once I can come to the conviction that human life has been at stake, even for a short time, it is the duty of the Court amply to reward the persons concerned; and for obvious and plain reasons—first, because from the necessity of the case, a very great reward should be given wherever there has been a sacrifice of human life; and, secondly, that human life is above all other considerations, and ought never to be exposed to unnecessary hazard and risk. These are the principles."

Judgment

And the same learned judge said in the same case at p. 62:

"Now, of course, according to ordinary principles, all these matters are governed by general rules; and it is utterly impossible to go minutely into each individual case and each particular point; and it never is a satisfactory investigation, take what pains you will, for it always will be that which Lord Stowell used to call it, a *rusticum judicium*."

And so, for these reasons, I shall refrain from examining further in unnecessary detail all the facts which it is necessary to consider which make up what Dr. Lushington called in *The Charlotte* (1848), 3 W. Rob. 68, 71, "the many and

diverse ingredients of a salvage service," which will be found classified in Lord Justice Kennedy on Civil Salvage, 2nd Ed., 133, at the end of which classification that learned author says:

"Where all or many of these elements are found to exist, or some of them are found to exist in a high degree, a large reward is given; where few of them are found, or they are present only in a low degree, the salvage remuneration awarded is comparatively small."

In the article on "Salvage," Halsbury's Laws of England, Vol. 26, p. 557, written by Lord Justice Kennedy and others, it is said:

"Salvage service in the present sense is that service which saves or contributes to the ultimate safety of a vessel, her apparel, cargo, or wreck, or to the lives of persons belonging to a vessel when in danger at sea, or in tidal waters, or on the shore of the sea or tidal waters, provided that such service is rendered voluntarily and not in the performance of any legal or official duty or merely in the interests of self-preservation."

And in the said book of the same learned author on "Salvage," p. 20, it is said:

"Two things at least are essential to the constitution of a salvage service. There must, in the first place, be danger to the subject of the service. In the second place, the undertaking of the service must be a voluntary act on the part of the salvor."

The principal facts in favour of a salvage award that stand out in the case at bar are: The stranding of the steamer; her appreciable list to starboard, and in such a position that the apprehension, as it then appeared, of her sliding off to her own peril and that of the "Iskum" could not, though slight, be wholly ignored; the existence of a fog; the large number of passengers; and the uncertainty of an unfavourable wind springing up at any time at that season of the year. It is admitted that the "Iskum" stood alongside and placed herself at the disposal of the "Adelaide" for the purpose of transferring her passengers, baggage, and mails from 3.30 till 7.30, when that service was completed.

Judgment

Many cases were cited to me, but none of them, as is to be expected in these varying occurrences of the sea, is what might be termed close to the one at bar. On the general principle of salvage it was said in *The "Phantom"* (1866), L.R. 1 A. & E. 58 at p. 60, 12 Jur. (N.S.) 529, by Dr. Lushington:

"I am of opinion that it is not necessary there should be absolute danger in order to constitute a salvage service; it is sufficient if there is a state of difficulty, and reasonable apprehension. There might be danger of

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further difficulty occurring, and I think it is proved in this case, from the facts to which I have adverted, that it was a matter of importance for the vessel to be moved—that she was, while she lay where she did, in reasonable apprehension of danger, and that reasonable apprehension was fulfilled by the accident that occurred."

And in *The Ella Constance* (1864), 33 L.J., Adm. 191 at p. 193 Dr. Lushington also said:

"It is a case in which there was no immediate risk, no immediate danger; but there was a possible contingency that serious consequences might have ensued."

The subject has lately been considered by Mr. Justice Bucknill in *The Suevic* (1908), P. 154; 77 L.J., P. 92, wherein he says at pp. 157-8:

"Cases of life salvage alone are of rare occurrence in this Court, and therefore it is necessary carefully to consider the principles upon which a salvage award may be made in such a case as this. I apprehend that it will be accurate to say that the principle which lies at the bottom of life salvage is that there must, in the first instance, be actual danger to the persons whose lives have been salved, or the apprehension of danger, and that seems to me to cover the whole ground. If there is no danger, or anything like danger, there is nothing to be saved from."

And at pp. 158-9:

"Now, the weather being, as I find it to have been, foggy or misty, so that the light could not be seen, but only the loom of it in the water, and the wind of force about six, as I find, with a ground swell, these people very properly, as the master of the Suevic thought, had to be landed with the greatest expedition. If anything had happened and any life had been lost through these people not being sent ashore as quickly as possible, very severe and harsh things would have been spoken of the master and of the great company he serves, and one may be satisfied that the master duly appreciated the position."

And again at p. 159:

"People are fond, sometimes, of using the word 'danger' only, but there is a great difference between danger and risk of danger; and just as the principle of salvage here applies to people on this ship who were either in danger or risk of danger, so a tug which is being navigated even by the most skillful navigator would be, I find, either in danger or risk of danger in going to the neighbourhood in which this ship was."

I find myself quite unable to say that there was not here that apprehension or risk of danger which constitutes salvage. The subject has been considered by me many times in this Court, and a case which bears some relation to this one is the *Grand Trunk Pacific Coast S.S. Co., Ltd.* v. *The "B.B."* (1914), Mayer's Admiralty Law and Practice, 544; 6 W.W.R. 711; 15 Ex. C.R. 389; wherein I held there was "an element of

appreciable risk"; and see also my recent decision in *The "Andrew Kelly"* v. *The "Commodore"* [*ante* p. 439]; (1919), 1 W.W.R. 1059; 19 Ex. C.R. 70. Some stress was laid in argument upon the fact that the "Iskum" was not in danger, but while that is one of the "many and diverse ingredients" of salvage, yet it is not an essential thereof: *cf. The Ellora* (1862), Lush. 550; *The Altair* (1897), P. 105; 66 L.J., Adm. 42; and *The Toscana* (1905), P. 148; 74 L.J., P. 54.

Viewing, then, the services here as salvage, I have to award the same, and after full consideration of the circumstances I am of opinion that the sum of $1,000 is the proper award to make, and in so doing I bear in mind what was said by the Admiralty Court in the *London Merchant* (1837), 3 Hag. Adm. 394 at p. 400:

> "A great steam navigation company is peculiarly bound to encourage salvage assistance; they owe it to the public; they are particularly engaged in carrying passengers; they are large contractors for carrying the mail."

Judgment

Here, it must be remembered, not only the passengers but their baggage, and the mail were transferred expeditiously to a place of safety, the baggage being so much that the mate of the "Iskum" says it was stacked up forward so high that he could not see over the bow from the wheelhouse. The apportionment of this award will be on the principle cited in the case of *The "Andrew Kelly"* v. *The "Commodore," supra,* and I shall give further directions in regard thereto when the registrar is furnished with particulars of the complement of the "Iskum's" crew.

There will be judgment accordingly for the plaintiffs for $1,000 and the costs follow the event.

Judgment for plaintiffs.

MURPHY, J.

1919

Nov. 2.

SHAW v. SHAW.

Divorce—Adultery—Cruelty—Evidence—Admission in letter from defendant—Admissibility.

SHAW v. SHAW

On petition for divorce the petitioner submitted in evidence a letter she had received from the respondent in England, in which he admitted he had committed adultery on various occasions and that he intended to remain in England.

Held, that if the Court is satisfied as to the *bona fides* of the letter, the evidence is sufficient proof of adultery and there should be an order absolute.

Statement

ACTION for dissolution of marriage. The petitioner and respondent were married in British Columbia in 1911. They lived in British Columbia and Alberta, being in British Columbia in 1916, when the husband went overseas. There were no children. The wife petitioned for divorce on the 5th of August, 1919. Upon the hearing of the petition the husband did not appear. As proof of adultery, the petitioner submitted in evidence a letter she had received from her husband written from Seaford, Surrey, England, on the 8th of March, 1919, in which he admitted that since going overseas he had committed adultery with a number of women on various occasions; cruelty was also alleged, evidence of which was submitted. Tried by MURPHY, J. at Victoria on the 20th of November, 1919.

Bullock-Webster, for petitioner.

Respondent did not appear.

Judgment

MURPHY, J.: I am satisfied in regard to the *bona fides* of that letter, and therefore I am not concerned whether the original adultery was condoned or not. There has certainly been adultery committed beyond all question. There will be a decree absolute and costs against the respondent.

Petition granted.

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Shipping—Collision in harbour—Neglect to keep proper look-out—Failure to keep course and speed—Article 21, Sea Regulations.

The making of a landing along the waterfront of a busy harbour is a manœuvre which ought to be accompanied by full precautions, the first of which is an adequate look-out.

Observations of MARTIN, LO. J.A. in *Bryce* v. *Canadian Pacific Ry. Co.* (1907), 13 B.C. 96 at p. 101; 6 W.L.R. 53, affirmed by the Judicial Committee of the Privy Council (1907), 15 B.C. 510 pp. 512-3; 13 Ex. C.R. 394 upon the "proper precaution" of keeping a "general look-out" in Vancouver Narrows applied.

A serious burden is imposed upon a vessel if she fails to "keep her course and speed" as required by article 21 of the Sea Regulations, and she lays herself open to attack by the "give-way" vessel by departing from the directions of the article and must be prepared to justify the departure by the proper execution of nautical manœuvres, such as in dropping a pilot, or approaching a landing or drawing up to an anchorage, or to lessen the consequences of collision, to save life or otherwise.

S.S. Albano v. *Allan Line Steamship Company, Limited* (1907), A.C. 193; 76 L.J., P.C. 33 at p. 40 followed.

ACTION of damage by collision. Tried by MARTIN, LO. J.A. at Vancouver on the 20th and 21st of June, 1917. The facts appear in the judgment.

Woodworth, for plaintiff.
C. B. Macneill, K.C., for defendant.

20th September, 1917.

MARTIN, LO. J.A.: This action arises out of a collision in Vancouver harbour on December 28th last, at about 3.45 p.m., when the high-powered steamship Prince Rupert (Duncan McKenzie, master), 320 feet in length, gross tonnage 3,379, registered 1,626, speed 18 knots, collided with the steam tug Cleeve (Wm. N. Coughlin, master), length 58 feet 6 inches, beam 15 feet, and caused considerable damage, her stern cutting into the Cleeve's port side about amidships. Both vessels had entered the Narrows, the Cleeve in advance, and passed Brockton Point and Burnaby Shoal, having the last behind them, with the Cleeve inside of it, the intention of the Prince Rupert being

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to make her landing at her owner's dock, the Grand Trunk Pacific, and that of the Cleeve to make the Hastings Saw Mill wharf, a short distance beyond said dock. It will thus be seen that their intentions, if carried out, having regard to the short distance to be travelled, would sooner or later result in converging and intersecting courses, dependent upon the rate of speed of the respective vessels. The evidence is in certain important respects contradictory, but after an unusually careful consideration of it (necessitated by the fact that there is here the strange occurrence of a collision in broad daylight on a clear, calm day in a harbour) I find as a fact that the Cleeve's straight course was kept at a speed of about six knots from Burnaby Shoal towards her said destination and that it was not varied till "in the agony of an impending collision." At one time the Prince Rupert was admittedly as regards the Cleeve an overtaking vessel, up to, at least, when abeam of Burnaby Shoal at 3.37 p.m., and after she, the Prince Rupert, changed her course, after passing said shoal to S. 50° E., and later to S. 25° E., to make a landing at said dock, she became a crossing, if not still an overtaking vessel, and in either case bound under articles 19, 22, or 24 to keep out of the way of the Cleeve which she had, I find, on her starboard side, and in such case there was under article 21 the correlative duty cast upon the Cleeve to "keep her course and speed," which duty I find she discharged. I am unable to take the view that the stopping of the Prince Rupert's engines and her slowing down on encountering the North Vancouver Ferry changed her character as regards the Cleeve or lessened her obligations; it seems to me that relying on the fact that she was at half-speed, going six to eight knots after passing the shoal, she either thought she could afford to ignore the Cleeve and would have time to make her landing before the Cleeve's course intersected, or else she dismissed the Cleeve entirely from her mind on the erroneous and improper assumption that she was only going as far as the Canadian Pacific Railway Company's Australian wharf, a long way short of the Grand Trunk Pacific dock, or up Coal Harbour, which latter view is sufficiently supported by the evidence of her first mate, Roderick McKenzie. From either point of view this, in the circumstances, was a "neglect to keep a proper look-out"

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as required by the "good seamanship" (article 29), and it was not taking proper "precautions" to speculate upon and miscalculate the speed of the Cleeve, especially in ignorance of her destination. These misapprehensions as to speed and relative conditions lead to serious consequences as pointed out by the Lord Chancellor in *The Olympic and H.M.S. Hawke* (1913), 83 L.J., P. 113; (1914), 12 Asp. M.C. 580; 112 L.T. 49; (1915), A.C. 385. In my opinion the making of the landing along the waterfront of a busy and important harbour is a manœuvre which ought to be accompanied by full precautions, the first of which is an adequate look-out. I draw attention to my observations upon the "proper precaution" of keeping "a general look-out" in Vancouver Narrows in *Bryce* v. *Canadian Pacific Ry. Co.* (1907), 13 B.C. 96 at p. 101; 6 W.L.R. 53, which view was affirmed by their Lordships of the Privy Council, as reported in 15 B.C. 510, at pp. 512-3; 13 Ex. C.R. 394, wherein their Lordships said of the master of the Chehalis:

"The real cause of this unfortunate collision was that there was no adequate look-out on board the *Chehalis* . . . . . It seems almost incomprehensible that he should not have noticed her [The Princess Victoria] even before she rounded, and as she was rounding the [Brockton] Point, unless he never looked anywhere except straight ahead of his vessel."

These observations are, in my opinion, very appropriate to the circumstances of the case at bar, and I also refer to those in *Cadwell* v. *The Ship C. F. Bielman* (1906), 10 Ex. C.R. 155. I think that the attention of the Prince Rupert was, after passing the shoal, so engrossed upon the ferry that she became "strangely oblivious of the presence of the Cleeve," to adopt the language of their Lordships of the Privy Council in *S.S. Albano* v. *Allan Line Steamship Company, Limited* (1907), A.C. 193; 76 L.J., P.C. 33 at p. 34; 96 L.T. 335; 10 Asp. M.C. 365.

Judgment

So far as the Cleeve is concerned, while her master had been aware for some little time of the presence and approach of the Prince Rupert, yet it was his duty to obey article 21 and "keep his course and speed, and he was justified, in his position, in assuming that the Prince Rupert would conform to article 19 and keep out of his way, and he properly persisted in this line of conduct till the Prince Rupert was upon him, when "in the agony of impending collision" he tried ineffectually to escape

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from it by going astern and putting his helm to starboard, and though it was too late, yet no blame clearly can be attached to him for the failure of these final efforts.

It was suggested that the Cleeve might have avoided the accident if she had earlier altered her helm, but the cases shew that it imposes a serious burden upon a vessel if she fails to conform to article 21, and she lays herself open to attack by the "give-way" vessel by departing from its directions and must be prepared to justify that departure by the proper execution of nautical manœuvres, such as in dropping a pilot, or approaching a landing, or drawing up to an anchorage, or to lessen the consequences of collision—to save life or otherwise. See the late cases of *The Fancy* (1916), 86 L.J., P. 38; (1917), P. 13, and *The Echo* (1917), P. 132; 86 L.J., P. 121, on the point; and also those of *The Velocity* (1869), 39 L.J., Adm. 20; L.R. 3 P.C. 44; 6 Moore, P.C. (N.S.) 263; *Steamship "Arranmore"* v. *Rudolph* (1906), 38 S.C.R. 177; *S.S. Albano* v. *Allan Line Steamship Company, Limited, supra; The Roanoke* (1908), P. 231; 77 L.J., P. 115; 99 L.T. 78; and *The Olympic and H.M.S. Hawke, supra.*

Judgment

In the *S.S. Albano* case, *supra,* their Lordships said, p. 40:

> "It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, and then act, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this."

Applying this language to the case at bar, I determine that the master of the Cleeve kept his course and speed up to a proper point and that the accident is solely attributable to the negligence of the Prince Rupert in failing to comply with the articles above cited.

The prior judgments of this Court in *The "Cutch"* (1893), 2 B.C. 357; 3 Ex. C.R. 362, and *Smith* v. *Empress of Japan* (1901), 8 B.C. 122; 7 Ex. C.R. 143, confirm in general the conclusions I have arrived at.

Therefore let judgment be entered in favour of the plaintiff with costs, and if necessary there will be a reference to the registrar, with merchants, to assess the damages.

Judgment for plaintiff with costs.

CANADIAN PACIFIC RAILWAY v. STEAMSHIP "BELRIDGE."

Shipping — Collision — Excessive speed in snow-storm — Article 16, Sea Regulations—The Maritime Conventions Act, 1914, Can. Stats. 1914, Cap. 13—Default of two vessels—Division of damages.

A ship is not entitled to run through fog and snow at a speed which is safe for herself but immoderate and dangerous for others.

Pallen v. *The Iroquois* (1913), 18 B.C. 76; 23 W.L.R. 778 followed.

In apportioning damages resulting from a collision between two ships, where the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of damages should be half and half.

The Peter Benoit (1915), 13 Asp. M.C. 203; 85 L.J., P. 12 followed.

ACTION by plaintiff, as owner of the steamship "Empress of Japan," for $30,000 damages against the steamship "Belridge" occasioned by a collision which took place off Trial Island, near Vancouver Island, B.C., on the 31st of January, 1917. Tried by MARTIN, Lo. J.A. at Vancouver on the 19th, 20th and 22nd of June, 1917. Statement

McMullen, for plaintiff.
Mayers, for defendant.

21st September, 1917.

MARTIN, Lo. J.A.: On January 31st, 1917, about half-past four (Victoria time) in the afternoon, the British twin-screw steamship Empress of Japan (W. Dixon Hopcroft, master), length 455 feet, gross tonnage 5,940, collided with the Norwegian steamship Belridge (Nels Olsen, master), length 450 feet, gross tonnage 7,020, in the Strait of Juan de Fuca, between Trial and Discovery Islands, the Empress of Japan being inward bound for Vancouver pursuing a course from Trial Island to round Discovery Island, and the Belridge out- Judgment

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ward bound pursuing a course from Discovery Island to round Trial Island, which are about three miles and six cables apart. The tide was at slack and the state of the weather, according to the preliminary act filed by the Belridge, was "heavy snow-storm, very thick," with a varying north-westerly wind about 20-25 miles, and according to the Japan, a "snow-squall," with a "northerly moderate wind"; the latter vessel admits she was going at a speed of twelve knots and her best speed, her pilot says, was 16¼, while the former alleges, erroneously, I find, that her speed was only "about three or four knots." The Japan alleges she first saw the Belridge "about half a mile distant ahead," and the Belridge first saw the Japan "two to three ship lengths about one point on the port bow." The ships came together about amidships on their port sides and both sustained damage.

For some time before as well as at the time of collision both vessels had been sounding fog signals, as had also the light-houses at Trial and Discovery Islands.

So far as the Japan is concerned the case is very simple. She was on her own shewing clearly violating article 16 by not going at a "moderate speed" in the snow-storm (which speed was maintained till the Belridge came in sight) within the principles fully considered by me in *The Tartar* v. *The Charmer* (1907), Mayers's Admiralty Law and Practice, p. 536; and *Pallen* v. *The Iroquois* (1913), 18 B.C. 76; 23 W.L.R. 778 to which I refer, and also to *The Counsellor* (1913), P. 70; 82 L.J., P. 72. In the second case the contention that a ship is entitled to run through fog or snow at a speed which is safe for herself but immoderate and dangerous for others is disposed of.

Judgment

Then as to the Belridge. She, after passing Discovery Island, continued to go, I find, through the snow-storm at a speed of upwards of eleven knots, but upon hearing a ship's fog signal to the south-west, apparently forward of her beam in the direction of Trial Island, reduced her speed to half, making at the least six knots, and shortly thereafter upon hearing the same whistle repeated almost ahead changed her course one point to the westward, but did not for three or four minutes after half speed reduce to "slow," not till after she had heard two more

whistles from what she then knew was the Japan, and after going "slow" for two or three minutes sighted the Japan, and put her helm hard aport and engine full speed astern, but too late to avert the impact. This is putting the matter in as favourable light as possible for the Belridge, based on admissions of her pilot and officers, and yet it clearly shews that she also violated article 16 in two respects, not going at a moderate speed at eleven knots, and not having stopped her engines and navigated with caution when she heard the signal of another vessel, apparently forward of her beam, whose position was not ascertained. No satisfactory reason was given for her failure to comply with the requirements of the article, and at the very least I cannot understand why she did not reduce her speed to slow earlier than she did, especially in that frequented locality. Her case, therefore, is also covered by the two authorities already cited. I have only to add that it seems an unaccountable thing that none of the witnesses for the Japan will admit that he heard any fog signal from the Belridge though the independent witness H. J. Austin, who was waiting for her in his launch off Brotchie Ledge and saw the Japan pass him, says, and I believe him, that he heard her signals for some considerable time, nearly an hour, approaching from about Ten Mile Point, passing Discovery and Trial Islands on her course past the Ledge, about three miles from Trial Island.

Judgment

It remains, then, to consider the application of The Maritime Conventions Act, 1914, Can. Stats. 1914, Cap. 13, Sec. 2, which came into force on July 1st of that year: Canada Gazette, 6th June, 1914. The relevant portions of the section follow:

"Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

"Provided that—

"(*a*) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

"(*b*) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and . . . . ."

This is the first time, I may say, that I have found it neces-

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sary to consider the effect of this section, but it has been considered several times in England, beginning with *The Rosalia* (1912), P. 109; 81 L.J., P. 79; 12 Asp. M.C. 166; where the degree of liability was apportioned at 60 and 40 per cent.; *The Bravo* (1912), 12 Asp. M.C. 311; 29 T.L.R. 122; 108 L.T. 430, at four-fifths and one-fifth; *The Counsellor* (1913), P. 70; 82 L.J., P. 72, at two-thirds and one-third; *The Cairnbahn* (1913), 12 Asp. M.C. 455; 83 L.J., P. 11; 110 L.T. 230; (1914), P. 25, equally apportioned; *The Llanelly* (1913), 83 L.J., P. 37; 110 L.T. 269; 12 Asp. M.C. 485; (1914), P. 40; and *The Umona* (1914), P. 141; 83 L.J., P. 106; 111 L.T. 415; 12 Asp. M.C. 527, at three-fourths and one-fourth; *The Ancona* (1915), P. 200; 84 L.J., P. 183, at two-thirds and one-third; *The Kaiser Wilhelm II.* (1915), 31 T.L.R. 615; 85 L.J., P. 26, equally apportioned; and *The Peter Benoit* (1915), 13 Asp. M.C. 203; 85 L.J., P. 12, equally apportioned. There is a discussion of the question in this last and leading case, in the House of Lords, and it is there laid down, p. 207, by Lord Atkinson that where

"the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of the damages should be half and half."

How the apportionment should be arrived at is thus viewed by Lord Sumner, p. 208:

Judgment

"The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do: a general leaning in favour of one ship rather than of the other will not do: sympathy for one of the wrongdoers, too indefinite to be supported by a reasoned judgment, will not do. The question is not answered by deciding who was the first wrongdoer, nor even of necessity who was the last. The Act says, 'having regard to all the circumstances of the case.' Attention must be paid not only to the actual time of the collision and the manœuvres of the ships when about to collide, but to their prior movements and opportunities, their acts, and omissions. Matters which are only introductory, even though they preceded the collision by a short time, are not really circumstances of the case but only its antecedents, and they should not directly affect the result. As Pickford, L.J. observes: 'The liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.' That must be in fault as regards the collision. If she was in fault in other ways, which had no affect on the collision, that is not a matter to be taken into consideration."

I feel that I should say in this case, as Lord Atkinson said in that (p. 207):

"There is not, in my opinion, any such preponderance proved in this

case. Both vessels were to blame; and, in my view, the evidence leaves it very uncertain which was most to blame."

There will be a reference to the registrar, with merchants, if necessary, to assess the damage. As both ships are to blame, each will bear her own costs, in accordance with the rule laid down in *The Bravo* case, *supra*.

Let judgment be entered accordingly.

Judgment accordingly.

JOE v. MADDOX & OULETTE.

Practice — Garnishment — Defective affidavit — "Person" — Not to include partnership—Rules of County Court, Order X., r. 23; Order XI., r. 1 —R.S.B.C. 1911, Cap. 14, Secs. 3 and 20—B.C. Stats. 1913, Cap. 4; 1915, Cap. 15, Sec. 3.

In order to enable the Court to make an order under section 3 of the Attachment of Debts Act, the strictest compliance with the statute is required.

Where an affidavit in support of an application for such an order sets out that the garnishees are indebted to the defendant, when on the face of the proceedings there are three defendants, the defect is one both in form and substance and the order should be refused.

APPEAL by plaintiff from an order of HOWAY, Co. J. of the 9th of June, 1919 (reported 27 B.C. 224), setting aside a garnishee order issued by the registrar at New Westminster before judgment under Order XI., r. 1, of the County Court Rules. The garnishees are a firm of barristers in Vancouver. The affidavit in support of the application reads as follows:

Statement

"1. I am Solicitor for the above named plaintiff, and am aware of the facts hereinafter referred to.

"2. The plaintiff is desirous of commencing an action in respect of wages for work and labour done.

"3. In respect of the cause of action herein, the defendant is justly and truly indebted to the plaintiff in the sum of Two hundred and eighty-three dollars, after making all just discounts.

"4. I am informed and believe that Messrs. Wismer, McGeer & Johnson, of Standard Bank Building, Vancouver, B.C., are indebted under obligation

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or liable to the said defendant, and that the said Wismer, McGeer & Johnson are within the Province of British Columbia."

The appeal was argued at Vancouver on the 6th of January, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. M. Whiteside, for appellant: Objection was taken that the order being made to a firm, in a firm name, it should have been made by a judge under Order X., r. 21, but that order does not take away the power of the registrar to issue the order under Order XI., r. 1: see *Hogue* v. *Leitch* (1915), 22 B.C. 10. The word "person" includes a corporate body. The learned judge followed *Walker* v. *Rooke* (1881), 6 Q.B.D. 631, but Order XLVIIIA., r. 9 (English), which came into force later, is the same as our Order X., r. 23, so that the *Walker* case is no longer an authority: see Lindley on Partnership, 8th Ed., 359.

Wismer, for respondent: The affidavit supporting the application does not comply with the rule. He did not state the name, address and description of the garnishees. By the 1915 amendment the Attachment of Debts Act was made to apply to the County Court, and the rules were added, but at no place in any Act is Order X., r. 23, and the rules cannot widen the jurisdiction. The authority for the rules is section 162 of the County Courts Act (R.S.B.C. 1911, Cap. 53) and this rule is subsequent to the statute. He says he should be under Order XI., r. 1, but under that rule he must claim in his affidavit that the action is pending, etc. This procedure is taken under the 1913 amendment to the Attachment of Debts Act, so Order X., r. 23, has no application.

Argument

Whiteside, in reply: As to the affidavit complying with the rules see *Beaubier* v. *Lloyd* (1918), 1 W.W.R. 772. On the question of information and belief see *Tate* v. *Hennessey* (1901), 8 B.C. 220; *In re J. L. Young Manufacturing Company, Limited* (1900), 2 Ch. 753.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be dismissed, and I wish to confine my opinion to one point. There have been very many interesting points discussed at the bar, and a good deal can be said *pro* and *con* upon some of them, but there

is one difficulty which seems to be an insuperable one in the appellant's way, and that is that the affidavit upon which this order was made does not comply with the form given in the statute of 1913; and it seems to me that in order to succeed in obtaining the order which was sought the utmost strictness was required in following out the terms of the statute.

Now Mr. *Whiteside,* making the affidavit in question here, has sworn that the garnishees were indebted to the defendant. It appears on the face of the proceedings that there were three defendants. That seems to me to be a fatal objection, not merely in form, but in substance, because it may be that these garnishees were indebted to one defendant and not to either of the other two defendants. It does not even appear by the affidavit which defendant it is alleged the garnishees were indebted to. That is a matter of substance, and where strictness is required, as it is required in cases of this kind, in order to give the Court jurisdiction, or at all events, if not to give jurisdiction, in order to enable the Court to make the order which is asked for here, the strictest compliance with the statute is required. On that ground and on that ground alone, I would dismiss the appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree.

MARTIN, J.A.

GALLIHER, J.A.: I regret to say that the affidavit is not only defective on that point, but I think it is defective from the fact that there is no description of the facts set out. I notice in the Attachment of Debts Act that Form A purports to be taken from the 1913 Act, and is exactly similar in every respect with the 1913 Act until you come down to the words "and is within the Province of British Columbia." There it was changed to where it is "within the jurisdiction of the Court." However, that is on another feature. I might mention that that change has occurred to me.

GALLIHER, J.A.

I notice that it is the garnishees who are fighting these proceedings. However, I suppose it is perfectly right. It seems peculiar, but there may be good reasons for it that we do not know. However, on the whole, I think that the affidavit is defective, and the appeal must be dismissed.

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McPHILLIPS, J.A.: Notwithstanding the strenuous and able argument of Mr. *Whiteside,* I agree with HOWAY, Co. J. in the Court below. I think that the reasons given for his judgment are right. I do not think that it was within the power or jurisdiction of the district registrar to make the order which was made. The furthest point to which you might extend Order X., r. 23, would be an order that could be made under Order XI., r. 1; and if there was necessity to introduce the exact terminology of the statute in Order XI., r. 1, as the statute then stood, there would be just as much necessity to introduce the section that we find in 1913. In considering statute law, what is required is to read it all and apply it in such a manner as to make it workable. Now, I cannot advise myself that I would be right in saying, when the Legislature has applied its mind to a firm or partnership in precise terms and given that authority to a judge alone, that the Legislature intended (except it was done in a most apt way), to extend that power and authority to the district registrar to make the orders, and if I needed anything to fortify myself in coming to the conclusion that I do, I would consider that strong support. This view is enough in itself, to dispose of the appeal, but with respect to the affidavit I think it was defective—defective in several particulars. The style of cause is not accurate and the utmost strictness is required upon which to found an attaching order. The operation of an order of this kind may mean bankruptcy at times to people—being deprived of liquid assets by virtue of an order made as in this case—even before the commencement of an action.

Then the address, I think, has not been given as required. "Standard Bank Building" is certainly insufficient. I have no hesitation in saying "Standard Bank Building, Vancouver, B.C.," is no address whatever. Further, there is, without the question of a doubt, no description given. On these grounds the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *A. M. Whiteside.*
Solicitors for respondents: *Wismer, McGeer & Johnson.*

MAHRER v. FECHNER *ET AL.*

MORRISON, J. (At Chambers)

1920

Jan. 8.

MAHRER v. FECHNER

Practice—Foreclosure—Taking of accounts—Marginal rule 795.

Where an order *nisi* in an action for foreclosure includes an order for the taking of accounts that does not contain all the directions required under marginal rule 795 a substantive application may be made for an order to proceed with accounts.

APPLICATION by defendant for an order to proceed with accounts. The plaintiff obtained an order *nisi* for foreclosure. The order included a clause for taking accounts, *viz.*:

"This Court doth order that an account be taken of what is and shall be due for principal, interest, etc., on a certain mortgage mentioned in the pleadings in this action and that such account be taken before the district registrar of the Supreme Court of British Columbia at such time and place as he shall by writing appoint."

A month elapsed after the order *nisi* was made and the taking of accounts was not proceeded with. Counsel for defendants asks for an order to proceed with accounts, submitting that the clause for account in the order *nisi* does not mention the time within which the registrar is to proceed, and marginal rule 795 is imperative. The defendants are anxious to have the accounts taken and the six months' time for redemption to run, so that they may come in and redeem. Heard by MORRISON, J. at Chambers in Vancouver on the 8th of January, 1920.

Statement

Whealler, for the application.
Fleishman, contra.

MORRISON, J.: I think the application should be granted. Marginal rule 795 seems quite explicit that the order for accounts must state a time limit in which accounts must be proceeded with. The amendment of 1918 to this rule requires that the order *nisi* contain full directions for taking the accounts and in that event the necessity for a substantive application, as is now made, is dispensed with. In the present case, the order did not contain all the essential directions and I therefore think the application is justified.

Judgment

Application granted.

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NORTHWEST TRADING CO. v. NORTHWEST TRADING CO.

NORTHWEST TRADING COMPANY LIMITED v. NORTHWEST TRADING COMPANY LIMITED *ET AL.*

Company law—Foreign company—Registration in British Columbia—Previous registration in same name—Application refused—Action attacking name of company first registered—R.S.B.C. 1911, Cap. 39, Secs. 18, 27 and 168.

In 1917 the plaintiff Company incorporated in the State of Washington as the Northwest Trading Company Limited, being the outcome of a partnership engaged in the business of exporters and importers of general merchandise. The business extended, and it engaged in business, directly to some extent but chiefly through agents, in British Columbia prior to application to the registrar of joint-stock companies for registration as an extra-provincial company. The application was refused owing to the defendant Company having been incorporated in March, 1918, under identically the same name. In an action for a declaration that the plaintiff Company is entitled to the exclusive use of its corporate name and that the defendant Company be compelled to change its name and in default that it be wound up:—

Held, that a foreign company is not debarred by the Companies Act from obtaining redress and independent of fraud the right of the foreign company to compel the domestic company to change its name depends on the character of the name and the nature and extent of the foreign company's business in the Province at the time the name was adopted by the domestic company. A foreign company has, however, no such right where the name is "geographical" and not "fanciful" and at the time of the incorporation of the domestic company the foreign company had not established such a business in the Province that the public were deceived by the adoption of the name by the domestic company.

In the case of an application for registration in British Columbia by a foreign company, if the name is identical with that of a company already incorporated, there is no discretionary power in the registrar. The application must be refused.

Under section 168 of the Companies Act, a foreign company duly registered can enforce its contracts although such contracts were made in the Province before the company's registration, such contracts therefore cannot be regarded as illegal and the company's conduct in doing business before registration cannot be raised as a bar to an equitable remedy sought by the company against the use of its name which it may claim has become associated with its business.

Statement

ACTION for a declaration that the plaintiff Company is entitled to the exclusive use of its corporate name as against

the defendants and to compel the defendants to change the name of the defendant Company to one different from that of the plaintiff and in default of such change being effected within a reasonable time, so as to enable the plaintiff to be registered as an extra-provincial company, that the defendant Company be wound up. Tried by MACDONALD, J. at Vancouver on the 7th and 8th of October and the 19th of November, 1919.

A. Alexander, and *Tiffin,* for plaintiff.
Mayers, for defendants.

12th January, 1920.

MACDONALD, J.: Plaintiff claims that, as against the defendants, it is entitled to the exclusive use of its corporate name within the Province, and that the defendants should be compelled to change the name of the defendant Company to one dissimilar to that of the plaintiff. Further, that, in default of such change being effected, within a reasonable time, so as to enable the plaintiff to be registered as an extra-provincial company, that such defendant Company should be wound up.

Plaintiff Company has a capital of $300,000, fully paid up, and is an outcome, by incorporation, of a partnership known as the Northwest Trading Company. Such partnership was engaged in the business of exporters and importers of general merchandise, with its head office at Seattle, Washington, and, in January, 1917, deemed it advisable to incorporate, in that State, under such name, with the addition of the term "Limited." Its business prospered extensively, so that agents were established not only upon this continent, but in Europe and the Orient. It bought and sold merchandise, running into the millions of dollars annually. It engaged in business directly, to some extent, in British Columbia, but the larger portion of its business, in this Province, was carried on through agents. It then sought to be registered, in this Province, as an extra-provincial company and applied to the registrar of joint-stock companies for that purpose.

Judgment

The application was refused on the ground that the defendant Company had, in the month of March, 1918, already been incorporated, under identically the same name as the plaintiff Company. It is contended, in the first place, that such refusal was

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discretionary with the registrar and cannot now be questioned. The legislation, passed for the purpose of avoiding confusion, through the use of names of companies, which are either identically the same, or so similar as to be calculated to deceive, is as follows (Companies Act, Sec. 18(1)):

"A company or society may not be incorporated nor may an extra-provincial company be licensed or registered by a name [a] identical with that by which a company or society or firm in existence is carrying on business or has been incorporated, licensed or registered, or [b] so nearly resembling that name as in the opinion of the Registrar to be calculated to deceive, or [c] by a name of which the Registrar shall for any other reason disapprove. . . . . ."

The reasons for refusing an application for incorporation, registration or licensing, are thus grouped under three headings. I think that only, as to the two latter of these, can the registrar exercise any discretion, *viz.*: (1) Where there is simply a resemblance between the names, which is calculated to deceive; (2) Or where "for any other reason" the registrar disapproves of the name, under which incorporation or registration is sought. Where the name is identically the same, the statute is prohibitive, and the application should, as in this instance, be properly refused, though I do not consider this prohibition would prevent the incorporation of a domestic company being attacked by a foreign company under proper circumstances.

Judgment

Defendant Company then invoked the provisions of section 27 of the Companies Act as a defence to any right of action on the part of the plaintiff. This section is as follows:

"27. (1.) A certificate of incorporation given by the Registrar in respect of any company shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act."

While the effect of this section is not covered by authority, and it was suggested that the question had not previously been raised, still, I do not think that it was intended, nor should it give a company, so incorporated, such a point of vantage, that it could debar a foreign company from obtaining redress, if it were wronged by the prior incorporation or registration of a company in this Province. If this contention prevailed, the result might be that a wealthy company, having a world-wide

reputation, and desiring to freely carry on business in this Province, might find itself prevented from doing so by a company, which had pirated its name and was incorporated, not to honestly transact business, but simply for the purpose of thwarting the larger company, or being pecuniarily compensated for abandonment of the field. This would be such an injustice that our Courts would readily apply a remedy. It is alleged, that this course was pursued by the defendant Company in this instance. Further, that the facts surrounding its incorporation, and subsequent negotiations between the parties, indicate such fraudulent intent. It is stated, that the choice of the particular name, adopted by the promoters of the defendant Company, occurred simply by chance selection from a number of names that were under consideration. There was no particular reason given for its adoption, except that one of the principal shareholders had, in his early years, lived in the Northwest. It was unfortunate, however, that a name should be chosen which was in use by a company in an adjoining city, and which might well be applied to a company with its head office in the northwestern portion of the United States, but is misapplied to a company doing business in British Columbia. The term "Northwest" in Canada is usually applied to that portion of the Dominion, formerly known as the Northwest Territories. Still, the incorporators of the defendant Company assert, that it was not with any dishonest motive, that they adopted this particular name, and one of the defendants considered that, if it were now relinquished, it would constitute a loss of prestige on the part of the Company. I should think the better, and stronger, position to take would be that, as the Company had been incorporated, without any fraudulent intent, under a name, which is desired by a foreign corporation, that if it is requested to abandon such name, it can fix its own price, as compensation.

Judgment

While the facts surrounding the incorporation of the defendant Company, warranted an attack by the plaintiff, as to a fraudulent intent, in obtaining incorporation, still, it has failed. I accept the evidence of the defendants, as to their *bona fides* in this respect. The failure, to satisfy me on this point, is, in a measure, induced, through bearing in mind the principle, that

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the *onus,* of proving allegations of fraud, rests so completely upon the party complaining.

It is, then, contended, by the plaintiff, that even if it were decided that the defendant Company, in its incorporation, was not guilty of fraud as against the plaintiff, still, it should, upon the position of the plaintiff being disclosed and asserted, comply with its request as to changing the name. In other words, that if defendants persisted in retaining a name, which had been inadvertently adopted, that this would constitute fraud and entitle the plaintiff to seek a remedy. The judgment of James, L.J. in *Orr Ewing & Co.* v. *Johnston & Co.* (1880), 13 Ch. D. 434 at pp. 453-4 is cited in support of this proposition. The pertinent portion is as follows:

> "Supposing that by some accident a man had inadvertently used a ticket which was so calculated to deceive the ultimate purchaser, and therefore so calculated to injure the plaintiffs in their legitimate right of property in a trade-mark, the moment the attention of the defendants or any persons in their position was called to the fact of the similarity of the two marks and to the complaint of the persons who owned the first mark that it was likely to injure them, it was his duty to immediately discontinue the use of the trade-mark complained of; and, however honest or inadvertent the original mistake may have been, the continuation of the use of it after that was pointed out is itself sufficient evidence of a fraudulent intention. The fraud would then consist in continuing to do it even if there had been an original inadvertence in the use of it."

Judgment

This decision, however, is only applicable, if the defendants are not legally entitled to use, in this Province, a name identical with that of the plaintiff Company. While the defendants may have been unreasonable in their demands, as to the amount sought to be obtained for consenting to and effecting the desired change, still, this should not affect their rights herein, if they are really entitled to retain their present name.

I should, then, consider, whether plaintiff has, with respect to its name, a *status,* which, on equitable grounds, justifies assistance from a Court in this Province.

The right of a company, to prevent another company, or individual, from appropriating its name, or part of its name, even though not engaged in a like business, was discussed in *Grand Trunk Ry. Co.* v. *James* (1916), 10 W.W.R. 1075. In that case, the improper course pursued by the defendants was

indicated, by adopting the following excerpt from *Samuels* v. *Spitzer* (1900), 177 Mass. 227 [58 N.E. 693 at p. 694]:

"In establishing a new business the defendant had no occasion to adopt a name which would be likely to mislead the public, and induce them to believe that the business which he was establishing was conducted by the plaintiffs. It was easy to choose a satisfactory name unlike the plaintiffs', and to conduct the business in such a way as to leave the plaintiffs the whole benefit of such reputation as they had gained in the community."

And, in the same case, Beck, J., at p. 1085, refers to a number of English authorities, as supporting the following proposition laid down in 10 Cyc. at p. 151:

"While the name of a corporation is not in strictness a franchise, yet the exclusive right to its use may be protected in equity by the writ of injunction by analogy to the protection of trade-marks, just as the name of an individual, a partnership, or a voluntary association may be so protected."

Then, the basis, upon which an individual is entitled to seek such protection, was outlined by James, L.J. in *Levy* v. *Walker* (1879), 10 Ch. D. 447-8 as follows:

"It should never be forgotten in these cases that the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark, that is to say, a man has a right to say, 'You must not use a name, whether fictitious or real—you must not use a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent mis-statement, deprive me of the profits of the business which would otherwise come to me.' . . . . An individual plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain anyone else from injuring his business by using that name."

Compare Lord Chelmsford's statement in *Du Boulay* v. *Du Boulay* (1869), L.R. 2 P.C. 430 at pp. 441-2:

Judgment

"The right to the exclusive use of a name in connection with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or, at least, of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction."

The principles, governing an individual, would be equally applicable to a company. Plaintiff admits, that it has no monopoly of the name itself. It must necessarily take the ground, that it has a business which will be injured by the use of a similar name and it thus has a right to compel the suggested change, on the part of the defendants.

Defendants submit, however, that the plaintiff cannot com-

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plain, nor seek assistance, on equitable grounds, as it does not come to the Court with clean hands. It is contended, that any "business" which may have been carried on by the plaintiff, in this Province, was illegal and that its continuance should not be implemented, nor even recognized, by any judgment of the Court. They are right in their contention, to this extent, that it is only by an application of the principles of equity that the plaintiff can hope to succeed, but I have to consider, whether I am restrained by authority from applying them. Defendants rely upon the decision in *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297, as supporting their position upon the question of illegality.

I have already found that, the plaintiff, without being registered, as an extra-provincial company, entered into contracts and carried on business, to a limited extent, within the Province, so that if the legislation remained the same as it was, when this case was decided, I would feel bound to hold, that such business was illegal.

Cameron, J.A., in *Consolidated Investments, Ltd.* v. *Caswell* (1915), 8 W.W.R. 43 at p. 45 considered this contention as follows:

"As to the other point raised, that a contract, made by an unlicensed company, is illegal and void, there is no doubt some authority to be found for that in the cases arising under the wording of the British Columbia Statute. See *Northwestern Construction Co.* v. *Young*, 13 B.C. 297."

Judgment

He, then, adds, in drawing a distinction between our statute, as it then stood, and the legislation in Manitoba, which he was considering, as follows:

"The British Columbia Statutes, however, did not contain the proviso in s. 122. The far-reaching nature of this saving clause is explained in *Semi-Ready Limited* v. *Tew* [(1909)], 19 O.L.R. 227, by Mr. Justice Riddell at p. 235, where a similar clause in the Ontario Act was given effect to. Riddell, J. says: 'All difficulty as to the want of provincial licence is removed by the production of such licence, obtained since the argument of the appeal. See *per* Stuart, J. in *Bessemer Gas Engine Co.* v. *Mills* [(1904)], 8 O.L.R. 647, at p. 649, *ad. fin.*; *per* Britton, J. at p. 650, *ad. fin.* The action may now be maintained."

The British Columbia statute (R.S.B.C. 1897, Cap. 44, Sec. 123) which, in *Northwestern Construction Co.* v. *Young, supra,* was considered, as rendering the contract not only unenforcible, but illegal, was in part as follows:

"unless otherwise provided by any Act, no extra-provincial company having gain for its purpose and object, shall carry on any business within the scope of this Act in this Province unless and until it shall have been duly licensed or registered under this Act, and thereby become expressly authorized to carry on such of its business as is specified in the licence or certificate of registration, and no company, firm, broker, or other person shall as the representative or agent of, or acting in any other capacity for any such extra-provincial company, carry on any of its business within this Province until such company shall have obtained such licence or certificate of registration; and any such company which fails or neglects to obtain such licence or certificate of registration, shall incur a penalty of fifty dollars, recoverable upon summary conviction for every day during which it carries on business in contravention of this section," etc.

Then, by the Companies Act, R.S.B.C. 1911, Cap. 39, this section was amended and its provisions divided into separate sections, so that, at that time it was as follows:

"139. Every extra-provincial company having gain for its purpose and object within the scope of this Act is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker, or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the Province until such extra-provincial company shall have been licensed or registered as aforesaid."

"167. If any extra-provincial company shall, without being licensed or registered pursuant to this or some former Act, carry on in the Province any part of its business within the scope of this Act [as amended by amendment of 1914], such extra-provincial company shall be liable to a penalty of fifty dollars for every day upon which it so carries on business. [B.C. Stats. 1914, c. 12, s. 21]."

Judgment

While the wording of the original section, restraining extra-provincial companies from doing business, without being licensed or registered, is thus somewhat different, and the section is divided, so that the penalty appears in another portion of the Act, still, I do not think that such change would destroy the *ratio decidendi,* upon which the decision in *Northwestern Construction Co.* v. *Young, supra,* was based. In 1910, however, a new section had been introduced, and it appeared in the Companies Act as follows:

"168. So long as any extra-provincial company remains unlicensed or unregistered under this or some former Act, it shall not be capable of maintaining any action, suit, or other proceeding in any Court in the Province in respect of any contract made in whole or in part within the Province in the course of or in connection with its business, contrary to the requirements of this Part of this Act:

"Provided, however, that upon the granting or restoration of the licence

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or the issuance or restoration of the certificate of registration or the removal of any suspension of either the licence or the certificate, any action, suit, or other proceeding may be maintained as if such licence or certificate had been granted or restored or such suspension removed before the institution of any such action, suit, or other proceedings."

What is the effect of sections 167 and 168, considered together?

Duff, J. in *Weyburn Townsite Co.* v. *Honsberger* (1919), 3 W.W.R. 783 at p. 795 [59 S.C.R. 281 at p. 297], discusses similar Ontario legislation and its object as follows:

"The provisions of section 16 shew plainly enough that the policy of this licensing enactment is primarily in its object and effect a revenue enactment; and subsection 2 of the last-mentioned section explicitly provides that a licence granted during the progress of an action is sufficient to support the right of action."

See Haggart, J.A. in *Consolidated Investments, Ltd.* v. *Caswell, supra,* at p. 46, to the same effect, considering similar legislation:

"The object of this statute was to control these foreign companies and raise a revenue. It did not make void all the contracts or engagements entered into by them. The right of action is only suspended until the licence is issued."

If I decided that section 167 of our statute was only enacted for the purpose of raising a revenue, then, I might be detracting from its prohibitive effect upon contracts, as indicated in *Northwestern Construction Co.* v. *Young, supra.* I need not, however, consider such a situation, as section 168 would be of no benefit to an extra-provincial company seeking registration, with respect to previous business, if it were held, that other sections of the Act rendered all prior contracts illegal. The language of this section indicates, that when such a company has carried on business, without being licensed or registered, it can obtain the right to enforce its contracts by being licensed or registered. This logically means that our Courts would be required to recognize its right in this respect. They could not properly be called upon to do so, if the contracts were illegal.

Judgment

The position of a company entitled, by its charter, to do business, outside the territorial limits of the Province or State of its incorporation, is shortly expressed by Brodeur, J. in *Weyburn Townsite* v. *Honsberger, supra,* at p. 806 [59 S.C.R. p. 313] as follows:

"A company only incorporated in a Province [or State] becomes an artificial person authorized by its charter and with the capacity of carrying on its business in all the parts of the world where by the comity of nations such business is not repugnant or prejudicial to the policy or to the interests of the local authority."

Compare Anglin, J. at p. 803.

I think the change in the Companies Act destroyed the effect of the judgment in *Northwestern Construction Co.* v. *Young, supra,* and that the plaintiff Company was entitled to enter into contracts in this Province, prior to being registered as an extra-provincial company. If they saw fit thus to do business, the only impediments would be the imposition of a fine (which might be relieved against later on, after registration), and that its contracts could not be enforced until registration had been obtained, so the plaintiff is not invoking the aid of the Court, to sanction and perpetuate business of an illegal nature.

Plaintiff not being debarred from resorting to a Court of Equity, and defendant Company not having improperly adopted its name in the first instance, or been guilty of fraud, in refusing to make the change, upon the similarity being disclosed, is the position of the plaintiff such, that I should compel a change in the name of the defendant Company? This involves consideration of the important question, as to whether the business of the plaintiff was of such a nature, as to give it a right to prevent the defendant Company from registering, or registration having been obtained, to direct such change in the name to be made.

Judgment

The prior incorporation of the defendant Company would not of itself, destroy the right of the plaintiff to seek a remedy and obtain a decision which would allow it to obtain registration, but this right would, in my opinion, depend upon other controlling factors. I think, in order to determine the rights of the plaintiff, one should consider the situation as it stood, at the time the defendant Company obtained incorporation. The name it then adopted was not appropriated, as far as the Companies Act applied. It was justified in choosing a name which had no particular significance from an exporting or importing standpoint. It was "geographical" and not "fanciful." Even if plaintiff had been carrying on an extensive business in this Province, in its own name, but without registration, such name

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had not acquired a "secondary meaning," nor as being applicable to any particular goods, in which plaintiff dealt. Plaintiff was not in the strong position held by the plaintiff in *Semi-Ready* v. *Semi-Ready* (1910), 15 B.C. 301, where the defendant company had obtained incorporation under the Provincial statute, and, then, the plaintiff company, engaged in the same line of business, but incorporated under the Dominion Companies Act, restrained the defendant company from infringing on its trade name. CLEMENT, J. at p. 302, refers to the position of the plaintiff as follows:

> "Given, as here, a Dominon company with a certain and somewhat odd name, the subsequent incorporation of a Provincial company with that identical name is so palpably a fraud upon the public and a wrong to the existing company that the onus is very strong upon the new company to justify its position."

In that case, the defendant company adopted a "fanciful" name and one which, it was doubtless aware, applied to a company carrying on an extensive business throughout Canada in the clothing trade. Here, the adoption of a geographical name by the plaintiff, in Seattle, Washington, did not create a condition which, of itself, entitled it to complain of its use by another company in Canada. As previously mentioned, it does not assert a monopoly, or franchise, in the name, so it must necessarily resort, as a sole ground for intervention of the Courts, to the nature and extent of its business. I think I should consider this phase of the situation, as applied to British Columbia. Any business, transacted by plaintiff, had, to a great extent, been carried on through agents and only in a few isolated cases did the plaintiff Company do business in its own name. It had not established a real "business" in this Province. The public was not being deceived through the adoption by the defendant Company of the same name as the plaintiff. While there might have been, in the future, a competition in the sale of goods exported and imported by the parties, still, it had not occurred.

Judgment

I do not think the nature or extent of the business of the plaintiff had been such as to entitle it to have its name preserved, so to speak, and that, at some future time, it might complain of another Company being incorporated in this Prov-

ince under a similar name. Whatever rights it might possess in some other field of competition, as against defendant Company, such right did not extend to this Province. It was not in the same position as that held by the plaintiffs, in *Hendriks* v. *Montagu* (1881), 17 Ch. D. 638, where the plaintiff, on behalf of the shareholders in an old established company, obtained an order restraining the promoters of an intended new company from obtaining registration under a name, similar to the one under which such old company had been carrying on business for a number of years. The Court of Appeal decided that, aside from the provisions of the Companies Act, the plaintiff was entitled to restrain such new company from being registered. The reputation already gained by the old established company, and the fear of its established business being impaired, seem to have been the basis of the judgment, preventing registration. The following extract, at p. 648, emphasizes this point:

"The question is simply whether the name they have adopted for a business of the same kind, and in the same city, is so like the name of the plaintiffs, which they have used as their trade name for so long a period, as in fact to enable the defendants to appropriate, or to result in the defendants in fact appropriating, a material part of the business of the plaintiffs' company, by misleading people to suppose that they were dealing with the plaintiffs, when, in fact, they were dealing with the defendants."

There were a number of authorities cited, but I do not think it necessary to discuss them, except that plaintiff particularly referred to *Panhard et Levassor* v. *Penhard-Levassor Motor Company, Limited* (1901), 2 Ch. 513; 18 R.P.C. 405. This case, however, is quite distinguishable upon the facts. The defendant company had adopted its name, not with the intent of actually carrying on business, but for an ulterior motive. It had no right to a name which was associated with an extensive and reputable business, even though not carried on in England. The name it had chosen was plainly an act of piracy, and although this ground was not the basis of the judgment, still, it was fully discussed and may have had some effect upon the result.

Judgment

The ground, for the interference of the Court in these cases, is referred to in Kerly on Trade Marks, 3rd Ed., 497, as follows:

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"That the use of the defendant Company's name, or its intended name, is calculated to deceive, and so to divert business from the plaintiff to the defendant, or to occasion a confusion between the two businesses. If this is not made out, there is no case. See *Daimler Motor Co. (1904), Ltd.* v. *London Daimler Co., Ltd.*, 24 R.P.C. 379 (1907), C.A."

Compare *Braham* v. *Beachim* (1878), 7 Ch. D. 848 at p. 856, where Fry, J. states:

"I am of opinion that it is not necessary to prove damage where the thing done by the defendants has, in the opinion of the Court, a tendency to enable them to deceive by selling as the plaintiffs' their own goods."

Here plaintiff had no particular class of goods known as its product or manufacture, but even if the plaintiff had any cause to complain, through the adoption of its name by the defendant Company, I doubt if its use would deceive the public or divert business. It might if the two Companies carried on business in the same city, or Province, cause confusion. Such a result is immaterial, if the plaintiff did not have the prior right of "user" of the name. It would not of itself justify a complaint, which would be remedied by the Court. Such prior user of a trade-mark or trade name, for a number of years, is the foundation for judgments, in which redress was obtained, *e.g., Edelston* v. *Edelston* (1863), 1 De G. J. & S. 185, approved of in *Slazenger & Sons* v. *Spalding & Brothers* (1909), 79 L.J., Ch. 122; (1910), 1 Ch. 257.

Judgment

In my opinion, the right of user of a trade name, and consequent relief, depends upon whether the company complaining has a previously well known and long established business in the Province under such name, which may be interfered with and injuriously affected by a company adopting, and becoming incorporated under a similar name. Plaintiff does not fulfil these requirements and so is not entitled to seek the assistance of the Court. The action is dismissed with costs.

Action dismissed.

VICTORIA (B.C.) LAND INVESTMENT TRUST LIMITED v. WHITE.

MURPHY, J. (At Chambers)

1920

Jan. 14.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LTD. v. WHITE

Practice—Judgment in default of defence—Application to set aside—No status not having entered appearance.

Judgment having been entered against the defendant in default of defence, he applied to set aside an order allowing substitutional service of the writ, the writ and the judgment.

Held, that the defendant, not having entered a conditional appearance, he had no *status* to attack the writ and subsequent proceedings on the action.

APPLICATION to set aside an order allowing substitutional service of writ and statement of claim on the defendant by mailing same in a registered letter addressed to the defendant in London, England, and to set aside the writ and judgment. The defendant actually received the letter containing the writ in Los Angeles on the 23rd of December, 1919. No appearance having been entered or defence delivered, the plaintiff entered judgment by default on the 28th of December, 1919. Heard by MURPHY, J. at Chambers in Victoria on the 5th of January, 1920.

Statement

Alexis Martin, for the application.

J. R. Green, contra, raised the preliminary objection that the defendant not having entered an appearance had no *status* to make the application and no affidavit of merits had been filed.

Argument

14th January, 1920.

MURPHY, J.: I think the preliminary objection taken by the plaintiff that the defendant has no *status,* not having entered an appearance or conditional appearance, must prevail. The defendant asks to have the order for substitutional service pronounced by me on the 4th of November last, allowing service of the writ on the defendant by registered letter addressed to him at London, England, set aside, as being granted on insufficient material, and to set aside the writ and the service thereof on the ground of the irregularities alleged in the same. The

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defendant's counsel contends that he is entitled to make this application under Order XII., r. 30, which reads as follows:

"A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance, to serve notice of motion to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorizing such service."

From a careful reading of this rule, however, it appears to be clearly intended only to enable a defendant, before judgment, to apply to set aside the writ or order allowing service. The decision of *Chock* v. *Fung* (1901), 8 B.C. 67, is very nearly in point and supports the plaintiff's preliminary objection. The defendant therefore has no *status* to attack the order for substitutional service of the writ.

The plaintiff further contended that the defendant had not filed an affidavit of merits. I think, however, that if the defendant were properly before the Court, he could attack the

Judgment

proceedings, upon which judgment was obtained, for irregularity, without shewing merits, and upon shewing sufficient irregularity would be entitled to have the judgment set aside *ex debito justitiæ*. In view of the other objection—the defendant's lack of *status*—however, it is not necessary to go into this.

The defendant's application will therefore be dismissed with costs.

The defendant by his summons asks for leave to enter an appearance, and I will make an order giving him leave to do so.

Application dismissed; defendant granted leave to enter appearance.

THE CLEEVE v. THE PRINCE RUPERT. (No. 2).

MARTIN, LO. J.A.

1917

Dec. 22.

THE CLEEVE v. THE PRINCE RUPERT

Shipping—Collision—Damages—Laying-up of ship while officers in attendance at Court—Loss of profit therefrom—Right of damages for such loss.

The loss of profit resulting from the laying-up of a tug while her master and engineer were in attendance at the Wreck Commissioners' Court of Investigation, held not to be an item which should be allowed on the assessment of damages arising out of a collision between the tug and another vessel.

MOTION to vary the report of the registrar on the assessment of damages arising out of a collision wherein the Prince Rupert was adjudged liable for all damages (*ante,* p. 533), heard by MARTIN, Lo. J.A. at Vancouver on the 19th of November, 1917. Statement

Woodworth, for the motion.
Tiffin, contra.

22nd December, 1917.

MARTIN, Lo. J.A.: This is a motion to vary the report of the registrar on the assessment of damages arising out of a collision of these vessels, wherein the Prince Rupert was adjudged liable for the whole damage, as reported in (1917), 27 B.C. 533. The registrar disallowed two items of damage, the first being a charge of $105 for three days at $35 per day during which the plaintiff tug was laid up while her master and engineer had to go to Victoria in January last to attend the Wreck Commissioners' Court of Investigation held under the Canada Shipping Act (Cap. 113, R.S.C. 1906) to investigate the collision in all its aspects, including the conduct of the ship's officers involved, and fix the responsibility therefor upon said officers. The second item is a charge of $157.50, being solicitor's and counsel's charges in connection with the subsequent rehearing of the investigation which was ordered by the minister of marine under section 806, and upon which the said officers of the plaintiff's ship were represented by counsel. Judgment

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With respect to the first item, it is submitted that as the vessel was a small one with only a crew of three men all told, it was impossible to get officers to run her for a short period of three days, and yet that delay and loss of profit were inevitably occasioned by her officers having to attend said Court at Victoria (being summoned on five days' notice) which was a direct consequence of the collision, which should be recovered against the defaulting ship. I am of opinion, however, that it cannot properly be so regarded, because whatever else may be said of the matter, it was the duty of the master, at least (and presumably the engineer), to attend said Court of Investigation as a personal matter to explain and, if necessary, defend his own reputation and conduct which might lay him open to the grave penalty of cancellation or suspension of his certificate. That Court has power by section 794 to "make such order as it thinks fit respecting the costs of such investigation," but has not seen fit to do so. While it may, in the circumstances, be a hardship that the delay has caused the laying-up of this small tug, yet if I sanctioned such a charge the same principle would have to be applied to the case of a big ship, chartered for a daily great sum with a large complement of officers and crew, which would clearly be going too far. I think, therefore, in the absence of any authority in his favour, that the applicant can get nothing on this item, and must resort to the expenses for witnesses and the costs as provided by the Canada Shipping Act.

Judgment

The same reasoning applies also to the second item, which is likewise disallowed.

It follows that the report of the registrar is confirmed at $1,650.51, and the motion to vary it dismissed with costs.

Motion dismissed.

REX v. RALSTON.

MURPHY, J.

1919

May 2.

REX v. RALSTON

Criminal law—Automobile—Driver—Proof of owner's responsibility for—Motor-traffic Regulation Act, R.S.B.C. 1911, Cap. 169, Secs. 33, 41 and 46.

In order to hold an owner of an automobile responsible for an infraction of the Motor-traffic Regulation Act it must be shewn that he was the driver or that the driver was entrusted with its care.

Moore v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 504 followed.

MOTION by *certiorari* to quash a conviction by South, J.P., deputy police magistrate for Vancouver, for an alleged infraction of the Motor-traffic Regulation Act. An officer of the City police force saw automobile number 1753, on the 13th of March, 1919, pass a street-car which was stopped for the purpose of discharging and taking on passengers. The officer failed to identify the driver, but positively identified the car, and proved that the car was owned by the defendant. Sections 33 and 46 of the Motor-traffic Regulation Act are as follows: Statement

"33. The owner of a motor for which a licence is issued under this Act shall be held responsible for any violation of this Act, or of any regulations provided by order of the Lieutenant-Governor in Council, by any person intrusted with the possession of such motor."

"46. Every offence against the provisions of this Act committed by the employee, servant, agent, or workman of any person holding any licence for owning or operating a motor shall be deemed to be the offence of the person holding such licence, and such person shall be answerable for and shall be punished for such offence: Provided that nothing herein shall absolve the actual offender from guilt and punishment, but he shall be punished also."

Heard by MURPHY, J. at Vancouver on the 2nd of May, 1919.

J. E. Bird, for the motion: It was not shewn that the defendant was the party driving the automobile, that the party driving was one entrusted with its care, or that he was an employee, servant, workman, or agent of the owner. The case of *Moore* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 504 applies. *Mattei* Argument

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v. *Gillies* (1908), 16 O.L.R. 558, can be distinguished on account of the wording of said section 33.

R. L. Maitland, contra: If the provisions of sections 41-46 of the Act are considered, the evidence is sufficient to justify the conviction.

Judgment

MURPHY, J.: Short of proof that the driver and owner of the car were identical, or that the driver was entrusted with possession of the motor, the evidence is insufficient. The case of *Moore* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 504 applies here. The conviction is quashed.

Conviction quashed.

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REX v. DAHLIN

REX v. DAHLIN.

Constitutional law—British Columbia Prohibition Act—Penalty for breach—Procedure to enforce—Jurisdiction of local Legislature—British North America Act—Court of Appeal—Judgment—Duty of Court below to follow—B.C. Stats. 1916, Cap. 49.

The local Legislature has power to pass the British Columbia Prohibition Act (B.C. Stats. 1916, Cap. 49), may impose the penalty of imprisonment for breach of its provisions, and enact the necessary procedure to enforce the same.

Regina v. *Wason* (1890), 17 A.R. 221 followed.

It is the duty of the Court below, notwithstanding what its opinion may be, to follow and carry out the judgment of the Court of Appeal.

Where a conviction has been affirmed by the Court of Appeal and the accused is subsequently released upon *habeas corpus* by a judge of the Court below on the ground of want of jurisdiction of the Court of Appeal, such an order is ineffective and it is the duty of the officers of the Court to refuse to carry it out.

Rex v. *Gartshore* (1919), 27 B.C. 425 disapproved.

Statement

APPEAL by way of case stated from the decision of CAYLEY, Co. J., of the 31st of October, 1919, convicting the accused for breach of the provisions of the British Columbia Prohibition Act. The case stated was as follows:

"Information was laid on the 14th of July, 1919, by G. A. Murray charging Gus Dahlin the appellant herein for that at the City of Vancouver on the 13th of July, 1919, he did unlawfully sell liquor contrary to the form of the statute in such case made and provided. The said charge was heard under the provisions of the Summary Convictions Act on the 22nd of July, 1919, at the police court in the City of Vancouver by C. J. South, Esquire, deputy police magistrate for the City of Vancouver. The deputy police magistrate above named found the appellant guilty of the charge and sentenced him to six months' imprisonment. Against this conviction the appellant appealed to the County Court of Vancouver holden at Vancouver, notice of appeal being dated the 22nd of July, 1919. The hearing of the appeal came before me as one of the County Court Judges of the County Court of Vancouver, and after several adjournments was finally heard by me on Friday, the 24th of October, 1919, and I dismissed the appeal after the evidence had been taken. Counsel for the said appellant raised the following point which I now desire to submit to this Honourable Court upon the question of law thereby involved:

Statement

"Was I right in deciding that the Provincial Legislature has the power to pass legislation providing the procedure for the enforcement of Provincial penal legislation such as the British Columbia Prohibition Act, chapter 49 of the B.C. Statutes, 1916, and amendments thereto?"

The appeal was argued at Vancouver on the 20th and 21st of November, 1919, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

J. A. Russell, for appellant: This appeal is taken under subsection (4)(*f*) of section 6 of the Court of Appeal Act, being from an appeal to the County Court under the Summary Convictions Act. Section 28 of the Prohibition Act (B.C. Stats. 1916, Cap. 49) provides the penalty for selling liquor, and my contention is, the words "upon summary conviction thereof," inserted in the section, is *ultra vires* of the Provincial Legislature.

Argument

[MACDONALD, C.J.A., after referring to *Rex* v. *Sit Quin* (1918), 25 B.C. 362, referred to *Rex* v. *Gartshore* (1919), 27 B.C. 425, as follows:

Reference has been made to a recent order in *habeas corpus* proceedings releasing the accused in that case from custody notwithstanding the affirmance of his conviction by this Court. As the law as it stands gives no appeal from an order in *habeas corpus* proceedings, discharging the accused person from custody, the matter is one for the intervention of the Legislature, not of the Court, and hence I desire to say nothing more with respect to it.

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MARTIN, J.A.: I am entirely in accord with what my brother MCPHILLIPS has said respecting the recent occurrences in the *Gartshore* case. It comes to this, that though the highest Court in the Province has, after argument, solemnly affirmed its jurisdiction and declared that an offender was properly convicted by the police magistrate of Vancouver for unlawfully selling liquor, yet a judge below has dared in effect to overrule the judgment of this Court and discharge the offender from prison. Now if such things can be done, there is no excuse for the further existence of this Court, and the matter should be clearly understood so that the Legislature, which is the High Court of Parliament, can come to the assistance of this Court and cure so intolerable a scandal. I am pleased to see present the representative of the Attorney-General, in the person of the solicitor of his department (Mr. Carter), so that cognizance may be taken of this our public protest. In *In re Robert Evan Sproule* (1886), 12 S.C.R. 140, which my brother MCPHILLIPS referred to, and which I recently applied in *The Leonor* (1917), 3 W.W.R. 861, the sheriff of British Columbia refused to release a prisoner in his custody though required to do so by a writ of *habeas corpus* issued, not by a judge below us as here, but by one of the justices of the Supreme Court of Canada, at Ottawa, because the prisoner had been convicted and his conviction affirmed by the then Full Court of British Columbia, and the sheriff justified his action because the affirming order of the Full Court was "paramount" to the writ of the justice of the Supreme Court of Canada, and the sheriff's conduct was justified, because the Supreme Court of Canada decided that the writ so issued by one of its members had been improvidently issued and was an abuse of the process of the Court. If a similar course had been adopted here an effectual stop might have been put to the scandal to justice which has been caused by the peculiar proceedings in the *Gartshore* case by bringing them to an early test which has, unhappily in the public interest, been avoided by the procedure that was selected.

Argument

MCPHILLIPS, J.A.: As this appeal is one raising a question of jurisdiction, in passing let me refer to the *Gartshore* case, as our order in this case, as in that, may be rendered nugatory

owing to the warden not being advised beforehand that the Court of Appeal's order is paramount. I would have thought that the warden would have been entitled to make answer that he would hold the person committed under the order of the Court of Appeal of British Columbia confirming the conviction. It seems to be an extraordinary thing that when a judgment of the highest Court of the Province is given, that the judgment of the Court below should be obeyed. I am very glad that counsel for the Attorney-General is here, because it is a situation affecting the administration of and enforcement of the Prohibition Act which cannot well be overlooked. The police magistrate of this city was held by this Court to have rightly adjudged that there had been an infraction of the Prohibition Act and imprisonment was imposed, and the defendant was in close custody under that conviction, the conviction being affirmed. This being the situation, the learned Chief Justice of British Columbia notwithstanding released the defendant upon *habeas corpus* upon the ground of want of jurisdiction in the Court of Appeal. Any such order must be non-effective as against the order of the ultimate Court of Appeal: (see *In re Robert Evan Sproule* (1886), 12 S.C.R. 140 at p. 141). Further, it is the duty of the Court below, notwithstanding what its opinion may be, to follow and carry out the judgment of the Court of Appeal. The Court of Appeal's judgment may only be reviewed by the Supreme Court of Canada and the Privy Council in proper cases, where a further appeal is permissible.]

Argument

My contention is the words are contrary to the intention of the provisions of section 91 (27) of the British North America Act. I am assuming that prohibition is a criminal law. Subsections (14) and (15) of section 92 give the Province certain jurisdiction in criminal matters, but the procedure for supervising the penalty is taken away by subsection (27) of section 91. On the question of whether this is criminal procedure see Paley on Summary Convictions, 7th Ed., 123; *Attorney-General* v. *Radloff* (1854), 23 L.J., Ex. 240 at pp. 244-5; 248; *Regina* v. *Roddy* (1877), 41 U.C.Q.B. 291 at p. 298; *Mann* v. *Owen* (1829), 9 B. & C. 595 at p. 599. As to the distinction between what is made punishable by imprisonment by the

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Dominion from that made by the Province see *Regina* v. *Roddy, supra.* When it provides a procedure for dealing with an offence it is *ultra vires* of the Province. Subsections (14) and (15) of section 92 of the British North America Act give no such right. Prohibitive legislation may be passed provided it does not interfere with that branch of legislation: see *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at pp. 835 and 838. They have not the power to provide the machinery for imposing imprisonment. *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 explains and approves of the *Russell* case. It is erroneous to insert in an Act what you think the Legislature may have intended to be included in it: see *Salomon* v. *Salomon & Co.* (1897), A.C. 22 at p. 38; *Regina* v. *Lawrence* (1878), 43 U.C.Q.B. 164 at p. 172. When a man is deprived of his liberty the offence is a crime: see the judgment of Anglin, J. in *In re McNutt* (1912), 47 S.C.R. 259 at p. 282; *Regina* v. *Toland* (1892), 22 Ont. 505. On the question of the competency of the Legislature see also *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A.C. 524 at p. 528; *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502. The cases cited against me are *Regina* v. *William Bittle* (1892), 21 Ont. 605 and *Rex* v. *Covert* (1916), 10 Alta. L.R. 349; 28 Can. Cr. Cas. 25, but these cases are not based on sound reasoning and should not be followed.

Argument

W. M. McKay, for the Crown: As to what is meant by the word "criminal" as applied to "procedure in criminal matters" see the judgment of Stewart, J. in *Rex* v. *Covert* (1916), 10 Alta. L.R. 349 at p. 350; see also *Rex* v. *Miller* (1909), 19 O.L.R. 288; *Reg.* v. *Robertson* (1886), 3 Man. L.R. 613; *Regina* v. *Wason* (1890), 17 A.R. 221.

Russell, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be dismissed. I rely upon *Regina* v. *Wason* (1890), 17 A.R. 221, and the cases referred to therein. It seems to me clear that where the local Legislature has power to pass a law such as the British Columbia Prohibition Act (and it is conceded, in this argument, that the Legislature had that power) the penalty of imprisonment may be imposed for the breach of that law, and

the enactment of the procedure to enforce the penalty is competent to the local Legislature. That is the whole point in this case. In so holding, I am simply following past decisions of our Courts.

The appeal is dismissed.

MARTIN, J.A.: In my opinion the question submitted to us should be answered in the affirmative. The contention of counsel for the appellant is so fully covered and answered by the decision of the Court of Appeal in Ontario, in the unanimous decision of *Regina* v. *Wason* (1890), 17 A.R. 221, it is necessary to add very little to that. I am especially in accord with what Mr. Justice Burton says in his judgment. He points out the distinction that exists and arises "from the lax use of the expression 'crimes' as applied to penalties inflicted by the local Legislature." The whole of his judgment is so appropriate I adopt it; and I also lay great stress upon the unanimous decision of the Full Court of Manitoba delivered by Mr. Justice Killam in *Reg.* v. *Robertson* (1886), 3 Man. L.R. 613, where, in dealing with the conviction under the Game Laws, where a penalty was imposed, a penalty of a fine, he says at pp. 627-8, in regard to the express point before us:

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"If this enactment be not *ultra vires* of the Provincial Legislature as coming within the subject of Criminal Law, it appears necessarily to follow that the prosecution for an offence against the Act is not one of the 'Criminal Matters' the procedure in which is a subject of Dominion legislation."

If it is excepted from subsection (27) of section 91, any doubt at all that has arisen from certain expressions used by the Supreme Court of Canada, in the *McNutt case* (1912), 47 S.C.R. 259, is explained and removed by the recent decision of the Appellate Court of Alberta in *Rex* v. *Covert* (1916), 10 Alta. L.R. 349.

I forgot to refer to Lefroy's Canadian Constitutional Law, 1918, at pp. 140-3, where the matter is well summarized.

MCPHILLIPS, J.A.: I am also of the opinion that the question submitted should be answered in the affirmative. The learned counsel for the appellant did not challenge the constitutionality jurisdiction of the British Columbia Prohibition

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Act, save in respect of procedure. That is, the constitutionality of the Prohibition Act was admitted, but it was contended that anything that had relation to the enforcement of the penalties, coupled with imprisonment, could only be criminal procedure falling within subsection (27) of section 91 of the British North America Act, powers wholly within the jurisdiction of the Parliament of Canada. As opposed to that, it is submitted that section 92, subsection (15) is all sufficient to meet the objection. That is, that the Prohibition Act being a constitutional enactment, all necessary and proper provisions for its due operation are within the power of the Provincial Legislature. That seems to me to be the only reasonable conclusion. All the statute law has to be read together, especially here where we have a written constitution.

For over fifty years we in Canada have been able to work fairly efficiently under our written constitution, both Federal and Provincial. That which is dealt with here is peculiarly within the province of the Legislature. And the legislation, to be given effect to, must have some reasonable machinery for its operation. That machinery is provided under the Summary Convictions Act of the Province. As to the policy of the legislation, it is well known that the Courts have nothing to say in that regard. All that can be said in regard to that matter is that it will be dealt with by another forum, and I would be sorry to have to come to the conclusion that any infraction of the Prohibition Act can be said to be a crime. There might be things that follow from infractions of the Prohibition Act, overt acts owing to intoxication which would bring about crimes, but so far as the Prohibition Act itself is concerned I can see nothing in it that could be at all stigmatized as crime, as crime is understood, not only in the law, but as crime is understood in the language of the people.

MCPHILLIPS, J.A.

Appeal dismissed.

Solicitor for appellant: *J. A. Russell.*

Solicitors for respondent: *McKay & Orr.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada, the Exchequer Court of Canada, or to the Judicial Committee of the Privy Council:

ATTORNEY-GENERAL OF BRITISH COLUMBIA AND THE CORPORATION OF THE CITY OF VICTORIA v. BAILEY *et al.* (p. 305).—Reversed by Supreme Court of Canada, 3rd February, 1920, except as to counterclaim, as to which there was no appeal. See 60 S.C.R. 38; (1920), 1 W.W.R. 917; 54 D.L.R. 50.

CANADIAN PACIFIC RAILWAY COMPANY v. WORKMEN'S COMPENSATION BOARD (p. 194).—Reversed by the Judicial Committee of the Privy Council, 5th August, 1919. See 88 L.J., P.C. 169; 36 T.L.R. 3; (1919), 3 W.W.R. 167; (1920), A.C. 184.

COLLISTER *et al.* v. REID *et al.* (p. 278).—Affirmed by Supreme Court of Canada, 21st October, 1919. See 59 S.C.R. 275; (1919), 3 W.W.R. 229; 50 D.L.R. 289.

DUNPHY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 327).—Affirmed by Supreme Court of Canada, 20th October, 1919. See 59 S.C.R. 263; (1919), 3 W.W.R. 1076; 50 D.L.R. 264.

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. WILSON AND MCKENZIE. THE SAME v. DUNLOP (p. 144).—Reversed by the Judicial Committee of the Privy Council, 23rd October, 1919. See 89 L.J., P.C. 27; 122 L.T. 563; 36 T.L.R. 49; (1919), 3 W.W.R. 961; 50 D.L.R. 371; (1920), A.C. 358.

"JESSIE MAC," THE v. THE "SEA LION" (p. 394).—Reversed by the Exchequer Court of Canada, 6th November, 1920. See (1921), 1 W.W.R. 873.

JEU JANG HOW, *In re* (p. 294).—Appeal to Supreme Court of Canada quashed for want of jurisdiction, 16th October, 1919. See 59 S.C.R. 182; (1919), 3 W.W.R. 1115; 50 D.L.R. 41.

VAN HORNE, DECEASED, *In re* ESTATE OF SIR WILLIAM, AND THE SUCCESSION DUTY ACT. THE ROYAL TRUST COMPANY v. MINISTER OF FINANCE (p. 269).—Reversed by Supreme Court of Canada, 21st June, 1920. See 61 S.C.R. 127; (1920), 3 W.W.R. 600.

WELLINGTON COLLIERY COMPANY, LIMITED, AND CANADIAN COLLIERIES (DUNSMUIR), LIMITED v. PACIFIC COAST COAL MINES, LIMITED (p. 404). —Affirmed by Supreme Court of Canada, 8th March, 1920. See 60 S.C.R. 651.

Cases reported in 26 B.C., and since the issue of that volume appealed to the Supreme Court of Canada or the Judicial Committee of the Privy Council:

BING KEE v. MCKENZIE *et al.* (p. 509).—Reversed by the Judicial Committee of the Privy Council, 5th August, 1919. See (1919), 3 W.W.R. 221.

DOMINION TRUST COMPANY, LIMITED, BOYCE AND MACPHERSON, *In re* (p. 302).—Affirmed by Supreme Court of Canada, 19th May, 1919. See 59 S.C.R. 691.

ISITT AND ISITT v. GRAND TRUNK PACIFIC RAILWAY COMPANY (p. 90). —Affirmed by Supreme Court of Canada, 7th February, 1919. See 59 S.C.R. 686.

SCHETKY AND ACADIA, LIMITED v. COCHRANE *et al.* (p. 257).—Affirmed by Supreme Court of Canada, 8th March, 1920. See 60 S.C.R. 650.

Cases reported in 25 B.C., and since the issue of that volume appealed to the Supreme Court of Canada:

ALBION MOTOR EXPRESS v. CORPORATION OF THE CITY OF NEW WESTMINSTER (p. 379).—Affirmed by Supreme Court of Canada, 12th October, 1918. See 59 S.C.R. 655; 52 D.L.R. 682.

BAKER v. RICHARDS (p. 397).—Affirmed by Supreme Court of Canada, 10th October, 1918. See 59 S.C.R. 656.

CANADIAN FINANCIERS TRUST COMPANY v. ASHWELL *et al.* (p. 97).— Reversed by Supreme Court of Canada, 13th May, 1918. See 59 S.C.R. 657; 52 D.L.R. 683.

ORDE v. RUTTER *et al.* (p. 45).—Affirmed by Supreme Court of Canada, 13th May, 1918. See 59 S.C.R. 658.

STEPHEN *et al.* v. MILLER *et al.* (p. 388).—Affirmed by Supreme Court of Canada, 17th February, 1919. See 59 S.C.R. 690.

WILSON AND LANGAN v. KEYSTONE LOGGING & MERCANTILE COMPANY LIMITED (p. 569).—Affirmed by Supreme Court of Canada, 7th February, 1919. See 59 S.C.R. 685; 52 D.L.R. 678.

Case reported in 24 B.C., and since the issue of that volume appealed to the Supreme Court of Canada:

UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA v. THE WAKENA (p. 156).—Decision of the Exchequer Court of Canada, reversing the decision of MARTIN, Lo. J.A. affirmed by Supreme Court of Canada, 14th May, 1918. See 59 S.C.R. 659.

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to follow and carry out the judgment of the Court of Appeal. Where a conviction has been affirmed by the Court of Appeal and the accused is subsequently released upon *habeas corpus* by a judge of the Court below on the ground of want of jurisdiction of the Court of Appeal, such an order is ineffective and it is the duty of the officers of the Court to refuse to carry it out. *Rex* v. *Gartshore* (1919), 27 B.C. 425 disapproved. REX V. DAHLIN. - - **564**

2.——*Municipality — By-law — Prohibitive, discriminatory and unreasonable — Grounds for declaring by-law ultra vires.*] Where express power to pass a by-law is conferred by the Legislature the objection that it is prohibitive, discriminatory and unreasonable must go so far as to establish that the passage of the by-law was brought about, not in good faith as an honest exercise of the power conferred, but in abuse thereof for ulterior purposes and that it goes beyond what was intended to be allowed by the Act. REX V. LOW CHUNG. - - - - - - - - - - - - **469**

3.——*Public Inquiries Act Investigation — Importation of intoxicating liquor — Validity—R.S.B.C. 1911, Cap. 45, Sec. 3; Cap. 110, Sec. 4.*] The Public Inquiries Act (R.S.B.C. 1911, Cap. 110) is within Provincial legislative powers under section 92 of the British North America Act. The appointment of a commissioner under the Public Inquiries Act to inquire into the unlawful importation of intoxicating liquor into the Province, by what means such importation was effected, the names of persons or corporations engaged in such importation, the disposition of the liquor so imported, and the unlawful sales of liquor within the Province is *intra vires* of the Lieutenant-Governor in Council. *In re* PUBLIC INQUIRIES ACT. - - - **361**

4.——*Workmen's Compensation Act — Foundering of vessel—In territorial waters of Alaska — Crew lost — Compensation to dependants—Ultra vires—B.C. Stats. 1916, Cap. 77, Secs. 8, 9 and 12—B.N.A. Act, Secs. 91, and 92, Clauses 2, 13 and 16—57 & 58 Vict. (Imp.), Cap. 60, Sec. 503 — R.S.C. 1906, Cap. 113, Secs. 921-2-3.*] The "Princess Sophia," a steamship of the plaintiff Company registered at Victoria, B.C., foundered with all on board in Lynn Canal within the territorial waters of the United States. The Workmen's Compensation Board, constituted for the purpose of the administration of Part I. of the Workmen's Compensation Act, being about to pay compensation to the dependants of the crew of the "Princess Sophia," the plaintiff Company applied for an injunction to restrain the said Board from making such payments on the grounds that sections 8, 9 and 12 of the said Act are *ultra vires* of the Legislature, alternatively that Part VIII. of the Merchant Shipping Act, 1894 (Imp.), applies and said Board is bound to observe the provisions thereof and alternatively that the Workmen's Compensation Act is repugnant and unworkable with sections 921, 922 and 923 of the Canada Shipping Act. It was held by the trial judge that the vessel having foundered in Alaskan territory the legal consequences to the plaintiff in the way of liability in respect of the death of those on board would be determined by the law of that territory; that on the evidence there is by the law of the territory a very limited liability in tort to pay damages, there being no legislation akin to the Workmen's Compensation Act creating a liability to pay compensation, and this immunity enjoyed by the plaintiff in respect of its navigation in Alaskan waters is a civil right existing beyond the Province, in derogation of which the Province could not validly legislate. *Held*, on appeal, affirming the decision of CLEMENT, J. (MCPHILLIPS, J.A. dissenting), that section 8 of the Act imposes on the employer as an incident of the contract between himself and persons resident within the Province, an obligation to compensate his workmen or his dependants in respect of injury or loss of life suffered outside the Province. The right conferred on the workmen by the Legislature is a civil right but not a civil right in the Province or a matter of merely a local or private nature in the Province. The accident may give rise to civil rights in the country in which it occurred. The right is a substantive one, not merely a legal remedy for a right otherwise recognized. Section 9 of the Act preserved to the workman the right to treat the accident as one giving him a civil right in a foreign country. He may elect to take what the foreign law gives him or take under the Act, but while the workman's extra-provincial rights are preserved those of the employer are not. He is given no option to have his obligations measured by the foreign law. Section 8 cannot therefore be supported by clauses 13 and 16 of section 92 of the North America Act. *Held*, further, that the Board is merely an intermediary between the employers and their workmen collectively. Its powers are both judicial and ministerial and in exercising

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that under section 41 of the British Columbia Prohibition Act when the prosecution proved that accused had in his wagon the cases of liquor it could rest and then if the accused offered no evidence he might be convicted but if he did offer evidence which shews his innocence, the section appears to be framed for the double purpose of making convictions easy and acquittals of the innocent possible. The accused having proved his innocence, the appeal should be allowed. REX v. LEE DUCK. - - - - - - **482**

2.——*Automobile — Driver — Proof of owner's responsibility for — Motor-traffic Regulation Act, R.S.B.C. 1911, Cap. 169, Secs. 33, 41 and 46.*] In order to hold an owner of an automobile responsible for an infraction of the Motor-traffic Regulation Act it must be shewn that he was the driver or that the driver was entrusted with its care. *Moore* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 504 followed. REX v. RALSTON. - - - - - - - - - **563**

3.——*Certiorari — Refused — Appeal — Bail pending appeal—Jurisdiction—R.S.B.C. 1911, Cap. 17.*] There is jurisdiction in the Supreme Court to order bail pending an appeal from the refusal of *certiorari* on a conviction under section 10 of the British Columbia Prohibition Act. REX v. SALLY. - - - - - - - - - - - - **419**

4.——*County Court Judge's Criminal Court — Jurisdiction — Offence committed outside County—Criminal Code, Secs. 577 and 584—B.C. Stats. 1909, Cap. 33, Sec. 3(a).*] A sleeping-car conductor on a passenger train running from Calgary to Vancouver was accused of accepting bribes to permit persons to ride free on the train. The acts complained of took place in British Columbia before the train came within the boundaries of the County of Vancouver. He was arrested in Vancouver and committed for trial. He elected to be tried before the County Court Judge's Criminal Court of Vancouver County and on trial was convicted. Before accused pleaded, objection was taken to the jurisdiction of the Court. On appeal by way of case stated:—*Held*, that the Court had jurisdiction under section 577 of the Criminal Code. The words "within the jurisdiction of said Court to try" in the section refer not to the territorial limits of the Court but to any crime or offence within the competency of the Court to try. REX v. NEVISON. - - - - - - - - - - **12**

5.——*Dismissal of information by justice of the peace—Appeal—Notice—Copy served — Insufficiency of — Criminal Code, Sec. 750(b).*] A notice of appeal from an order of a justice of the peace dismissing an information was properly filed in the County Court registry but the copies served respectively on the respondent and the justice were signed by some person other than appellant's solicitor without further description, and gave the wrong date for the hearing of the appeal. *Held*, that the notices served were not "copies" of the notice filed within the meaning of the Act, and were invalid. *Rex* v. *Brimacombe* (1905), 10 Can. Cr. Cas. 168 applied. REX v. ANDERSON. - - - - - - - - **168**

6.——*Inland Revenue Act — Still for manufacture of spirits — In possession of accused—Trial by magistrate summarily—R.S.C. 1906, Cap. 51, Sec. 2, Subsec. (h), Sec. 132, Subsec. (b), and Sec. 180—Criminal Code, Sec. 778.*] A person accused of unlawfully having in his possession a still and mash suitable for the manufacture of spirits without having first given notice thereof under the Inland Revenue Act may be tried by a magistrate in a summary manner. REX v. CARMITO. - - - **225**

7.——*Intoxicating liquor — Sale of — Conviction — Stated case — No direct evidence of delivery by accused—Sufficiency of proof of sale—B.C. Stats. 1916, Cap. 49, Secs. 10 and 28.*] The accused was charged with selling intoxicating liquor in violation of the British Columbia Prohibition Act. The person to whom the alleged sale was made stated in evidence that the accused told him he could get him some liquor, and witness answered he would take a gallon of Scotch and two bottles of gin. He later gave accused a cheque for $42. He did not know where the cheque was, and could not produce it in Court. A week later witness found four bottles of Scotch whisky and two bottles of gin in his house. There was no evidence of who brought it or how it came there. Accused was convicted by the police magistrate and on a stated case the conviction was quashed by HUNTER, C.J.B.C., who held there was not sufficient evidence to prove a sale. *Held*, on appeal, reversing the decision of HUNTER, C.J.B.C. (MCPHILLIPS and EBERTS, JJ.A. dissenting), that the evidence adduced by the Crown was sufficient to prove a sale of liquor under section 10 of the Prohibition Act. REX *ex rel.* DENING v. GARTSHORE. - - - - - - - - - - - - **175**

8.——*Jury—Empanelling — Direction to stand by—Called a second time—Right to*

challenge—Criminal Code, Sec. 928.] When jurors, on being directed to stand aside on a criminal trial, are called a second time after the panel has been exhausted, the Crown has no right to peremptorily challenge such jurors even where the right to peremptorily challenge four jurors on the first calling of the panel has not been exhausted (MACDONALD, C.J.A. dissenting). If the Crown is allowed to peremptorily challenge jurors recalled after the panel has been exhausted, the jury is improperly constituted, and a substantial wrong has been done, entitling the accused to a new trial. REX v. CHURTON. - - - - - **26**

9.——*Member of unlawful association—Order in council, 28th September, 1918, (P.C. 2384)—Assent of Attorney-General in each case—Prohibition.*] The assent of the Attorney-General, under order in council of the 28th of September, 1918 (P.C. 2384), to the prosecution of a number of men (the names being set out in the one assent) was held to be insufficient on the prosecution of one of those mentioned and a writ of prohibition was directed. REX v. SETO KIN KUI. - - - - - - **416**

10.——*Offence against Prohibition Act—Two justices of the peace—Jurisdiction—Conditional—Municipal Act, B.C. Stats. 1914, Cap. 52, Secs. 403 and 404.*] The accused was convicted at Prince Rupert by two justices of the peace for an offence committed in said city against the British Columbia Prohibition Act. On application for a writ of *habeas corpus*:—*Held*, that the conviction was bad because it did not shew on its face that such adjudication took place because of the illness or absence or at the request of the city police magistrate, or that the city had no police magistrate, being the only cases where, under sections 403 and 404 of the Municipal Act, a justice of the peace has jurisdiction in a city. REX v. SMITH. - - - - - **338**

11.——*Perjury—"Judicial proceeding"—Evidence of—Jurisdiction—Criminal Code, Secs. 170 and 171.*] Upon a trial before the County Court Judge of Yale exercising criminal jurisdiction for perjury alleged to have been committed at a previous trial of the accused before a Court of summary jurisdiction at Princeton of keeping a common gaming-house, there was no evidence shewing that the alleged crime for which he was first tried took place in the County of Yale, there was evidence that it took place in Princeton but none that Princeton was in the County of Yale. On a stated case a question reserved for the opinion of the Court was whether the alleged offence of perjury was committed in a judicial proceeding within the meaning of the Criminal Code. *Held, per* MACDONALD, C.J.A. and MARTIN, J.A., that it was open to the magistrate to take judicial notice of the fact that Princeton was in the County of Yale, that it depends on notoriety and if the fact is sufficiently notorious the judge may take judicial notice of it. The question should be answered in the affirmative. *Per* MCPHILLIPS and EBERTS, JJ.A.: That on the evidence there was a *coram non judice* and the question should be answered in the negative. The Court being equally divided the conviction was sustained. REX v. IRWIN. - - - - - - - - - **226**

12.——*Prohibition Act—Second offence—Conviction for—No proof of previous conviction—Style of cause in criminal matters—B.C. Stats. 1915, Cap. 59, Secs. 80 and 99; 1916, Cap. 49, Secs. 10, 28, 33 and 42.*] The accused was charged with having sold liquor contrary to the provisions of the British Columbia Prohibition Act, with the added allegation that she had previously been convicted of the same offence. She was convicted by the magistrate, who imposed the penalty for a second offence, but there was no evidence adduced at the hearing of a former conviction. On *certiorari* the conviction was amended and a penalty imposed for a first offence. *Held*, on appeal, affirming the decision of MACDONALD, J. (GALLIHER, J.A. dissenting), that there is but one offence under section 10 of the British Columbia Prohibition Act, the penalty only being different for a second offence, and the Court may amend the conviction so as to impose only the penalty for a first offence where there is no evidence to support the finding of the magistrate that the accused had been previously convicted. *Per* MARTIN, J.A.: In the style of cause in criminal matters it should always be "The King." There is no precedent for putting "The Crown" on the record. REX v. MALISKA. - - - - **111**

13.——*Seduction—Evidence of deceased person taken on preliminary hearing—Not proved on trial—Read to jury by Crown counsel from appeal book—Prisoner found guilty—Stated case—Criminal Code, Secs. 999, 1002 and 1018.*] The prisoner was tried with a jury upon an indictment for, (1) rape, and (2) seduction. After giving evidence at the preliminary hearing the girl upon whom the crime was alleged to

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expected a commission of from 2 to 5 per cent. of the amount of the loan should he succeed in obtaining it. The managing director said nothing in answer to this statement, but requested the plaintiff to go back immediately and endeavour to obtain the loan. The plaintiff proceeded to New York and succeeded in obtaining the assent of the New York company to lend the required sum. Subsequently, for reasons (other than that of obtaining permission to fly a neutral flag on the ships), the Norwegians repudiated the contracts for the ships and the defendant Company took no further action, and the money not being required, was never advanced by the New York company. The evidence of the managing director of the defendant Company was that the payment of commission was contingent upon the money being paid and the Norwegian contract going through. In an action by the plaintiff for a 3 per cent. commission upon $500,000, being the amount agreed to be advanced by the New York company, it was held by the trial judge that the plaintiff, having been solicitor for the company, must clearly prove the special bargain alleged, and on the evidence it did not appear that the parties were at one in their understanding of the bargain, and the action was dismissed. *Held*, on appeal (MCPHILLIPS, J.A. dissenting), that assuming defendant's contention to be correct that the payment of commission was contingent upon the Norwegian contract being carried out, this had reference only to obtaining permission to sail under a neutral flag. The repudiation of the contract was for other reasons, and the defendant acquiesced in it without the plaintiff's consent. The plaintiff, having performed his part in obtaining the loan, and being in no way responsible for the failure in the carrying out of the Norwegian contracts, and the consequent payment of the money under the loan, he was entitled to his commission. WHITESIDE v. WALLACE SHIPYARDS, LIMITED. - - **40**

2.——*Sale of timber lands—Agreement—Construction of—Evidence — Efficient cause—Jury.*] The plaintiff brought action for commission or in the alternative for a *quantum meruit* for services rendered on the sale of timber lands of the defendant Company. The articles of association of the Company contained a stiuplation that the property should not be sold for less than $640,000 cash without the consent of the shareholders. On the 5th of September, 1910, the shareholders passed a resolution

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authorizing a sale at $650,000 on such terms as the directors thought fit. On the 2nd of December, 1914, one Garland, the managing director of the Company, wrote the plaintiff Roray offering $35,000 commission should the plaintiff bring about a sale of the property for $685,000. The plaintiff worked on the sale and in fact introduced to Garland one English who was one of the eventual purchasers. In October, 1917, a sale was brought about through other agents to Messrs. Wood and English, the purchase price being based on board measurement, to be paid for as the timber was taken, and $25,000 to be paid when the timber was logged. The shareholders gave the required assent to this sale, with a commission to the agents who brought it about, but they appeared to have had no knowledge of the plaintiff's employment by Garland. On the trial the jury found that the sale had been induced by the plaintiff's efforts and judgment was given for $35,000 for services rendered. *Held*, on appeal, reversing the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting in part), that the contract with the plaintiff was one of special employment and the eventual sale was not within the contract; that in view of the stipulation in the articles of association, of which the plaintiff must be charged with knowledge, Garland, the managing director, had no authority to enter into a contract of general employment, the acceptance by the Company of the offer to purchase resulting in the sale that was made, only bound the Company to pay commission to agents whom the managing director was authorized to employ to procure the very offer accepted, and in order to claim commission thereon the plaintiff was bound to see that recognition by the Company of his employment in the transaction had been obtained, and this could not be implied in the absence of knowledge of the plaintiff's connection with the sale. *Per* GALLIHER, J.A.: Assuming that the grounds given for allowing the appeal are wrong, there should be a new trial, as the finding of the jury that the plaintiff was the efficient cause of the sale was against the weight of evidence, unreasonable, and against clear inferences to be drawn from uncontradicted facts. *Per* MCPHILLIPS, J.A.: There was sufficient evidence to support the jury's findings, which should not be disturbed, but as such findings were upon the contract in said letter of the 2nd of December, 1914, which expressed said commission to be payable "as and when received" and no moneys