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 XXV.

VICTORIA, B. C.
PRINTED BY THE COLONIST PRINTING AND PUBLISHING COMPANY, Limited
1919.

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

TABLE OF CASES CITED

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RULES OF COURT.

PROVINCIAL SECRETARY'S OFFICE,
18th July, 1919.

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

By Command.

J. D. MACLEAN,
Provincial Secretary.

That Rule 2 of Order IX., being Marginal Rule 49 of the Supreme Court Rules, 1906, be repealed, and the following substituted therefor:—

"2. When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order, upon such terms and conditions (if any) as may seem just, for substituted or other service or for the substitution of notice for service by letter, advertisement or otherwise, as may seem just; and such order may be made by the Court or a Judge notwithstanding that the plaintiff shall be unable to allege, or unable to satisfy, the Court or a Judge that such writ will probably reach the defendant, or will probably come to his knowledge, or that he is evading service, and such order may be made not only where the defendant is within the jurisdiction, but also where he is, or may be, out of the jurisdiction, in any case where such writ may lawfully be personally served out of the jurisdiction."

And that Rule 6 of Order LXVII., being Marginal Rule 1017 of the Supreme Court Rules, 1906, be repealed, and the following substituted therefor:

"6. Where personal service of any writ, notice, pleading, summons, order, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, and it is made to appear to the Court or Judge that prompt personal service

cannot be effected, the Court or Judge may make such order, upon such terms and conditions (if any) as may seem just, for substituted or other service, or for substitution of notice for service by letter, advertisement, or otherwise, as may seem just, and such order may be made by the Court or a Judge notwithstanding that the plaintiff shall be unable to allege, or unable to satisfy, the Court or a Judge that such writ, notice, pleading, summons, order, warrant, or other document, proceeding, or written communication will probably reach the defendant or the person against whom such order is to be made, or will probably come to his knowledge, or that he is evading service, and such order may be made not only where the defendant or such person is within the jurisdiction, but also where he is, or may be, out of the jurisdiction, in any case where such writ, notice, pleading, summons, order, warrant, or other document, proceeding, or written communication may lawfully be personally served out of the jurisdiction."

Dated at Victoria, B. C., this 14th day of July, 1919.

JOHN OLIVER,
Acting Attorney-General.

Approved this 14th day of July, 1919.

JOHN OLIVER,
Presiding Member of the Executive Council.

PROVINCIAL SECRETARY'S OFFICE,
18th July, 1919.

HIS HONOUR the Lieutenant-Governor in Council, under the provisions of the "County Courts Act," directs that the County Court Rules, 1914, be amended as follows:—

By Command.

J. D. MACLEAN,
Provincial Secretary.

That the County Court Rules, 1914, be amended by adding thereto, immediately preceding Rule 9 of Order III. thereof, the following:—

"8A. Where personal service of any summons and plaint, writ, notice, pleading, order, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, and it is made to appear to the Court or Judge that prompt personal service cannot be effected, the Court or Judge may make such order, upon such terms and conditions (if any) as may seem just, for substituted or other service, or for substitution of notice for service by letter, advertisement, or otherwise, as may seem just, and such order may be made by the Court or a Judge notwithstanding that the plaintiff shall be unable to allege, or unable to satisfy, the Court or a Judge that such summons, and plaint, writ, notice, pleading, order, warrant, or other document, proceeding, or written communication will probably reach the defendant or the person against whom such order is to be made, or will probably come to his knowledge, or that he is evading service, and such order may be made not only where the defendant or such person is within the jurisdiction, but also where he is, or may be, out of the jurisdiction, in any case where such summons and plaint, writ, notice, pleading, order, warrant, or other document, proceeding, or written communication may lawfully be personally served out of the jurisdiction."

Dated at Victoria, B. C., this 14th day of July, 1919.

JOHN OLIVER,
Acting Attorney-General.

Approved this 14th day of July, 1919.

JOHN OLIVER,
Presiding Member of the Executive Council.

RULES OF COURT

Provincial Secretary's Office,
December 24th, 1918.

HIS HONOUR the Lieutenant-Governor in Council, under the provisions of the "County Courts Act," directs that the County Court Rules, 1914, be amended as follows.

By Command.

J. D. MACLEAN,
Provincial Secretary.

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1. That Rule 20 of Order XI. of the County Court Rules, 1914, be amended by striking out the word "the" before the word "defendant" in the second line of said Rule, and inserting the words "both plaintiff and" in lieu thereof.

2. That Form 3 of Part I. of Appendix A to said Rules be amended by adding to and immediately following the second paragraph of the Notice to Defendant therein the following:—

"Such dispute note if filed by you in person shall contain therein your address for service, which must be within three miles from the Registry out of which this summons is issued."

3. That Form 113 of Part IV. of Appendix A to said Rules be amended to read as follows:—

"NOTICE OF PAYMENT INTO COURT BY GARNISHEE.

"[*Heading as in Garnishee Summons.*]

"Take notice that under the order herein issued on the day of , 191 , the Garnishee named in the said order has paid into Court the sum of $.

"And further take notice that the said sum of $ will be paid out to the plaintiff , unless you appear at this Court on , the day of , 191 , and show cause to the contrary.

"Dated this day of , 191 .

Registrar.

"To the above-named plaintiff
and
"To the above-named defendant."

Provincial Secretary's Office,
December 24th, 1918.

HIS HONOUR the Lieutenant-Governor in Council, under the provisions of the "County Courts Act," directs that the County Court Rules, 1914, be amended as follows.

By Command.

J. D. MACLEAN,
Provincial Secretary.

That Rule 17 of Order V. of the County Court Rules, 1914, be amended by adding thereto the following, immediately after clause (2) thereof:—

"(3.) No action shall be set down for trial unless the hearing fee is paid before the day of the sitting held by the Judge to fix the date for the trial of such action, or within such extended time as the Judge may allow, and if the plaintiff fail to pay such hearing fee before such sitting, or within such extended time the defendant may pay the same and have the action set down for trial, or may apply to the Court or a Judge to dismiss the action for want of prosecution; and on the hearing of such application the Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as may seem just: Provided that when an action is set down for trial by the defendant, he shall give to the plaintiff and all co-defendants, or to their respective solicitors, at least ten days clear notice of the day fixed for the said trial."

APPEAL RULES UNDER THE DOMINION RAILWAY ACT, R.S.C., 1906.

GENERAL ORDER dated the 31st day of October, 1918, made by the Supreme Court of British Columbia by virtue of the powers vested in that Court by section 209 of the "Railway Act," R.S.C. 1906, chapter 37:—

(1.) This order may be cited as the "Railway Arbitration Appeal Amendment Order."

(2.) Every appeal from the award of arbitrators under the "Railway Act" of the Dominion of Canada, shall be heard and determined by a single Judge.

(3.) The Judge may make such order as to the costs of the appeal, as shall appear to be just.

(4.) The General Rules, dated the 28th day of November, 1905, are hereby rescinded.

G. HUNTER, C.J.B.C.
AULAY MORRISON, J.
W. H. P. CLEMENT, J.
DENIS MURPHY, J.
F. B. GREGORY, J.
W. A. MACDONALD, J.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

DALE v. INTERNATIONAL MINING SYNDICATE *ET AL.* KOSCIS v. INTERNATIONAL MINING SYNDICATE *ET AL.*

SWANSON, CO. J.

1917

June 20.

DALE *v.* INTERNATIONAL MINING SYNDICATE

KOSCIS *v.* INTERNATIONAL MINING SYNDICATE

Mechanics' liens—Registration in Land Registry office—Failure to register in time—Mechanics' Lien Act—Curative section—Effect of—R.S.B.C. 1911, Cap. 154, Secs. 19 and 20.

Section 19 of the Mechanics' Lien Act provides, *inter alia*, that a lien for wages owing for work in a mine shall cease to exist at the expiration of 60 days after the last work is done unless in the meantime the person claiming the lien shall file in the nearest County Court registry, in the county wherein the land is situate, an affidavit, etc., and shall file in the Land Registry office a certified copy of the affidavit, etc. Section 20 of said Act provides that "No lien shall be invalidated by reason of failure to comply with any of the requisites thereof, unless . . . the owner . . . is prejudiced thereby," etc. The plaintiffs filed the affidavits required in the County Court registry in time and otherwise complied with the requirements of section 19 of the Act, except that they were late in filing certified copies of their affidavits in the Land Registry office.

Held, that the omission to register in the Land Registry office within the specified time is not cured by section 20 of the Act and is fatal to the validity of the lien even where registration was effected within the prescribed time in the County Court registry.

SWANSON, CO. J.

1917

June 20.

ACTION in the County Court of Yale to enforce mechanics' liens. Tried by SWANSON, Co. J., at Merritt on the 31st of May, 1917.

DALE v. INTERNATIONAL MINING SYNDICATE

KOSCIS v. INTERNATIONAL MINING SYNDICATE

Grimmett, for plaintiffs.
Maughan, for defendants.

20th June, 1917.

SWANSON, Co. J.: These are actions to enforce mechanics' liens against two certain mineral claims in the Nicola mining division. The defence chiefly relied on is that the "affidavit" of lien ("duplicate" or "certified copy") was not filed in the Land Registry office for this district within the time limited by section 19 of the Mechanics' Lien Act (R.S.B.C. 1911, Cap. 154), to wit, within 60 days after last work was done on mineral claims. It is admitted that in other respects section 19 has been complied with. The plaintiffs' solicitor contended that this omission is covered by the curative section 20. The lien is created by section 6, the code of procedure regulating its enforcement being defined by section 19, with which must be read the curative section 20. The gist of section 19 is that "every lien . . . . . shall absolutely cease to exist . . . . . after the expiration of 60 days after the last work is done [in case of a mine] . . . . . unless . . . . . the person claiming the lien shall file in the nearest County Court registry . . . . . an affidavit . . . . . and shall within the [said time] . . . . . file in the Land Registry office . . . . . a duplicate or a certified copy of the affidavit." Section 20 reads as follows:

Judgment

> "A substantial compliance only with the last preceding section shall be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof, unless, in the opinion of the judge adjudicating upon the lien under the said Act, the owner, contractor, sub-contractor, mortgagee, or some other person is prejudiced thereby, and then only to the extent to which he is prejudiced, and the judge may allow the affidavit, statement of claim, plaint, and summons to be amended accordingly; and may allow the addition or substitution of all proper parties to the claim of lien, and the action to enforce the same, although the time for filing the affidavit mentioned in the said last preceding section, and instituting proceedings under section 23 hereof, shall have, or either of them has, expired."

It is contended on behalf of the plaintiffs that the omission

is excused by the words in said section 20 "and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof, unless . . . . . the owner . . . . . is prejudiced thereby . . . . ." I do not think the owners are prejudiced by the omission to file in the Land Registry office within the time limited, the lien having been filed within the proper time in the County Court registry and later on in the Land Registry office. It is, on the other hand, argued by the defendants' counsel that the scope of these words must be narrowed to defects in the form of the affidavit, statement of claim, plaint and summons, which latter are capable of correction under this section. After careful consideration of the matter, I am unable to find any case dealing explicitly with the point. The two sections in question are similar to sections 13 and 14 in the Alberta Act (1906, Cap. 21). The difficulty is clearly resolved by the express wording of the statutes of Ontario, 10 Edw. 7, Cap. 69, Sec. 19 (2): "Nothing in this section shall dispense with registration of the claim of lien"; R.S. Man. 1913, Cap. 125, Sec. 17 (2); Nova Scotia, R.S.N.S. 1900, Cap. 171, Sec. 17 (2); R.S. Sask., Cap. 150, Sec. 19 (2)—(see section 4 of Cap. 38, 1913, amending section 23 of Cap. 150). There is no such provision in the New Brunswick Act (R.S.N.B. 1903, Cap. 147), nor in the Alberta or British Columbia Acts. We must keep this subsection of the Manitoba Act in mind in reading the words of Killam, C.J. in *Robock* v. *Peters* (1900), 13 Man. L.R. 124 at p. 141, dealing with section 17:

Judgment

"The latter clause appears divisible into two parts. First, only substantial compliance with sections 15 and 16 is required; and, secondly, no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some party is prejudiced, provided there is registration of a claim. I think that the onus on the question of prejudice is upon the party objecting to the registered claim. The defect is not to invalidate the lien, unless in the opinion of the judge, there is prejudice to someone. That is, the judge must positively form the opinion, for which purpose he must have some evidence, either direct or arising out of the circumstances and the nature of the defect. In the present case there is nothing to suggest that any of the parties interested saw the registered statement of claim or knew its contents or was in any way affected by the error."

Dealing with the Ontario statute, which is similar to the Manitoba one, Chancellor Boyd in *Crerar* v. *Canadian Pacific*

SWANSON, CO. J.

1917

June 20.

DALE v. INTERNATIONAL MINING SYNDICATE

KOSCIS v. INTERNATIONAL MINING SYNDICATE

Judgment

R.W. Co. (1903), 5 O.L.R. 383 says: "The statutory Act which gives vitality to the lien is its due registration." Whilst the lien is created by section 6, the words of section 19 state that it "shall absolutely cease unless . . . . . the affidavit is filed . . . . . as set forth in the section . . . . ." Meredith, J. in *Bickerton & Co.* v. *Dakin* (1891), 20 Ont. 695 at p. 702 states a canon of construction which has generally been followed by the Canadian Courts in construing these remedial Acts:

"These essentially remedial Acts are to be given such fair, large and liberal construction and interpretation, as will best ensure the attainment of these objects. Effect ought not to be given to technical objections, founded upon matters which in no way have prejudiced, or could prejudice, any one."

This is the principle of interpretation set forth in our Interpretation Act (R.S.B.C. 1911, Cap. 1, Sec. 25, Subsec. (5)). The words of Riddell, J. in *Barrington* v. *Martin* (1908), 16 O.L.R. 635 at p. 639 dealing with the curative section 18 of the Ontario Act, do not help us, as the learned judge assumes that the claim of lien is registered in the three possible cases he deals with. The curative section of the Ontario Act does not dispense with the necessity of registration of the lien. In *Day* v. *Crown Grain Co.* (1907), 39 S.C.R. 258 the Supreme Court was dealing with the Manitoba statute, which follows the Ontario statute in not excusing non-registration of the lien as required by the Act. I have been referred to three decisions of our own Court of Appeal, in which, however, no express mention is made of section 20 of our Act by any of the counsel in argument or by any members of the Court in their reasons for judgment. In *Vannatta* v. *The Uplands, Ltd.* (1913), 18 B.C. 197; 25 W.L.R. 85, MACDONALD, C.J.A. held lien of claimant filed too late as to two items, the contract under which the deliveries were made having expired more than 31 days before the registration. IRVING, J.A. held that claim being for services Vannatta had 31 days from completion of his services to register his claim of lien. In *Coughlan & Sons* v. *John Carver & Co.* (1914), 20 B.C. 497, MACDONALD, C.J.A. at p. 499 said:

"A sub-contractor for the supplying of material only cannot acquire a lien unless he complies with the provisions of section 6, and cannot maintain it after 31 days from the last delivery of his material unless he comply with section 19 (2)."

GALLIHER, J.A., p. 501:

"As material men, their lien was out of time: see subsection (2) of section 19, Cap. 154, R.S.B.C. 1911."

In *J. A. Flett, Limited* v. *World Building Limited and John Coughlan & Sons* (1914), 19 B.C. 73 at p. 75; 26 W.L.R. 612 at p. 618, GALLIHER, J.A. said:

"I cannot take the view that this was a continuing contract, hence the appeal must be allowed, as the plaintiffs were out of time in filing their lien as to the $950, and no notice was given as to the $43 claim, as is required by the statute."

It is apparently assumed by the Court of Appeal, without dealing expressly with the curative section 20, that non-registration of a lien within the time specified in the Act is fatal to the validity of the lien. There can be no distinction in principle between registration in the County Court registry and registration in the Land Registry office, both being made obligatory by section 19. I must, therefore, take it to be necessarily implied from (although not expressly decided by) the above decisions that the Court of Appeal holds that non-registration of the lien within the specified time is not cured by section 20, and is fatal to the validity of the lien.

Judgment

There will be judgment accordingly for the defendants in these two actions, dismissing the claims to enforce said liens and vacating the registration of the liens in the County Court registry and in the Land Registry office, but reserving to the plaintiffs the right to prosecute their personal claims against the defendants the International Mining Syndicate and the members thereof for work done by plaintiffs on said mineral claims, no evidence having yet been heard, the argument on the technical points proceeding on admissions of counsel. The defendants Mathew D. Ovington and E. Ovington will be entitled to their costs.

Action dismissed.

MURPHY, J.

1916

Dec. 4.

COURT OF APPEAL

1917

Dec. 21.

VICTORIA-VANCOUVER STEVEDORING CO. v. G. T. P. COAST STEAMSHIP CO.

VICTORIA-VANCOUVER STEVEDORING COMPANY LIMITED v. GRAND TRUNK PACIFIC COAST STEAMSHIP COMPANY LIMITED.

Guarantee — Stevedoring — Contract for — Indemnity clause saving stevedoring company from liability for injuries to workmen—Negligence of stevedoring company—Effect on indemnity clause.

A contract to supply a steamship company with longshore labour contained an indemnity clause providing that "the steamship company shall hold the stevedoring company entirely harmless from any and all liability for personal injury to any of the stevedoring company's employees while performing labour embraced in this agreement." A labourer sustained injuries through the negligence of the stevedoring company, for which he recovered judgment in damages. In an action under the indemnity clause to recover the loss sustained by reason of the employee's injury:—

Held, on appeal, affirming the judgment of MURPHY, J. (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that the indemnity clause includes a case of personal injury to a labourer resulting from the negligence of the stevedoring company.

City of Toronto v. *Lambert* (1916), 54 S.C.R. 200 distinguished.

APPEAL from the decision of MURPHY, J. in an action tried at Vancouver on the 30th of November, 1916, for enforcement of an indemnity clause in an agreement whereby the defendant Company held the plaintiff Company harmless from liability for personal injury to any one in the course of their employment under the agreement. The agreement recited that the Stevedoring Company should provide longshoremen and undertake the work of loading and unloading the Steamship Company's boats and the Steamship Company was to supply all gear and material required for the work. During the performance of the work wheelbarrows were required and not having been supplied by the Steamship Company, the man who was injured was sent with others to the Stevedoring Company's warehouse to get them. He had to climb a ladder to an elevated platform where the wheelbarrows were stored and owing to a defect in the ladder he fell and sustained injuries. He brought action and recovered damages from the plaintiff.

Statement

Mayers, for plaintiff.

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

4th December, 1916.

MURPHY, J.: I entertain no doubt that the agreement was in force at the time of the accident. On consideration, I am of the opinion that the work Scott was doing was, under the circumstances proven, labour to perform the stevedoring business of defendant Company and, therefore, falls within the ambit of said agreement. By the arrangement plaintiff was to furnish all labour for doing this work and defendant all necessary gear. The evidence shews that the practice is to house, when it is not in use, such gear as is not on the ships themselves. Obviously, otherwise, it would be damaged by exposure. If then the defendant Company had the necessary gear, it would be in part, at any rate, housed. If, this being so, they, when called upon by plaintiff's foreman to fulfil their part of the bargain to furnish gear, directed him to send his men to get it from the place where it was housed and the foreman did so, could it be said by defendant Company that these men were not doing work to properly undertake and execute the stevedoring of defendant Company's vessels? Clause 1 of the agreement provides for the furnishing of labour to perform the stevedoring work and also to properly undertake and execute such stevedoring work. Clearly, I think, the fetching of gear under the circumstances supposed would be at least labour to properly undertake the stevedoring work, for it could not be carried on without such gear.

What difference can there be, so far as the ambit of labour covered by the agreement is concerned, if instead of owning the gear and having it in their own building, they first borrow it as it lies in defendant's building and then give the same orders as in the case supposed? I can see none. It is conceded that the judgment obtained was secured on the principle of master and servant liability, and that that finding under the circumstances is binding on both parties to this action.

Then it is said the agreement is not intended to cover plaintiff's own negligence, or if it is, the language is not sufficiently wide, and reliance is placed on *Price & Co.* v.

MURPHY, J.

1916

Dec. 4.

COURT OF APPEAL

1917

Dec. 21.

VICTORIA-VANCOUVER STEVEDORING CO. *v.* G. T. P. COAST STEAMSHIP CO.

Union Lighterage Company (1903), 72 L.J., K.B. 374, and similar cases. These are common-carrier cases and I agree with plaintiff's counsel, there is a clear distinction between them and such contracts as the agreement herein. In common-carrier cases, the clause exempting from liability is invoked to abrogate the common law rule that a common carrier is in the absence of fraud an insurer. Obviously, express and clear words would be required to abrogate *in toto* such a general principle. The case is altogether different when, as here, one party is making a contract with another to supply labour at a fixed price. One of the greatest, if not the greatest, risk that he who furnishes the labour must run is his liability for damages for personal injuries to the workmen when engaged in the work to be done. I think it must be held, from the wording of the agreement, that this question was present and was being dealt with by the contracting parties. Both must be taken to have known that, apart from the provisions of the Workmen's Compensation Act, such liability could only attach to plaintiff by reason of some negligence for which they were responsible. They must be at fault. Being an incorporated company, such fault could not be personal but the fault of agencies for which the law holds them accountable. As to the Workmen's Compensation Act, it is doubtful if it would apply at all to much of the work to be done under the agreement. With the question and these legal principles, which both parties must be held to know, present to their minds, plaintiff and defendant entered into a contract of indemnity, set out in paragraph 5 of the agreement. The words are:

MURPHY, J.

> "That the Steamship Company shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement."

The words could scarcely be wider. "From all or any liability," in view of what I hold must have been in contemplation of the parties when the contract was signed, cannot, I think, be narrowed by invoking cases dealing with an entirely different legal relationship. There will be judgment for the plaintiff.

From this decision the defendant appealed. The appeal was

argued at Vancouver on the 8th of May, 1917, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

MURPHY, J.

1916

Dec. 4.

COURT OF APPEAL

1917

Dec. 21.

VICTORIA-VANCOUVER STEVEDORING Co. *v.* G. T. P. COAST STEAMSHIP Co.

Sir C. H. Tupper, K.C., for appellant: The agreement dated the 20th of November, 1911, was to remain in force for one year, and if not then terminated was to remain in force until terminated by one of the parties. The accident did not occur until the 1st of July, 1915. I contend the parties wishing to continue the agreement must say so. The injured man was not engaged in performing labour within the ambit of the agreement, and, in addition, there was negligence on the part of the Stevedoring Company. The agreement did not contemplate payment for loss due to the negligence of the plaintiff Company: see *Perry* v. *Payne* (1907), 10 Ann. Cas. 589 *et seq.*; *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200; 33 D.L.R. 476; *Mitchell et al.* v. *Lancashire and Yorkshire Railway Company* (1875), 44 L.J., Q.B. 107 at p. 109; *Price & Co.* v. *Union Lighterage Company* (1904), 1 K.B. 412 at p. 416.

Mayers, for respondent: The question of expiration of the contract at the end of one year was not pleaded and cannot be raised here. The case of *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200 does not apply as it refers to a different subject-matter. As to the application of the words "owner's risk" see *B.C. Canning Co.* v. *McGregor* (1913), 18 B.C. 663. As to the ambit of the term "accident arising out of and in the course of his employment" see *Moore* v. *Manchester Liners, Limited* (1910), A.C. 498; *Sharp* v. *Johnson & Co., Limited* (1905), 2 K.B. 139 at p. 145; *Pierce* v. *Provident Clothing and Supply Company, Limited* (1911), 1 K.B. 997 at p. 1003; *Lane* v. *W. Lusty & Son* (1915), 3 K.B. 230; *Gallant* v. *Owners of Ship Gabir* (1913), 108 L.T. 50; *Geary* v. *Ginzler and Co. Limited, ib.* 286. The case of *Houlder Line, Limited* v. *Griffin* (1905), A.C. 220 turns on the fact that the vessel was floating in the dock of another at the time of the accident. Merely negligence will not prevent recovery by the assured: see *Dudgeon* v. *Pembroke* (1875), 1 Q.B.D. 96 at p. 109; *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Company* (1898), 2 Q.B. 114 at p. 124.

Argument

Tupper, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: I agree with the learned judge in his findings that Scott was doing work embraced in the contract when fetching the wheelbarrow from the defendant's storehouse. It is clearly proven that Scott was the employee of the plaintiff and not of the defendant when he sustained his injuries. He brought action against the plaintiff and succeeded on the ground that the injuries were the result of the plaintiff's negligence. What the plaintiff seeks to recover in this action is payment by defendant, under an indemnity agreement, for loss which was the direct consequence of the plaintiff's own negligence, and in which negligence the defendant was not in any way involved. The indemnity agreement reads as follows:

"That the Steamship Company shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement."

The language of this contract is very wide and comprehensive, but it does not in express terms cover liability arising out of plaintiff's own negligence. Similar language has been given a restricted meaning in contracts of carriage and bailment and of insurance. In *Price & Co.* v. *Union Lighterage Company* (1904), 1 K.B. 412 at p. 414, Lord Alverstone, C.J. said:

"Since the case of *Phillips* v. *Clark* (1857), 2 C.B.N.S. 156; 26 L.J., C.P. 168, it has been settled that when a clause in such a contract as this [carriage] is capable of two constructions, one of which will make it applicable where there is no negligence on the part of the carrier or his servants, and the other will make it applicable where there is such negligence, it requires special words to make the clause cover non-liability in case of negligence."

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Collins, M.R. and Romer, L.J. were of the same opinion.

Now is there any reason why the same rule of construction should not be applied to this case? It is true a common carrier is an insurer, but that only means that his responsibility is greater than that imposed by the law upon other classes of contractors. To the extent to which the law imposes liability on an employer, he is in no different position with respect to that liability than is the common carrier under his common law liability as such. It is merely a question of degree. The contract of the carrier limiting his common law liability is not unlike the contract in question so far as the objects aimed at

are concerned. The carrier shifts his burden to the shoulders of the owners of the goods, while here the plaintiff shifts it to those of the defendant. In each case the question is one of construction. Is effect to be given to the wide language of the agreement, which, if literally construed, would relieve the negligent party from the consequences of his own negligence? Where it is necessary in a particular case to construe such an agreement literally in order to give it meaning and operation, then it must be so construed: *McCawley* v. *Furness Railway Co.* (1872), L.R. 8 Q.B. 57. In that case exemption from liability could have no meaning at all unless it read as relieving the railway company from liability arising out of its own negligence. But in this case the contract operates to relieve the plaintiff of the burden of making compensation to which employers are entitled under the Workmen's Compensation Act, which compensation is payable irrespective of the employer's negligence. The principle involved in such cases is, I think, that unless by clear words or by necessary implication one party is to bear the risk of the other's negligence, the contract should not be so construed. It offends against one's sense of justice and reason to say, in the absence of clear words, that the risk to be taken by the defendant was one involving the obligation to indemnify the plaintiff for a loss brought about by plaintiff's own negligence.

MACDONALD, C.J.A.

While agreeing with the findings of fact of the learned trial judge, I am unable to take his view of the law, and therefore would allow the appeal.

MARTIN, J.A. dismissed the appeal.

MARTIN, J.A.

GALLIHER, J.A.: Agreeing, as I do, with the learned trial judge's findings of fact, there remains only the construction to be placed on clause 5 of the contract of indemnity.

The words "from any and all liability" are very wide indeed, but should we construe them so as to protect against liability arising out of their own negligence? *Sir Charles Tupper* relied upon *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200; 33 D.L.R. 476, and at first blush that case might seem to be applicable, but on a close analysis of that case it would seem to me that the decision there proceeded upon the ground that

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where the liability arose out of the negligence partly of the city corporation and partly of the company, the city were not protected by the words of the indemnity clause, the Court holding that the general words "or otherwise howsoever" must be read as *ejusdem generis* and did not widen the scope of the particular words preceding, Anglin, J. pointing out that it would be importing something into the clause which the Court would not be justified in doing. Read in that light, the case does not, as I view it, assist us any. *Mitchell et al.* v. *Lancashire and Yorkshire Railway Company* (1875), 44 L.J., Q.B. 107, was also relied on by appellant.

The defendants in the above case were originally common carriers of the goods in question for the plaintiffs, but on arrival of the goods sent notice to the plaintiffs that they held same not as common carriers but as warehousemen at owners' sole risk, and subject to the usual warehouse charges. The Court, Blackburn and Field, JJ., held that notwithstanding the words "at owners' sole risk" in the notice, defendants were liable for negligence.

The distinction which the learned trial judge sought to draw as between common-carrier cases and the contract in the case at bar, if sound, did not obtain, as the relationship of defendant to plaintiff was not that of common carriers (which had ceased) but that of bailees for hire, and the Court was dealing with the general principle involved in contracts of that nature. The same principle is discussed in *Price & Co.* v. *Union Lighterage Company* (1903), 72 L.J., K.B. 374, where Walton, J. refers at p. 376 to *Mitchell et al.* v. *Lancashire and Yorkshire Railway Company, supra.* The judgment of Walton, J. was affirmed in appeal (1904), 1 K.B. 412.

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I think the principle discussed in these cases applicable to the case at bar. Moreover, it seems to me that it could not have been in the contemplation of the parties at the time the contract was entered into that respondent was to be insured against its own negligence.

I would allow the appeal.

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MCPHILLIPS, J.A.: The action was one for the enforcement

of an indemnity clause contained in an agreement between the parties to the action, under which the respondent contracted to supply to the appellant the requisite longshore labour in connection with the ships of the appellant. The clause as contained in the agreement reads as follows: [already set out.]

The appellant under the terms of the agreement paid for all longshore labour on an hourly basis. The respondent was liable under the terms of the agreement for all loss or damage to cargo caused by its supplied employees. The agreement was entered into on the 20th of November, 1911, to enure for one year from that date and, if not then terminated, to remain in force thereafter until either party thereto should give three months' notice in writing terminating the same. Some argument was addressed from the bar to the effect that the contract was non-existent and could not be given effect to. I did not look upon it that the learned counsel for the appellant felt that his submission upon this ground was at all forceful. Upon the facts the contract unquestionably is a subsisting contract and was treated by the appellant as subsisting, and if anything more was needed the statement of counsel for appellant sets this point at rest:

"The Court: It is a valid agreement.

"*Sir C. H. Tupper*: Yes, I have no doubt that is the agreement."

A longshoreman by the name of Scott, one of the supplied longshoremen under the contract, met with an injury whilst in the act of getting some wheelbarrows from off the premises of the respondent, the wheelbarrows being necessary to unload coal from the bunkers of the ship "Henrietta," a ship of the appellant, the foreman Meakin, who was a foreman of the respondent, being one of the supplied longshoremen under the contract, having ordered Scott to go for the barrows along with another man by the name of Emmett, he also being one of the supplied longshoremen. When Scott, in the discharge of his duty and obeying the order of the foreman who was in superintendence, was about the work he fell and suffered personal injuries. The injuries ensued because of the fall of a ladder, which, placed upon a greasy or slippery floor without fasteners or spikes, fell when he was in the act of ascending same to the place where

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the wheelbarrows were stored. The evidence is that the appellant applied to the respondent for leave to get and use the wheelbarrows, they being the property of the respondent.

Now as to the relation of the parties, *i.e.*, in the carrying on of the work. To illustrate this we have the evidence of the master for the appellant, Captain Nicholson. When examined he had this to say:

"Now when the Henrietta arrived at the dock what negotiations would take place for the unloading of the cargo? Well, we would notify the Stevedoring Company of the prospective arrival of the steamer, and that approximately so many men were required.

"Yes? And under the present arrangement they would round these men up and turn them over to us, and we would engage them to work with cargo, and engage a foreman of the Stevedoring Company to keep general oversight over the handling of it.

"Over the handling of the men? Yes. Those men are engaged by the dock agent or by the mate of the ship.

"And the dock agent is your employee? Our employee, yes."

"Well, your dock foreman, the man who was in charge of the work has absolute jurisdiction over the work has he not? Yes.

"If he saw fit to send Scott to get some tackle it would be perfectly within the scope of his jurisdiction? Yes.

"And if he sent Scott to get some tackle it was the proper thing for him to do? If he considered it so, yes.

"Well, Captain Nicholson, in addition to the dock agent who was in charge of the unloading on behalf of the Steamship Company, was there any foreman in charge of the Stevedores? There usually was.

"Whose servant is such foreman, the Stevedoring Company? Well, during the time he is engaged in our ship he is our servant and paid by us.

"But he is employed for the purpose of superintending the men? Yes.

"And he is really an employee of the Stevedoring Company, is that correct? Well, permanently, yes. Temporarily, I regard him as our employee."

Scott brought an action against the respondent for the injuries suffered by him in the Supreme Court, and the trial took place before Mr. Justice MURPHY and a special jury, and he was awarded damages to the amount of $190. The action may be said to have been brought both at common law and under the Employer's Liability Act (R.S.B.C. 1911, Cap. 74). The verdict being a general one, no questions being answered, it is impossible to say in what way liability was imposed, but the amount allowed is well within what might have been allowed under the Employer's Liability Act. Unquestionably, Scott was, at the time he met with the injuries, obeying the order of

Meakin who had superintendence intrusted to him (R.S.B.C. 1911, Cap. 74, Sec. 3).

The fact that the storehouse, where the wheelbarrows were, happened to be the storehouse of the respondent was in its nature accidental. It was the place where Scott was directed to go. The learned trial judge in his judgment said:

"It is conceded that the judgment obtained was secured on the principle of master and servant liability and that that finding under the circumstances is binding on both parties to this action."

And it is to be remembered that this appeal is brought against the judgment of Mr. Justice MURPHY, who was the trial judge in the Scott action, and it is to be further remembered that it is discussed in the evidence that the respondent when sued by Scott insisted upon the appellant taking charge of the action and defending the same, although technically, it is true, a written authority went from the respondent to the general solicitors for the appellant to defend the action in its name, but yet it may well be said that the defence of the Scott action was really for a time at least the defence of the appellant in the name of the respondent, although there is evidence that on the 29th of November, 1915, a letter was written by the appellant to the respondent repudiating all liability and calling the attention of the respondent to the fact that the trial of the action had been adjourned to the 21st of December, 1915, at which time the trial was had. That Scott was at the time at work, although at the moment doing that which was preliminary to the actual work to be proceeded with, may be the more forcefully borne in upon one's mind by considering the judgments in *Sharp* v. *Johnson & Co., Limited* (1905), 2 K.B. 139 at p. 145; *Moore* v. *Manchester Liners, Limited* (1910), 79 L.J., K.B. 1175; *Pierce* v. *Provident Clothing and Supply Company, Limited* (1911), 1 K.B. 997; *Gallant* v. *Owners of Ship Gabir* (1913), 108 L.T. 50.

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The intention of the parties is what is to be gleaned in view of the terms of the agreement and that which was contemplated to be done thereunder. It is not only the application of well known principles of law governing contracts of indemnity and insurance. In the present case, what was to be done was to provide the labour not the gear that might be found necessary

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to carry out the work. The case is to be determined upon all the facts and circumstances referable, of course, to the terms of the contract of indemnity, *i.e.*, to be controlled by the special or peculiar facts; the indemnity is to be held effective if the terms thereof reasonably cover the claim made: see *Gooch* v. *Clutterbuck* (1899), 68 L.J., Q.B. 808, A. L. Smith and Vaughan Williams, L.JJ., at p. 810; *Agius* v. *Great Western Colliery Co., ib.* 312, Lord Halsbury, L.C. at p. 316; A. L. Smith, L.J. at p. 317; Chitty, L.J. at p. 318. In entering upon the work Scott is injured in getting the wheelbarrows, essential articles to enable the coal to be taken from the bunkers of the Henrietta. Can it be said that the negligence for which he (Scott) has recovered against the respondent constitutes such negligence as will excuse the appellant from being called upon to perform the contractual obligation entered into by it, *i.e.*, "that the Steamship Company [the appellant] shall hold the Stevedoring Company [the respondent] entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement"? In my opinion the appellant cannot be held to stand excused. There was no wilful act or default upon the part of the respondent, and that has occurred which was clearly within the meaning of the contract of indemnity, *viz.*: personal injury ensued to one of the employees of the respondent while performing labour embraced in the contract. The principle which, in my opinion, must govern in the present case is that which is to be found stated by A. L. Smith, L.J. in *Trinder, Anderson & Co.* v. *Thames & Mersey Marine Insurance Co.* (1898), 67 L.J., Q.B. 666 at pp. 671-2.

Whilst it cannot be gainsaid that Scott was the employee of the respondent, and likewise Meakin the foreman, yet the position of matters was this, that the foreman and the longshoremen would to a very considerable extent be subject to the general direction of officers of the appellant. This is evident from the evidence of Captain Nicholson above quoted, and it might well be that in consequence thereof would be exposed to possible injury in the carrying out of the work and in executing orders really emanating from the appellant, arising owing to

the exigency of the moment. This is well portrayed by the following statement in Captain Nicholson's evidence when it is considered that Scott suffered the injuries in going for the wheelbarrows:

"Well, you would require tackle and apparatus occasionally to unload a ship, would you not? We furnish it."

The learned counsel for the appellant greatly relied upon the judgment of the Supreme Court of Canada in the case of *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200; 33 D.L.R. 476, where it was held that the agreement of indemnification there under consideration did not apply to the case of damages which the city would have to pay as a consequence of its own negligence and neither relieved it from liability nor entitled it to indemnity. With the greatest of deference, I cannot see that the case has application to the present case. The case before us upon this appeal may rightly be said to be a converse case; furthermore, the contractual obligation is in different terms. It is useful, however, and instructive to note the language of Duff, J. at p. 211 when considering the phrase "otherwise howsoever," as we have to consider in the present case the very comprehensive contractual obligation entered into by the appellant with the respondent "shall hold [the respondent] entirely harmless from any and all liability for personal injury to any of the [respondent's] employees while performing labour embraced in this agreement." Could language be more explicit in defining the extent and nature of the indemnification? There certainly could be no liability upon the respondent at the suit of any of the employees without negligence, save possibly under the Workmen's Compensation Act (R.S.B.C. 1911, Cap. 244) if the work being done could be said to be within the purview of the statute (see *Houlder Line, Limited* v. *Griffin* (1905), A.C. 220 at p. 222). The intention of parties may be said to be unmistakably evidenced. That which was indemnified against was all liability that would flow from the due carrying out of the work in the way of personal injuries to the employees, save no doubt that which the law will exclude, that is, there would be no indemnification where the injuries were occasioned by the wilful act of the respondent, which is not the present

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case. The natural and reasonable construction of the words of the indemnity import that the appellant undertook all liability which would in ordinary course fall upon the employer when the employee is injured whilst engaged in the work covered by the contract.

In my opinion, it is too narrow a construction of the contractual obligation of indemnification before us to say that there is no liability if there was negligence upon the part of the respondent. The perils against which the respondent was to be saved harmless were perils of personal injury to their employees. Personal injuries in the case of Scott occurred and liability therefrom was imposed. It was this liability that was covered (see *Field Steamship Company* v. *Burr* (1899), 1 Q.B. 579 at p. 583, A. L. Smith, L.J.) The intention of the parties to the contract is plain and clear, and that construction should be put upon the contract which best carries out the intention of the parties (see *Langston* v. *Langston* (1834), 2 Cl. & F. 194 at p. 243; *In re Johnston Foreign Patents Company, Limited* (1904), 2 Ch. 234 at p. 247; *Mayer* v. *Isaac* (1840), 6 M. & W. 605 at p. 612).

In *Gwyn* v. *Neath Canal Co.* (1868), L.R. 3 Ex. 209 at p. 215, Kelly, C.B. said:

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"The result of all the authorities is, that when a Court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned."

To construe the indemnity provision in the contract in accordance with the submission of the appellant would be to render it wholly illusory. The natural and reasonable construction has been arrived at by the learned trial judge.

I would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Tupper & Bull.*
Solicitors for respondent: *Bodwell, Lawson & Lane.*

WILLIAMS AND SEARS v. RICHARDS.

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WILLIAMS v. RICHARDS

Judgment — Action to set aside on ground of fraud dismissed — Another action to recover amount due on judgment—Same issues—New evidence —Res judicata—Statute of Limitations, R.S.B.C. 1911, Cap. 145.

The plaintiffs obtained a judgment against the defendant by default in 1895, for debt. Ten years later the defendant brought action to set aside the judgment on the ground that it was obtained by fraud, which was dismissed. In an action by the plaintiffs for the amount due on the first judgment the grounds for defence were substantially the same as those upon which the action of 1905 was based, but the defendant also claimed that new evidence had been discovered since the action in 1905. The learned trial judge dismissed the action on the ground of *res judicata*.

Held, on appeal, affirming the decision of CLEMENT, J. that on the question of *res judicata* the test is whether the issues now sought to be set up were disposed of on the former trial. The discovery of new evidence has no bearing on the case.

APPEAL from the decision of CLEMENT, J., of the 21st of June, 1917, in an action for the amount due on two judgments, the first being for $2,466.26, recovered in January, 1895, and the second for $684.30, recovered in May, 1906. In 1892 the defendant borrowed $3,000 from Dr. Powell, of Victoria, giving as security a promissory note indorsed by the plaintiffs. He also gave further security in the way of four life-insurance policies amounting in all to $8,000. Later Dr. Powell, who was paid off by the plaintiffs, handed over the insurance policies to them, and after paying certain premiums the plaintiffs realized $1,100 on the policies and allowed them to lapse. Later the plaintiffs brought action for the amount due them through paying the Powell notes and obtained judgment first above mentioned. In December, 1905, the defendant brought action in the Supreme Court to set aside said judgment on the ground that it was obtained by fraud, alleging that the writ in the action was never served on the defendant, and judgment was obtained by default of appearance through a false affidavit of service; that there was fraudulent suppression of the fact; that

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the debt had been paid and that they fraudulently neglected to realize on the securities at their market price. On the trial before DUFF, J. the action was dismissed. This action was brought to preserve the debt by reason of the Statute of Limitations, and the defences raised were, that the original judgment of 1895 was obtained by the plaintiffs fraudulently representing to the officers of the Court that defendant was served with the writ in the action; that he had never waived non-service; that the plaintiff Sears had assigned all his interest in the matters in dispute and that the whole claim had previously been settled and satisfied. It was raised by the defence on the trial that new evidence had been discovered since the former action, but judgment was given in favour of the plaintiffs, on the ground that the issues raised in the defence were disposed of in the former action and were therefore *res judicata*. The defendant appealed.

The appeal was argued at Vancouver on the 7th of November, 1917, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Maclean, K.C., for appellant: We say the judgment before DUFF, J. was obtained by fraud, and we discovered new evidence after that action. If the Court is misled by the parties the judgment can be set aside: see *The Duchess of Kingston's Case* (1776), 2 Sm. L.C., 12th Ed., p. 754 at p. 761; *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295 at p. 300; *Harper* v. *Cameron* (1893), 2 B.C. 365. The original judgment was a default judgment and we say this was due to our not having been served with process. Before the judgment of CLEMENT, J. in this action Sears assigned all his interest to Williams, and he has no right of action: see *Read* v. *Brown* (1888), 22 Q.B.D. 128; see also Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2 (25).

Lowe (*J. Percival Walls*, with him), for respondents: The only fraud is what is in the defence. They cannot go outside the record. Full particulars must be given of the fraud alleged and it must be proved with preciseness: see *Page* v. *Page* (1915), 22 B.C. 185. In the former action the allegations of

fraud were fuller than in this case and included all the allegations in this case. When fresh evidence is discovered they must first get rid of the former action. The issues raised were disposed of in that action and are *res judicata*. Notwithstanding the assignment, Sears still has an interest and should be a party: see *Goon Gan* v. *Moore* (1892), 2 B.C. 154; *Marchant* v. *Morton, Down & Co.* (1901), 70 L.J., K.B. 820; *Dell* v. *Saunders* (1914), 19 B.C. 500; *Union Assurance Co.* v. *B.C. Electric Ry. Co.* (1915), 21 B.C. 71. In any case the Court can amend. On the question of *res judicata* see *Shoe Machinery Company* v. *Cutlan* (1896), 1 Ch. 667; Halsbury's Laws of England, Vol. 13, p. 334, par. 468. The facts should be proved and counsel should tender to the Court what they wish to bring forward: see *Caldwell* v. *Davys* (1900), 7 B.C. 156; *Hopkins* v. *Gooderham* (1904), 10 B.C. 250.

Argument

Maclean, in reply.

MACDONALD, C.J.A.: The appeal should be dismissed. I think the contention of the respondents is the correct one, that the matter sought to be raised before Mr. Justice CLEMENT in the Court below was *res judicata.*

In the original action there was, as I understand it, a default judgment entered in 1895. This was attacked in 1905 by the defendant in that action, and the attack was based upon the grounds upon which the defendant now relies in this action; the issues raised by him in the statement of claim in 1905 he now raises in his statement of defence in this action. Mr. Justice DUFF tried the action in 1905 and disposed of those issues. It may be that some additional evidence has been discovered which was not before Mr. Justice DUFF, but that is not the test, as to *res judicata.* The test is, did the judge dispose of the issues which are now sought to be set up? It is clear on the pleadings in both actions that those issues were finally disposed of before Mr. Justice DUFF. I therefore think the learned judge in the Court below was right in holding that the defence was *res judicata.*

MACDONALD, C.J.A.

MARTIN, J.A.: I think the judgment below should be affirmed.

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GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.: I think the appeal should be dismissed. Unquestionably the situation is one of *res judicata*.

I do not consider that I am called upon to give any considered judgment with regard to the suggested evidence claimed to be so lately discovered which might constitute fraud—evidence not before Mr. Justice DUFF. I do not find that it is a case where there was the exercise of "reasonable diligence," and I cannot come to the conclusion that Mr. Justice DUFF was imposed upon. Of course, if that were so, and the judgment of the Court was obtained by imposition, unquestionably the arm of the law is long enough to reach out to give proper relief, but I cannot see that a case of that character is at all reasonably suggested, or that there is any probable cause of action. Further, the lack of diligence to discover the alleged evidence is an insuperable difficulty and precludes the extension of any indulgence at this late date.

Appeal dismissed.

Solicitor for appellant: *H. H. Shandley.*
Solicitor for respondents: *John R. Green.*

THE CORPORATION OF THE CITY OF VICTORIA v. MACKAY.

COURT OF APPEAL

1917

Nov. 6.

CITY OF VICTORIA v. MACKAY

Arbitration—Stated case—By-laws—Non-publication and non-filing of in Land Registry office—B.C. Stats. 1906, Cap. 32, Secs. 50 (142) and 86.

Subsection (142) of section 50 of the Municipal Clauses Act, 1906, provides that every by-law passed thereunder "shall before coming into effect" be published in the B.C. Gazette and in a newspaper and that after said publication a certified copy, together with an application to register the same, shall be filed in the Land Registry office. Section 86 of the same Act provides that every by-law passed by the council shall be registered in the office of the County Court by depositing with the registrar a true copy thereof certified by the clerk of the municipality and under its seal, and such by-law shall take effect and come into force and be binding on all parties as from the date of such registration. On an arbitration to assess damages for the expropriation by the City of Victoria of certain lands in pursuance of a by-law of said city it appeared that the by-law was duly registered in the office of the County Court of Victoria in compliance with section 86 of said Act, but was not published as provided in subsection (142) of said section 50 or registered in the Land Registry office of said district. On a case stated as to whether the arbitrators had power to act:—

Held, affirming the decision of MURPHY, J. (MARTIN, J.A. dissenting), that section 86 of the Act is the section which, if complied with, fixes the date upon which the by-law in question came into effect and subsection (142) of section 50 must be read as directory only.

[An appeal to the Supreme Court of Canada was allowed.]

APPEAL by the City of Victoria from the order of MURPHY, J., of the 29th of May, 1917, on an appeal by way of stated case from the arbitrators appointed to assess compensation and damages in respect of the expropriation of a strip of land facing on Douglas Street, being part of lots 36 and 38 in the subdivision of lot 1269, section 6, being fourteen and six-tenths feet wide on the north end and thirty-nine and six-tenths feet wide at the south end of the lots, the property of Frances J. Mackay of Victoria.

Statement

The by-law for expropriation was passed on the 29th of May, 1911. Notice of expropriation was given Mackay on the 7th of June, 1911, and the by-law was registered in the County

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Court on the 19th of June, 1911. The arbitrators proceeded with the arbitration and gave their award conditional upon their having power to do so, and they then stated a case as to whether the arbitrators had power to act by reason of the non-registration and non-publication of the by-law in the Land Registry office as required by subsection (142), section 50, of the Municipal Clauses Act, B.C. Stats. 1906.

The appeal was argued at Victoria on the 11th of June, 1917, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

McDiarmid, for appellant: Publication and registration under subsection (176) of section 53, Cap. 170, R.S.B.C. 1911, is a condition precedent to the coming into force of the by-law. On the question of whether the City is estopped by reason of appearing on the arbitration see *Regina* v. *L. & N. W. Railway Co.* (1854), 3 El. & Bl. 443; *Brierley Hill Local Board* v. *Pearsall* (1884), 9 App. Cas. 595.

Argument

Maclean, K.C., for respondent: Section 86 of the Act of 1906 (Cap. 32) brought the by-law into force. We have no control over the proper carrying out of the Act: see *Hanna* v. *City of Victoria* (1916), 22 B.C. 555. The sections that were not complied with are "directory" only: see *Nowell* v. *Worcester Corporation* (1854), 23 L.J., Ex. 139 at p. 143; *Montreal Street Railway* v. *Normandin* (1917), A.C. 170 at p. 175; 86 L.J., P.C. 113; Maxwell on Statutes, 5th Ed., 598.

McDiarmid, in reply.

Cur. adv. vult.

6th November, 1917.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal is from the order of MURPHY, J. on a case stated by arbitrators. The Municipal Council of the City of Victoria was by Cap. 32, Sec. 50, Subsec. (142) of the statutes of 1906, empowered to pass by-laws for the widening of streets. That subsection further provides that every by-law passed thereunder "shall before coming into effect" be published in the British Columbia Gazette and in a newspaper and that after said publication a certified copy, together

with an application to register the same, shall be filed in the Land Registry office.

The council passed a by-law for the widening of Douglas Street, which entailed the taking of a strip of respondent's land. The by-law was not published, nor was application made to file a certified copy in the Land Registry office. The parties nevertheless proceeded to arbitration, whereupon the appellant, the City, took the position that as such by-law had not been published, or a copy filed as required by said section, it had never come into force and the arbitrators had consequently no jurisdiction to make an award. The arbitration proceedings were initiated by the City by notice of expropriation served on respondent, and this was followed by entry upon and survey of the land taken and by the appointment of arbitrators. The respondent makes no objection to the non-compliance by the City with the provisions of said subsection. The situation, therefore, is that the City is attempting to take advantage of its own shortcomings. If said subsection (142) stood alone its construction would be simple enough. It might very well be read as making publication a condition precedent to the coming into force of the by-law. But it must, I think, be read in connection with section 86 of the same statute which declares that every by-law passed by the council shall be registered in the office of the County Court by depositing with the registrar a true copy thereof, certified by the clerk of the municipality and under its seal, and such by-law shall take effect and come into force and be binding on all parties as from the date of such registration. This is a most important section. It is from the date of such registration that the time limited runs within which applications to quash by-laws may be made to the Court. In my opinion, section 86 is the section which, if complied with, fixes the date upon which the by-law in question came into effect, and in this view of the section I think subsection (142) must be read as directory only. It gives a mandate which, if ignored, may perhaps be ground for setting the by-law aside if proceedings be taken within the proper time, but it does not nullify the operation or effect of section 86.

MACDONALD, C.J.A.

The only other way of reading subsection (142) is to confine

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its provisions to the particular subject with which it deals, and to say that by-laws passed under the section of which it is a subsection are not subject to the provisions of section 86. But the language does not exclude the application of section 86. It is not "no by-law passed under this section shall come into effect until published." If that were the language used there would be great force in the appellant's contention. But the words are capable of a construction in harmony with section 86, and I think they ought so to be construed. In this view it becomes unnecessary to consider the question of estoppel.

MACDONALD, C.J.A.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A. allowed the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the governing statute law may rightly be said to be section 86 and subsection (4) of section 251 of the Municipal Clauses Act (B.C. Stats. 1906, Cap. 32), and compliance was had with this statute law. Now the contention is, although the appellant is the moving party throughout in these proceedings, that all the proceedings are abortive because of the fact that subsection (142) of section 50 of the same Act was not complied with in respect of publication of the by-law in the British Columbia Gazette and the filing thereof in the Land Registry office. In my opinion, when the particular facts and circumstances are taken carefully into consideration the present case is one that excludes the application of subsection (142) of section 50. The statute should not be read as a pitfall. Section 86 is in no uncertain terms and applies to every by-law. The enacting language is "be registered in the office of the County Court for the district . . . . and such by-law shall take effect and come into force and be binding on all persons as from the date of such registration." It will be observed that subsection (142) of section 50 uses the words "coming into effect," and section 86 "take effect and come into force." The words "come into force" are important, when it is considered that section 89 and following sections deal with the procedure for quashing by-laws, and section 90 enacts that the proceedings must be taken within one month after the regis-

tration in the office of the County Court. This would seem to be conclusive and as indicating the intention of the Legislature. How is it possible to say that a by-law is not in force when the Legislature has said that upon a certain thing being done, which has been done, it shall "be binding on all persons"? Undoubtedly there is inconsistency here between subsection (142) of section 50 and section 86, but when section 86 is found to be the imperative section bringing the by-law into force, any inconsistency there may be must be passed over. "The construction that produces the greatest harmony and the least inconsistency is that which ought to prevail": see *Attorney-General* v. *Sillem* (1863), 2 H. & C. 431, Pollock, C.B. at p. 517.

Then the appellant, in my opinion, cannot, after proceeding to arbitration, now set up the non-compliance with subsection (142) of section 50—the default in the doing of something that it was incumbent upon it to do. In *Wilson* v. *McIntosh* (1894), A.C. 129, at p. 134, the Judicial Committee quoted with approval the following opinion of Darley, C.J. (*Phillips* v. *Martin,* 11 N.S.W.L.R. 153):

> "It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts."

MCPHILLIPS, J.A.

I would also refer to what Sir Arthur Channell said in *Montreal Street Railway* v. *Normandin* (1917), 86 L.J., P.C. 113 at p. 116:

> "When the provisions of a statute relate to the performance of a public duty, and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

(Also see *Plunket* v. *Molloy* (1856), 8 Ir. Jur. (N.S.) 83; and *Nowell* v. *Worcester Corporation* (1854), 23 L.J., Ex. 139 at p. 143).

In *De Winton* v. *Mayor, &c. of Brecon* (1859), 28 L.J., Ch. 600 Romilly, M.R. at p. 604 said:

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"If the Court finds a positive inconsistency and repugnancy, it may be difficult to deal with it, but, so far as it can, it must give effect to the whole of the Act of Parliament."

It seems to me impossible for a Court to say that a by-law is ineffective (subsection (142) of section 50) or not in force when we have the Legislature saying that upon a certain thing being done, *i.e.*, registration in the office of the County Court (section 86) "such by-law should take effect and come into force and be binding on all persons as from the date of such registration."

MCPHILLIPS, J.A.

The contention put forward by the appellant after all that has taken place and this lapse of time is, in my opinion, unconscionable and ought not to prevail unless it is that the Court is met with intractable law, and must hold that the by-law is without legal effect, that intractable law I do not find.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. agreed with MACDONALD, C.J.A. in dismissing the appeal.

Appeal dismissed, Martin, J.A. dissenting.

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

Solicitors for respondent: *Elliott, Maclean & Shandley.*

JAMES THOMSON & SONS, LIMITED v. DENNY AND ROSS.

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Practice — Appeal — Application to withdraw — Costs — Right to deprive successful party of costs—"Good cause"—R.S.B.C. 1911, Cap. 51, Sec. 28—B.C. Stats. 1913, Cap. 13, Sec. 5.

The defendants moved for leave to withdraw an appeal from an interlocutory order which had been made unnecessary, owing to the defendant having succeeded on the final disposition of the action; and for an order requiring the plaintiff to pay the costs of the appeal.

Held, per MACDONALD, C.J.A., that the appeal should be struck out and the costs follow the event.

Per MARTIN and MCPHILLIPS, JJ.A. that the appeal should be struck off the list but there should be no order as to costs thereof or of the motion.

A party who declines to facilitate his opponent gratuitously is not guilty of oppressive conduct that would entitle the Court to deprive him of costs.

Per MACDONALD, C.J.A.: Once good cause is found the Court becomes possessed of full discretion to make such order as to costs as it deems just in accordance with the principles and practice of the Court. That discretion is as full and absolute as that enjoyed by the Court of Chancery before the Judicature Act. Although a successful plaintiff may be ordered to pay the defendant's costs, in no case has a successful defendant been ordered to pay the plaintiff's costs, as the plaintiff being the aggressor and having dragged the defendant into Court, no matter how technical and unmeritorious the defence may have been, the defendant cannot be ordered to pay the costs of the action which was not initiated by him.

APPLICATION by defendant Denny to the Court of Appeal for leave to withdraw an appeal that had been set down for hearing at the April sittings of the Court. The action was tried by MURPHY, J. on the 28th of March, 1916, and on the 4th of April he made an interlocutory order for a reference to the registrar to ascertain the amount due from the defendant Denny on account of the debt of the partnership firm (Denny & Ross, defendants in the action) existing at the date of the retirement of the said Denny from the firm. Notice of appeal from this order was given by Denny on the 15th of April, 1916,

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who on the 26th of May applied to the trial judge for a stay of proceedings in the reference until the disposition of the appeal. This application was refused. The reference was proceeded with and on the 5th of June the registrar made his report, finding that no moneys were due from the defendant Denny in respect of the debt. The plaintiff then applied to vary the registrar's report. This the trial judge refused to do, and dismissed the action as against the defendant Denny. As the result of the proceedings before the registrar rendered the appeal unnecessary, the defendant Denny moved to abandon the appeal and that the plaintiff be ordered to pay the appellant's costs.

The application was heard at Vancouver on the 4th of April, 1917, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Mayers, for the application.
Hancox, contra.

Cur. adv. vult.

6th November, 1917.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The defendants appealed from the judgment at the trial finding the question of liability in the plaintiff's favour and directing a reference. Before the appeal books were prepared defendants' solicitor wrote to plaintiff's solicitor a letter suggesting that as the result of the reference might render the appeal unnecessary, the hearing of the appeal should be delayed, and the expense of preparing appeal books avoided. The plaintiff's solicitors declined to assist the appellants in this way. They took the position that they would neither facilitate the appeal nor waive compliance with the rules, but would simply leave the defendants to pursue their own course without either hindrance or assistance. Appellants then prepared the appeal books, and kept the appeal in good standing. The result of the reference was in defendants' favour, and the action was dismissed before the appeal came on for hearing. No appeal has been taken from that judgment by the plaintiff. In these circumstances the appellant Denny moved for leave to abandon the appeal and for an order that the

respondent should not only be deprived of the costs of the appeal, but ordered to pay the appellants' costs thereof. That the Court may deprive the respondent of costs for good cause is not denied, but the power of the Court to order a successful party to pay the costs of the unsuccessful party is denied. Once good cause is found, the Court becomes possessed of full discretion to make such order as to costs as it deems just in accordance, of course, with sound principles and practice of the Court. That discretion is as full and absolute as that enjoyed by the Court of Chancery before the Judicature Act.

Mr. *Mayers,* in support of his motion, cited *Myers* v. *Financial News* (1888), 5 T.L.R. 42; and *Williams* v. *Ward* (1886), 55 L.J., Q.B. 566. *Harris* v. *Petherick* (1879), 4 Q.B.D. 611 is another authority on the same subject. In all these cases it was the plaintiff in the action who was ordered to pay the defendant's costs, that is to say, in no case has a successful defendant been ordered to pay the plaintiff's costs of the action, and this I take it is founded upon this principle, that the plaintiff being the aggressor, and having, as it were, dragged the defendant into Court, no matter how technical and unmeritorious the defence may have been, the defendant cannot be ordered to pay the costs of the action which was not initiated by him.

In order to see what was the practice of the Court of Chancery it may be useful to refer to some of the old cases. In *Cooth* v. *Jackson* (1801), 6 Ves. 12, Eldon, L.C. at p. 41 said:

"With respect to the costs, if I dismiss the bill, I cannot give the plaintiff his costs. Certainly I shall not give the defendant his costs, though I do dismiss the bill."

In *Lewis* v. *Loxham* (1817), 3 Mer. 429 grave doubt was expressed as to whether it would not be contrary to the principles and practice of the Court to order a defendant to pay the plaintiff's costs where the plaintiff failed in the cause: see also note (*a*) to this case.

In *Tidwell* v. *Ariel* (1818), 3 Madd. 403, Sir John Leach, V.C. dismissed the bill without costs. He said (p. 409):

"I wish I could give the plaintiff his costs: but the Court cannot do this when it dismisses the bill."

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In *Dufaur* v. *Sigel* (1853), 4 De G. M. & G. 520, Lord Justice Knight Bruce at p. 525 said:

"I have had considerable doubt, and have looked with my learned brothers into several cases upon the question, of directing costs to be paid by a defendant where there is neither a fund to be administered nor an estate in dispute, and where a plaintiff's case fails. Without saying that the jurisdiction does not exist, I think it a jurisdiction of considerable delicacy and difficulty."

The order made by the Court in this case directed the defendant to pay the costs of some unimportant matters in affidavits, and certain other costs, which he had undertaken to pay, and dismissed the bill without costs.

In *Dicks* v. *Yates* (1881), 18 Ch. D. 76, the Court of Appeal reversed the judgment of Bacon, V.C. which ordered the defendant to pay the plaintiff's costs of the action. The circumstances of that case are peculiar. The plaintiff sued for infringement of copyright. Before the case was heard the infringement had ceased. The Vice-Chancellor on hearing the evidence and argument of counsel, and having come to the conclusion that defendant was to blame for not taking steps to end the litigation before trial, said that he would make no order other than that the defendant should pay plaintiff's costs of the action. Defendant appealed, and while it was conceded that an appeal would not lie on the question of costs only, the Court admitted the contention of appellant's counsel that to order the defendant to pay the costs was inferentially to find that the plaintiff's action was well founded, whereas it was not and ought to have been dismissed, and hence if dismissed the Court could not order defendant to pay the costs of the action. Jessel, M.R. at p. 85 said:

MACDONALD, C.J.A.

"I wish not to be supposed to go further than I intend. I think that the Court has a discretion to deprive a defendant of his costs though he succeeds in the action, and that it has a discretion to make him pay perhaps the greater part of the costs by giving against him the costs of issues on which he fails, or costs in respect of misconduct by him in the course of the action. But a judgment ordering the defendant to pay the whole costs of the action cannot, in my opinion, be supported unless the plaintiff was entitled to bring the action. Therefore, I think that the appeal should proceed."

In the same case Lord Justice James said:

"I should add that there is an essential difference between a plaintiff and a defendant. A plaintiff may succeed in getting a decree and still

have to pay all the costs of the action, but the defendant is dragged into Court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there."

After hearing the appeal on the merits the Court gave the defendant costs in both Courts without further adverting to the alleged misconduct of the defendant.

Where the costs cannot be made payable out of a fund or an estate, and where they are in the discretion of the Court by reason of "good cause" or otherwise, the cases, I think, establish the following propositions: (1) A successful party, whether plaintiff or defendant, may be deprived of his costs; (2) a successful defendant will not be ordered to pay the plaintiff's general costs of the action, although he may be ordered to pay the costs of certain issues or questions in respect of which he has failed, or in respect of which his conduct has been dishonest or oppressive; (3) in very exceptional cases a successful plaintiff will be ordered to pay the whole costs of the action to an unsuccessful defendant. In considering this case I do not pay attention to the result in the Court below. It so happens that defendants have succeeded there. Their appeal at the time they took it was well launched, but it was not a step in the action—it was a new proceeding. They were exercising a privilege or right which the law gave them to have their case reheard in this Court, but in this appeal they were the aggressors. They assumed the character of plaintiffs in the appeal, but if they had had their appeal heard and had failed, in my opinion, they could not have been awarded the costs of the appeal, even if they had convinced the Court that good cause had been shewn why the costs should not follow the event. They could at best have been relieved of respondent's costs.

MACDONALD, C.J.A.

On the second branch of the case, that is to say, whether good cause has been shewn by the materials before us, I am of opinion that it has not. The respondent simply declined to do anything to assist the appellants in their appeal. Numerous examples might be cited where costs could be saved if one party would consent to waive strict compliance with the rules and practice; but to say that because a party declines to gratuitously facilitate his opponent he is therefore guilty of oppressive con-

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duct, entitling the Court to deprive him of costs, is to go a long way further than either authority or principle warrants.

In my opinion the respondent was not guilty of such conduct, and therefore I hold that there has been no good cause shewn for depriving it of the costs of the appeal, not to say ordering it to pay the appellant's costs, either of the appeal or of preparing the appeal books.

I would, therefore grant the motion permitting the appellant to abandon his appeal, but would give the costs of the appeal and of the motion to the respondent, in other words, the costs should follow the event.

MARTIN, J.A. MARTIN, J.A. held that the appeal should be struck out and that there should be no order as to costs.

MCPHILLIPS, J.A. McPHILLIPS, J.A.: I would deny the motion. The appeal should be struck out, making no order as to costs thereof or of the motion.

Appeal struck off; no order as to costs.

Solicitors for appellant Denny: *Bodwell & Lawson.*

Solicitors for respondent: *Russell, Mowat, Wismer & McGeer.*

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BURNS v. JOHNSON

Crown lands—Pre-emption—Agreement for sale before issue of Crown grant —Validity of—"Transfer," meaning of—Land Act, R.S.B.C. 1911, Cap. 129, Sec. 159.

An agreement for sale of an undivided one-half interest in a pre-emption record, entered into prior to the issue of the Crown grant, comes within the definition of the word "transfer" in section 159 of the Land Act (R.S.B.C. 1911, Cap. 129), and is therefore absolutely null and void under the provisions of said section.

American-Abell Engine and Thresher Co. v. *McMillan* (1909), 42 S.C.R. 377 followed.

APPEAL from the decision of MORRISON, J., of the 12th of December, 1916. The plaintiff and defendant were partners in the hotel business in South Fort George. In March, 1911, they entered into an agreement with one Styles for the purchase of an undivided one-half interest in a pre-emption record of 160 acres of land that Styles had pre-empted, about one mile from Fort George, the purchase price being $2,000, of which $200 was paid in cash and $165 was later spent in improvements on the land, no further payment being made. The hotel in which they were partners was burnt down in July, 1911, when they dissolved partnership and accounts were taken (which included payments made on the pre-emption purchase) and Johnson paid Burns $4,500. In October, 1912, Styles obtained a Crown grant for the land in question and in the following month sold the property to Johnson for $4,000. In the meantime the property had been surveyed and was found to contain only 41 acres. On obtaining title Johnson sold a portion of the property to the Grand Trunk Pacific at a considerable profit. Burns brought action for a declaration that Johnson held an undivided one-quarter interest in the property as trustee for himself, and the learned trial judge so held. The defendant appealed.

Statement

The appeal was argued at Vancouver on the 13th of April, 1917, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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A. D. Taylor, K.C., for appellant: The original transaction was illegal under section 159 of the Land Act (R.S.B.C. 1911, Cap. 129): see *Turner et al.* v. *Curran et al.* (1891), 2 B.C. 51; *Hjorth* v. *Smith* (1897), 5 B.C. 369; *Manley* v. *O'Brien* (1901), 8 B.C. 280; *Simpson* v. *Proestler* (1913), 18 B.C. 68; *Johnson* v. *Anderson* (1914), 20 B.C. 471. The Act in Ontario is different, but the case of *Meek* v. *Parsons* (1900), 31 Ont. 529 is in my favour; see also *American-Abell Engine and Thresher Co.* v. *McMillan* (1909), 42 S.C.R. 377; *Gathercole* v. *Smith* (1880), 17 Ch. D. 1. As to the meaning of the word "alienation" or "transfer" see *The Queen* v. *Victoria Lumber Co.* (1897), 5 B.C. 288; *Brownlee* v. *McIntosh* (1913), 48 S.C.R. 588; *Cumming* v. *Cumming* (1904), 15 Man. L.R. 640; *Wetherell* v. *Jones* (1832), 3 B. & Ad. 221. On the evidence and the merits the action should fail, as the acquiring of the property by the defendant was a new transaction, and assuming the learned judge was right in declaring the defendant a trustee, he ordered the taking of accounts on a wrong basis.

Argument

Patmore, for respondent: The dissolution of partnership between the parties did not apply to the land, and after the dissolution Johnson's actions with reference to the land shewed he acted in bad faith. My contention is this agreement was not void under the Act: see *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334.

Taylor, in reply.

Cur. adv. vult.

6th November, 1917.

MARTIN, J.A.

MARTIN, J.A. allowed the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I think the appeal must be allowed. It seems to me that the case of *American-Abell Engine and Thresher Co.* v. *McMillan* (1909), 42 S.C.R. 377 is applicable, and that the agreement relied upon here is contrary to the policy of the Act. No other agreement in respect of this particular property was entered into between plaintiff and defendant, nor does there appear to have been any postponement of the agreement going into effect, as was the case in *Hjorth* v. *Smith*

(1897), 5 B.C. 369. In any view of the plaintiff's case, it seems to me he is thrown back upon the original agreement, which, in my opinion, is invalid.

McPhillips, J.A. allowed the appeal.

Appeal allowed.

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Solicitors for appellant: *Taylor & Campbell.*
Solicitors for respondent: *Patmore & Fulton.*

SMITH v. BRUNSWICK BALKE COLLENDER COMPANY.

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1916
Dec. 14.

Contract—Bowling-alleys—Supplying and installing—Insufficient ventilation—Dry rot—Liability.

In the case of a contract to supply and install bowling-alleys which provides that a concrete foundation must first be laid by the owner under the contractor's directions, it is the duty of the contractor to make reasonable provision for ventilation for the protection and preservation of the alleys.

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SMITH v. BRUNSWICK BALKE COLLENDER CO.

APPEAL from the decision of HUNTER, C.J.B.C. in an action tried by him at Kamloops on the 24th, 25th and 26th of October and the 14th of December, 1916, for damages sustained by reason of the negligent and defective laying of certain bowling-alleys, the result of which was that dry rot set in and the alleys were rendered unfit for use.

The plaintiff Smith with one Purdy rented a basement in a hotel at Kamloops in July, 1912, and entered into a contract with the defendant Company's agent for the installation of four bowling-alleys. The arrangement was that Smith and Purdy were to put in a concrete floor on the premises and the defendant Company was then to install the alleys. The concrete floor was put in under the supervision of the defendant's agent, and later the material for the alleys arrived and was installed by the agent. When the material for the alleys arrived Purdy

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(one of the partners in the original contract) could not pay his share and he dropped out of the concern. All payments for the alleys, including the concrete floor, were made by the plaintiff Smith's father. When the alleys were completed Smith took into the business with him one O'Neil who, a few months later, owing to the enterprise proving a failure, dropped out and Smith ran it alone. O'Neil paid nothing towards the cost of the alleys. A letter signed by Purdy, dated the 1st of May, 1916, in which he certifies that he retired from the partnership on the arrival of the alleys and assigned his interest to Smith, was allowed in evidence. In the spring of 1915, it was found that the alleys had dry rotted. The plaintiff claimed the alleys were not properly installed, no provision having been made for ventilation under the alleys and such space as was there was filled up with shavings and other rubbish which prevented the passage of air.

Fulton, K.C., for plaintiff.
McMullen, for defendant.

HUNTER, C.J.B.C.: I am quite satisfied that the Company recognized that the plaintiff Leo A. Smith eventually became the sole owner of any rights under this contract, and that they dealt with him as the sole party interested accordingly.

With regard to the question of liability itself, I am of the opinion, after looking at the contract, which provides that the foundation is to be constructed under the defendant's instructions, that they not only undertook the contract to build the alley-ways but that they also assumed the function of architects and of supervising its construction. However, admitting for the moment they did not assume the function of architects, I think, even if they were to be regarded simply as builders, that they did not build the alley-ways in a workmanlike manner. It cannot be said that alley-ways built in a basement, such as was the case here, are built in a workmanlike manner when there is not only no provision whatever made for their ventilation but the dead air space is left stuffed up with rubbish. I feel satisfied that nearly every person who has lived in this country for any length of time understands perfectly well that in order

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to prevent wood from dry rotting there must be circulation of air. It appears to be particularly essential in the case of a dry atmosphere such as prevails at Kamloops. These people undertook to build alley-ways at Kamloops, and I think it was part of their duty to make themselves acquainted with local conditions, but whether they did so or not, I think they assumed the responsibility at all events. It would have been a very simple matter to have provided a proper circulation of air for these alley-ways. It could have been done in half-a-dozen different ways, as for example by requiring that the cement foundation be grooved from one end to the other, thereby admitting air under the joists or stringers, or by notching the stringers themselves or boring holes through the stringers. It was not, in my opinion, necessary in order to cause proper ventilation to have any connection with the wall of the building, in fact I do not think their contract called upon them to do that. If the plaintiff wished the alley-ways to be so installed, that should have been made a matter of separate and distinct contract. But I do not think, on the other hand, that the defendant Company, even as architects, were bound to provide outside ventilation for the purpose of preventing dry rot. It would have been, in my opinion, quite sufficient to have caused a circulation of air to take place under the alley-ways themselves within the basement without necessarily connecting that circulation with the outside of the building.

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With regard to the question of damages, we have the testimony of the agent to the effect that these alley-ways could be replaced for the sum of $1,000 which would involve the assumption that the defendant would agree to rebuild them for that amount. I am rather disposed to discount that statement, however, in view of the fact that the price charged was $2,500, which of course, it is true, included the price of the balls and the pins, the pits and the return ways. On the other hand, I do not think the plaintiff is entitled to be put in the same position as if new alley-ways were to be built. There must be some allowance made for ordinary wear and tear and depreciation, which I would place at somewhere about one-fifth, and the best consideration I can give to the question of damages is to

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allow him the sum of $1,200, which, I think, is reasonable in view of all the circumstances. I therefore give judgment for that amount.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 5th of April, 1917, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

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Argument

Griffin, for appellant: The question is whether the contractors have to provide a system of ventilation that will prevent dry rot from setting in. There were four alleys, supported by stringers 2 by 4 crosswise, with a space of two inches between. It is contended that in order to have proper ventilation there should have been stringers lengthwise too. To attach liability they must have held themselves out as specially skilled. They only had two cases of dry rot before, one in Seattle and one in San Francisco, and in the latter case the alley was over the sea-water. The action is not maintainable by Smith alone. The contract was made by Smith and Purdy. The other had an equal interest with Smith and must be a party: see Bullen & Leake's Precedents of Pleadings, 7th Ed., p. 16; Odgers on Pleading, 7th Ed., 14. If he does not consent to be a party, he can be added as a defendant: see *Cullen* v. *Knowles* (1898), 2 Q.B. 380. For authority as to the general nature of our duty see *Jenkins* v. *Betham* (1854), 15 C.B. 168 at p. 188; *Lanphier* v. *Phipos* (1838), 8 Car. & P. 475 at p. 479; *Love* v. *Mack* (1905), 92 L.T. 345 at p. 349; Hudson on Building Contracts, 4th Ed., Vol. 1, pp. 29-30; Beven on Negligence, 3rd Ed., Vol. 2, p. 1128. We are not bound to a special or unusual degree of skill; we must use a reasonable degree of skill and care.

Fulton, K.C., for respondent: As to parties an application was made to add Purdy, as the liability arose from the first contract: see *Dell* v. *Saunders* (1914), 19 B.C. 500. The alley was in a basement about ten steps down, the foundation being a bed of concrete. It was a well known local condition that dry rot was apt to set in on ground floors. As to their liability see Halsbury's Laws of England, Vol. 3, p. 297; *Moneypenny* v. *Hartland* (1826), 2 Car. & P. 378.

Griffin, in reply: On the question of parties see *Strong* v. *Canadian Pacific Ry. Co.* (1915), 22 B.C. 224.

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MACDONALD, J.A.: I think an obligation rested on the defendant to include in the plan of installation of the bowling-alleys in question reasonable provision for ventilation of the floor. It was argued that the subject of dry rot is a very abstruse one, and that therefore the defendant was not to blame for not anticipating dry rot in the circumstances of this case. The causes of dry rot may be matter of some division of opinion among scientists, but the conditions which favour its occurrence are well known, and were quite well known to the defendant at the time of the installation of the alleys in question.

When the defendant undertook to install the alleys and to direct the construction of the foundations upon which they were to be built, it was its duty to make provision for ventilation. Defendant's witnesses admitted that ventilation is one of the factors which make for the prevention of dry rot, and for the preservation of wood, and yet in the plans furnished and in the installation itself no ventilation at all was provided for.

I would go farther even than the learned trial judge was prepared to go, who doubted that there was an obligation on the defendant to provide for the circulation of air from the outside —I would go farther and say that, in my opinion, the defendant was bound to provide for that in its plans, if necessary. I do not say that it was bound to bear the expense of it; it did not contract to bear the expense of the building of the foundation or basement, but the work was done under its direction and in reliance upon its skill, and it would have entailed no expense upon it to have provided in its plans and directions to plaintiff for what was requisite in the way of ventilation.

MACDONALD, C.J.A.

On the question of parties I agree with the trial judge.

I would dismiss the appeal.

MARTIN, J.A.: allowed the appeal.

MARTIN, J.A.

MCPHILLIPS, J.A.: This is an action against the appellant

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by the respondent for damages sustained by reason of the negligent and defective laying of certain bowling-alleys at the City of Kamloops. The appellant is perhaps the best and most widely known manufacturer in this business upon the continent of America, being in the business for the best part of a century. The contract was to be performed by the supplying of the bowling-alleys and their installation, all to be done under the instructions of the appellant, the foundation therefor to be prepared by the purchaser (respondent), and according to the instructions of the appellant. The action was tried by HUNTER, C.J.B.C., and expert testimony was led as to the installation and the placing of the bowling-alleys. In my opinion, it cannot be said that there was conflicting testimony in any of the relevant evidence. The testimony of one expert called by the defence, that of Alfred W. Le Page, directly met the point at issue, *i.e.*, the lack of ventilation—the cause of the damage. Under cross-examination this question was put to him:

"Well for instance you wouldn't think of putting a floor down on the ground, no basement below it, in a house without providing ventilation for that floor, would you? Well, no, I don't believe I would."

The contention at the trial upon the part of the respondent was just that—that the bowling-alleys were laid down without any care or attention whatever to ventilation, which, upon the evidence, is shewn to be absolutely necessary to preserve the bowling-alleys from dry rot. Dry rot took place consequent upon there being no ventilation, and the default was the default of the appellant. I agree with the learned Chief Justice in the words of his judgment reading:

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"With regard to the question of liability itself I am of the opinion after looking at the contract which provides that the foundation is to be constructed under the defendant's instructions that it assumed not only the contract to build the alley-ways but that it also assumed the function of architects and of supervising its construction."

The learned counsel for the appellant in a careful argument discussed the authorities and attempted to shew that the appellant did not come, upon the facts of the present case, within the principle that imposed liability, and amongst other authorities referred to *Jenkins* v. *Betham* (1854), 15 C.B. 168 at p. 188; and *Love* v. *Mack* (1905), 92 L.T. 345 at p. 349. With defer-

ence, I do not think that it is at all possible for the defence in this action to escape liability. Here there was absolute neglect to provide ventilation of any nature or kind. And negligence in allowing the shavings to remain under the alleyways, thereby further preventing ventilation. Can it be said, upon the facts, that there was exercise of or the application of that skill and knowledge which the law requires, and which contractors undertaking the work of installation and the supervision of work must be held to have undertaken? The learned counsel for the appellant also referred to Hudson, the well-known work on Building Contracts, 4th Ed., Vol. 1. The learned author at p. 29 states the principle in the following words:

"The services rendered to their employers by engineers, architects, surveyors and valuers, being undertaken by them for reward, they are bound to possess an ordinary and reasonable degree of skill in the art or profession which they profess, by undertaking to do the work, and to act with reasonable care and diligence in rendering those services, and are liable for failure to do so."

Also see the judgment of Tindal, C.J. in *Chapman* v. *Walton* (1833), 10 Bing. 57, 63, referred to in Hudson at pp. 29-30.

Now the learned Chief Justice has found the fact, and this was after a view. It would seem to me that the appeal is hopeless. The defence has made out no case which even approaches the view expressed by Tindal, C.J. which, being shewn, would admit of escape from liability. There has been in the present case shewn an entire absence of the application of or the bringing to bear of a reasonable degree of skill to the performance of the duty devolving upon the appellant, and when damage has ensued by that default as of necessity the liability is rightly imposed upon the appellant and that is the judgment of the learned trial judge. As to the value attachable to a judgment of first instance upon a question of fact, even where the trial has been without a jury, it is instructive to read what the Lord Chancellor (Lord Loreburn) said in *Lodge Holes Colliery Co., Lim.* v. *Wednesbury Corporation* (1908), 77 L.J., K.B. 847 at p. 849:

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"Mr. Justice Jelf stated in terms that these were the two contentions advanced, and this has not really been disputed. I regard the finding of Mr. Justice Jelf as conclusive on the question of fact. It has not been assailed, and, if it were, I need not repeat what has often been said as to the advantages enjoyed by a judge who has heard the witnesses. When a

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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."

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In my opinion, it has not been shewn that the judgment of the learned trial judge is in any way in error, either upon the facts or upon the law, and it should not be disturbed. Upon the question of damages, the submission is that as assessed they are excessive. With that contention I cannot agree. I cannot say that in amount it could be at all capable of being said that there is "no reasonable proportion between the damages and the circumstances of the case and that the verdict should be set aside on the ground of excessive damages," a principle acted upon in the case of *M'Grath* v. *Bourne* (1876), 10 Ir. R., C.L. 160 at p. 165. (Also see *Harris* v. *Arnott* (1890), 26 L.R. Ir. 55).

The principle which governs appellate Courts in considering the damages allowed in Courts of first instance, whether the trial has been had with a judge and jury or without a jury, received consideration in the Judicial Committee in *McHugh* v. *Union Bank of Canada* (1913), A.C. 299, and at pp. 308-9 Lord Moulton, delivering the judgment of their Lordships, said:

"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 damage 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."

MCPHILLIPS, J.A.

It is clear that the damages, upon the evidence, cannot be deemed excessive. It follows that, in my opinion, the judgment of the learned Chief Justice of British Columbia should be affirmed, and the appeal dismissed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Martin Griffin & Co.*
Solicitor for respondent: *F. J. Fulton.*

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Timber licences—Application—Description of location—Sufficiency of—B.C. Stats. 1907, Cap. 25, Sec. 13; 1912, Cap. 17, Sec. 17.

C. in applying for special timber licences described his locations as on Clyde Creek, about four miles distant southerly from the Fraser River, in Cariboo district. There was no creek named Clyde shewn on the Government map by which he was guided in prospecting and staking, but he found a broken tree at the creek mouth with the words "Clyde River" blazed on it. H. being in the local recording town about 80 miles away some two months later, was informed of good timber on a creek called Swede, the location of which was given to him by his informant. He proceeded to the place and staked, and it proved to be the same creek as C. named Clyde. The evidence of H. was that the creek was known locally as Swede; that of C. was that the creek had no name at the time. According to conversation with local persons and the evidence of officials of the lands department in charge of the compilation of the Government maps, there was no creek known to the department as either Clyde or Swede until brought to notice by the stakings in question in this action. The department on receipt of C.'s applications forwarded to him a blue print of the section, on which to indicate the location of Clyde Creek. While this was in transit, H.'s applications were received, describing Swede Creek in relation to Goat River, which was known to the department and appeared on the Government map. The department plotted the stakings accordingly, and when C. forwarded his map indicating Clyde Creek with his stakings, the department marked it on the official map some distance east of Swede, as named by H. It happened that, as the surveys later shewed, there was actually a creek on the ground in that vicinity. Licences were issued to H. in February, 1908, and to C. in the following April. In an action for a declaration as to who was entitled to the limits in dispute, it was held by the trial judge that a grant having been first issued to H., it must be taken to have been regularly issued, and that under the last clause of section 17 of the Forest Act (Cap. 17, B.C. Stats. 1912) the subsequent grant (although prior in location) could not be validated as against the prior grant.

Held, on appeal (*per* MACDONALD, C.J.A. and EBERTS, J.A.), that the statute governing the granting of licences required the applicant to describe as accurately as possible the land over which he sought to obtain such licence, especially with reference to the nearest known point or to some creek, river, stream or other water, and that C. having in the description of his location called a stream Clyde Creek when in fact it was well known in the locality as Swede Creek, he

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had not complied with the requirements of section 13 of said Act and his location was invalid.

Per MARTIN and MCPHILLIPS, JJ.A.: That in construing section 13 of the Land Act Amendment Act (B.C. Stats. 1907, Cap. 25) regard must be given to the condition of that part of the Province in which the lands in question lie. A very different meaning would obviously be attached to the words in the case of the location of claims in well-known localities from the case of locations made in vast virgin areas in remote districts. The conditions in the district in which the location in question was made, were such that the objection raised to the description made by C. should not prevail. Further, that section 17 of the Forest Act may for analytical purposes be divided into three paragraphs, and the third paragraph thereof applies to the first paragraph but not to the second. The first is one of validation of title solely; the second of context of areas and boundaries based solely on original location; the third of explanation of the first. Paragraph two has therefore application to this case and effect must be given to priority of location.

The Court being equally divided, the appeal was dismissed.

[An appeal to the Supreme Court of Canada was dismissed.]

APPEAL from the decision of CLEMENT, J., in an action tried at Victoria on the 12th, 13th and 14th of December, 1916, for an injunction to restrain the defendants from cutting timber or otherwise interfering with certain timber leases held by the plaintiff in the Cariboo district. The defendants held licences for the ground in dispute whose predecessors in title had staked by an experienced staker in July, 1907. He had a Government map with him at the time, and staked a number of claims on a creek which he called Clyde Creek, on one side of the Fraser, and about 12 miles east of a well-defined and known water-course called Goat River. At the same time he staked other claims on the farther shore of the Fraser, opposite those in dispute. These latter claims were not in contest. There were not many of the creeks known officially by any name then, except locally, as given by some prospector, trapper or staker, and according to the then Government maps, Clyde Creek (as well as Swede Creek) was unknown and unmarked. He was led to name this particular creek Clyde from the fact that close to the mouth of it he found a stake with the word "Clyde" on it. He followed out all the legal requirements, and made application for the licences, when the department sent him a blue print of the section, with a request that he shew Clyde Creek thereon

Statement

in order that the claims might be plotted. He did so, shewing the creek in its relation to Goat River and the Fraser. This delayed the granting of the licences. In the following September the plaintiff's staker, also an experienced man, was in Barkerville, and heard of some good timber on a creek called Swede Creek. He left for the place, following directions given to him by his informant, but without any maps or plans, and staked on what he called Swede Creek, which proved to be the same as his forerunner called Clyde, and he staked virtually the same ground. This creek was put on the map by the department, shewing the second lot, the plaintiff's claims, and when the defendants' tracing came in, they were placed on Clyde Creek, which the department marked on the map some miles further to the east.

The plaintiff's claims were surveyed in due course, and the conflict ascertained, hence the action to determine the rights of the parties. On the survey by the defendants, the stakes were apparent on the creek which the plaintiff called Swede Creek and the defendants called Clyde, and the point to be decided by the Court was whether the misnaming of the creek was fatal to the first staker, or whether, in the then state of official knowledge and the absence of some of these creeks altogether from the maps until brought to light by prospectors or stakers, it was not open to any staker to give them a name and thus acquire prior rights, so long as he gave the correct location in relation to some well-ascertained landmark, such as in this case, Goat River.

Statement

The licences to Orde were issued in February, 1908, and those to the defendants' predecessor, Bogle, in April, 1908.

Section 17 of the Forest Act (Cap. 17, B.C. Stats. 1912) reads as follows:

"All special timber licences heretofore granted and all renewals thereof heretofore issued shall be deemed to have been legally and validly granted and issued, as the case may be; but nothing in this section contained shall affect any legal proceedings now pending respecting any such licence or renewal thereof.

"In the event of any dispute between holders of special timber licences as to the areas or timber to which as between themselves the holders of such licences may be entitled, effect shall be given to priority of location, so that the first locator shall have and take the area and timber comprised

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in his location; and nothing in this section shall be deemed to validate any special timber licence as against any prior Crown grant, lease, special timber licence, or pre-emption record."

It was held by the trial judge that once licences are issued under the last paragraph of this section the prior grant must prevail, that the prior locator cannot then invoke the provisions of the second paragraph thereof and that the plaintiff was entitled to the limits in dispute. The defendants appealed.

Statement

The appeal was argued at Victoria on the 11th, 12th and 13th of June, 1917, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

Bass, for appellants: The evidence shews the ground in dispute was staked by the predecessors in title of both parties, the defendants having the senior locations. He misnamed the creek upon which he located, but described it correctly with reference to Goat River, which was well known at the time and the question is whether this error invalidates the title. Our licences must be held to be valid under section 17 of Cap. 17, B.C. Stats. 1912 (Forest Act). Upon Cameron (the defendants' locator) staking the ground it became lawfully occupied and was not open to location by others: see *Deisler* v. *Spruce Creek Power Co.* (1915), 21 B.C. 441. The plaintiff claims under a subsequent location, and he must shew he has validly staked and acquired the ground in question before he has any *locus standi* to attack the senior location: see *Clark* v. *Haney and Dunlop* (1899), 8 B.C. 130; *Farmer* v. *Livingstone* (1883), 8 S.C.R. 140. As to requirements of location see *Pellent et al.* v. *Almoure et al.* (1897), 1 M.M.C. 134; *Waterhouse* v. *Liftchild* (1897), 6 B.C. 424.

A. H. MacNeill, K.C., for respondent: As to the validity of defendants' location, both Swede and Clyde Creeks were well known at the time. We have a prior grant in fact. The applicants did not comply with the Act in the various applications, and the locations were so vaguely described that it was difficult to locate them, and in fact there is no evidence that they staked on Swede Creek. It is in the discretion of the Commissioner to give such licences as he sees fit. As to the rights of an applicant for a timber licence see *Wilson* v. *McClure* (1911), 16

B.C. 82. On the question of overlapping Crown grants see *Victor* v. *Butler* (1901), 8 B.C. 100. In making his application Cameron did not refer to any known spot, they represented to the Crown that the claims were elsewhere than Swede Creek and they were bound by that: see *Francoeur* v. *English* (1897), 6 B.C. 63; *British Lion Gold Mining Co.* v. *Creamer* (1903), 2 M.M.C. 51; *Coplen* v. *Callahan* (1900), 30 S.C.R. 555; *Collom* v. *Manley* (1902), 32 S.C.R. 371. On the question of defendants' right to attack the plaintiff's title see *Hall* v. *The Queen* (1900), 7 B.C. 89; *Osborne* v. *Morgan* (1888), 13 App. Cas. 227; *In re Coal Mines Act: Re Baker et al.* (1907), 2 M.M.C. 530; *Hartley* v. *Matson* (1902), 32 S.C.R. 644; *Smith* v. *The King* (1908), 40 S.C.R. 258; *Canadian Company* v. *Grouse Creek Flume Co.* (1867), 1 M.M.C. 3. As to abandonment owing to delay see *Peck* v. *Reginam* (1884), 1 M.M.C. 13.

Argument

Bass, in reply: The trial judge found as a fact that defendants staked on what is now known as Swede Creek, and also that they were the first locators, and that neither of the streams was then known as now named on the map.

Cur. adv. vult.

6th November, 1917.

MACDONALD, C.J.A.: I am convinced that Cameron, who staked the defendants' claims, did in fact locate them on Swede Creek not knowing the creek to be so named and believing it to be known as Clyde River. It appears that the creek was never known as Clyde River, but Cameron saw that name written on a blaze and erroneously concluded that that was the name of the stream. Hence when he described his locations as on Clyde River he erroneously described them. The plaintiff's agent, Henderson, staked the same ground a few months later without encountering any prior stakes. He described his initial point as follows:

MACDONALD, C.J.A.

"Commencing at a post marked Ernest Dunsford Orde's N.E. corner Post No. 1 limit planted on the West side of Swede Creek about six miles from its mouth where it empties into the Fraser River about 12 miles above the mouth of Goat River, thence," &c.

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The Goat River is a well known river and was at the time shewn on maps of the district. Cameron was well aware of that fact. The Fraser is one of the largest rivers of the Province, so that it was quite feasible for Cameron to have described his location by reference to these two well known rivers. His testimony is that the river or creek on which he staked was the first one east of Goat River, on the same side of the Fraser. Not knowing the name of the creek, he could have given a good description of his staking without naming it. I think it has been satisfactorily proven that the creek in question was never known as Clyde River, but was for a long time prior to the date in question well known in the locality and in Barkerville, the nearest town thereto, as Swede Creek, and when Henderson's applications for licences were accepted by the department of lands, the name Swede Creek was officially adopted or recognized, and this stream has since appeared on the official map of the district by that name.

The statute governing the granting of licences requires the applicant to "describe as accurately as possible the land over which he seeks to obtain such licence especially with reference to the nearest known point, or to some creek, river, stream or other water." That must, I think, be taken to mean some identified creek, river, stream or other water. No one looking at the notice which the locator Cameron posted at the Government office in Barkerville pursuant to the Act could identify Clyde River, which did not in fact exist, except in the mind of Cameron. For the purposes of his application he called the stream Clyde River, without ascertaining the fact that the stream had the well recognized name of Swede Creek. To the general public the notice would convey nothing more than the information that Clyde River might be one of the scores of tributaries of the Fraser in the Cariboo district, theretofore unnamed. That Cameron made a mistake in describing the locality is admitted in a letter written by one of the defendants, apparently on behalf of all of the defendants, and in which he makes a plea to the department for indulgence on account of the mistake. It is regrettable that the defendants, who I am sure acted in perfect good faith throughout, must suffer, but of

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two innocent parties, the one on whose side the mistake was made must bear the consequences of it.

It was also urged that the granting of the licences and the acceptance of the plaintiff's surveys were entirely in the discretion of the chief commissioner of lands and that his discretion cannot be reviewed.

It is not necessary, in view of the conclusion to which I have come on the other points involved, to express an opinion upon this one.

The appeal should be dismissed.

MARTIN, J.A.: During the argument we announced that we were satisfied that Cameron had duly made the location (for Bogle) now covered by the defendants' licences on what is now called Swede Creek, which left open for discussion the questions arising on section 17 of the Forest Act (1912), Cap. 17, and those respecting compliance with statutory requirements other than location.

In view of its importance and practical benefit in relation to one of our chief industries, section 17 has engaged my prolonged study, with the result that the difficulties of construction, which at first blush seemed formidable, have disappeared, and I have reached a solution of it which is satisfactory to myself at least. That section is as follows: [already set out in statement].

To understand it most readily, it may, for analytical purposes, be divided into three paragraphs, each dealing with a distinct subject-matter, thus:

(1) "All special timber licences heretofore granted and all renewals" (saving pending legal proceedings) are validated, *viz.*: "shall be deemed to have been legally and validly granted and issued."

This applies only to licences issued before the 27th of February, 1912 (when the Act came into force), and does away with all objections based on failures to comply with statutory conditions, or any defects in the issuance of the licences themselves, which would include, *e.g.*, signature by the wrong official, or other departmental errors. The intention is to quiet titles to "special timber licences" theretofore issued and, be it noted, it validates them as against all the world and not merely in

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disputes between themselves. But it does not validate or even relate to other timber licences granted to hand loggers under section 31.

(2) When "any dispute" arises between licence holders as to the areas covered by their respective licences to which "between themselves . . . [they] may be entitled, effect shall "be given to priority of location, so that the first locator shall have and take the area and timber comprised in his location."

This paragraph relates only to disputes of special licence holders "between themselves" and is not directed, like the preceding, to validating titles, but lays down a rule or principle as to the manner in which disputes respecting conflicting areas between those who have obtained special licences shall be determined (which obviously means by Courts of justice) because as regards "any dispute as to the staking and location" of the area, before the issuing of the licence that has presumably (if the cause of it had then cropped up) been decided by the chief commissioner under section 16 of the Land Act Amendment Act of 1907, based on "priority of such location," subject to compliance with statutory conditions. This, however, still leaves open for determination, *e.g.*, such disputes as are now before us, because it is not possible for an applicant to raise a dispute on his application which has only arisen after its erroneous disposition; this is something he never could be expected to contemplate or provide for; least of all to expect

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that, as unfortunately occurred here, a licence for his senior location should be issued to a junior locator and applicant. The effect of this paragraph (2), in my opinion, is to establish the ordinary Courts of law as the forum for the definition and determination of the areas (or timber thereon) respecting which conflicting licence holders are in dispute "between themselves." It has nothing to do with the "validity" of licences in the sense that word has long been used and understood in this Province in mining and cognate legislation like this, and in which sense it is employed in paragraph (1). For the purposes of said definition and determination all the conflicting licences are assumed to be valid (in this case, indeed, they have actually been validated by section (1) as having been "heretofore granted") and as conferring the rights which a licensee is

vested with under section 18, and the contest is deliberately thrown back to the actual original locations upon the ground, *i.e.*, to the posts and lines and notices thereunder, not, be it noted, to later lines or any boundaries created by any mistakes of departmental officers or surveyors or others, or any alteration in the boundaries of the original location which, it is admitted, are made during survey and which, though acceptable to the Crown, may vary considerably from the original location. And so the Legislature, having in mind doubtless this discrepancy, declared that "effect shall be given to priority of location so that the first locator shall have and take the area and timber occupied in his location," thereby carrying out the same principle of adjudication (based on "priority of location," but asserted here in much stronger and clearer language) after licence, as before it, in decisions by the chief commissioner, under said section 15. That conflicts for the "same ground" are contemplated appears by the warning and "understanding" given in the licence itself, and so accepted by the licensees, as follows:

> "The licence . . . . is issued and accepted subject to such prior rights of other persons as may exist by law, and on the understanding that the Government shall not be held responsible for or in connection with any conflict which may arise with other claimants of the same ground."

The word "licence," as used in this paragraph, is something fundamentally distinct from "location," and they must not be confused; the former means the document issued by the Crown, conferring the rights above named; the latter means the act of location or staking upon the ground: see sections 15 and 16 of 1907, in which "staked or located" or "staking and location" are used synonymously, and are also so used in relation to leases of Crown lands: see section 13 (2). And in section 13 (5), in cases of dispute before completion of application, the same principle of "priority of such location" is established. Furthermore, as regards the acquisition of pre-emptions, it is described in the margin of section 3 of 1907 as "staking pre-emption claims," and the "date of location" as is required to be given. The word also has another meaning, the "location" itself, *i.e.*, claim, as well as the successive acts of location (1 M.M.C., Glossary, 858, 866). Thus the everyday expression "the senior

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and junior locations overlapped," means a conflict between the claims as "located" or "staked" on the ground: see the word used in both senses in, *e.g., Pellent et al.* v. *Almoure et al.* (1897), 1 M.M.C. 134. The word is in very long use by the Legislature in this Province: the term "locating a claim" is employed in the Gold Mining Ordinance, 1867, Sec. 25, 1 M.M.C. 555; and see *Deisler* v. *Spruce Creek Power Co.* (1915), 21 B.C. 441 at pp. 455-7. The plaintiff here has himself adopted the primary meaning and alleges, paragraph 3 of his statement of claim, that he "duly located" certain tracts of land. In paragraph 2 of section 17 it is used in both senses: "priority of location," *i.e.,* priority according to the act of location; and "comprised in his location," *i.e.,* in his claim after location thereof. And in *Laursen* v. *McKinnon* (1913), 18 B.C. 682, a case of conflicting areas of timber berths, the word is used in its different meanings by this Court, notably by IRVING, J.A. The statutory form No. 12 given under section 15 of 1907, p. 106, requires the locator to swear that he "did locate" the area applied for out of "unoccupied and unreserved Crown lands, not being part of an Indian settlement"—*Cf.* section 56.

The proceedings taken by an applicant for a special licence to cut timber on Crown lands under sections 50, 51, as amended by said section 15, would be properly described by saying that he "made a location" or "located a claim" thereunder, and the areas so located would be his timber "location" or claim, and it is styled "staking of claim" in the margin of section 51 of 1897; and Cameron properly uses the term in his notices, referring to "Bogle's timber claim No. 1," etc.; indeed, all through the trial it was so used by witnesses, counsel and the Court, though after the licence has been issued and a survey made the location is styled, in section 25 of the Forest Act, a "timber limit," thus distinguishing between the two stages. And I can perceive no reason in principle why the due location of a timber claim has not just as completely occupied and segregated it from the public domain as the marking out of the mining lease did in *Deisler's* case, *supra,* 458.

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That the earlier locator or applicant for Crown lands should

be preferred is one of our earliest principles of legislation, recognized in the Gold Fields Act, 1859, Rule XVII (1 M.M.C. 549), which provides that:

"In staking out plots of land for free miners and traders for gardening and residential purposes, under the powers of the said Gold Fields Act, 1859, contained, the Gold Commissioner is to keep in view the general interests of all the miners in that locality, the general principle being that every garden benefits indirectly the whole locality, and also that the earlier application is to be preferred."

Many other examples of this principle will be found, I have no doubt, in our present statutes, but I shall content myself by referring to merely one notable and important one, in the Coal and Petroleum Act, Cap. 159, R.S.B.C. 1911, section 27 of which declares that " in any application under the provisions of this Act regarding which any adverse claim or protest may have been lodged or objection taken, the Minister of Lands" or other nominated officer shall adjudicate upon the rights of the adverse claimants (with an appeal given to the Supreme Court), "Provided that in case any dispute as to the staking arises the right to the completion of the application may be recognized according to priority of such staking," and *Cf. Deisler's* case, *supra,* p. 457.

In the determination under paragraph (2) of the question of priority of location, the validity or regularity of the opposing licences is not attacked or in issue, and the question as to the status of a licence holder to attack the licence of another does not arise, as it did in the cognate case of *Canadian Company* v. *Grouse Creek Flume Co.* (1867), 1 M.M.C. 3, and later cases noted on p. 8, and the Court is restricted to the sole issue of priority of original location, and once that is ascertained that phase of the dispute is at an end, and it thereupon becomes the inevitable duty of the Court to give effect to it as the Act directs —"so that the first locator shall have and take the area and timber comprised in his location." The section is a very unusual one, but very beneficial, I think, designed to meet unusual circumstances and to enable the Government to keep out of legal difficulty as indicated by the "understanding" above quoted.

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This brings me to the last paragraph:

(3) "And nothing in this section shall be deemed to validate any special

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timber licence as against any prior Crown grant, lease, special timber licence, or pre-emption record."

The question is, what does it apply to? It is open to attach it to anything "in this section," *i.e.*, in the whole section, to which it may fairly and reasonably relate. It deals with the subject-matter of validation only; and in but one aspect thereof, *viz.*: the prohibition of the validation of any subsequent licence "as against any Crown grant, lease, special timber licence, or pre-emption record." Be it noted that it does not extend to contests between licence holders and the holders of other very numerous and valuable estates and interests derived from the Crown lands, *e.g.*, mining claims, lode or placer (which carry also valuable timber and surface rights); or licences held under the Coal and Petroleum Act, *supra*; or estates arising out of Acts of Parliament, such as in the Esquimalt and Nanaimo Railway grant of *Bainbridge* v. *E. & N. Ry.* (1896), 1 M.M.C. 98, or in the Railway Belt of the Canadian Pacific Railway, etc.—*The King* v. *The Burrard Power Co.* (1909), 12 Ex. C.R. 295; (1910), 43 S.C.R. 27; (1911), A.C. 87; and *In re Assessment Act and Heinze* (1914), 20 B.C. 99; (1915), 52 S.C.R. 15; and *Cf. Farrell* v. *Fitch and Hazlewood* (1912), 17 B.C. 507; and *The Queen* v. *Farwell* (1887), 14 S.C.R. 392, or grants derived from the Hudson's Bay Company, as to which see *Dorrell* v. *Campbell* (1916), 23 B.C. 500, 506, 508. In the first place that prohibitory safeguard primarily and clearly relates to paragraph (1), to which it is in no sense repugnant but complementary, because it was necessary to restrict the unlimited and irreconcilable consequences of validating at large an indefinite and immense number of licences of long and short standing without any regard to their priority as against thousands of other Crown documents, though, as has just been noted, certain large and important classes have not been dealt with. Some principle had to be laid down to guide the grantees and the Courts in the determination of the contests that would inevitably arise, and that of priority was again, naturally, decided on. So it is only necessary to read this paragraph as relating to paragraph (1) in order to give it a due, wide and beneficial effect. Nothing

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stands in the way of doing so, grammatically or otherwise, and indeed it must be done, because it is impossible to say, in my opinion, that in the construction of the first paragraph the last can be disregarded.

The only remaining question is, does it apply to paragraph (2)? In my opinion it does not, as would flow from what I have already said, because, in the limited class of disputes it covers, it does not raise questions and conflicts of validity of document or title, but solely of the ascertainment of the fact of the real boundaries of areas upon the ground, based upon prior original location. This, I think, is the effect of that very unusual provision and though the result of the ascertainment may be the loss of more or less area covered by a licence, yet that is not, strictly and properly speaking, having regard to the language of the section, a question of validation of title or document, but of the ascertainment of the extent of the area to which the licence attaches and over which it operates. The leading case in this Province of *Victor* v. *Butler* (1901), 8 B.C. 100; 1 M.M.C. 438, is an illustration of the ordinary conflict between grantees of lands from the Crown, or their successors in title, and the decision was there (p. 446 and note) that "the prior grant should prevail against the defendants' later grant so far as the conflicting portion thereof is concerned." But if there had been a provision in the Yukon mining laws, that in a case of a dispute between the holders of Crown grants or mining claims, as to the areas and boundaries of conflicting claims, the matter must be determined according to priority of location upon the ground, then the Court would have had to decide that case not by the dates of the grants but by the times of location. And the same result would follow in the case of a similar provision respecting disputes between the grantees of pre-emptions. The principle is the same whether a small part of a large grant or a large portion of a small grant is involved, and the principle still remains even if the over-lapping or encroachment should be so great as to wholly extinguish the claim of one of the grantees.

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Now, what is the difference in principle between such cases and that which is before us? In my opinion, clearly none.

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With all due respect for other opinions, the error in this case has, I think, been that it was treated as an attack upon and an attempt to invalidate licences, whereas it is, essentially, only one of contest of boundaries in the manner directed by a special statute passed to meet such a class of action. The legal result of the investigation by the Court into the priority of the respective locations is that the junior location fails *pro tanto* to the extent it overlaps the senior, according to the location on the ground. But in some cases it might well be that the result would establish the fact that though there was an apparent overlapping of areas according to the description in the licences, there was only a trifling encroachment on the ground by original location, so that the doctrine *de minimis non curat lex* might well apply; or, again, it might be established that there was no overlapping at all, and full effect could be given to both the apparently conflicting licences. It would be a most unfortunate thing if the attainment of such happy results were to be frustrated by a strained construction which would engraft the third paragraph upon the second. It is to be remembered that the junior licence, to the extent that it did not overlap by location, would still be entitled to the benefit of the validating paragraph (1) as against the senior licence in case of any unlawful encroachment by the senior, and both of them as against all the rest of the world would be entitled to assert their rights to the full extent, not merely according to location, but according to the description in the licence. The more the whole section and its peculiar subject-matters are studied, the more does it come clear to me that all practical and theoretical difficulties are avoided by regarding paragraph (2) as a statutory guide to the Court in the method of construing and applying licences to the apparently conflicting areas therein described, which conflicts have given rise to so much costly litigation, and so we arrive at that beneficial and harmonious expression of the intention of the legislation which we aimed at in *Deisler's* case, p. 459.

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To recapitulate: my views of the three paragraphs, in brief, is: The first is one of validation of title solely; the second of contest of areas and boundaries based solely on original location; the third of explanation of the first.

There remains the question of alleged non-compliance with statutory conditions. It is admitted that the locations were made in good faith, but each party sets up irregularities upon which invalidity of the opposing licences is based; the defendants alleging in paragraph (13) of the defence that the plaintiff's locations were not made upon "unoccupied lands of the Crown," and the plaintiff alleging various irregularities, of which only one was relied upon in the argument, *viz.*: insufficiency of the description in the notice, Form 13, section 15.

But I am of the opinion that paragraph 1 of section 17 prevents either of these groups of licences before us being so attacked, even assuming that either party has a status to do so, as to which see *Cook* v. *City of Vancouver* (1912), 17 B.C. 477; (1914), A.C. 1077, and the cases cited in my judgment therein at p. 488 and *Cf.* p. 480. The original licences were, we are told, all issued before section 17 came into force (on 27th February, 1912), and it declares that "all special timber licences" and "all renewals thereof heretofore issued shall be deemed to have been legally and validly granted and issued," and the only limitation upon this is in paragraph (3), which relates solely to a conflict of priority between licences which have otherwise been validated and certain other Crown instruments; in other words, the validation does not go to the extent of preferring a valid junior licence over a valid senior one, but it does extend to all else. Therefore the section prevents the Court from entering into any questions of irregularity as regards location or otherwise, or from seeking to discover grounds for declaring licences to be deemed invalid that Parliament has declared "shall be deemed" by the Courts to be valid. Once the stage has been reached that it can be said: "There exists in this case a valid licence," the only question remaining is, what is covered thereby? In *Cook* v. *City of Vancouver, supra,* their Lordships of the Privy Council said, p. 1081:

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> "There exists therefore in this case a valid water record in favour of the respondents, and it is not suggested that they have done anything which is not covered by this record."

The principle is the same as regards these timber licences. I express no opinion, as it is irrelevant, upon the course to be

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pursued in the case of a licence issued after the 27th of February, 1912.

But if I should be in error in this view (though I have a very strong and clear opinion on it), I think it desirable, having regard to the importance of the case, to give my opinion on the objection advanced by the plaintiff. The statute says (p. 100 of 1907):

"Such notice shall be in the Form No. 13 of the Schedule hereto, and shall describe as accurately as possible the land over which he seeks to obtain such licence, especially with reference to the nearest known point, or to some creek, river, stream or other water. . . . ."

In construing this language regard must primarily be given to the condition of that portion of the Province in which the lands in question lie; in other words, to the circumstances. A very different meaning would obviously be attached to the words in, *e.g.*, the case of locating claims in well-known localities near Victoria, the capital, and in the case, as at bar, of locations made in vast virgin areas in remote districts where the prospectors are the explorers and properly name the streams they find, which names are, or should be, adopted in the lands department, so far as possible without confusion, though they are subject to alteration by the final competent authority of the Geographic Board of Canada. It is admitted that the lands department was "dependent largely on prospectors, timber cruisers, timber stakers, and so on for the names of waters," in such cases "the nearest known point" is necessarily a very elastic term, to which corresponding latitude should be given, and it must not be overlooked that the statute only requires "the nearest known point, or to some creek, river," etc., and not "and" as has been assumed by the principal departmental witness, amongst others.

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In this view of the matter, let us look at Cameron's first notice, thus:

"District of Cariboo
"Notice No. 1

"I, James Cameron, intend to apply for a special licence to cut timber upon 640 acres of land bounded as follows: Commencing at a post planted one mile east of Clyde River four miles south from the Fraser River, Cariboo District; thence N. 89 chains; thence E. 80 chains; thence S. 80 chains; thence W. 80 chains. Located July 2nd, 1907.

"James Cameron,
"Agent for Michael P. Bogle."

Comparing this with Form 12, I think it must be conceded that on the face of it the statute is complied with; the only question arising would be as to the identification of that tributary of the Fraser River, in Cariboo district, which he refers to and names "Clyde River." Now, where there are no maps in the land department, or elsewhere, shewing such a stream as then existing in a virgin area, with no evidence to the contrary (as is the case here), what else should be done in that department, for the purposes of the first application near that stream, than to accept the name as sent in and used by the applicant? The object of the notice posted in the land commissioner's office, and of the deposit of the accompanying declaration, is to put other prospectors and applicants on their guard and inquiry, and also the lands department officials themselves. The statute is none the less exactly complied with because the stream or lake to which reference is made is a new discovery; a distinction is drawn between "a known point" and (or) "some creek . . . . or other water," which would include lake. Is it to be held that if a timber cruiser discovered a large lake in virgin territory and located claims on its shore "with reference" to it, his location was invalid because the land office officials, or others, had never heard of the lake before? In complying with the statute the locator may elect which of the two specified classes of "reference" he desires to describe his location by, *i.e.*, known points of waters.

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The difficulty has arisen from the issuance of the plaintiff's licences on the 19th of February, 1908, before the defendants' prior application had received due and careful consideration, in view of the name of two new streams having been sent in to the lands department. It is not conceivable, to my mind, if action had been suspended on plaintiff's applications till after the further information asked for by the department (deputy commissioner of lands) from Cameron on the 9th of January, 1907, had been received in the shape of Exhibit 6, that the overlapping of the applications would not have been discovered. There was quite enough in the defendants' application to put all concerned upon their guard, and it is to be noted that in said letter the deputy commissioner did not suggest that there was

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any failure in complying with the statute, but asked for further information of location "in order to facilitate the issuance of licences."

It seems a very unfortunate thing when two applications in the same district, on tributaries of the same river (Fraser) were received and being considered at the same time on two streams new to the lands department, that the licences were issued to that applicant whose locations were not made till more than two and a half months later than those of the prior applicant.

Assistance is to be found in *Cook* v. *City of Vancouver, supra,* in the application of a general principle to these statutory requirements of description in the acquisition of rights from the Crown. That case was on a water record, and this Court held (pp. 479-80-487-8)—and was affirmed by the Privy Council, p. 1080—that what might appear to be the substantial error of one mile in eleven in the description of the place of diversion in a water record did not, in the circumstances, invalidate it, though the locality was only a few miles from the City of Vancouver. And it must be remembered that these timber locations are for large areas, 640 acres, and that in any event, as pointed out by the plaintiff's witness, Henderson, in the absence of any statutory requirement as to "blazing" lines or posts (such as there is in the Mineral Act, section 29, R.S.B.C. 1911, Cap. 157), "it would be very easy" to overlook altogether a prior valid location; the omission to require "blazes," the witness truly said, was "a great mistake"; therefore, in any event, even the fullest compliance with the statute does not avoid the probability of being misled. And it seems inevitable that in the prospecting and opening up of new districts there should be a confusion of the names of creeks. The exhibits before us shew this; one of the creeks, for example, has already borne three names, *viz.*: Garnet, Stony and Fleet. Furthermore, there is no finding by the learned trial judge against the defendants on this point; he was simply asked to declare the validity of the plaintiff's licence against the defendants so far as they overlapped, and he did so, and the formal judgment carries out that intention, based upon the assumption that the

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contest was one of validation of licences simply, which view I have already dealt with.

Having regard to all the foregoing, I have come to the conclusion that in the circumstances the objection raised to the description should not prevail.

Such being the case, it is not necessary to consider the objection raised by the defendants against the plaintiff's licences, but it has not escaped my attention (1) that the latter's notices, which purport to be annexed to the original applications on file (the copies in the appeal book are imperfect, as I find on careful comparison) are not a compliance with Form 13 and do not even purport to be signed by the applicant; (2) that the descriptions in such defective notices do not even shew upon which side of the giant Fraser River Swede Creek is situate; and (3) that the so-called sketch plans on the back of the formal applications ("all the requirements" of which forms must be complied with —section 15) are, except in two instances, nothing of the kind, but simply meaningless numbered blocks of straight lines having no relation to any other physical or geographical features whatever. And yet no difficulty was experienced in the lands department in issuing these licences, though the applications were not lodged in the proper office in Barkerville till the 17th of December, 1907 (as I see on reference to the original exhibits on the departmental files) while the defendants' applications had been lodged there long before, on the 23rd of October.

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It follows that from all the foregoing that, in my opinion, this appeal should be allowed.

McPHILLIPS, J.A.: I have had the advantage of reading the judgment of my brother MARTIN, with which I entirely agree. I would, therefore, allow the appeal.

MCPHILLIPS, J.A.

EBERTS, J.A.: This is an appeal from the judgment of Mr. Justice CLEMENT in an action brought by the plaintiff for an injunction to restrain the defendants from entering on or cutting down timber or otherwise interfering with or trespassing upon the plaintiff's timber leases, being lots numbered 11323 to 11331, inclusive, Cariboo District, British Columbia, and for

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damages, etc., and for a declaration that defendants have no right, title or interest in the timber contained within the boundaries of said lots.

The facts appear to be shortly these: In the years 1906 and 1907 the desire to secure timber concessions in British Columbia, and particularly that part of British Columbia through which the Grand Trunk Pacific Railway was to pass, namely, between the Tete Jaune Cache and Fort George, on the north and south side of the Fraser River, and the head waters of same, and commonly known as Upper Fraser River, was very pronounced. Very little was generally known of that portion of the Province, except the knowledge earned by prospectors for minerals, trappers and timber stakers. There were in those years only two available means of reaching the country in which the limits mentioned in this action are situated. One by way of Barkerville, in the County of Cariboo (and at which place the Government agency for the County of Cariboo is situated); and the other by way of Edmonton, thence through the Yellow Head Pass to the head waters of the Fraser River, thence by raft or canoe to the site of the property in question.

Timber in that part of the Province was evidently being talked of in Cranbrook and Fernie, and the record shews Cameron along with four others left Kootenay and made their way to Barkerville. Any timber staking Cameron was to carry out was to be for a Mr. Bogle, with whom he had made an agreement, and who, it will be seen, was the predecessor in title to the defendants in this action, and who now claim the ownership of the property staked by Cameron. At Barkerville on the way in Cameron seemed to have made very few inquiries, for on being asked:

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"Did you make any inquiries at Barkerville before you went in? Tried to glean all the information I could, but I could not get any information about the country or streams or anything, they did not seem to have any. I inquired of prospectors and everything else.

"The Court: They knew the Goat River? The Goat River was known, yes. But they did not seem to have any more information at Barkerville except what was on the map; the map that I had seemed to give all the information they had. They did not have anything else that I could find out."

In a former part of his evidence he said:

"What information had you as to the country, to guide you? Very little, except what I got from the maps.

"What maps did you have? Well, I had the latest that could be procured at that time, I cannot remember the date of them, but they were the best maps the Government had at that time."

Barkerville is only a village. It has but one street and is the headquarters of the Government agent, who gleans all the information he can from prospectors and others of the different "attractive propositions" in the sphere of his authority, and gladly gives same to all inquirers. However, Cameron and his friends left Barkerville by way of the trail to Goat River, which runs into the Fraser from the south. The trail from Barkerville to the Upper Fraser first strikes the upper waters of the Goat. The Cameron party evidently got to the Upper Fraser on or about the 2nd of July, 1907. Cameron was in the upper Fraser River country from the 2nd to the 11th of July, 1907, when he finished staking, and returned by the same route he went in to Barkerville, and on the 22nd of July, 1907, says he "made out his papers" and had them sworn to and filed in the Government office, and then made his way home to Kootenay.

His initial staking notice reads as follows:

"I James Cameron, intend to apply for a special licence to cut timber upon 640 acres of land bounded as follows: Commencing at a post planted one mile east of Clyde River, four miles south from the Fraser River, Cariboo District; thence N. 80 chains; thence E. 80 chains; thence S. 80 chains; thence W. 80 chains. Located July 2nd, 1907.

"James Cameron,
"Agent for Michael P. Bogle."

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Cameron on this expedition staked in all 13 timber claims for Bogle, and of which the defendants allege nine are in conflict with the licences above mentioned issued to the plaintiff. All of the claims in conflict appear by the record to be tied to the original staking.

One Silas Joseph Henderson in February or March, 1907, made an arrangement with the plaintiff to stake timber for him in this locality, and having finished staking timber in the upper Fraser country for a Mr. Sprague, found himself in Barkerville in August, 1907. He got information there was timber on Swede Creek. Swede Creek and Clyde Creek were well known at Barkerville, and named as such, so he was then

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informed by Mr. Walker, the Government agent, and by people who had been hunting and trapping there. Looking over the office files he found that no timber had been staked on Swede Creek up to that time, and on the 4th of September, 1907, again proceeded to the upper Fraser by the usual trail *via* Goat River, and on the 21st and 22nd of September, 1907, staked ten timber limits for the plaintiff. His initial staking was as follows:

"1. Commencing at a post marked 'Ernest Dunsford Orde's north-east corner post, No. 1 limit,' planted on the west side of Swede Creek, about six miles from its mouth, where it empties into the Fraser River about 12 miles above the mouth of Goat River; thence west 160 chains; thence south 40 chains; thence east 160 chains; thence north 40 chains to point of commencement. Located September 21st, 1907."

Nine other locations tied to Orde No. 1 limit were made, posting, advertising, etc., were duly carried out, and from the record the legal requirements for the acquisition of special timber licences seemingly were duly carried out.

Now, the contention of the defendants is this, that although Cameron in 1907 staked the Bogle claims and described them as on Clyde River, or Creek, and in his evidence says he described them on Clyde River from the fact of having "run across an old 'stump' with the name 'Clyde River' marked on it —that is where I got the name." (It is a peculiar circumstance, and may be accounted for, but in no part of the record can I find any mention of any witness except Cameron having seen the "old stump" with the name "Clyde River" marked on it.) And against that we have the evidence of Henderson and McKale that in 1907 Swede Creek and Clyde Creek, or River, were well known about Barkerville (the starting point on the trail for all the locators) by those names by many trappers and prospectors, and by Mr. Walker, the Government agent there, and Swede Creek was known as such by McKale from June, 1906, and by no other name, and he had been continuously in that country since 1905 to the date of trial, with the exception of one year—1910. He knew Clyde Creek as such from 1907, and he got his knowledge from the Government agent in Barkerville. Mr. Bamford in his evidence says that at the time of the issue of the licences to the plaintiff, he, in reply to the Court, said he had not as yet attempted to plot out the Bogle claims:

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"I could not follow them [the Bogle claims] because the description was not sufficient to place them upon the map in their proper position. I didn't know the position of Clyde Creek."

He further says:

"Well, if you had had Mr. Cameron's plan in at the time, and then taken his measurements as given in his notices, would you have been on your guard then that he had made a mistake as to naming the stream? No, I certainly would not. I have no question about the position of Clyde Creek and the other creek.

"Swede Creek? I had them before me, if there had been any question I would never have let them go out, if I thought there was any chance of it being on the same creek."

And further he says:

"But apparently he [Cameron] sent you a sketch of Swede River? No, he sent me in a sketch of Clyde River.

"He made a sketch of Swede and thought it was the Clyde? That is the point; I knew Clyde River from the sketch, and I put it on the map as from the sketch.

"You put it on there because he called it Clyde River? Yes."

The plaintiff and defendants have both taken out perpetual timber licences under section 6 of the Land Act Amendment Act, 1910. After the issuance of such perpetual special timber licences the plaintiff caused the lands so staked by Henderson to be surveyed by a duly-qualified surveyor, and the same gazetted and accepted by the proper department, and in compliance with the Land Act. No adverse claim was put in by defendants, or any of them.

In considering the whole question, can it be said the defendants have complied with the statutes in force relating to applications for timber licences? In the first place, Cameron, who made the original applications, applied for land on Clyde River, a river which did exist, and his description in his first location is so vague that Mr. Bamford, the chief draughtsman in the office of the Surveyor-General, was not able to plot the tracts on the reference map, which he could have done had the sketch described the land as accurately as possible over which he seeks to obtain such licence, especially with reference to the nearest point, or to some creek, river, stream or other water, etc. He knew the mouth of Goat River and could have found out the position of Swede River when at Barkerville on his way in, when he could have easily described his stakings as on Swede Creek, or a creek about so many miles south of the Fraser, and

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which creek where it joins the Fraser is approximately . . . . miles from the mouth of Goat River. On the other hand, a short time after Cameron's staking, Henderson made his way to the same locality and described his initial location as—

"Commencing at a post marked Ernest Dunsford Orde's N.E. Corner post No. 1 limit planted on the west side of Swede Creek, about 6 miles from its mouth where it enters into the Fraser River about 12 miles above the mouth of Goat River. Thence," etc.

Evidently the information got by Henderson from the Government agent at Barkerville on his way in as to the position of and name of Swede Creek was reliable and correct. All through, the action of the plaintiff's agent, Henderson, seems to have been correct in carrying out the law. His locations were plotted out on the reference map by the officers of the department before those of the defendants; he has perfected his title by survey and gazetting, and notice to all persons who had adverse claims, and finally had his survey made and was not adversed—a far better case on the merits than the defendants', whose predecessors in title made wrong and vague descriptions of their locations, and admittedly so, for in a letter dated the 22nd of October, 1912, to the chief commissioner of lands and works, from Mr. A. W. Codd, one of the defendants, he says, *inter alia,* "because of the mistake of the original locators Cameron and McCormick the present supposed owners of the above-named timber licences have been paying in their timber fees when in fact the laws of your country have not been complied with."

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The holding and acquisition of timber lands is now governed by the Forest Act (B.C. Stats. 1912, Cap. 17), section 17 of which recites: [already set out in statement].

The disputes in this matter have been brought into Court by seemingly a friendly suit to settle the rights of the parties under the above section. It would appear from the record that both parties staked on Swede Creek, but the defendants' location was not made in accordance with the statutes, and the plaintiff's was, and therefore he should succeed.

I could very reasonably have curtailed my remarks with reference to the merits of this action and concurred with CLEMENT, J., the trial judge, in his construction of section 17.

The plaintiff's licences were first issued, and by the statute

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vest in the holder all rights of property whatsoever in trees, timber and lumber cut within the limits of the licence during the term thereof.

Section 17 says:

"Nothing in this section shall be deemed to validate any special timber licence as against any prior Crown grant, lease, special timber licence, or pre-emption record."

The Crown has vested in the plaintiff all the rights of property whatsoever in all trees, etc., within the limits of his licences, and has accepted his surveys, and how now can he, in the face of the statute, be divested and the defendants' licences validated against his special timber licences except in some way by the intervention of the Crown?

I am of opinion that the appeal should be dismissed.

The Court being equally divided, the appeal was dismissed.

Solicitors for appellants: *Bass & Bullock-Webster.*
Solicitor for respondent: *A. H. MacNeill.*

WARDROPER v. STEWART-MOORE.

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Contract—Part performance—What constitutes—Equitable assignment—Statute of Frauds.

Practice—Appeal—Preliminary objection—Notice of motion—Language of strictly applied.

The plaintiff held a mortgage secured by a property occupied by a garage, of which the defendant was owner. They both employed the same agents, who collected the rent, paid the interest on the mortgage and the balance to the owner. Upon certain principal coming due the mortgagee wrote the agents stating he was willing to forego the payment for six months but the mortgagor must sign an agreement guaranteeing that a sufficient sum be reserved from the garage rent to pay the interest without lapse until such time as the whole loan be refunded. Upon this letter being shewn the mortgagor he wrote the agents instructing them to act as his sole agents, collect the rents, and pay the mortgage interest regularly until the loan be refunded in

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full. This arrangement was carried out for a year, when the mortgagor wrote the agents instructing them to cease collecting the rents. The mortgagee then sued the tenant for the rents, claiming there was an equitable assignment thereof and that the revocation was nugatory. On an interpleader issue it was held by the trial judge that the mortgagor's authority was revocable as there was no sufficient evidence of the agreement to satisfy the Statute of Frauds, and the letter from the mortgagor relied on did not constitute an equitable assignment, as it shewed no consideration on its face.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that irrespective of the question of equitable assignment, the extending of the time for payment of principal, the benefit of which was accepted by the mortgagor upon his agreeing that the mortgagee should be paid out of the rents, was a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and the appeal should be allowed.

When a preliminary objection is taken that an appeal is out of time, the respondent will be held strictly to the grounds taken in his notice of motion.

APPEAL from the decision of LAMPMAN, Co. J. on an interpleader issue arising out of an action brought by Wardroper and Stewart-Moore against the Duncan Garage Limited, for the rent of a garage in Duncan, B.C. Tried at Victoria on the 22nd of May, 1917. Stewart-Moore owned the garage. In August, 1914, he borrowed by way of mortgage $9,000 from Wardroper, which was secured by the property in question, the money having been used in building the garage. Interest was payable quarterly at 8 per cent. per annum, and an instalment of $3,000 of the principal became due and payable on the 20th of August, 1915. Both parties had the same agents in Duncan (Messrs. Leather & Bevan), who collected the rents from the tenants, paid the interest on the mortgage and the balance to the owner. When the $3,000 payment on the mortgage came due Wardroper wrote the agents the following letter:

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"I am willing to forego this refund for another six months, *i.e.*, until the 20th Feb. provided the interest is paid promptly each quarter when due. To assure myself of this and Mr. Stewart-Moore's good faith in the matter it is imperative that Mr. Stewart-Moore shall sign an agreement guaranteeing that a sufficient sum shall be reserved from the garage rent by your firm to pay the mortgage interest every quarter without lapse until the 20th Aug., 1917, or until such time as the whole loan is refunded."

Evidence was given that on being shewn the letter Stewart-Moore "read and accepted" the terms thereof, and handed the agents the following letter:

"In respect to the mortgage dated Aug. 20th, 1914, between myself and Mr. W. H. Strickland Wardroper covering lot 7, block 2, map 209, Duncan Townsite, I herewith instruct you to act as my sole agent in this matter and collect the rent as same becomes due from the Duncan Garage Limited, and keep the interest paid regularly on said mortgage until such time that the loan is refunded in full, before using any of the said rent to any other purpose on my account."

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This arrangement was carried out until November, 1916, when Stewart-Moore notified Leather & Bevan to cease collecting rent. Wardroper later sued the tenants for $400, being 5 months' rent from 1st October, 1916. He claimed the rent under an equitable assignment from Stewart-Moore, and joined him as a party plaintiff after tender of an indemnity. Stewart-Moore objected to Wardroper's right to join him as a party plaintiff and denied that he had made any assignment of the rents. The tenants admitted liability for the five months' rent and paid the sum claimed into Court. An interpleader was directed, making Wardroper plaintiff and Stewart-Moore defendant.

Statement

D. M. Gordon, for plaintiff.
Davie, for defendant.

19th June, 1917.

LAMPMAN, Co. J.: The plaintiff is the mortgagee for $9,000 of certain premises in Duncan, of which the defendant is the owner. The tenants are the Duncan Garage Limited. In the mortgage transaction the firm of Leather & Bevan acted as agents for both parties and they collected the rent and out of it paid the interest on the mortgage to the plaintiff, and any balance they paid over to the defendant. In August, 1915, an instalment of $3,000 principal became due, but the defendant was unable to pay it when payment was demanded. Plaintiff then wrote Messrs. Leather & Bevan a letter, in which he stated: [already set out in statement].

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On this letter being shewn to defendant by Messrs. Leather & Bevan, he gave them the following letter: [already set out in statement].

This arrangement was then carried out until November, 1916, when defendant notified Messrs. Leather & Bevan to cease

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collecting. Plaintiff subsequently sued the Duncan Garage Limited for $400, being five months' rent from 1st October, 1916, and the Garage Company paid the rent into Court, and its disposition depends on the interpleader issue which was directed.

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The plaintiff contends that the letter of the 2nd of November, 1915, amounts to an equitable assignment of the rents. Rent is an interest in land, and by the 4th section of the Statute of Frauds, the agreement respecting it must be in writing. The letter of the 2nd of November, 1915, is a blank so far as the consideration is concerned. The consideration moving defendant to sign that letter was plaintiff's promise to forego the $3,000 instalment, but that is not a part of the letter—it is in no memorandum signed by defendant.

LAMPMAN, CO. J.

The plaintiff's case fails because the agreement is not in writing. *Ex parte Hall. In re Whitting* (1879), 10 Ch. D. 615 is in point. This disposes of the issue and it is not necessary to consider the other points argued, as to whether the letter is an assignment and whether or not it is irrevocable.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 7th and 8th of November, 1917, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

D. M. Gordon, for appellant.

Davie, for respondent, raised the preliminary objection that the appeal being from an interlocutory judgment was not brought in time, the ground set out in his notice of motion being that the notice of appeal had been given "more than 15 days after the 'signing and entry' of judgment."

Argument

Gordon, raised a preliminary objection to the preliminary objection that the judgment was not "signed and entered" until after the notice of appeal was given, as appeared by the registrar's certificate produced. The judgment (which was reserved) was handed down by the trial judge on the 19th of June; notice of appeal was given on the 16th of July, but the formal judgment was not "signed and entered" until the 27th of July. The respondent must be held strictly to his notice, as he is

relying on a technical point. The words in the notice are "signed and entered" only, and he must be held to these words. *Shipway* v. *Logan* (1916), 22 B.C. 410 does not apply to this case, as here the judgment was not delivered in open Court.

Davie, contra: The plaint and procedure book has an entry of the 19th of June, stating "Reasons for judgment handed down by Judge LAMPMAN. The plaintiff's case fails because the agreement is not in writing." This, it is submitted, is a sufficient entry of the judgment.

Gordon, in reply: The plaint and procedure book is a mere reference book kept by a clerk and distinct from the registrar's book, in which judgments are entered. The registrar's certificate is conclusive as to the date of entry.

7th November, 1917.

MACDONALD, C.J.A.: I think the preliminary objection taken by Mr. *Gordon* to the preliminary objection of Mr. *Davie* must prevail. It must be admitted that the point is not by any means free from doubt. This being the case I think we should give the appellant the benefit of it, as the preliminary objection is in one sense a technical one and is an attempt to shut out an appeal on the merits. Mr. *Davie's* preliminary objection is that though notice of appeal was given within 15 days from the signing and entry of the formal judgment, it was not given within 15 days from its pronouncement, but that is not the point taken in his notice of motion. If the objection were properly taken it ought to be given effect. The appeal should have been taken within 15 days from the pronouncement of judgment, which was the 19th of June. The point is that the objection has not been properly taken and on that ground, and in no way questioning *Shipway* v. *Logan* (1916), 22 B.C. 410, I base my judgment.

MACDONALD, C.J.A.

MARTIN, J.A.: If we are to take it that the judgment was entered and signed on the 27th of July, I think Mr. *Davie's* objection must fail. I am unable to get over the difficulty of the registrar's certificate. Otherwise I would have no hesitation in holding that the judgment was entered on the 19th of June.

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GALLIHER, J.A.: I agree with my brother MARTIN, but I might just qualify that in one respect. I would entertain some doubt, even if the certificate had not been produced, as to whether this is not merely a note to the effect that the reasons were handed down by Judge LAMPMAN, and that it is not the entering and signing of judgment that is contemplated.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the way to adopt with regard to these technical matters is to give strict effect to them or extend the indulgence of the Court. For myself, I would prefer not to be very technical in these matters—in the interests of justice—but I think it would be only building up a lot of contradictory decisions, which means confusion in practice. *Shipway* v. *Logan* (1916), 22 B.C. 410, and *Frumento* v. *Shortt, Hill & Duncan, Ltd., ib.* 427 are cases for consideration.

EBERTS, J.A.

EBERTS, J.A.: I am of opinion that the judgment should be appealed within 15 days from the delivery of the judgment of LAMPMAN, Co. J. on the 19th of June.

Preliminary objection overruled.

Argument

Gordon, on the merits: In the case of a debtor giving a creditor an authority or power of attorney to secure the debt or allow him to repay himself it cannot be revoked, even where no present consideration is given: see *Walsh* v. *Whitcomb* (1797), 2 Esp. 565; *Alley* v. *Hotson* (1815), 4 Camp. 325; *Gaussen* v. *Morton* (1830), 10 B. & C. 731; *Smart* v. *Sandars* (1848), 5 C.B. 895; *Gurnell* v. *Gardner* (1863), 4 Giff. 626. On the question of consideration see *Walker* v. *Rostron* (1842), 9 M. & W. 411 at p. 420. The principal should be able to take the benefit of the agent's authority: see *Heyd* v. *Miller* (1898), 29 Ont. 735; *Molsons Bank* v. *Carscaden* (1892), 8 Man. L.R. 451. The giving of the authority to collect rents amounted to an equitable assignment of them: see *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523 at pp. 546-7; *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1905), A.C. 454 at p. 462; *Dickinson* v. *Marrow* (1845), 14 M. & W. 713; *Fisher* v. *Miller* (1823), 7 Moore 527; *Hutchinson* v. *Heyworth* (1838),

9 A. & E. 375. The agents were authorized by Stewart-Moore but it was for Wardroper's benefit, so they must be deemed to be Wardroper's agents: see *Bailey* v. *Culverwell* (1828), 8 B. & C. 448. We agreed to give an extension of time for payment and the respondent took the benefit of this before repudiating and this is sufficient part performance to take the contract out of the Statute of Frauds: see *Coates* v. *Coates* (1887), 14 Ont. 195. We can therefore give parol evidence of the arrangement.

Davie: The letter from Stewart-Moore to his agent was the ordinary authority given agents, revocable at any time, and cannot be construed into an equitable assignment. In order to create an equitable assignment it must be from some definite fund and directed to the creditor: see *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763; *Christmas* v. *Russell* (1871), 14 Wall. 69; *Watson* v. *Bagaley* (1849), 12 Pa. 164; *In re Cleary* (1894), 9 Wash. 605; 38 Pac. 79. There cannot be an equitable assignment when the person giving authority retains any control over the fund: see *Malcolm* v. *Scott* (1843), 3 Hare 39 at p. 45; *Morrell* v. *Wootten* (1852), 16 Beav. 197; *Hodgson* v. *Anderson* (1825), 3 B. & C. 842; *Gibson* v. *Minet* (1824), 2 Bing. 7; *Watson* v. *The Duke of Wellington* (1830), 1 Russ. & M. 602 at p. 604; *Re Russell, Russel* v. *Oakes* (1893), 37 Sol. Jo. 212. Stewart-Moore remained in control as he paid his garage bill by way of set-off. The plaintiff cannot connect the two letters by parol evidence: see *Ex parte Hall. In re Whitting* (1879), 10 Ch. D. 615.

Argument

Gordon, in reply.

8th November, 1917.

MACDONALD, C.J.A.: The appeal should be allowed. I am quite in accord with the argument of Mr. *Davie* as far as the equitable assignment is concerned. I do not think there was an assignment of anything except moneys that actually came into the hands of the real estate agents Leather & Bevan, and as the money in question here never came into their hands at all, it did not pass under the assignment. But there is a phase of the matter under which, I think, the appellant is entitled to

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succeed. The appellant offered to extend the time of payment of the principal for six months, or until the whole of the debt is repaid, on condition that the defendant would pay the interest on the mortgage from time to time out of the rents in question. The letter making the offer was shewn to the defendant and it is stated that he agreed thereto, and by letter of the 20th of August, 1914, instructed his agents to collect the rents and pay the interest from time to time. That was done for a period of about one year. Now, the evidence also shews that the plaintiff actually granted the extension of time. The result of that is that there was part performance of the contract which would otherwise have been unenforceable. While the payment of money cannot be relied upon as part performance, the extension of time can, and that lets in parol evidence of the contract, and on that ground I think the appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: I am of opinion this appeal can be prosecuted apart from any question of equitable assignment, since there was part performance of the agreement, and that agreement has been before us properly.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I cannot agree with the judgment of the majority of the Court. It is the determination of a very important point, namely, whether there was part performance, because in actions of this nature it is the second string to the bow. My difficulty is that I cannot find a contract. That which is alleged to be the contract is the letter to the principal's own agent, a letter which, unquestionably, could be revoked and was revoked. Fry on Specific Performance, 5th Ed., p. 291, par. 581, says:

"First, the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged."

The mortgagee asks for a certain agreement, and it is admitted that it was never given, and the letter in itself constitutes no agreement. Fry goes on to say:

"All that can be gathered from acts of part performance is the existence of some contract in pursuance of which they are done, and the general character of the contract: they cannot, unless possibly in some very

singular case, be themselves sufficient evidence of the particular contract alleged."

And what I find my difficulty to be is this, I cannot find the contract.

EBERTS, J.A.: I concur in the result.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Crease & Crease.*
Solicitor for respondent: *C. F. Davie.*

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STEPHENS v. THE ROYAL TRUST COMPANY.

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Practice—Receiver—Negligence—Damages—Separate action for—Leave to bring required—Estoppel.

A receiver, being an officer of the Court, cannot be sued without leave in a separate action in respect of acts done in discharge of his office.

APPEAL from the decision of GREGORY, J., of the 28th of May, 1917. The plaintiff occupied the ground floor of a premises on Robson Street in Vancouver, where she carried on a millinery business. The water-pipes in the premises above the store, which were unoccupied, were allowed to freeze and burst, the result being that the plaintiff's store below was flooded and the stock damaged. In May, 1916, the defendant Company had been appointed receiver of the building in question by an order of the Court in a former action, and in March, 1917, an application made in that action to restrain the plaintiff from proceeding with this action on the ground that it was brought without leave of the Court, was refused. The plaintiff claimed that the defendant Company was guilty of negligence in respect of the maintenance of the premises in

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question in not providing means to adequately protect the pipes from freezing. On the trial the preliminary objection was taken by the defendant that leave must first be obtained in the former action to bring this action, in answer to which the plaintiff contended that although the defendant Company was in possession as receiver he was not suing the Company *qua* receiver, as the Company had committed an act of negligence for which it is personally liable. The preliminary objection was sustained and the action dismissed. The plaintiff appealed.

The appeal was argued at Vancouver on the 30th of November and the 3rd of December, 1917, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

R. M. Macdonald, for appellant: The question of leave to bring the action was argued and adjudicated upon by HUNTER, C.J.B.C., when he made the order in March, 1917, dismissing the application to restrain the plaintiff from proceeding with this action. The point is *res judicata*: see *Badar Bee* v. *Habib Merican Noordin* (1909), 78 L.J., P.C. 161 at p. 163; *In re May* (1885), 28 Ch. D. 516 at p. 518; *Koosen* v. *Rose* (1897), 76 L.T. 145; *Henderson* v. *Henderson* (1843), 3 Hare 100 at p. 115; *Payne* v. *Newberry* (1890), 13 Pr. 392. When a solicitor sues without authority, objection must be taken by way of preliminary objection: see *Continental Tyre and Rubber Company (Great Britain) Limited* v. *Daimler Company, Limited* (1915), 1 K.B. 893 at p. 913. On the question of leave being required see Kerr on Injunctions, 5th Ed., 641; *Searle* v. *Choat* (1884), 53 L.J., Ch. 506; *Ames* v. *The Trustees of the Birkenhead Docks* (1885), 20 Beav. 332; *Hawkins* v. *Gathercole* (1852), 1 Drew. 12 at p. 17; *Helmore* v. *Smith* (1886), 35 Ch. D. 449 at pp. 454-6; *Re West Lancashire Railway Company* (1890), 63 L.T. 56 at p. 58; *Crow* v. *Wood* (1850), 13 Beav. 271. A receiver is personally liable for any contracts he makes as receiver: see *Burt* v. *Bull and Ward* (1894), 64 L.J., Q.B. 232; *Moss Steamship Co.* v. *Whinney* (1911), 81 L.J., Q.B. 674 at p. 676; *In re Anglo-Moravian Hungarian Junction Railway Co. Ex parte Watkin*

(1875), 1 Ch. D. 130; *Watling* v. *Lewis* (1911), 80 L.J., Ch. 242. Any one who commits a wrong is liable whether he is an agent or not: see Clerk & Lindsell's Law of Torts, Can. Ed., 112; *Lucy* v. *Bawden* (1914), 2 K.B. 318. I contend if he is personally liable the question of receivership does not arise, and I am entitled to sue him without leave of the Court.

Symes, for respondent: The definition of a receiver is found in Riviere on Receivers, 169. The Court will not allow one of its officers to be sued without leave: see Kerr on Receivers, p. 193; *Aston* v. *Heron* (1834), 2 Myl. & K. 390 at p. 397; *Searle* v. *Choat* (1884), 25 Ch. D. 723; *In re Maidstone Palace of Varieties, Limited* (1909), 2 Ch. 283; *Angel* v. *Smith* (1804), 9 Ves. 335 at p. 337; Beven on Negligence, 3rd Ed., Vol. 2, p. 1266; *Vine* v. *Raleigh* (1883), 24 Ch. D. 238. The statement that we are landlords is not supported by authority. On the question of estoppel by record see Halsbury's Laws of England, Vol. 13, pp. 326 and 334; *Salaman* v. *Warner* (1891), 1 Q.B. 734 at p. 736; *Bozson* v. *Altrincham Urban Council* (1903), 1 K.B. 547; Bigelow on Estoppel, 5th Ed., 59; *Feversham* v. *Emerson* (1855), 105 R.R. 579 at p. 584.

Argument

Macdonald, in reply.

MACDONALD, C.J.A.: I think the appeal should be dismissed. In my opinion the action is an action against the receiver, and the breach of duty complained of, if it be a breach of duty at all, is the breach of the receiver as such and in no other capacity.

On the question of *res judicata* the order of the Chief Justice of British Columbia was not one that could be pleaded in estoppel to the course taken by the learned trial judge. The proceeding was clearly an interlocutory one. It was one going to the discretion of the judge as to whether he should grant the injunction or not. In my opinion he took an erroneous view of the nature of the action, but of course that does not affect the matter so far as estoppel is concerned. The learned trial judge was quite right, when the point was taken before him that the action could not proceed without leave of the Court, in dismissing the action as he did. The suggestion that the Chief Justice's

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refusal to enjoin the plaintiff from proceeding with the action was tantamount to leave to proceed with the action, in my opinion, is quite unsound. There was no application before him for leave; he did not consider the question of leave; he exercised no discretion with regard to whether he should grant leave or not, and therefore what was done before him cannot in any sense be held to be tantamount to the granting of leave; therefore on all the questions involved in the appeal I think the learned trial judge was right.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed. In the first place that which is conclusive upon this point is the decision of the learned Chief Justice of British Columbia, who heard the application when the point was taken that the action could not be proceeded with without leave first having been obtained. That is conclusively, in my opinion, settled by the case of *Koosen* v. *Rose* (1897), 76 L.T. 145. If the other parties were not willing then to accept the decision of the Chief Justice, they should have appealed. The defendant as receiver asked leave to defend this action, and at the trial urged that the action was wrongly launched, leave not being first had to bring the action, and the learned trial judge gave effect to the contention. The action was stated to be an action against the Royal Trust Company. It is not stated in the style of cause that the Company is sued in any representative capacity. On the pleadings it was not possible for the plaintiff to open a case against the Royal Trust Company as receiver, and I can quite understand that there may be an action independent of the receivership, because, after all, the receiver must proceed regularly, and I can quite understand that there might be many things that a receiver would do that would not be done in the course of the receivership, in respect of which no liability would necessarily fall on the estate. The cause of action alleged would appear to be within the decision in *Rickards* v. *Lothian* (1913), A.C. 263. The Royal Trust Company was called upon to use all reasonable care, and to allow the pipes to freeze in the premises above was not the

exercise of all reasonable care. One cannot receive rents and profits and be in effect the landlord and mortgagee in possession and escape the legal responsibility that thereby arises. It is true that the question might arise at the trial as to whether or not the liability (if any) of the Royal Trust Company could be said to be a liability *dehors* the receivership, but I think the proper order to make would be to direct that leave be now given to prosecute the action against the defendant as receiver, as well as in its corporate capacity apart from the receivership. This would be an order in the furtherance of justice and justifiable under all the circumstances.

EBERTS, J.A.: I certainly concur in the remarks of the learned Chief Justice. EBERTS, J.A.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Bird, Macdonald & Ross.*
Solicitors for respondent: *Wilson & Whealler.*

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BELL v. JOHNSTON BROTHERS, LIMITED.

Negligence—Driving motor-truck—Look-out—Sounding horn—Injury to person riding bicycle.

Practice—Leave to take step in action—Not obtained by plaintiff—Objection first raised in notice of appeal—War Relief Act, B.C. Stats. 1916, Cap. 74; 1917, Cap. 74, Sec. 8.

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Section 8 of the War Relief Act Amendment Act, 1917, which came into force on the 19th of May, 1917, provides that "every plaintiff or party commencing, instituting, or taking any proceedings in or out of Court shall after service of the writ, notice, or other process whereby any proceedings in or out of Court are instituted, and before taking any further step, furnish evidence to the satisfaction of such Court or of the officer or tribunal in whose office or before which any proceedings out of Court are being taken, that the defendant was not at the time of such service entitled to the benefit of this Act," etc. The writ was issued in this action on the 10th of May, 1917, and without the plaintiff complying with the above section the action was tried and judgment given in his favour on the 20th of June following. The defendant first raised the point that the plaintiff had not complied with the provisions of the War Relief Act in his notice of appeal.

Held, that it is only when the plaintiff proposes to take a step in the action that he is required to obtain leave. In the present instance it is the defendant who is taking the step (*i.e.*, giving notice of and bringing on the appeal), in which case the provisions of the Act do not apply.

The plaintiff was riding a bicycle westerly, on the southerly side of Hastings Street in Vancouver, and about to cross Cambie Street, when the defendant's motor-truck coming easterly on the north side of Hastings Street was about to turn and go southerly up Cambie Street. The plaintiff had ample time to cross Cambie Street in front of the motor-truck but, while crossing, his wheel skidded and he fell. The driver of the motor-truck saw him fall, but was not able to stop until it rested on the plaintiff's leg and fractured it. The driver did not sound his horn when turning the corner. In an action for damages judgment was given for the plaintiff.

Held, on appeal, affirming the decision of MCINNES, Co. J. (MACDONALD, C.J.A. dissenting), that there was evidence upon which the learned judge below might reasonably find that the driver of the motor-truck was negligent and the appeal should be dismissed.

Statement APPEAL by defendant from the decision of MCINNES, Co. J., in an action for damages tried at Vancouver without a jury.

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The plaintiff, a messenger boy, was on a bicycle going west on Hastings Street. The defendant's motor-truck was going east on Hastings Street and when turning south to go up Cambie Street the boy fell in front of the truck. The truck was within about 8 feet of him when he fell, and it was stopped when it was on the boy's leg, the leg being broken. The action was commenced on the 10th of May, 1917, and the trial took place on the 20th of June, when judgment was given for the plaintiff. The War Relief Act Amendment Act came into force on the 19th of May, 1917. Notice of appeal was given on the 30th of June, 1917. This notice of appeal was withdrawn on the 18th of September, and on the same day a new notice of appeal was given, including an additional ground of appeal that the trial judge erred in proceeding with the trial as the plaintiff had not produced evidence that the defendant was not entitled to relief under the War Relief Act Amendment Act, 1917. This question had not been raised by the defendant previously.

Statement

The appeal was heard at Vancouver on the 5th and 6th of December, 1917, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Gillespie, for appellant: The amendment to the War Relief Act of 1916 was assented to on the 19th of May, 1917, and this action was tried on the 20th of June, when judgment was given for the plaintiff. The trial was a step in the action after the amending Act came into force, and was taken without the leave required under section 8 of the amending Act.

Argument

Beck, K.C., for respondent: The point was first raised in the notice of appeal, and could therefore only apply to the appeal, but the appeal is a step taken by the defendant to which the Act does not apply. I say the defendant waived any objection by not raising it at the trial: see *Moore* v. *Gamgee* (1890), 25 Q.B.D. 244 at p. 248.

5th December, 1917.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I do not intend to intimate that the practice which was followed in the Court below in obtaining leave in cases of this kind is wrong. I want to guard myself against expressing any such opinion. What I say is that the

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defendant is the person taking the step, and the provisions of the Act do not apply. If the other side were appealing the defendant's contention might be perfectly correct, assuming that the statute would apply to the facts of this case, but here the defendant is the appellant, and such a case plainly is not contemplated by the statute. I am not deciding anything more than that on the facts of this case, the plaintiff not being desirous of taking any step, the Act does not apply. It is only when the plaintiff proposes to take a step in the action that the statute applies.

GALLIHER, J.A.

GALLIHER, J.A.: I think your application might be all right if the statute said that the taking of a step was null and void, but the statute does not say so. Therefore it is only a matter which might be voided by your making some application to set aside the proceedings.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with what the Chief Justice and my brother GALLIHER have said. The position is shortly this: If you want to take the benefit of a statute, you must move in time. The benefit of a statute may be waived. Here it is the defendant who is moving—appealing. The plaintiff is content to rest upon his judgment; he is not taking any step which entitles the defendant to invoke the statute.

Argument

Gillespie: There is no evidence of negligence on the part of the defendant. There is clear evidence that the boy could have crossed with time to spare if he had not fallen, and the fall was entirely due to his own carelessness. The driver stopped as quickly as he could when he saw the boy fall, and, in addition, if the boy had used reasonable quickness after the fall he could have got out of the way.

Beck: There is a statutory obligation to sound the horn, and the driver was negligent in this regard. When turning a corner particular care must be taken by the driver.

Gillespie, in reply: The sounding of the horn does not apply, as the boy had plenty of time to pass. To make this argument effective, he must shew the sounding of the horn would have prevented the boy from falling, which is absurd.

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MACDONALD, C.J.A.: The point involved is a very narrow one. The legal principles applicable are so well established that it is only necessary to refer to the facts. The driver of the truck saw the boy fall, and become in imminent danger of being hurt. He was bound to use every reasonable care to avoid injuring him. It does not matter whether the boy was guilty of contributory negligence or not, the driver was bound to use every reasonable care to avoid injuring him.

After reading the evidence I am particularly struck with that of the driver of the truck. He is a man of 40 years of age, a careful man, who had been driving this truck for two years without accident. He tells exactly what he saw and what he did frankly, concealing nothing. He says, "I saw the plaintiff, I saw him 40 feet away. I was crossing the street, Hastings to Cambie, at the rate of 4 miles an hour." He says the boy was coming east on Hastings Street and that he, the driver, was crossing the Hastings Street tracks intending to go up Cambie Street. He says: "The boy saw me. He was looking towards me." To say, under those circumstances, with no obstruction between them, that there could be any excuse for the boy not seeing the truck seems to me to be absurd. If he was paying any attention at all he must have seen the truck, and that being the situation there was no necessity for the driver of the truck to sound the horn; the horn is only required to be sounded as a warning to persons who might not be aware of the proximity of the truck. So far as his duty to this boy was concerned, if he were convinced that the boy saw him, and the circumstances were such that he must or ought to have seen him, he was justified in assuming that there was no reason to sound his horn. He says: "I watched the boy to see whether he was going to pass me or what he was going to do." That the boy kept right on without changing his course and that when he got in front of the truck, about 8 feet from it, his wheel slipped and he fell. At that moment there was danger; up to that moment there was no danger. If the wheel had not slipped and the boy had not fallen, he would have passed several feet ahead of the truck. At that moment it seems to me the danger became imminent, and

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it was the duty of the driver then to take every reasonable care to avoid the mishap.

As I read the evidence, and I have read it very carefully, the driver acted with good judgment, in the second or two between the time the boy fell and the truck came in contact with him. We have as against that the evidence of the boy and three other witnesses. McIntyre says that he did not see the truck or the boy until the truck had come in contact with him. Legate says the same thing. The evidence of these two witnesses has no bearing on the crucial question in the case. Thomas, a conductor of a street-car standing some 50 or 60 feet away when the accident occurred, is not sure of anything. The plaintiff is a bright boy, a messenger boy, but he makes some very reckless statements in regard to distances and time, while on the other hand the evidence of the driver is that of a man apparently careful in his statements of distances and time. The boy on his examination for discovery says, "That after I fell I was on the street about two minutes before the car struck me." That cannot be so, and the absurdity of it was realized when he came to give his evidence at the trial. Then he put it at about half a minute. That is equally absurd, because the motor-truck would have travelled, going at the rate it was going, 200 feet in half a minute. He speaks of half a minute when a second or two is meant. One has to take his statements with a grain of salt. On his examination for discovery he says that another motor-car which was coming behind him in the same direction was half a block behind him. On the trial he says it was 50 feet behind him. There again there is the difference between half a block and 50 feet, probably 50 feet was correct. It shews want of care in making statements, not necessarily dishonesty. It shews want of capacity to judge distances and time. In the face of this evidence we have the very clear statement of the man who saw the whole situation, the man who was watching it, fearing that something might happen, and who could tell without reference to the plan or to the rails or anything of that kind how far the boy was in front of him, and he says that when the boy fell about 8 feet in front of him he put on his brakes and did everything possible

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to avoid the accident. I am quite well aware that it is a delicate thing to interfere with the judgment of the trial judge who has seen the witnesses, where there is any conflict which reflects upon the credibility of the witnesses, but here there is really no question of credibility or dishonesty involved. It is a matter of judgment and after reading the evidence, as I did after adjournment last night, I am thoroughly convinced that the learned trial judge was entirely wrong.

GALLIHER, J.A.: I would dismiss the appeal. What brings me to a conclusion in upholding the judgment in the boy's favour is shortly this: The boy in his evidence says he was riding along Hastings Street, about 3 feet from the curb. That is quite reasonable, that would be the proper place for the boy to be riding. Then he started to cross, directly across. It would also be reasonable to suppose, having only some 80 or 100 feet to go, that he would not swerve out much, and that pretty well fixes the boy where it shews him at the figure 5, but even assuming that the boy did swerve a little to the north, it would bring him where another witness shews him at the point 2, a little further north of where the other witness shews him. Taking the evidence of the motor-man, I mean the street railway motor-man, that the front wheels appeared to be crossing the southerly rail of the street railway track on Hastings Street, you would get a distance within which the motor-man himself admits he could have easily stopped his car, after the boy fell. Or taking the evidence of the driver of the car himself, that he was crossing the track, his hind wheels were over, that would give him 14 feet, which is the length of the truck, I understand; his hind wheels had passed over the southerly rail, allowing that 14 feet, and allowing the furthest point north that has been attempted to be fixed by witnesses for the plaintiff as the boy's position, the driver would still, according to his own admission, have ample time to stop the car before it reached the boy. I agree with what the Chief Justice has said as to disturbing the finding of the Court below, and the trial judge having decided in favour of the plaintiff, I do not feel that we would be justified in reversing that finding.

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MCPHILLIPS, J.A.: I would dismiss the appeal. The learned judge had sufficient evidence before him on which he could have rightly and properly arrived at the conclusion he did. Were I to express any opinion in detail on the evidence, I think that, shortly, it might be said to be this: Primarily we have non-compliance with a provision of the Motor-traffic Regulation Act (R.S.B.C. 1911, Cap. 169), the horn has to be sounded where reasonably necessary. I think, under the circumstances of this case, that the driver ought reasonably to have sounded the horn, that it was reasonably necessary to sound the horn, and the horn was not sounded, and it was all the more necessary in this particular case from this point of view: he was about to go up Cambie Street, and looking at it from that point of view, what intimation would the boy have that the motor was about to go up Cambie Street? The driver of the motor-truck about to go up Cambie Street (which has an up grade) went into second gear to enable him to get up speed and power to surmount the grade, and it is fair to assume that if the horn had been sounded that it would have been something to call the boy's attention to the fact that the motor-truck was going up Cambie Street. However, quite apart from that, there is ample evidence upon which the learned trial judge could have found as he did; there was time within which the driver of the motor-truck, if he had exercised reasonable care, could have avoided injuring the boy, and while that evidence is there it would be difficult, in fact impossible, to say that the learned judge arrived at a wrong conclusion. I must say, in my opinion, the learned trial judge arrived at the right conclusion.

EBERTS, J.A.

EBERTS, J.A.: I am of opinion that the verdict should not be disturbed. The facts have been gone into very clearly before this Court. It seems that the driver of this van was coming along the north side of Hastings Street and proposed turning up Cambie Street, going southerly from Hastings Street, and it appears that one of the men who were on Cambie Street yelled out to him to look out, when he was just crossing the south rail of the Hastings Street track. If that is so, that he was just crossing the south rail of the track at that time, he had lots of

opportunity to see the boy and to avoid injuring him. It is admitted that he did not sound his horn. There is one thing I feel very strongly about and that is, with reference to these drivers sounding their horns at the intersection of the sections of these streets, particularly at the intersection of such streets as Hastings Street and Cambie Street. Many people have been killed through this neglect, and only the other day a terrible accident occurred in the City of Victoria. It would appear that this driver was very careful of protecting his own skin. I am strongly of the opinion that it was a case of great negligence, of gross negligence on behalf of the driver. It may be that he is a man of 40 years of age and that he had never had an accident before, but there is a portion of his evidence which shews negligence, in my opinion. He said that the boy saw him and that he saw the boy. If he saw the boy when he was coming down Hastings Street, when he was intending to turn and go up Cambie Street, he should have done something to warn the boy that he was going to turn, that he was going up Cambie Street, so that the boy would have some intimation that he was going up Cambie Street. He should have sounded his horn. He did not sound his horn, and, therefore, I think that he is guilty of negligence, as I have already said.

EBERTS, J.A.

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

Solicitor for appellant: *W. D. Gillespie.*
Solicitor for respondent: *A. R. Creagh.*

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Dec. 18.

THE CHILLIWACK EVAPORATING & PACKING COMPANY, LIMITED v. CHUNG.

Appeal—Jurisdiction—Interlocutory order—Notice out of time.

CHILLIWACK EVAPORATING & PACKING CO. v. CHUNG

Judgment having been entered by default and damages ordered to be assessed, the plaintiff gave notice of the date upon which the damages were to be assessed. On the hearing the defendant moved to set aside the judgment and that he be allowed in to defend. This motion was dismissed, and the damages were then assessed and final judgment entered. Thirty-five days later the defendant gave notice of appeal, both from the final judgment and from the order refusing to re-open the case. On the hearing of the appeal respondent raised the preliminary objection that the order refusing to re-open was interlocutory; that the notice of appeal was therefore out of time and the appeal should be dismissed.

Held, that the order refusing to re-open the case being an interlocutory order, the notice of appeal was out of time, and the appeal should be dismissed.

APPEAL by defendant from the decision of HOWAY, Co. J., of the 9th of May, 1917, in an action for damages owing to the defendant not carrying out an agreement to supply the plaintiff with 20 tons of potatoes at $51.50 per ton. No dispute note was entered, and on the 24th of April interlocutory judgment was signed. Notice was given on the same day to the defendant that damages would be assessed at Chilliwack on the 9th of May, 1917. On that day counsel for the defendant appeared on the hearing and applied to set aside the interlocutory judgment and that leave be granted to enter a dispute note, which was refused. The damages were then assessed at $240 and $40.50 costs, for which judgment was entered. On the 13th of June the defendant entered an appeal from the final judgment of the 9th of May, and from the dismissal of the motion on the same date to set aside the interlocutory judgment and grant leave to enter a dispute note. On the appeal preliminary objection was taken that the appeal was late as to the refusal of the application to enter a dispute note and to set aside the interlocutory judgment.

Statement

The appeal was argued at Vancouver on the 10th and 14th of December, 1917, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Bloomfield, for appellant.

R. M. Macdonald, for respondent, raised the preliminary objection that the appeal was out of time. Judgment was signed (the defendant being in default) on the 24th of April and notice was given for assessment of damages on the 9th of May, when counsel for defendant moved to set aside the judgment of the 24th of April, and that he be allowed to file a dispute note. This was refused. The damages were then assessed and final judgment entered. The notice of appeal given on the 13th of June was double-barrelled: first, from the final judgment; and secondly, from the refusal to set aside the judgment of the 24th of April and to be allowed in to defend. The order refusing leave to be allowed in to defend is interlocutory, and the appeal is therefore out of time: see *O'Donnell* v. *Guinane* (1897), 28 Ont. 389; *Salaman* v. *Warner* (1891), 1 Q.B. 734. The damages had to be assessed subsequently: see *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Company* (1891), 19 S.C.R. 434; *In re Jerome* (1907), 2 Ch. 145; *Grieve* v. *Tasker* (1905), 75 L.J., P.C. 12; *Crown Life Insurance Co.* v. *Skinner* (1911), 44 S.C.R. 616.

Argument

Bloomfield, contra: When the order determines the rights of the parties it is final: see *Laursen* v. *McKinnon* (1913), 18 B.C. 10 at p. 15; *Attorney-General* v. *Great Eastern Ry. Co.* (1879), 27 W.R. 759; *Voight* v. *Orth* (1903), 5 O.L.R. 443. A judgment directing that damages be assessed is a final judgment: see *McDonald* v. *Belcher* (1904), A.C. 429. In the case of *Bozson* v. *Altrincham Urban Council* (1903), 1 K.B. 547 the judgment in *Salaman* v. *Warner* (1891), 1 Q.B. 734 is questioned.

Macdonald, in reply: Notwithstanding the *Bozson* case, *Salaman* v. *Warner* is adopted by the Courts. In the case of *Voight* v. *Orth* (1903), 5 O.L.R. 443, the motion was to set aside the judgment as irregular, which is a different case, and

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McDonald v. *Belcher* is different, as the specific cause of action was finally dealt with: see also *Smith* v. *Davies* (1886), 31 Ch. D. 595; *Whistler* v. *Hancock* (1878), 3 Q.B.D. 83; *Atwood* v. *Chichester, ib.*, 722; *Isaacs & Sons* v. *Salbstein* (1916), 2 K.B. 139.

Cur. adv. vult.

18th December, 1917.

MARTIN, J.A. (oral): In this matter we reserved judgment on the preliminary objection, and we have considered the matter carefully during adjournment and have examined a great many other cases than those which were referred to, and we are of the opinion that the preliminary objection must be sustained on this interlocutory order. We were so fortunate, I might say, without going into other cases, to have the decision of the Supreme Court of Canada which precisely embodies the principle that we anticipated would be found to exist if the matter had been carefully looked into by counsel. I refer to the case of *Gladwin* v. *Cummings* (1883) in Cassels's Digest, 1893, p. 426, an appeal from the Supreme Court of Nova Scotia, to be found in 16 N.S. 168. The recent case also of *O'Donohoe* v. *Bourne* before the Supreme Court in (1897), 27 S.C.R. 654 follows the same reasoning; and the difference between the practice in Ontario on the point and the practice here, as adopted by the Supreme Court of Canada, which we, of course, in this Province follow, is fully set out by the Divisional Court of Ontario in the case of *F. J. Castle Co. Ltd.* v. *Kouri* (1909), 18 O.L.R. 462; 14 O.W.R. 125. I have prepared a written judgment on the point, in view of the practical importance of it, but we all agree in the meantime. The appeal is dismissed.

MARTIN, J.A.

GALLIHER, J.A. (oral): I have only to say, in case there is any misconception about the result of the judgment in *Laursen* v. *McKinnon* (1913), 18 B.C. 10, I have taken the trouble to look into that case carefully. The effect of the judgment on the point in *Laursen* v. *McKinnon* is that it is an interlocutory judgment. There is no question of that when one understands the application that was made there, and the effect of it. Mr. Justice IRVING's judgment, if carefully read (he dissented in

GALLIHER, J.A.

that) discloses that it was a question with him whether there had been any judgment at all, that is, that the trial was not continuing on; and there is where the distinction comes in. This judgment was interlocutory.

McPHILLIPS, J.A.: I agree.

Solicitor for appellant: *Edgar Bloomfield.*
Solicitor for respondent: *John Ewen.*

SCOTTISH TEMPERANCE LIFE ASSURANCE COMPANY LIMITED v. JOHNSON.

Mortgage—Acceleration clause—Interest—Due and payable on certain day—Default—Right of action for principal on following day.

Where an instalment of interest on a mortgage becomes due and payable on a certain day, and there is a clause in the mortgage that in default of payment of interest the whole of the moneys thereby secured become due and payable in case of default, an action to enforce payment of the principal and interest may be commenced on the following day.

APPEAL by defendant from the decision of MORRISON, J., of the 8th of February, 1917, in an action for principal and interest due on a mortgage dated the 1st of May, 1914, the principal to become due and payable on the 1st of May, 1917, with interest at 8 per cent. payable quarterly on the 1st of August, November, February and May in each year. The mortgage contained a proviso that in case default should be made in payment of any portion of the moneys the whole of the moneys thereby secured should immediately become due and payable. A balance of $209.65 interest was due and payable on the 1st of November, 1915. The plaintiff had sued in the

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County Court and obtained judgment on the 14th of October, 1915, for the first three instalments of interest. The writ was issued in this action on the 2nd of November, 1915, for the principal and all interest due, including the fourth quarterly instalment which was due and payable on the 1st of November, 1915. The plaintiff withdrew his claim for interest at the trial and judgment was signed for the amount of the principal only. The defendant appealed mainly on the ground that the plaintiff was premature in bringing the action.

The appeal was argued at Vancouver on the 7th of May, 1917, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Argument

A. D. Taylor, K.C., for appellant: Judgment had been obtained for three instalments of interest in the County Court. The fourth gale of interest was due on the 1st of November, 1915, and they commenced action for principal (there being an acceleration clause in the mortgage) and interest on the next day (2nd November). My contention is that they were premature in their action. They were only entitled to take advantage of the acceleration clause after default. There was no default until the 2nd of November, and defendant had all that day in which to pay. They could not, therefore, bring action until the 3rd of November. The action included the interest due on the first three payments, for which judgment had already been obtained in the County Court. In support of the question of election in suing for interest see *Seal* v. *Gimson* (1914), 110 L.T. 583; *Scarf* v. *Jardine* (1882), 7 App. Cas. 345; *In re Taaffe's Estate* (1864), 14 Ir. Ch. R. 347; *Lord Bagot* v. *Williams* (1824), 3 B. & C. 235; *Stewart* v. *Todd* (1846), 9 Q.B. 767; Halsbury's Laws of England, Vol. 13, p. 334.

Sir C. H. Tupper, K.C., for respondent: The interest was due on the 1st of October. On the following day defendant was in default and immediately subject to action: see *Leeds and Hanley Theatre of Varieties* v. *Broadbent* (1898), 1 Ch. 343 at p. 348; *Bolton* v. *Buckenham* (1891), 1 Q.B. 278; *Gelmini* v. *Moriggia* (1913), 2 K.B. 549 at p. 552; *Canada Settlers' Loan Co.* v. *Nicholles* (1896), 5 B.C. 41; *Edwards* v. *Martin* (1856), 25 L.J., Ch. 284; Halsbury's Laws of England,

Vol. 1, p. 244, par. 435, and p. 268, par. 474. In regard to merger, there was no merger here as there was no such agreement. Merger is controlled by agreement: see Fisher on Mortgages, 6th Ed., p. 796, par. 1560; *In re European Central Railway Co.* (1876), 4 Ch. D. 33 at pp. 35-6; *Popple* v. *Sylvester* (1882), 22 Ch. D. 98; *Commissioner of Stamps* v. *Hope* (1891), A.C. 476; *Economic Life Assurance Society* v. *Usborne* (1902), A.C. 147 at pp. 152-3; *Arbuthnot* v. *Bunsilall* (1890), 62 L.T. 234. As to interest paid after due date see *Williams* v. *Morgan* (1906), 1 Ch. 804; *Keene* v. *Biscoe* (1878), 8 Ch. D. 201.

Argument

Taylor, in reply: On question of accepting interest after it is due constituting waiver see *Langridge* v. *Payne* (1862), 2 J. & H. 423. As to action being premature see *Kennedy* v. *Thomas* (1894), 2 Q.B. 759.

Cur. adv. vult.

21st December, 1917.

MACDONALD, C.J.A.: Taking for granted that the election to take judgment in the County Court for the three instalments of interest sued for in that Court would preclude plaintiff from relying upon default in payment of those instalments to accelerate the due date of the principal, there is nevertheless the subsequent instalment which fell due on the 1st of November to be considered.

The action was commenced on the 2nd of November. Mr. *A. D. Taylor* contends that default cannot be said to have been made until after the last moment of time of the 1st of November, and that therefore defendant was not in default until the 2nd of November, and that it was only after default that the principal could become due under that clause, from which he argued that action before the 3rd of November was premature. The language of the acceleration clause is "on default" not "after default," although I do not decide that if the language was after default that would make any difference. I think defendant was in default immediately after the expiry of the date fixed for payment, namely, the 1st of November, and that on the 2nd of November plaintiff was entitled to elect to take advantage of that default and commence its action for the

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principal sum, as well as for the interest which then fell due. Recovery of judgment for the amount of the prior instalments was no more a waiver of the right to take advantage of the acceleration clause than was the acceptance of payments from time to time voluntarily made. It was the default in payment of the instalment due on the 1st of November which gave defendant the right to take advantage of the clause.

There is an appeal also against the dismissal of the counter-claim. There is, however, no evidence to support the counter-claim. I cannot assume that plaintiff disregarded the judgment of this Court by maintaining a receivership which ended with that judgment. I must assume that thereafter the receiver was acting for the plaintiff as mortgagee in possession, a position it was entitled to take under the terms of the mortgage.

The appeal should be dismissed.

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MARTIN, J.A. MARTIN, J.A. dismissed the appeal.

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

Appeal dismissed.

Solicitor for appellant: *J. E. Jeremy.*
Solicitors for respondent: *Tupper & Bull.*

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Trial—Jury—Charge—Misdirection—Appeal—Charge to be considered as a whole—Contract—Mental condition of party—Misrepresentation—Consistency of defence.

On the question of misdirection in the judge's charge it is the duty of the Court of Appeal to consider the charge as a whole and unless there is a substantial misdirection or an element tending to mislead or confuse there is no ground for a new trial.

A trust company brought action against an executor for the amount of calls upon shares held by the testator in the company. The defences were that the testator was mentally incompetent to contract when he purchased the shares and that he was induced to buy through misrepresentation. The judge in his charge said "either of these defences may be true, but they cannot both be true. If he were mentally incompetent, then the question of misrepresentation would not arise at all, but in order that a misrepresentation could be made to him and be effective to enable his executors to get out of the contract you must first start with the proposition that he was capable of making a contract." There was a general verdict for the plaintiff. The defendant appealed mainly on the ground of misdirection.

Held, on appeal (MACDONALD, C.J.A. dissenting), that reading the charge as a whole, no ground has been shewn why the verdict should be set aside and a new trial ordered.

APPEAL by defendants from the decision of MURPHY, J., of the 13th of December, 1916. The action was to recover calls upon shares, applied for by George R. Ashwell, deceased. He applied five times for shares, *i.e.*, on the 15th of October, 1909, for 25 shares (par value $100) at $110; on the 24th of December, 1909, for 75 shares at $115; on the 26th of October, 1910, for 100 shares at $120; on the 14th of March, 1911, for 100 shares at $125; and on the 29th of June, 1911, for 100 shares at $125 a share. Mr. Ashwell died in December, 1913, at the age of 83. Two defences were set up: (1), that his mental condition at the time was such as to make him incompetent to contract, and (2), that he was induced to invest in the stock owing to the misrepresentation of the officers of the plaintiff Company. The jury found he was competent to

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contract and that there was no misrepresentation. The executors of the Ashwell estate appealed mainly on the ground that the learned judge had misdirected the jury.

The appeal was argued at Vancouver on the 27th and 30th of April, 1917, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

C. W. Craig, for appellants: Mr. Ashwell died in December, 1913, when 83 years old. He made five applications for shares between October, 1909, and June, 1911, involving about $48,000. The evidence shews that from and after 1907 his condition was such that he was not capable of making himself liable on a contract, and from the time he first applied for shares the plaintiffs knew of his incompetence. We say he was induced to apply for shares through misrepresentation by the plaintiff. At the time Ashwell was first induced to apply for shares the officers of the Company represented that it was a trust Company and that the profits amounted to large sums for two years, whereas, in fact, no trust business was done and all the profits were from real estate speculation. A prospectus issued in 1909, did not disclose the true facts. Liability for misrepresentation in a prospectus is continuing: see *Andrews* v. *Mockford* (1896), 1 Q.B. 372. The prospectus should contain the whole enterprise: see *Arkwright* v. *Newbold* (1880), 49 L.J., Ch. 684, and the suppression of a fact may amount to misrepresentation: see *Directors, &c. of Central Railway Co. of Venezuela* v. *Kisch* (1867), L.R. 2 H.L. 99; *New Brunswick and Canada Railway, &c. Company* v. *Muggeridge* (1860), 1 Dr. & Sm. 363; *In re London and Leeds Bank; Ex parte Carling* (1887), 56 L.J., Ch. 321; *Ross* v. *Estates Investment Company* (1868), 3 Chy. App. 682. As to the judge's charge, the jury were directed that if they thought Ashwell incompetent he would not then be affected by misrepresentation, but the submission is, any material misrepresentation in such case would invalidate the contract. As to what is the test of incapacity see *Cooke* v. *Clayworth* (1811), 18 Ves. 12; *Allore* v. *Jewell* (1876), 94 U.S. 506; *Imperial Loan Co.* v. *Stone* (1892), 1 Q.B. 599; *Ball* v. *Mannin* (1829), 1 Dow & Cl.

Argument

380; 4 E.R. 1241; *Osmond* v. *Fitzroy* (1731), 3 P. Wms. 129; American & English Encyclopædia of Law, 2nd Ed., Vol. 16, pp. 624-5.

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S. S. Taylor, K.C., for respondent: The Company was not advertised as a trust company *solus,* although a trust company its operations included other business, of which real estate was one. There is nothing in the evidence to shew that any untruthful statement was made to this man and the burden is on the defendants. This man was doing business with the Company for four years irrespectively of any papers (including the prospectuses) he had in his possession. As to the misrepresentation being the inducing cause see Leake on Contracts, 6th Ed., 251; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187 at p. 196.

Argument

Craig, in reply.

Cur. adv. vult.

21st December, 1917.

MACDONALD, C.J.A.: The action is for calls on shares. The defences set up were that the contracts with the deceased, whose executors are being sued, were (a) void for the reason that at the time they were entered into the deceased was mentally incompetent to enter into them, to the knowledge of the plaintiff; and (b) that the deceased was induced to enter into them by false representations made to him by plaintiff's agents. Briefly stated, the alleged false representation was that the Company was a trust company, carrying on business and making large profits as such, whereas in reality it was contended its business was that of a speculator in real estate.

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Deceased was solicited in December, 1909, by Mr. Donelly, the president of the plaintiff Company, and by Mr. Arnold, an agent of said Company, and at that time subscribed for some shares. He subsequently subscribed for other shares, but the representations complained of were made at the time of the December transaction. Arnold had shewn deceased the Company's prospectus. Donelly was asked what line of persuasion he took with deceased, and in answer said: "It would be along the general lines of a trust company and the profits to be made in the business." The prospectus contained quotations, from

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a trade journal, of statements shewing the profits made by three trust companies therein named, and this was relied upon also as a representation that the plaintiff was a trust company. While by its memorandum of association the plaintiff took powers to act as trustee, yet the business actually carried on was almost entirely that of real estate speculation, and the handsome profits which were mentioned in the plaintiff's balance sheet in 1909 and subsequent years, shewn to deceased, were made in such speculation, and not one dollar in trust business. One may ask why in these circumstances the profits to be made by trust companies should be so strongly emphasized in the prospectus, and why the deceased was solicited along general lines of trust companies, unless it was to induce him to believe that the shares offered were the shares of a company whose principal business, at least, was of that kind? In my opinion, there was some evidence for a jury to consider on the question of misrepresentation.

Now, the appellants complain of misdirection in respect of this defence of misrepresentation. The learned judge told the jury that if the deceased "were mentally incompetent then the question of misrepresentation would not arise at all." If this be an incorrect statement of the law, then there was misdirection. The proposition amounts to this: that if A by misrepresentation induce a sane man to enter into a contract, the victim may have redress; but if A by like misrepresentation induce an insane man, not knowing him to be so, to execute a contract, the victim can have no redress. The contract, it is argued, cannot be set aside on the ground of insanity because the other contracting party was not aware of the insanity, and it cannot be set aside on the ground that it was procured by false representation, because only a person having a mind sound enough to understand the terms of the contract could understand an inducement, or could do an act relying on the inducement; that comprehension of an inducement and reliance upon it presupposes mental capacity to understand all the terms of a contract. I do not think so. The feeble-minded are often easily led or misled. Mental incompetency to contract does not presuppose entire absence of understanding, but only the absence

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of that power of concentration of thought necessary to a proper comprehension of the whole contract.

The other substantial ground of appeal rests on the contention that the judge was in error in admitting evidence concerning the subsequent registration of the plaintiff as a trust company under the Trust Companies Act (B.C. Stats. 1914, Cap. 13). Objection was taken to this evidence, but the objection was overruled. To my mind the evidence, which extends over several pages, is irrelevant. It could have no other purpose than to lead the jury to the conclusion that after all said and done the Company was a very good one, which had promptly secured registration under the Act and might really be considered from its inception to have been a genuine trust company. The witness was enabled to give the Company a very favourable certificate of character under the guise of explaining the law as it was before the Trust Companies Act and as it was thereby changed. What effect this had on the jury is a matter of conjecture only, but I think it may have influenced their verdict. It may have diverted their minds from the broad question—was the Company represented to deceased as a company earning large dividends in the conservative lines of business usually associated with trust companies, to the technical and comparatively unimportant question of its nominal powers? If this evidence was, as I think it was, calculated to affect the minds of the jury on the issue of misrepresentation, it then was prejudicial to the defendants, not only in case the jury should come to the conclusion that deceased was incompetent to enter into the contract, but as well if they came to the conclusion that he was competent. Now, if they followed the instruction of the learned judge they would consider the issue of misrepresentation only if they found deceased to have been sane. It was strongly urged by respondent's counsel that there was no legal evidence of insanity; that if the jury had found deceased insane, their verdict could not be permitted to stand. We were asked to infer that the jury must have found against the defence of insanity, and that if they did they necessarily, in view of their verdict for the plaintiff, rejected the defence of misrepresentation. If

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that be so, it may be that the jury were influenced thereto by the evidence which ought to have been excluded.

In my opinion, there should be a new trial.

MARTIN, J.A. dismissed the appeal.

MCPHILLIPS, J.A.: I remain of the opinion that I formed upon the argument, and that is that the appeal should be dismissed. The trial of the action, one for calls due upon shares held by the late George Randall Ashwell in the Canadian Financiers Trust Company, was had before Mr. Justice MURPHY with a special jury, the verdict being a general verdict for the plaintiff (respondent).

The learned counsel for the appellants in his very able argument at the bar, submitted that the evidence disclosed incompetency upon the part of the late George Randall Ashwell, and that the verdict of the jury could not stand, and that that was his case, at the same time frankly stating that he did not contend that there was no evidence of competency, but that the verdict for the plaintiff was not upon the evidence a verdict that a jury acting reasonably could find. Some exception was taken to the charge of the learned trial judge, but when it is looked at and the course of the trial is considered, and what were the submissions of counsel at the time the case was given to the jury (see *Weiser* v. *Segar* (1904), 117 L.T. Jo. 8; *Nevill* v. *Fine Art and General Insurance Company* (1896), 66 L.J., Q.B. 195; (1897), A.C. 68; *Seaton* v. *Burnand* (1900), A.C. 135; 69 L.J., Q.B. 409) I cannot persuade myself that any error in law took place. That portion of the charge now taken exception to and strongly pressed at the bar, but apparently not objected to at the trial, reads as follows:

"The first one is that Mr. Ashwell was mentally incompetent, that he could not make any bargain that would be enforceable by the Courts. The other is that he was mentally competent, but that he was misled. Now, one or other of those defences may be true, but they cannot both be true. If he were mentally incompetent, then the question of misrepresentation would not arise at all, but in order that a misrepresentation could be made to him and be effective to enable his executors to get out of the contract, you must first start with the proposition that he was capable of making a contract. Either one of the defences, if established, remembering that the onus is on the defendant to establish them, is an answer to the

action, unless some provision that the law requires has not been complied with. In this instance, the only provision of that kind, as I will explain to you shortly, is that a man must act promptly when he finds out a misrepresentation."

I am unable to find any error in law in the proposition as put to the jury by the learned trial judge. It is remarking upon two inconsistent defences. Further, the charge cannot be read in any segregated form, it must be read as a whole. In *Blue & Deschamps* v. *Red Mountain Railway* (1909), 78 L.J., P.C. 107, Lord Shaw, who delivered the judgment of their Lordships, said at p. 110:

"Taking these sentences in immediate context together, it seems impossible to maintain that there was the misdirection suggested, and their Lordships do not think it legitimate, in considering a judge's charge to a jury, to separate a single sentence in the manner suggested, unless such sentence in fact dominated the reasoning upon which that portion of the charge was founded. Misdirection, to be a ground of new trial, must be substantial misdirection."

Also see Lord Reading, C.J. in *Rex* v. *Grubb* (1915), 31 T.L.R. 429 at p. 431, the charge is to be "viewed as a whole and without too minute an examination of the language." In *G. T. Ry. Co.* v. *Hainer* (1905), 36 S.C.R. 180 at p. 187 Sir Louis Davies, J. said:

"Then with respect to the judge's charge, as to which exception has been taken, I have read it most carefully and I am bound to say that taking it as a whole, as we are bound to do, I do not think it open to serious objection."

MCPHILLIPS, J.A.

I feel that in the present case I am free to adopt the language of Sir Louis Davies. It is indeed fitting language with which to dispose of the contention that there was misdirection. *Cooke* v. *Clayworth* (1811), 18 Ves. 12 (11 R.R. 137) was referred to as well as *Imperial Loan Co.* v. *Stone* (1892), 1 Q.B. 599; 61 L.J., Q.B. 449. The first case was one where intoxication was set up and upon that ground it was attempted to get rid of the agreement; the second case was one in which insanity was set up. In the first case the Master of the Rolls (Sir William Grant), at p. 16, said:

"After a very attentive consideration of the evidence in this case I can find no ground, on which upon the supposed state of intoxication of the plaintiff the Court could be warranted in decreeing this deed or agreement to be delivered up to be cancelled. There is a contrariety of evidence as to the fact of intoxication, upon which it is not easy for this Court to decide. There are three witnesses, who all swear, that at the time of execution the

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plaintiff was perfectly sober and capable of business: Marshall indeed says, he was as capable of transacting business to any extent as ever he was in his life. Whatever difficulty I may have in believing this after all the other evidence, that has been produced, I should hesitate to determine a fact, so controverted, without the intervention of a jury."

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In the second case Lord Esher, M.R. said (61 L.J., Q.B. 449) at p. 451:

"I take the law of England to be that when a person enters into a contract (by contract, I mean a contract in the ordinary sense of the word), and afterwards alleges and proves that he was so insane at the time that he did not, and could not, know what he was doing, the contract, whether it be executed or executory, is as binding upon him, and to the same extent, as if he had been perfectly sane at the time, unless he can prove that the party who is endeavouring to enforce the contract knew at the time the contract was made that he was insane, and so insane as not to know what he was about. It seems to me that this is shewn to be the law by the fact, which can hardly be doubted, that for a great number of years it has been necessary to plead, and the plea would not be good unless it went on to allege that the plaintiff knew of the defendant's insanity at the time of the contract. It would not be necessary so to plead unless the law was as I have stated. The law is proved by the form of the plea, and I desire to lay it down in the fullest terms. If that be so, it lies on the defendant here to prove, not only his insanity, but that the plaintiff knew of it at the time of the contract."

MCPHILLIPS, J.A.

Turning to the evidence in the present case, I must say, and I do so with great deference to the argument of the learned counsel for the appellant, who relies upon these cases and the principle laid down therein, that no sufficient evidence was adduced or led at the trial to at all support a holding that the late George Randall Ashwell was incompetent of contracting and that such incapacity was known to the respondent (see Stephen's Digest of Law of Evidence, Art. 49; *Lovatt* v. *Tribe* (1862), 3 F. & F. 9; and see *Martin* v. *Johnston* (1858), 1 F. & F. 122; Lord Cottenham, L.C. in *In re Dyce Sombre* (1849), 1 Mac. & G. 116, 128; *Tatham* v. *Wright* (1831), 2 Russ. & M. 1, *per* Tindal, C.J. at p. 20; *Towart* v. *Sellars* (1817), 5 Dow. 231). Here we have the intervention of a special jury; the trial extends over five days; the case was one eminently fitted for disposition upon the facts by a jury, and the jury gave a general verdict for the respondent. It is strongly impressed upon me that the case is not one which admits of a Court of Appeal taking a different view. The effect of a general verdict is dealt with in *Newberry* v. *Bristol Tramway and*

Carriage Company (Limited) (1912), 29 T.L.R. 177. At p. 179 the Master of the Rolls (Lord Cozens-Hardy) said:

"Now if the jury had simply given a general verdict . . . . they could not have interfered. But they had told the Court what they meant by their verdict."

It is clear that the respondent is entitled to say that having a general verdict in its favour, all material issues have been found in its favour by the jury. This being the case it is futile to contend now that there was incompetency or incapacity to contract. The further defence that there was fraud and misrepresentation also fails of being given effect to, in the face of the general verdict, as the verdict of the jury must be held to directly negative this defence also. The present case is one in which, in my opinion, the questions of fact were properly submitted to the jury and they have answered them by the general verdict reasonably. That being so, it is not a case warranting the disturbance of that verdict. The principle upon which a verdict of a jury will be reviewed, set aside and a new trial ordered, was given consideration in *Jones* v. *Spencer* (1897), 77 L.T. 536, and see *per* Lord Herschell at p. 538.

The evidence in the present case well warranted the holding of competency to contract and that there was no fraud or misrepresentation; the statutory powers of the Company amply covered the operations of the Company; the prospectus and reports in no way constituted fraud or misrepresentation. Knowledge of the statutory powers of the Company (see *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; Jessel, M.R.; *Griffith* v. *Paget* (1877), 6 Ch. D. 511; *Oakbank Oil Company* v. *Crum* (1882), 8 App. Cas. 65 at p. 71; *Owen and Ashworth's Claim* (1901), 1 Ch. 115) must be imputed to the late George Randall Ashwell, and it is impossible to contend that the representation was that the Company was a trust company only or that its business was essentially a trust business. The Company may properly be described as a trading company with many and varied powers, and these powers were all set out in public documents, the memorandum and articles of association, accessible to all persons caring to inform themselves. I do not propose to analyze the evidence at length. It is in its nature ample to support the jury in finding

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as they have—a general verdict for the respondent. Nor do I consider that any prejudice or miscarriage took place in the learned judge admitting evidence relative to the Trust Companies Act (B.C. Stats. 1914, Cap. 13). Undoubtedly this legislation came long after the contractual relationship was created—the subject-matter of the action—yet it might be said to be relevant in this way, that the Company complied with the requirements of this statute, and that it was corroborative of the representation made that the Company was in a sound financial condition, being capable of making the required deposit, which was of a very substantial nature, and indicating the worth and solvency of the Company, and that its powers as a trust company were confirmed. Upon the whole, and giving careful consideration to all the points so forcefully and ably presented by the learned counsel for the appellants, I cannot arrive at any other conclusion than the one which I think I have already well indicated, that the case was properly submitted to the jury and that no miscarriage took place. Reverting again to the position of the Court of Appeal in a case such as the one now before us, I would refer to *McArthur* v. *Dominion Cartridge Co.* (1904), 74 L.J., P.C. 30. Lord Macnaghten at p. 31 said:

"In Quebec, when an unsuccessful party, after verdict, moves for judgment or a new trial, the function of the Court under the Civil Procedure Code is the same as the function of a Court of Appeal in this country in similar circumstances. It is not the province of the Court to re-try the question. The Court is not a Court of Review for that purpose. The verdict must stand if it is one which the jury, as reasonable men, having regard to the evidence before them, might have found, even though a different result would have been more satisfactory in the opinion of the trial judge and the Court of Appeal."

MCPHILLIPS, J.A.

(Also see *Toronto Power Company, Limited* v. *Paskwan* (1915), A.C. 734, Sir Arthur Channell at p. 739). In *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 the Lord Chancellor (Lord Loreburn) at p. 697 said:

"To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some plain error of law, which the Court believes has affected the verdict, or some plain miscarriage, before it can be disturbed. I see nothing of the kind here. On the contrary, it seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion."

There being sufficient evidence to support the verdict and no error in law, it follows that the verdict of the jury in the present case should not be disturbed. The province of the Court of Appeal came under review by the Supreme Court of Canada in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 (see head-note):

"It should not undertake the functions of a jury where it may be reasonably open to them to come to more than one conclusion on the evidence."

Mr. Justice Duff, at p. 53, said:

"By the law of British Columbia, the Court of Appeal in that Province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence. The power given by Order 58, r. 4, 'to draw inferences of fact . . . . and to make such further or other order as the case may require,' enables the Court of Appeal to give judgment for one of the parties in circumstances in which the Court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the Court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff. This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and cautiously; *Paquin Limited* v. *Beauclerk* (1906), A.C. 148 at p. 161; and *Skeate* v. *Slaters (Limited)* [(1914)], 30 T.L.R. 290."

MCPHILLIPS, J.A.

Certainly the present case is not one which admits of the Court of Appeal saying against the general verdict in favour of the respondent that "the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence," and that that view is that the verdict should be set aside and judgment entered for the appellants, or failing that a new trial be directed, which is the submission put forward by the appellants. On the contrary, the evidence well supports the verdict of the constitutional tribunal invoked to determine the facts, and in the absence of error in law the decision of that tribunal must stand.

I would dismiss the appeal.

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

Solicitors for appellants: *Craig & Parkes.*
Solicitor for respondent: *Donald Smith.*

MURPHY, J.
(At Chambers)

1917

Sept. 12.

REX
v.
WITTMAN

REX v. WITTMAN.

Criminal law—Trading in bottles—Name of owner inscribed—Paper labels—Criminal Code, Sec. 490.

Trading in bottles to which are affixed paper labels bearing the name of the owner, is in contravention of section 490 of the Criminal Code.

Statement

APPLICATION by defendant to quash a conviction by the police magistrate for trading in bottles marked with a trade name, contrary to the provisions of section 490 of the Criminal Code, heard by MURPHY, J. at Chambers in Vancouver on the 7th of September, 1917.

Bird, for the application.
Harvey, K.C., contra.

12th September, 1917.

Judgment

MURPHY, J.: In my opinion, the conviction must be sustained. Section 490 uses the words "any bottle which has upon it the . . . name of another person." Section 449 of the Criminal Code (1892), which section 490 replaces, uses the words "blown or stamped or otherwise permanently affixed." As pointed out by Osler, J.A. in *Rex* v. *Irvine* (1905), 9 Can. Cr. Cas. 407 at p. 409, the new section speaks merely of "any bottle or syphon, which has upon it [not saying how this is to appear] the . . . name of another person." According to the same decision, the object of the Legislature was to prevent, as far as possible, the easy commission of the fraud of trading in bottles with the name of another person upon them. It is obvious that if this traffic is allowed in bottles, such as those in question here, they could be refilled by unscrupulous parties and the product sold as the product of the persons whose names are on the labels.

The words "upon it" used in the amended section, I think, strengthens the contention that the language is wide enough to cover paper labels affixed to a bottle.

Conviction sustained.

IN RE PEOPLES' LOAN AND DEPOSIT COMPANY AND DAVIDSON.

MURPHY, J. (At Chambers)

1917

Aug. 29.

IN RE PEOPLES' LOAN AND DEPOSIT CO. AND DAVIDSON

Company law—Winding-up—Books lost—All creditors not notified—Filing of claim after dividend—Effect of—Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 75.

Upon the Peoples' Loan and Deposit Company going into liquidation the liquidator, owing to the books of the Company being lost, was unable to notify all the creditors of the liquidation. In due course a dividend was declared and paid to all the creditors whose claims were filed. Subsequently another creditor filed his claim and made a demand that he be paid *pro rata* on the first dividend before payment of any further dividends.

Held, that he was entitled to rank as an unsecured creditor but that he could only participate in the undistributed assets of the Company.

APPLICATION by James Davidson to rank as an unsecured creditor in the distribution of the assets of the Peoples' Loan and Deposit Company, in liquidation. This Company was ordered to be wound up in 1915, under the Dominion Winding-up Act, and pursuant to the order of the Court a notice was published in the newspapers calling on the creditors to file their claims. The books of the Company had been lost, and the liquidator was unable to send notices to all of the creditors. Subsequently a dividend of 40 per cent. was declared, and paid to all of the creditors who had filed their claims. At a later date one James Davidson, who was a creditor of the Company for the sum of $180, filed his claim with the liquidator, and demanded that the liquidator pay to him his dividend of 40 per cent. before paying to any of the other creditors a further dividend. Heard by MURPHY, J. at Chambers in Vancouver on the 29th of August, 1917.

Statement

R. M. Macdonald, for the application: Notwithstanding the declaration of a dividend, the applicant was entitled to be paid his 40 per cent. before the other creditors were entitled to any further dividend, as under the Winding-up Act no creditor of a company obtained a preference over another of the same class.

Argument

MURPHY, J. (At Chambers)

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Aug. 29.

IN RE PEOPLES' LOAN AND DEPOSIT CO. AND DAVIDSON

Judgment

Arnold, for the liquidator, *contra*: By virtue of section 75 of the Dominion Winding-up Act, the applicant (having failed to file his claim until after a dividend had been declared and paid) was only entitled to rank with the other creditors in any future distribution of the assets.

MURPHY, J. ordered that the applicant be allowed to rank, notwithstanding that his claim was presented and proved after the time fixed for proving claims, but that he shall only participate with the other unsecured creditors *pari passu* in the undistributed assets, and be not allowed out of such undistributed assets before such distribution, the 40 per cent. dividend heretofore paid to the other creditors of the Company.

Application dismissed with costs.

MURPHY, J.

1917

Oct. 2.

HUMPHREY v. WILSON

HUMPHREY v. WILSON *ET AL.*

Conspiracy—Establishment of—Inference—Facts must fairly admit of no other inference.

Lodge—Expulsion—Damages—Rules governing—Right to more than nominal damages.

Costs—Nominal damages—Admissions by defendant—Discretion.

In an action for conspiracy, the plaintiff must prove a design common to the defendant and others to do him damage without just cause or excuse. It must be plainly established, but conspiracy may be arrived at by inference from the proved facts. Such facts must, however, be such that they cannot fairly admit of any other inference being drawn from them.

The foundation for the jurisdiction which a Court exercises to prevent improper expulsion of a club member rests upon the principle that the member may thereby be deprived of his right of property, and the Courts otherwise take no cognizance of expulsions from clubs except in so far as such expulsions may be a breach of contract, in which case the ordinary principles of assessing damages in contract apply. Only nominal damages may therefore be recovered for expulsion from membership in a lodge, where it is shewn that the only injury which the plaintiff suffered therefrom was the depriving her of the right of

access to the lodge room where the lodge meeting and social meetings were held, if such access to the meetings did not confer any pecuniary benefit and no special damages are claimed.

Admissions by letter from the defendant to the plaintiff when filing his defence in an action for damages for expulsion from a lodge should, in order to deprive the plaintiff, if successful, of costs, contain an express consent to payment of costs to that date, that no dues for the period of alleged expulsion would be expected from the plaintiff, and that the defendant would pay nominal damages; but if, upon the receipt of a letter from the defendant admitting nominal damages, the plaintiff continues the action and recovers nominal damages only, she will be deprived of costs from the date of the receipt of the letter.

ACTION for damages for conspiracy and for a declaration that the plaintiff is a member in good standing in the society known as the Ancient Order of Foresters; also for damages for illegal expulsion from said society. Tried by MURPHY, J. at Vancouver on the 19th to the 26th of September, 1917. Statement

J. H. Senkler, K.C., and *Wyness*, for plaintiff.
Ritchie, K.C., and *Dickie*, for defendants.

2nd October, 1917.

MURPHY, J.: Action claiming damages for conspiracy and for a declaration that plaintiff is a member in good standing in the society called the Ancient Order of Foresters and for damages for an attempted illegal expulsion therefrom. Dealing first with the conspiracy action:

"In such a proceeding it is necessary for the plaintiff to prove a design, common to the defendant and to others, to damage plaintiff, without just cause or excuse. That, at all events, it is necessary to prove. Now, a conclusion of that kind is not to be arrived at by a light conjecture; it must be plainly established. It may, like other conclusions, be established as a matter of inference from proved facts, but the point is not whether you can draw that particular inference, but whether the facts are such that they cannot fairly admit of any other inference being drawn from them": The Lord Chancellor in *Sweeney* v. *Coote* (1907), A.C. 221 at p. 222. There is no direct evidence here of such common design. What direct evidence there is expressly denies its existence. The plaintiff, to succeed, therefore, must make out a case by inference from proved facts, and therefore one measuring up to the standard above cited. My finding of fact on what I consider the material controverted allegations bearing on this phase of the case are: The remarks attributed to defend- Judgment

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ant Barclay as being made at the third by-law committee meeting relative to the nature of plaintiff's illness and to how plaintiff might be got before the arbitration committee are not proven to have been made. The charge that plaintiff was spreading reports as to leakage in the lodge funds was made at the lodge meeting, as alleged by defendants' witnesses, and was referred, together with the letters written by her and Mrs. Barclay, to the arbitration committee. Plaintiff was present at said lodge meeting and stated she was ready for the arbitration committee. When that committee convened, plaintiff and her husband objected there was no charge under the rules of the society, and that only the letters could be dealt with. The charge, as made at the lodge meeting, *re* spreading reports of leakage in the funds, was orally repeated. The objection was insisted upon by plaintiff and her husband. The secretary of the district lodge was present and was appealed to for a ruling. He inquired if plaintiff had been present at the lodge meeting when the charge was made and whether she had thereupon expressed her readiness to meet the arbitration committee, and the reply being in the affirmative, ruled that the inquiry should proceed. The defendants, including the defendant Barclay, rightly or wrongly believed he was the proper authority to decide this question and that his decision must be accepted as final. The inquiry went on, and, though somewhat disorderly, the evidence in connection with the leakage charge, and with the letters, was brought out, and the plaintiff's replies and explanations heard. At this stage, when the evidence was all in, plaintiff, who throughout the proceedings had been somewhat excited, lost control of herself and eventually became hysterical and had to be taken home. The arbitrators proceeded to consider their findings, but, the hour being late, had barely entered upon their task when they adjourned to meet the next evening. They then met and decided against the plaintiff and considered what penalty was to be imposed. It was resolved to recommend that she be asked to resign. When this report was presented to the lodge, it was referred back to the committee for more definite action, the plaintiff, in the meantime, having written a letter refusing to resign, and therein

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again reiterating her contention that no charge within the rules was before the arbitration committee. This letter was passed on by the lodge to the committee when the first report was referred back. The committee refused to consider further the point raised by the letter, holding it had already been passed upon by competent authority, and brought in the final report recommending expulsion, which the lodge accepted. These are, I think, the relevant facts in the case of defendant Hassel, other than those dealt with in granting nonsuit against certain other defendants. Dealing, then, with Hassel's case, he was a member and took part in all the proceedings of the arbitration board. Can it be said that the facts, as found, fairly admit of no other inference than that there was a design common to him and others to damage the plaintiff without just cause or excuse? In my opinion, clearly not. The point, so strongly urged, that no proper charge within the rules was before the arbitration committee, in view of the district secretary's ruling, and of the belief of the arbitration board that he was the proper authority to pass upon it, cannot be said to indicate such design to the exclusion of all other inferences. The proceedings, though disorderly, resulted in the charges being investigated in the presence of accused and on her defence being heard. No inference of such design can, I think, be reasonably drawn from these facts. The design must not only be common to defendant and others, but its object must be to damage the plaintiff without just cause or excuse. Even if common design were the only possible inference, do the facts found establish this requirement? If so the decision against the plaintiff, must be the main fact which does so. The plaintiff admits the use of the word "leakage" in reference to the funds. Was the rejection of her explanation a fact admitting of no other inference than the object of the board was to damage her without just cause or excuse? In my opinion, clearly not. The refusal to further consider the point as to the charge being within the rules, in view of the reason found to be true that in his belief the point had already been ruled adversely by the proper authority, cannot justify the requisite inferences. The only fact from which said inferences might

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be drawn is, in my opinion, the grounds set out in the final report as justifying expulsion. If all the other facts were equally equivocal, conceivably the plaintiff's case might have been made out. But, in my view, as above set out, they are clearly not so. I think a reasonable inference from the nature of the final report is that the parties who made it, being laymen, did not fully realize that their duty was to make a direct finding on the charges as laid, but assumed, in their report, the finding as made, and drew therefrom the conclusion that the plaintiff was a source of discord and utilized the conclusion, instead of the finding, as the reason for their report. At any rate, my view is that as the relevant facts, viewed as a whole, do not measure up to the requirements, as set out in *Sweeney* v. *Coote, ubi supra,* the action against Hassel must be dismissed. As to Mrs. Barclay, there is, I think, but one other relevant fact that can be urged why the requisite inferences must be drawn. That is that, when the appeal was pending, she had a conversation with defendant Scribbins and gave him the statement of facts she had read before the arbitration committee. But it is, I think, clearly a possible inference that this conversation took place and this document was handed over because defendant Scribbins had not been present at the third by-law committee meeting. It was because some of the alleged conversations then held were repeated to plaintiff that she wrote the letter to Mrs. Barclay which started the train of events culminating in this action. It was important, or, at any rate, could reasonably have been considered so by Mrs. Barclay and himself, that Scribbins, who was to represent the lodge on the appeal, should have the whole story fresh in his mind, and that part of it which he had only heard of at the arbitration committee meetings committed to writing. The action against her must, therefore, be also dismissed. As to Scribbins, the additional relevant facts in his case are that at the district court meeting he, by insisting on the strict compliance of the society's rules as to appeals, had plaintiff's appeal ruled out of order. This, according to the evidence, did not prevent the appeal being again lodged, but did prevent it being heard at that particular

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session. Scribbins had, at an informal gathering of the district lodge officials held between the time of the plaintiff's expulsion and the session of the district lodge, at which the question of appeal came up, inquired from the officials of the district lodge as to their opinion of the legality of the arbitration committee's proceedings in the matter of hearing the "leakage" charge without compliance with the rules requiring the charges to be in writing and a copy thereof given to plaintiff. He was advised that, under all the circumstances, the proceedings were regular. These men were in a superior position to him, and, rightly or wrongly, he believed their interpretation of the rules would be binding. Do these facts, coupled with those already dealt with, justify the drawing of the requisite inferences as the only inferences that can fairly be deduced? I think not.

The action for conspiracy is, therefore, dismissed as against all the defendants. As to the action against defendant Court Ladysmith for illegal expulsion, this defendant consented at the opening of the trial to a declaration that the expulsion was null and void, and that the plaintiff is, at the present date, a member in good standing, subject to the payment by her of any dues owing at the date of the so-called expulsion. I think this meets the justice of the case. There is no need for issuing an injunction against the defendant Court Ladysmith to insure compliance with a decree which they in open Court consent shall be made.

Judgment

There remains the claim for damages against the defendant Court Ladysmith. The foundation for the jurisdiction which a Court exercises to prevent an improper expulsion of a club member rests upon the principle that the member may be thereby deprived of his right of property: *Baird* v. *Wells* (1890), 59 L.J., Ch. 673, and authorities there cited. The remedy is by declaration and injunction, if necessary. Apart from this, the Courts take no cognizance of expulsions from voluntary associations except in so far as such expulsions may be a breach of contract. Hence, it may well happen that decisions of such bodies, which gravely affect some members thereof, and which do not satisfy the requirements of the law,

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may be arrived at by the committee or other like body without being open to be questioned in any civil Court or giving rise to any right of action whatever: *Baird* v. *Wells, ubi supra,* citing *Forbes* v. *Eden* (1867), L.R. 1 H.L. (Sc.) 568. If, then, breach of contract be the only other form of action open to a member of a voluntary association—apart, of course, from causes of action arising independently of the fact of membership in such bodies, *e.g.,* conspiracy—the ordinary principles of assessing damages in contract must apply in the absence of authority indicating specific exception to such principles, such as the books shew obtain in cases of breach of contract to marry, refusal by bankers to cash customers' cheques, and failure to make title in agreements for sale of real estate. I have been referred to no such authority. It is true that in *Wayman* v. *Perseverance Lodge of the Cambridgeshire Order of United Brethren Friendly Society* (1917), 1 K.B. 677, a small sum as damages was awarded by a County Court, but the case is not reported on the point of how this was assessed, and it may well be that damages to that amount were proven under the ordinary principles of assessing damages in breach of contract cases. On the other hand, in *Addis v. Gramophone Co.* (1909), 78 L.J., K.B. 1122, Lord Atkinson expressly states that the three exceptions, above mentioned, are the only ones he knows of, and that any tendency to create a fourth ought to be checked rather than stimulated.

Judgment

There was a contract between plaintiff and defendant Court Ladysmith whereby, in consideration of payment of initiation fees and dues, defendant Court Ladysmith agreed plaintiff should have the privileges and benefits of membership, subject to the constitution and rules. Defendant Court Ladysmith admits the wrongful breaking of this contract. The only privilege, or benefit of monetary value accruing to membership shewn in evidence, so far as I can see, are the sick benefits. As, however, there is no evidence that plaintiff, during the period since the alleged expulsion, has been so situated as to have been entitled to such benefits, if a member in good standing, she cannot claim loss on that score. It is true defendant Court Ladysmith has a lodge room, to which members have the right

of access to attend lodge meetings, but it is not shewn in evidence that a member reaps any further benefit from the existence of this room. Plaintiff is doubtless entitled to nominal damages for exclusion therefrom, but this is not what is being pressed for on her behalf. The only evidence of other privileges, or benefits, is that social evenings were spent at the lodge room once a month. Attendance, however, entailed either entrance money or a contribution of refreshments, and I cannot, on the record, say that exclusion therefrom occasioned any monetary loss to plaintiff. No special damages are claimed and, on the principles of assessment of damages for breach of contract, I think I can only award nominal damages, which I fix at $1.

As to costs, the solicitors for defendant Court Ladysmith wrote a letter to plaintiff at time of delivery of statement of defence which, it is alleged, furnishes good cause for not only depriving plaintiff of costs from that date, but for ordering her to pay defendant Court Ladysmith's costs from thence on, and *Florence* v. *Mallinson* (1891), 65 L.T. 354 is cited.

Judgment

It is true that what was in effect then offered is about all plaintiff takes under this judgment. However, I think express consent to payment of costs up to that date, an express statement that no dues during the period of alleged expulsion would be expected from plaintiff, and a consent to pay nominal damages ought to have been embodied in the letter. On the other hand, viewing the case as a whole, and having regard to the other correspondence between the solicitors, put in as exhibits, I think the subsequent litigation would have been avoided were it not that plaintiff believed herself entitled to other than nominal damages. If this judgment is correct, she was in error in this view, and to that extent the doctrine of *Florence* v. *Mallinson,* applies, so that I have a discretion as to the costs. I think substantial justice will be done if I give the plaintiff her costs up to and including delivery of statement of defence, and direct that each party pay its, or her, own costs from that date.

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Nov. 16.

IN RE PEMBERTON AND LEWIS

IN RE PEMBERTON AND LEWIS.

Will—Children—Power of appointment—Exercised by will—Revocation by codicil—Appointment by codicil beyond authority—Revival.

The words "child or children" primarily mean issue in the first generation only, sons and daughters, to the exclusion of grandchildren or other remote descendants.

A testatrix had, under the husband's will, power of appointment in what proportions a moiety of her husband's estate should be divided amongst their children. By her will she declared it should be divided between them share and share alike. By a codicil she revoked said appointment, and after declaring that all the children but one (J.) should receive the same equal portions as had been appointed to them in her will, the share that J. was to have received was directed to be held by the trustees upon trust to pay the income to J. for life, and after his death the income to his children.

Held, that under the husband's will the testatrix had no power to vest any interest in her grandchildren, but as the revocation by codicil of the appointment by will had been made only for the purpose of providing what the appointor considered a better provision for the benefit of the appointee and his family, and the appointment made under the codicil having failed, the original appointment under the will remained effective.

Onions v. *Tyrer* (1716), 1 P. Wms. 343 applied.

APPLICATION by the trustees of the will of the late Joseph Despard Pemberton and of the will of the late Theresa Jane Despard Pemberton that certain questions or matters arising in the administration of their respective estates be determined under Order LIVA. and Order LV., rr. 3 (*a*), (*b*), (*e*) and (*g*) of the Rules of the Supreme Court of British Columbia and that relief be given in respect thereof without an administration of said estates. The questions submitted were as follows:

Statement

"(1) Did the said Joseph Despard Pemberton the elder by his will confer upon the said Theresa Jane Despard Pemberton any power of appointment in favour of all or any grandchildren of the said testator, and if so, what power and in respect to what property?

"(2) Has the above named Theresa Jane Despard Pemberton by her will and codicils exercised the power of appointment conferred upon her by the will of the above named Joseph Despard Pemberton the elder over a moiety of his residuary estate, and if so, in whose favour has such appointment been made?

"(3) If such appointment is in part valid and in part invalid, to what extent is the same valid and invalid respectively, and who is entitled under such appointment? (a) as far as the same is valid? (b) as far as the same is invalid?

"(4) Who is entitled if no part has been validly appointed?

"(5) To what share or interest, if any, is Helen Mary Yoder Lewis, widow of Joseph Despard Pemberton the younger, entitled in the estate of the said J. D. Pemberton the elder, and subject to what, if any, limitations, provisions or conditions?"

The other relevant facts are set out fully in the reasons for judgment. Heard by MACDONALD, J. at Chambers in Victoria on the 21st of September, 1917.

Crease, K.C., for the trustees.

Maclean, K.C., for Mrs. Lewis.

16th November, 1917.

MACDONALD, J.: Joseph Despard Pemberton, the elder, by his will, dated the 22nd of July, 1892, directed that, subject to an interest during widowhood of his wife Theresa Jane Despard Pemberton, in the income of his residuary real and personal estate,

"my trustees shall hold my said residuary real and personal estate and the income thereof IN TRUST as to one equal moiety thereof for all or any such one or more exclusively of the other or others of my children and if more than one in such shares as my wife shall by my will appoint. PROVIDED THAT in the event of my wife marrying again the power lastly hereinbefore contained shall thenceforth cease to be exercisable and in trust as to the other equal moiety thereof and also as to the first mentioned equal moiety in default of and subject to any appointment by my wife under the power lastly hereinbefore contained in trust for all or any of my children or child who shall be living at the death or remarriage of my wife and if more than one in equal shares."

Judgment

By her will, dated the 14th of May, 1907, the said Theresa Jane Despard Pemberton, in exercise of such power appointed and declared that the trustees or trustee for the time being of the said will of her husband, should, from and after her decease, stand possessed of the trust funds and property representing or constituting, at the time of her death, one equal moiety of the residuary real and personal estate of her said late husband and of the income thereof "in trust for all the children of my said late husband in equal shares share and share alike." This was a perfectly good and proper exercise of the powers vested in the widow, but the diffi-

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culty arises from three codicils, to which I will presently refer. Mrs. Pemberton, by such will, after disposing of property held in her own right, and thus evidencing her desire to provide for her children, without any apparent preference, expressly declares her wishes and shews her desires in that respect as to other members of the family in the following terms:

"And I hereby declare that in making the foregoing disposition of my property I have endeavoured to provide as far as lies in my power for the widow and children, both or either as the case may be of any child of mine who may predecease me and whose widow and children will by such death be disentitled to receive under the terms of the will of my late husband any share or interest in the residuary real and personal estate passing under such will and distributable at my death and that I most earnestly hope that should any of my children predecease me leaving a widow or children or both living at my decease my surviving children one and all in so far as they lawfully can will supplement the provision hereby made out of the shares they will respectively take under the will of their father to such extent as will place such widow and children as nearly as possible on the same footing in every respect as if her husband and their father being a son of mine or their mother being a daughter of mine had survived me and received the share to which in such event such son or daughter would have been entitled under the will of my said husband."

This is worthy of mention, and should be taken into account, when the matter of intention comes to be considered, in connection with such will and the effect of the third codicil thereto.

Judgment

By a codicil, dated the 2nd of September, 1913, Mrs. Pemberton appointed her son-in-law, William Curtis Sampson, to be executor and trustee of her will in place of William Curtis Ward. The other provisions of the codicil are not material to the question to be determined herein. By a second codicil, of the same date, she made specific bequests of personal estate, and provision was made for disposition of property under certain conditions; but there is no discrimination apparent amongst her sons and daughters, and rather the contrary. Then, by the third codicil to her will, Mrs. Pemberton, on the 12th of July, 1916, declared, *inter alia,* as follows:

"I HEREBY REVOKE the appointment made by said will and left unaltered by the first codicil thereto dated the second day of September, 1913, of my son Joseph Despard Pemberton as one of my executors and trustees, AND I HEREBY DECLARE that the sole executors and trustees of my said will shall be my sons Frederick Bernard Pemberton and William Parnell Despard Pemberton, and my son-in-law, William Curtis Sampson.

"AND WHEREAS under and by virtue of the will of my said late husband

dated the 22nd day of July, 1892, I had power during widowhood to appoint by will one equal moiety of my said late husband's residuary estate among his children and the other equal moiety of my said late husband's residuary estate, and also the moiety over which I had power of appointment if no appointment thereof was made by me and subject to any appointment thereof made by me was by him devised upon the trusts declared in his said will for the benefit of his children.

"AND WHEREAS (never having married again) by my said will dated the 14th May, 1907, in pursuance of said power contained in my said late husband's will, I appointed the said one equal moiety of my said late husband's residuary estate to all the children of my said late husband in equal shares among such children, share and share alike.

"NOW I HEREBY REVOKE the said appointment and hereby appoint the said equal moiety of my said late husband's residuary estate among his children upon the same trusts and subject to the same limitation in the case of daughters as are by my said late husband's will declared concerning the other equal moiety of the said residuary estate devised by him, save and except that I declare and appoint that the share of the said equal moiety of the said residuary estate to which my son Joseph Despard Pemberton or his children shall be entitled to under the trusts hereafter declared shall be held by my said executors and trustees upon the separate trusts hereinafter declared concerning the same . . . .

"AND I HEREBY DECLARE and appoint that the shares of my said son Joseph Despard Pemberton or his children under the appointment hereby made by me under the said will of my late husband and under the devise hereby made by me of my residuary estate shall be held by my trustees upon the following trusts that is to say: Upon trust to pay the income of said shares to the said Joseph Despard Pemberton for his life without power of anticipation, and after his death my trustees shall pay the income of the said shares in trust for the three children of the said Joseph Despard Pemberton, namely, Yoder Theresa, Dorothea Benedicta, Massey Joseph Despard in equal shares during their joint lives, and I declare that upon the death of any one of the said three children, or if only two of the said three children shall survive me and the said Joseph Despard Pemberton, that my trustees shall pay to the survivors the income of the said shares during their joint lives in equal shares, and upon the death of one of such two surviving children, or if only one of the said three children shall survive me and the said Joseph Despard Pemberton, my trustees shall pay to the sole surviving child the entire of the income of the said shares during his or her life, and upon the death of such last surviving child or my trustees shall hold the entire of the corpus of the said shares in trust to pay the said corpus to any the child or all the children of the said three children who being a son of any such three children shall attain the age of twenty-one years or being a daughter of any of the said three children shall attain the age of twenty-one years or marry with the consent of her parents under that age, and if more than one such child in equal shares between them, and in case of any of the children of the said three children who should be minors at the date of the death of the last survivor of the said three children, I

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direct that my said trustees retain and hold the share of any such minor child or children in trust to pay the income thereof to such minor child or children during the minority of such minor child or children if in the discretion of my trustees such minor child or children shall be competent to receive and handle his or her share of such income, and if in the discretion of my trustees such minor child or children shall not be so competent my trustees shall hold and apply the share of such minor child or children for his or her maintenance benefit education or advancement until such minor child or children shall attain the full age of twenty-one years when my trustees shall pay to any such minor child or children his her or their share of the corpus of the said shares, and if there shall be no child or children of any of the said three children living at the date of the death of the survivor of the said three children then I direct my trustees to hold the said shares upon the same trusts and in the same proportions for the benefit of my children other than the said Joseph Despard Pemberton, and their children as are hereinbefore declared . . . ."

The trustees were also given absolute power and discretion to advance any of the three children of her son Joseph, the corpus of their full share and proportion of the said share of her said son Joseph, even although such children should not have come of age. Further discretion is also given for allotment or apportionment of her real and personal estate. The three grandchildren, and even the great-grandchildren who may participate, are referred to. The question thus arises whether Mrs. Pemberton, by this third codicil, simply conferred a life interest upon her son Joseph. It is apparent that Mrs. Pemberton desired by such codicil to exercise her power of appointment, in such a way as to confer an interest on the children of her son Joseph Despard Pemberton. It was not contended, by either side, that she had the right to thus exercise the power. It is clear, upon the authorities, that a gift to "children" does not include "grandchildren": see Hawkins on Wills, 2nd Ed., 113, and cases there cited to same effect; see *Re Williams* (1903), 5 O.L.R. 345.

Judgment

Lord Blackburn, in *Bowen* v. *Lewis* (1884), 9 App. Cas. 890 at p. 915, refers to the primary sense of the words "child or children" as follows:

> "Lastly, the words 'child or children' primarily mean issue in the first generation only, sons and daughters, to the exclusion of grandchildren or other remoter descendants."

If Mrs. Pemberton had no power, by such codicil, to thus appoint amongst her grandchildren, then, what becomes of the

one-sixth share which had been already properly dealt with, under her will? Does the third codicil operate, so as to simply give a life estate therein to her son Joseph and to be divided upon his death amongst his brothers and sisters, or does the valid appointment under the will revive and give the share absolutely to such son upon her death? A conclusion in this respect depends upon the wording of the codicil, coupled with the surrounding circumstances, especially those of such a nature, as to throw light upon the intention of the testator. The wording of the codicil is emphatic as to revoking the previous appointment. Then Mrs. Pemberton purports to treat all her children alike, as to the division of the moiety of her husband's residuary estate, except as to the share to which her son Joseph would be entitled. *In re Bernard's Settlement. Bernard* v. *Jones* (1916), 1 Ch. 552, is a case much in point, and in which the facts are very similar to those here presented. The question of "intention" is fully discussed, and at p. 559 reference is made to *Quinn* v. *Butler* (1868), L.R. 6 Eq. 225 at p. 227, where Lord Romilly says as follows:

"'I think the whole question depends upon the intention of the testator. If a will is simply revoked in order to make a gift in favour of another person, and you can see that there is no intention to revoke unless for that purpose, then the doctrine of *Onions* v. *Tyrer* [(1716)], 1 P. Wms. 343 applies.'"

Then after stating that this was a perfectly accurate definition of the principle, which ought to govern the Court in coming to a conclusion, Neville, J. refers to the case of *Duguid* v. *Fraser* (1886), 31 Ch. D. 449 at p. 452, in which Kay, J. held that the subsequent gift, in the events that had happened, having failed, the original gift by the appointor was not revoked. He quotes the judgment in the latter case as follows:

Judgment

"'There have been cases where the intention to revoke in any event being clear, as where the appointor began the invalid appointment by saying 'I revoke the former appointment to this extent,' and then proceeded to appoint —in which the Courts have been compelled by the language to give effect to the revocation, though not to the subsequent appointment. I do not feel myself fettered by anything of that kind.'"

I have referred to this quotation because the words of "revocation" herein are clear and, it is contended, control the situation; but this quotation from Mr. Justice Kay's judgment did not hamper, nor affect, Mr. Justice Neville in giving his judg-

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ment in the *Bernard's Settlement* case. He discusses this portion of the judgment of Kay, J., p. 560, as follows:

"In that case there were no direct words of revocation of the previous gift. Now it was a good distinction no doubt in a sense between the case before him and the cases that had been cited, and I respectfully agree with the conclusion that he came to in the case before him, but I think the words I have quoted might lead to a misunderstanding, because it does not seem to me that the real point is determined by the question of whether there are words of direct revocation or whether such words are absent. I think it is far too narrow a view to apply any such rule in construing documents of this kind, because it seems to me that when you have a gift in lieu of a previous appointment, either by necessary implication or by direct words, you must revoke the original appointment if you are to give effect to the second; and therefore, whether the testator says in so many words 'I do revoke,' or whether he uses words which necessarily involve revocation, it seems to me the result is the same, and that it would not be a wise distinction to make, except so far as the use of the direct words may be some guide as to the intention of the testator. I think the question which the Court has to determine is, Did the testator intend by the second appointment to revoke in any case the prior appointment, or did he really only intend to revoke it for the purpose of carrying out the alteration made in his second appointment and without having any intention of revoking the previous gift except for the purpose of the altered appointment?"

I have been referred to a number of authorities supporting the contention that Mrs. Pemberton had power to divide the one-sixth share. In other words, that she could give a life interest to her son Joseph, and the balance of the interest in such share to his brothers and sisters, *e.g.*, in *Wilson* v. *Wilson* (1855), 21 Beav. 25, Romilly, M.R. at p. 28 says:

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"He might, therefore, if he had thought fit, have given a life interest in one share to one, and the capital of it to another."

Cf. Crozier v. *Crozier* (1843), 3 Dr. & War. 353 at p. 371. Then, somewhat to the same effect, see *Shaw* v. *M'Mahon* (1843), 65 R.R. 724. There the testator gave a fund to be divided in equal parts amongst all his children living at his death. By codicil, he revoked the gift to one of his children. It was held that the share which had been given by will to this child belonged to the other children and did not devolve upon the heir-at-law and next of kin of the testator. The Lord Chancellor in his judgment, at pp. 727-8 says:

"It is now settled, and, in my opinion, upon very reasonable grounds, that where there is a gift to a class, and one dies in the testator's life-

time, his share will not lapse, but the whole will be divided amongst the survivors."

Even in that case, which was cited as shewing the recognition given to the rights of a class, the learned Chancellor refers to the matter of "intention," and after dealing with the position that would be created if the personal estate went to the next of kin, and thus destroy the object sought to be obtained by the exclusion of the particular child referred to in the codicil, says (p. 729):

"This clearly was not his intention, and there is no rule of law which compels me to adopt this construction. On the contrary, the authorities are in favour of the opposite construction. The gift is to a class, and the time of the death of the testator is a period when the objects included in that class are to be ascertained, and at that time William is excluded by the codicil. I am clearly of opinion that I disturb no rule of law, and give effect to the plain intention of the testator, in deciding, that William is excluded from any share of the residue, the whole of which must go to the other residuary legatees."

Is this to be the result effected by the third codicil to Mrs. Pemberton's will? If "intention," however, is to govern, then, what was the intention? There is nothing to indicate a withdrawal of affection by the mother towards her son Joseph and his children. Not only the will, but the codicil itself, indicate a feeling to the contrary. Was she not simply endeavouring, in the codicil, to render more effectual the proper management and disposition of the one-sixth share, which she had allotted by her will? If it had been pointed out to her that her power of appointment did not enable her to give an interest in the share directly to the grandchildren and that her authority in that direction would prove abortive, would she then simply have given a life interest in the share to her son Joseph and allowed the corpus of the share to go, upon his death, to her other children? I do not think so. To my mind, there are no circumstances which would support such a contention. It may be suggested that there is some distinction in the facts between the *Bernard's Settlement* case and the one under consideration, as Mrs. Bernard only sought to curtail the power of disposition or control of the share given to her daughter, whereas Mrs. Pemberton was desirous of giving an interest to her grandchildren. While there is this difference between the facts, I do not consider it sufficient to militate against the adoption of the reasoning of the learned judge.

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I think that, although the appointment by the will might be, in terms, revoked by the codicil, still that this was not to be operative in any event. It was only for the purpose of providing, what the mother might consider a better and safer provision for the benefit of her son Joseph and his family. She failed in this desire through inability to vest an interest in the share in her grandchildren. The appointment to this extent, under the codicil, having failed, in my opinion the original appointment stands, so that Joseph Despard Pemberton, Jr., became entitled immediately on the death of his mother to a one-sixth share in such moiety of his father's estate. He had the power of disposition thereof by his will, and so his widow, Helen Mary Yoder Lewis, acquired, upon his decease, such interest under his will. There should be costs to all parties out of the estate.

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IN RE SID B. SMITH LUMBER CO., LTD.

IN RE SID B. SMITH LUMBER COMPANY, LIMITED.

Company law — Winding-up — Taxes — Priority — Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 70—Effect of—"Accident fund"—Workmen's Compensation Board.

Upon the winding-up of a company the debts due the Province take priority over all unsecured debts, and the claim of the Province is not subject to the claims of employees of the company in respect to wages under section 70 of the Winding-up Act.

Claims by the Workmen's Compensation Board in respect of the "accident fund" are within the category of "claims by the Province," and are entitled to preference.

Statement

APPLICATION by way of appeal from the certificate of the registrar settling the list of creditors of the Sid B. Smith Lumber Company, Limited, in liquidation. Heard by MACDONALD, J. at Chambers in Vancouver on the 12th of November, 1917.

Arnold, for the liquidator.
W. C. Brown, for the Provincial Government.
Wismer, for Workmen's Compensation Board.

17th November, 1917.

MACDONALD, J.: This is an application, by way of appeal from the certificate of the registrar, settling the list of creditors of the Company. It is objected, on the part of the liquidator, that the registrar should not have preferred the claims of the Province, for taxes upon personalty, nor the amount due by the Company to the "accident fund" under the Workmen's Compensation Act.

As to whether the Province has priority over other claims of creditors, with respect to taxes against personal estate, this is a debt due the Province. Unless there is a distinction between the Dominion and one of the Provinces, as to a Province being considered as representing and being entitled to any privileges possessed by the Crown, then the general rule applies that, in a winding-up proceeding, debts owing by the Company to the Crown have priority over all unsecured claims. I do not think that any such distinction can be drawn. The debt in this instance is in a stronger position, than if it were an ordinary claim of the Crown against the Company. As it represents taxes, it has all the weight attached to a debt of this nature. The preference to which the Crown was thus entitled was fully discussed in *New South Wales Taxation Commissioners* v. *Palmer* (1907), A.C. 179. In that case, the Supreme Court of the State, held that the Crown was not entitled to any preference with respect to the sum of £53, due for land and income tax, and if there was anything to distribute amongst the creditors the Crown should simply participate therein *pari passu,* as being one of a class forming the general body of creditors. On appeal to the Privy Council two prerogatives, under which the Crown was entitled to peculiar privileges against the debtor and his property, were considered. The principle upon which one of such prerogatives depended was referred to as follows, pp. 185-6:

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"The prerogative, the benefit of which the Crown is now claiming, depends, as explained by Macdonald, C.B. in *The King* v. *Wells* [(1812)], 16 East, 278, upon a principle 'perfectly distinct . . . . and far more

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general, determining a preference in favour of the Crown in all cases and touching all rights of what kind soever where the Crown's and the subject's right concur and so come into competition.'"

The appeal was allowed, and the plan of distribution of the assets of the bankrupt altered so as to provide for the preferential right of the Crown. The right of such priority was further decided in *The Queen* v. *The Bank of Nova Scotia* (1885), 11 S.C.R. 1. Ritchie, C.J. refers to the fact that in *In re Oriental Bank Corporation* (1884), 28 Ch. D. 643, counsel for the liquidator made the following admission:

"We are quite willing to concede that the prerogative of the Crown and the colonies is as high as in this country."

Chitty, J., in the latter case, mentions the two prerogatives considered in the case of *In re Henley & Co.* (1878), 9 Ch. D. 469, and refers to one of such prerogatives, as being the right of the Crown, "when assets had to be administered, to priority over the subject." That the prerogative of the Crown extends to a colony was further declared by Sir James Bacon, V.C. in *In re Bateman's Trust* (1873), L.R. 15 Eq. 355 at p. 361 as follows:

"I cannot hesitate to say and to decide, that the Queen's prerogative is as extensive in New South Wales as it is here, in this county of Middlesex."

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This right is thus extended to one of the Provinces, forming the Dominion. I do not consider that, upon the union of British Columbia with the Dominion of Canada, that the connection between the Crown and this Province was in anywise impaired, so as to affect such prerogative right. The relationship between a Province and the Crown, was dealt with in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), A.C. 437. The status of a Provincial Legislature was considered, and it was pointed out that it does not occupy a subordinate position, and derives no authority from the Government of Canada. Its status is in nowise analogous to that of a municipal institution, which has authority constituted for purposes of local administration. Its powers are not simply administrative, but legislative. Within the limits assigned by section 92 of the British North America Act, they are exclusive and supreme. Their Lordships, in that case, held that the Provincial Government could invoke the prerogative rights of the Crown, and was entitled to a prefer-

ence in payment of its claim over other depositors and simple contract creditors of the bank. It is contended that, in any event, the claim of the Province for taxes is subject to the claims of clerks and other persons in the employment of the Company for three months prior to the order for winding-up being made. The section (70), of the Winding-up Act giving this privilege to the class is as follows:

"Clerks or other persons in, or having been in the employment of the company, in or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order."

While I feel disposed to give this section a liberal construction in order to attain the object desired, still, as the Crown is not specially mentioned, I do not think it can destroy the priority already referred to. The Interpretation Act, section 16, controls the situation as follows:

"No provision or enactment in any Act shall affect, in any manner whatsoever, the rights to His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby."

In my opinion, the appeal from the registrar, as to the personal taxes due the Provincial Government, should be dismissed.

Then as to the other contention, with respect to the amount due the "accident fund" of the Workmen's Compensation Board: If the Board is in the same position and is simply a branch or department of the Government of the Province, and the Province has the prerogative right already referred to, then the same decision would follow, as that already rendered with respect to the claims of the Provincial Government for taxes. It remains, then, to consider whether the Board, under its constitution and powers, is really a separate body and cannot invoke the prerogative of the Crown to create a preference as to payments due the "accident fund." The case to which I have been referred in support of the proposition that it is a distinct body by itself, and cannot be considered in the same light as the Province, is *Fox* v. *Government of Newfoundland* (1898), A.C. 667. In the course of winding-up proceedings taken with respect to the Commercial Bank of that colony, boards of education claimed a preference over other creditors

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with respect to certain amounts standing to their credit in the books of the bank. The Winding-up Act of Newfoundland provided that priority should be given in proceedings under the Act to all debts and claims due to the Crown or to the Government or revenues of the colony. The Supreme Court held that such education boards came within the purview of the Legislature and were entitled to the benefit of this provision. This judgment was reversed in the Privy Council, and the various sections constituting the boards of education, and outlining their manner of receiving and disbursing money, were considered. Attention was drawn to the fact that the moneys in the bank were under the partial control, at any rate, of the chairmen of the different boards of education, though the treasury department of the Government paid the money into the bank from time to time:

> "The bank receives the moneys for and on behalf of the several parties in whose favour the warrants are drawn and gives a receipt on their behalf. The warrants are drawn in favour of the several boards of education. After the payment the treasury has no further knowledge or cognizance of the condition of the accounts of the several parties in or with the bank."

There is a further power of the board to manage and expend moneys, appropriated in the manner outlined, amongst the different schools controlled by the different religious denominations. There is also power given to the board to make by-laws, rules and regulations for the establishment and management of the schools, provided that such by-laws are submitted to the Governor in Council for approval. The opinion is expressed in the judgment that the moneys were paid by the treasury to the bank and received by it "as the agent of, and on behalf of, the several boards of education." The bank did not become "a debtor to the Government for those sums or retain them for the Government." The Government had no longer any authority over the money. It was argued that the contrary position existed, *viz.*, "that the boards of education were merely distributing agents of the Government, only distributing branches." It was decided, however, that this view was not consistent with the provisions of the Act, and a consideration of the sections which supported this conclusion are instructive, as indicating

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the reasons which induced their Lordships to come to a decision that the position of the parties was actually the reverse. It invites a comparison of the sections thus controlling such conclusion, with the provisions of the Workmen's Compensation Act constituting the board, or commission, and giving it powers limited by the Act. The first of such sections which came under review in the Privy Council shewed that a distinction was made between money to be paid out by the board of education and money to be expended, as the Government and Governor-General in Council might determine. In this Province the practice is entirely different. By section 48 of the Act, the minister of finance is the custodian of all moneys and securities belonging to the "accident fund," and the Province is liable for the safe-keeping thereof. Then, all the moneys belonging to the "accident fund" which may be called for, or received by the board, are delivered to the minister of finance and to be deposited in the bank and credited "by the minister of finance to the 'accident fund.'" They are accounted for, as part of the consolidated revenue fund of the Province. Then, further control and disposition of the money is indicated by a provision that no moneys collected or received on account of the "accident fund" shall be expended or paid out without first passing into the Provincial Treasury and being drawn therefrom, as provided for in this particular section. To shew a lack of control of the board, over finances, it is required each month to submit to the auditor-general an estimate of the amount necessary to meet current disbursements from the "accident fund" during the succeeding month, and it is not until such estimate is approved by the auditor-general that the minister of finance is directed to pay the amount thereof to the board. The control exercised over the board, especially as to moneys received and disbursed, is further emphasized by other provisions, including requisite auditing by the auditor-general. The board is also required to make an annual report to the Legislature, and it shall contain such particulars as the Lieutenant-Governor in Council may prescribe. Other matters of difference between the boards of education as constituted in Newfoundland, and referred to in the Privy Council case, and

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boards of compensation in this Province might be drawn. Those indicated, however, are sufficient to satisfy me that the judgment in the Newfoundland case, is not an authority to support the contention of the appellant. In my opinion, the board is simply an adjunct, or administrative body, exercising its powers and acting for the Provincial Government on behalf of the Province. The result is that any moneys payable to the "accident fund" are due to the Province, and by its right of prerogative, as representing the Crown, it is entitled to the preference, indicated by the report of the registrar.

The application to vary the registrar's report is thus, on both points, dismissed with costs.

Application dismissed.

MACDONALD, J.

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FRANCIS v. WILKERSON.

Husband and wife — Separation proceedings — Alimony — Decree for — Assignment by husband for benefit of creditors—Preference—"Decree" —Whether included in "judgment"—R.S.B.C. 1911, Cap. 13.

FRANCIS v. WILKERSON

On a husband making an assignment under the Creditors' Trust Deeds Act, a decree for alimony does not give the assignor's wife a preference over his unsecured creditors.

Although a decision in a wife's favour for alimony, granted in proceedings under the Divorce and Matrimonial Causes Act, may be termed a "decree," it is at the same time a "judgment" of the Supreme Court, and is in the same position as any other judgment in that Court.

[An appeal to the Court of Appeal was dismissed.]

Statement

INTERPLEADER ISSUE to determine the rights of the parties to certain moneys paid into Court. Tried by MACDONALD, J. at Victoria on the 27th of September, 1917. The facts are set out fully in the reasons for judgment.

Maclean, K.C., for plaintiff.
Higgins, for defendant.

20th November, 1917.

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MACDONALD, J.: This is an interpleader issue, to determine whether certain moneys paid into Court, and which it has been agreed should be dealt with herein, as if they represented the goods and chattels hereinafter referred to are the property of the plaintiff as against the defendant. Defendant, by a decree under the Divorce and Matrimonial Causes Act, was allowed alimony against her husband, William H. Wilkerson, on the 9th of March, 1917. He was adjudged, *inter alia,* to pay her the sum of $1,668.55 and costs, which were taxed and allowed at the sum of $926.20. Execution was issued for these two amounts against the goods and chattels of the husband on the 16th of May, 1917, and the sheriff seized defendant's stock-in-trade in his jewellery store in Victoria on the same day. Defendant, thereupon made an assignment for the benefit of his creditors to Frederick W. Francis, plaintiff herein, and such assignee paid the sheriff the said sum of $926.20, representing such taxed costs, as well as fees to which the sheriff was entitled. Request was then made, for the sheriff to withdraw from the seizure, but the defendant herein contended that the assignment did not affect her right to recover, under such execution, the said sum of $1,668.55, as well as the sum of $926.20 so paid without any controversy. The neat point to decide is whether the contention thus made by the defendant in the issue is correct, or whether she is in the same position as to this amount of $1,668.55 as other creditors of her husband's, and can only realize her claim for alimony under the assignment.

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The plaintiff, as assignee, submits that the assignment, executed under the provisions of the Creditors' Trust Deeds Act (R.S.B.C. 1911, Cap. 13), takes precedence over the decree for alimony and the execution issued thereunder. Section 14 of such Act is as follows:

"14. (1) Every such assignment shall be registered in the proper Land Registry Office, and when so registered shall take precedence of all certificates of judgments and executions and attachments against land situate within the district of such office not completely executed by payment, subject to a lien for the costs of such judgment creditors: Provided, however, that nothing herein shall disturb the priorities of judgments registered under the Land Registry Act prior to the sixteenth day of September, 1901.

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"(2) Every such assignment shall take precedence of all judgments, of all executions against goods, and of all attachments of debts not completely executed by payment, subject to a lien in favour of such execution creditor for their costs."

This is a case of first impression. If the contention of the defendant as to alimony prevails, it means that by a decree for alimony, a wife has a preference over other unsecured creditors of the husband. She would be in the same position, as a diligent creditor had, by judgment and execution, attained, before the introduction of legislation, enacted for the purpose of distributing the assets of a debtor *pro rata* amongst his creditors. In proceedings for judicial separation and alimony under the Divorce and Matrimonial Causes Act, it is argued that the Court does not give a "judgment," but rather, a "decree." Section 8 provides that in all cases in which the Court shall make any "decree" or "order" for alimony, it may direct payment and impose "any terms or restrictions" which to the Court may seem expedient. This section was apparently utilized to a certain extent by the decree in question, as a portion of the alimony allowed is sought to be secured upon the husband's stock-in-trade. This does not, however, apply to the interest, upon which execution was issued. The Execution Act, R.S.B.C. 1911, Cap. 79, Sec. 26, gives the following definition of a judgment:

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"In this and the following sections to and including section 52, unless the context otherwise requires,—'Judgment' means any judgment, decree, or order of the Supreme Court or County Court, or claim established under the provisions of the Creditors' Relief Act, whereby the sum of one hundred dollars or more is payable to any person."

Provision then follows for the "registration" of the judgment against land, and the procedure to realize thereunder. This definition of a "judgment" is confined to the sections referred to, and it is contended does not form a general interpretation, so that a decree for alimony is to be included within the term "judgment." As to whether a "decree" under the Divorce and Matrimonial Causes Act is a "judgment," was discussed at length in *In re Brinstead. Ex parte Dale* (1893), 1 Q.B. 199. It was pointed out that formerly, in Chancery, the proceedings were called "suits" and the decision of a suit was called a "decree," but subsequently, by rules of Court, "suits" were to be called

"actions," and to be commenced not by a bill, but by a writ. The judgment of the Court was to be obtained by motion for judgment. Then, attention was drawn to the fact that nothing in the Rules of Court, save as expressly provided, should affect the procedure or practice in proceedings for divorce. In our Province we have separate rules affecting the procedure and practice relating to divorce, and including petitions for judicial separation. Decisions, in such rules, are not called "judgments," but "decrees." Mr. Justice Kay, at pp. 208-09, referring to the distinction in England, says:

"This, and, as I think, this only, creates the difficulty. In strict language, a decree of the Divorce Court is not called a 'judgment,' nor is a suit for divorce called an 'action.'"

He then refers to the subsection under consideration as creating a new Act of Bankruptcy and quotes Cotton, L.J. in *Ex parte Chinery* (1884), 12 Q.B.D. 342, and again, in *Ex parte Moore. In re Faithfull* (1885), 14 Q.B.D. 627, as having said that under such circumstances "we ought to give the words their strict meaning." This language was adopted by the Master of the Rolls in *In re Riddell* (1888), 20 Q.B.D. 512, and Mr. Justice Kay then decides as follows:

"Following that rule of construction, I most reluctantly come to the conclusion that 'judgment in an action' does not strictly describe or include a decree in a suit for divorce."

If this conclusion be accepted as binding, then the contention of the defendant would be sustained. I think, however, I should not, as a Court of first instance, decide that a decree for alimony has such priority over claims of other creditors unless I am fully satisfied as to the correctness of such a contention. As to any such preference being obtained by a wife for alimony, or arrears of alimony, such proposition is supported to some extent by the decisions in England to the effect that payments of alimony are not a debt or liability within the meaning of the Bankruptcy Act, 1883 (46 & 47 Vict., c. 52). They cannot, therefore, be proved in bankruptcy against the husband, and the liability still continues, to make the payments, notwithstanding his bankruptcy.

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Bowen, L.J., in *Linton* v. *Linton* (1885), 15 Q.B.D. 239 at p. 246, in referring to the obligation to make payments of alimony, says:

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"I think it would be absurd to say that this obligation is a 'debt or liability' provable in bankruptcy. . . . The very essence of it [alimony] is, that it is a monthly or weekly payment for the personal maintenance of the wife. It seems to me that it would be the wildest construction of section 37 to say that future payments of that kind constitute a debt or liability capable of being proved in bankruptcy."

In *Re Otway; Ex parte Otway* (1888), 58 L.T. 885, the distinction is also drawn, and it was held that a wife was not a "judgment creditor" within the meaning of subsection (5) of section 103 of the Bankruptcy Act, 1883.

In *Abraham* v. *Abraham* (1890), 19 Ont. 256, *Linton* v. *Linton, supra,* is referred to, and at p. 261 MacMahon, J. says "alimony is not an ordinary debt," and the assignment by the defendant Abraham to the defendant Hossie was held not to take precedence over the judgment of the wife for alimony, and she was not obliged to rank with the other creditors of her husband, Thomas Abraham. This decision, however, was not based upon any distinction between a "decree" and a "judgment." In fact, the decision given upon a suit for alimony in Ontario is termed a "judgment." It was based upon a special protection or security, afforded to a wife obtaining a judgment for alimony under a statute in that Province, which has in effect been incorporated in our Supreme Court Rules (1040g) as follows:

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"An order, judgment, or decree for alimony may be registered in any Land Registry Office of the Province, and such registration shall, so long as the order, judgment, or decree registered remains in force, bind the estate and interest which the defendant has in any lands in the Province, in the same manner as lands may be bound by the registration of judgments according to the laws for the time being in force in that behalf, and shall operate thereon for the amount or amounts by such order or decree directed to be paid, in the same manner and with the same effect as the registration of a charge of a life annuity, created by the defendant on his lands, would; and such judgment may be effected through a certificate of such order, judgment, or decree by the registrar or other officer authorized by the Court to sign the same; and such certificate may be under the seal of the Court: Provided that the Court, or a judge, may at any time order such registration to be vacated and cancelled upon such terms as to security or otherwise (if any) as may be just."

While the decision in favour of the defendant herein may be termed a "decree," and proceedings were taken under the Divorce and Matrimonial Causes Act, still, such decision was rendered by a judge of the Supreme Court, holding a trial in

that Court. The Supreme Court Act, which constitutes such Court, designates the judges who are to form that Court, and declares their powers and jurisdiction. It defines a "judgment" as including a "decree," so that when the decision herein was rendered, although termed a "decree," it was, in my opinion, a "judgment" of the Supreme Court and was in the same position as any other judgment in that Court. There is not a separate Court for trial of petitions under the Divorce and Matrimonial Causes Act. I think that the only privilege a wife can obtain, by judicial proceedings, over other creditors of her husband is by an order securing payment of alimony under section 17 of the Divorce and Matrimonial Causes Act. She may also, by applying the provisions of marginal rule 1040g, *supra,* as to land, obtain additional protection or preference, but it is not necessary to form a decided opinion on this point, as it is not material to the issue to be determined herein.

Judgment

While coming to the conclusion as to there being no preference given to the defendant herein, under her judgment or decree for alimony, I think it well to deal with the effect of the execution issued thereunder. While the question as to whether a "decree" is included within the term "judgment," and so controlled by the assignment, is quite arguable, still I think that, in any event, the defendant cannot claim that the execution, issued out of the Supreme Court, has any priority with respect to the goods in question, except as to costs.

There should be judgment for the plaintiff in the issue, with costs.

Judgment for plaintiff.

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Dec. 31.

IN RE PEOPLES' TRUST CO. AND CENTURY INSURANCE CO.

IN RE PEOPLES' TRUST COMPANY, LIMITED AND THE CENTURY INSURANCE COMPANY.

Company law—Mortgage—Registration with registrar of joint-stock companies not effected—Winding-up—Application under section 4, Companies Act Amendment Act, 1916—Liquidator's expenses—Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 92—R.S.B.C. 1911, Cap. 39, Sec. 102; B.C. Stats. 1916, Cap. 10, Sec. 4.

Company A mortgaged certain property to company B, which company later gave a declaration of trust to company C in respect to such mortgage. The mortgage was registered in the Land Registry office, but it was not registered with the registrar of joint-stock companies in compliance with section 102 of the Companies Act. Later an order was made winding up company A, and company D was appointed liquidator. Company C, as beneficial owner of the mortgage, applied for relief under the enabling provisions of section 4 of the Companies Act Amendment Act, 1916. The liquidator objected on the grounds (1) that he had, pursuant to order, advanced moneys for paying company A's debts, relying on the assets of said company to cover the advances, and (2), that the mortgage should not be rendered valid to the prejudice of the liquidator's claim for expenses for which he had a prior claim under section 92 of the Winding-up Act.

Held, upon the evidence that the liquidator did not look upon the land in question as a portion of the assets available for security when making advances, and company C should be granted permission to register under said section 4 of the Companies Act Amendment Act, 1916, but subject to the liquidator's priority for expenses to which he is entitled under section 92 of the Winding-up Act.

Statement

APPLICATION by the Century Insurance Company as the beneficial owner of a mortgage made by the Peoples' Trust Company, Limited, in liquidation, for an order that the mortgage be registered with the registrar of joint-stock companies as of a date prior to the commencement of the winding-up proceedings of the Peoples' Trust Company, Limited, as provided in section 4 of the Companies Act Amendment Act, 1916. The facts are set out fully in the reasons for judgment. Heard by MACDONALD, J. at Chambers in Vancouver on the 29th of November, 1917.

A. D. Taylor, K.C., for the Century Insurance Company.
Lidster, for the Liquidator.

31st December, 1917.

MACDONALD, J. (At Chambers)

1917

Dec. 31.

IN RE PEOPLES' TRUST CO. AND CENTURY INSURANCE CO.

MACDONALD, J.: The Peoples' Trust Company mortgaged certain property to the National Finance Company, on the 13th of May, 1911. Subsequently the National Finance Company gave a declaration of trust to the Century Insurance Company with respect to such mortgage. The mortgage was duly registered in the Land Registry office, but was not registered with the registrar of joint-stock companies. An order was made for winding up the Peoples' Trust Company on the 20th of February, 1913, and the Westminster Trust Company was duly appointed as liquidator. Under the provisions of section 102 of the Companies Act (Cap. 39, R.S.B.C. 1911), the mortgage, through such non-registration with the registrar, became void as against the liquidator. The Century Insurance Company, as beneficial owner of the mortgage, now seeks to avail itself of the enabling provisions of section 4 of the Companies Act Amendment Act, 1916. Such section provides that where a mortgage created by a company within certain periods, covering land, has been registered, pursuant to the Land Registry Act, but has not been registered with the registrar of joint-stock companies under said chapter 39, then a judge may, under certain circumstances, "notwithstanding anything to the contrary in such chapter contained, on the application of the company, or any person interested, and after notice to all parties concerned, and on such terms and conditions as seem to the judge just, order that" such mortgage, which would be otherwise invalid for want of such registration, may be registered with the registrar of joint-stock companies under said chapter 39 "as of the date prior to the commencement of the winding-up . . . . and that it be deemed to confer security as from the date mentioned in such order."

Judgment

The question for consideration is whether it would be "just" to grant the order sought by the applicant. It is contended, on the part of the liquidator of the Peoples' Trust Company, that such an order should not be made on the following grounds: First, that the Westminster Trust Company, pursuant to an order to that effect, advanced money for the purpose of paying an indebtedness of the Peoples' Trust Company to the Northern Crown Bank, and should have the land, covered by the mort-

MACDONALD, J. (At Chambers)

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Dec. 31.

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gage in question, available for the purpose of satisfying the unpaid balance of this advance. I think that the Westminster Trust Company, in making such loan, should be considered in the same position as a third party, and that the assets which were at the time considered available, as security for the moneys so loaned should not be augmented by the land covered by the mortgage in question. It is evident to me from the form of the order authorizing the loan and the correspondence, that the Westminster Trust Company did not consider such land, was a portion of the assets for purposes of security, in making such advance. It would not, under such circumstances, be unjust to place the Century Insurance Company in the same position as the Westminster Trust Company, thought it possessed, both at the time of making such advance and subsequently thereto, *i.e.*, that the mortgage of the Century Insurance Company was a valid and subsisting mortgage, and formed an encumbrance upon the property referred to in such mortgage. In coming to this conclusion I have considered *Keyes* v. *Hanington* (1913), 13 D.L.R. 139, but the facts there outlined, differ from those here presented. The order authorizing the loan in that case was general, and the security provided was not in any way limited.

The second ground taken is that the mortgage in question should not be rendered valid, to the prejudice of any claim that the liquidator might have for its own services or other expenses, including solicitors' costs attendant upon the liquidation. This contention is based upon the following section of the Winding-up Act, *viz.*:

Judgment

"92. All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company, in priority to all other claims."

I think that the liquidator of a company that is being wound up, under order of the Court cannot, by his own actions, prevent the setting up of a claim of this nature. He is not bound by his conduct. In other words, he can only act by order and instructions of the Court. Generally speaking, the principle of estoppel is not applicable as to anything of moment, that the liquidator may have said or done, without authority of the Court, in carrying out the liquidation. See on this point *Re Ontario Bank* (1912), 8 D.L.R. 243 at p. 251:

"The liquidator was appointed by the Court, is an officer for the time being of the Court, and except in minor matters acts entirely under its direction. See *In re Contract Corporation, Gooch's Case* (1872), 7 Chy. App. 207. So limited are his powers that it has been said that he cannot even make a formal admission (sometimes said to be the foundation of an estoppel *in pais*) which will bind the creditors and contributories. See *Re Empire Corporation (Limited)* (1869), 17 W.R. 431."

Then again, there is nothing to shew that the Century Insurance Company was prejudiced in any way, by any actions of the liquidator. Such actions might be considered by the Court, but until passed upon they would be ineffectual so as to actually change the position of parties or create any rights thereunder. So I think that the statutory priority, thus created by section 92, has not been affected, and the liquidator is entitled to look to the property covered by the mortgage in question, as a portion of the assets out of which any such costs and expenses properly incurred in the winding-up may be obtained. Such amount may exceed the value of the property covered by the mortgage, but if this be not the case, then the matter can be adjusted. If the applicant so desires, an order can be made allowing the registration of the mortgage pursuant to said section 4 of the Companies Act Amendment Act, 1916, and rendering it valid, except that it will be subject to the rights of the liquidator under section 92 of the Winding-up Act.

Judgment

The Century Insurance Company, as applicant, should pay the costs of and incidental to this application.

Order accordingly.

GREGORY, J.

1917

Sept. 19.

ROYAL BANK OF CANADA v. FALK

ROYAL BANK OF CANADA v. FALK *ET AL.*

Debtor and creditor—Accommodation indorser—Additional sums due holder by principal debtor—Application of payments by holder.

Where a principal debtor owes money to a bank in addition to the amount of a note upon which the defendant is an accommodation indorser, the bank is not bound to appropriate the moneys collected by it for the principal debtor towards the extinguishment of the note.

ACTION brought by the Royal Bank on a promissory note of which the defendant was an accommodation indorser. The principal debtor owed other moneys to the Bank, in addition to the amount secured by the note in question. The Bank received from time to time various sums to be applied to the principal debtor's indebtedness, but these sums were applied by the Bank to the portion of the principal debtor's indebtedness other than the amount secured by the note. The defendant contended these moneys should have been applied to the indebtedness secured by the note. Tried by GREGORY, J. at Vancouver on the 18th of September, 1917.

Statement

Sir C. H. Tupper, K.C., and *Alfred Bull,* for plaintiff.
D. Donaghy, for defendant Falk.

19th September, 1917.

GREGORY, J.: The defendant appeals to the equitable jurisdiction of the Court. His counsel has not been able to find any authority to support his claim for relief, and I know of none. There is no evidence to support the suggestion that the Bank knew defendant was an accommodation indorser and that he should be treated as a surety with reference to the securities.

Judgment

The Bank received the securities and the note sued on by virtue of an agreement between the Bank and The Peoples' Trust Company, and, so far as I can see, it was under no obligation, legal or equitable, to appropriate the moneys collected by it towards the extinguishment of the note indorsed by the defendant in preference to the one for $8,341.31. Defendant admits the indorsement and the amount, etc., and there must be judgment for the plaintiff. The costs, of course, follow the event.

Judgment for plaintiff.

IN RE ISRAELOWITZ.

CAYLEY, CO. J.

1917

Dec. 20.

IN RE ISRAELOWITZ

Criminal law—Extradition—Information—Validity—More than one charge included—Proof of foreign law.

It is no objection to an information that it contains more than one charge. Where the facts disclosed in extradition proceedings make out a *prima facie* case of theft under Canadian law, proof that such facts constitute larceny under the foreign law may be inferred from the defendant's indictment in the foreign state for the offence.

APPLICATION for extradition of one Adolphe Israelowitz, charged with grand larceny in the first degree, by the obtaining of

"(1) Twenty-five bonds issued by the Government of Russia of 1,000 roubles each, or $159 each in American money, by means of a cheque for $3,975, drawn on the National Park Bank of New York, and which cheque was worthless.

"(2) Five bonds issued by the Government of Germany of 1,000 marks each, or $116 each in American money, and two other German bonds of 2,000 marks each, or $232 each in American money, by means of another worthless cheque on same bank and payable to the order of the same parties, *viz.*, Joseph Walker & Sons, for $1,044. In each case the usual asseverations are made as to false pretences, etc., and of stealing the same."

Statement

There were two indictments and six counts found by the grand jury of New York against the prisoner. The principal evidence was tendered by way of depositions and photographic copies of exhibits, and one William G. Herbert, detective, of New York, gave evidence to the effect that he had seen the signature affixed to the depositions by the witnesses, and knew the signature of the judge before whom the depositions were taken. Heard by CAYLEY, Co. J. at Vancouver on the 13th, 14th and 15th of December, 1917.

R. L. Maitland, for the State of New York, for the application.

E. A. Lucas, for prisoner, *contra,* objected that the information could not be proceeded upon because the prisoner was originally arrested on another information, which must first be disposed of (see Daly's Criminal Procedure, 2nd Ed., 180;

Argument

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Baxter v. *Gordon, Ironsides and Fares Co.* (1907), 13 O.L.R. 598), and that a photograph is not sufficient identification. Identity must be proven: *Frith* v. *Frith* (1895), 65 L.J., P. 53; (1896), P. 74; Moore on Extradition, Vol. 1, p. 524. Original documents and exhibits must be produced: *In re John Wesley Parker* (1890), 19 Ont. 612. The foreign law must be proven by expert witnesses and not by an exemplified copy of the same: *Re Collins* (No. 3) (1905), 10 Can. Cr. Cas. 80. The information cannot contain more than one charge. All elements of false pretence must be proven, and the giving of a cheque is not obtaining goods by false pretences, being a promise to pay.

Argument

Maitland: The foreign law can be proven by the indictments themselves: see *Re Deering* (1915), 24 Can. Cr. Cas. 133. More than one charge can be included in an information: *In re O'Neill* (1912), 19 Can. Cr. Cas. 410. The cheques herein make out a *prima facie* case of false pretences: see *Rex* v. *Garten* (1913), 22 Can. Cr. Cas. 21. The Court can take notice of a photograph sworn to in depositions, and compare the likeness with that of the accused.

Lucas, in reply.

20th December, 1917.

CAYLEY, Co. J.: Adolphe Israelowitz, late of the City of New York, in the County of New York, is charged, upon the information of William G. Herbert, police constable of New York, and sworn herein on the 11th of December, 1917, with having on the 9th of October, 1917, obtained feloniously and fraudulently from the possession of Joseph Walker and others, partners in the firm of Joseph Walker & Sons [certain bonds,

Judgment

as already set out in statement].

Demand now is made for the committal of the prisoner for surrender to the authorities of the State of New York under the provisions of the Extradition Act.

Besides the information of William G. Herbert, and his evidence taken before me on the hearing, there was submitted a very complete form of evidence in the shape of authentications by the secretary of the British Ambassador at Washington, the Secretary of State of the American Government, and the Gover-

nor of New York State, shewing that the formalities had been observed and a request for extradition made in due form. An exemplified copy of the bill of indictment bench warrant, the return of the grand jury of the State of New York, and certificate of the information and the depositions taken in New York are put in, certified by Judge Nott, judge of the Court of General Sessions and presiding judge of the Court of General Sessions of the Peace of the City and County of New York.

To prove that the law of the State of New York is applicable to the present case, a copy of sections 1290, 1293, 1294, 1295 of chapter 88 of the laws of the State of New York, 1909, was put in, certified under the seal of the State of New York by the Second-Deputy-Secretary of State, Charles W. Taft, dated the 24th of November, 1917. Mr. Taft's authority is certified to by the Secretary of State of New York, and the document as being under the seal of the State of New York, and that such seal is entitled to full faith and credit is certified to by the American Secretary of State.

The depositions taken before Judge Nott, and certified to, were further verified by William G. Herbert, who gave evidence before me that he had seen the New York witnesses sign their depositions, that he had seen the originals of the exhibits to the depositions (copies of which were produced before me), that he had seen the original documents, photographs of which were produced as exhibits, and that he had taken some part in having them photographed. Mr. Herbert also proved Judge Nott's signature.

Judgment

In regard to the formal proofs of documents submitted to me, counsel for the prisoner objected to the indictment and the warrant; also to the photograph of the prisoner, and I deal with these matters first.

The New York warrant is not an essential piece of evidence, but the fact that a warrant was issued by him for the arrest of Israelowitz is duly certified to by Judge Nott. The indictment was sufficiently proved, and Judge Nott's certificate shews the legal steps taken in New York. It also assists in proving the New York law under which the proceedings were taken, and a formal copy of which was submitted as above. The photo-

CAYLEY, CO. J.

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IN RE ISRAELOWITZ

graph of Israelowitz is sufficiently evidenced in the depositions of Connolly.

It appears that accused, Adolphe Israelowitz, was on the 9th of October, 1917, and for a short time prior thereto, a broker doing business at 99 Nassau Street, New York City. The complainant is a member of the firm of Joseph Walker & Sons, engaged in the business of buying and selling stocks and bonds in New York and having offices in New York. On the 9th of October, 1917, in accordance with an order received by them from the said Adolphe Israelowitz the previous day, the firm of Joseph Walker & Sons delivered the following securities to Israelowitz at his office, Nassau Street, *viz.*: Imperial Russian Internal 5½ per cent. bonds, due 1926, in the denomination of 1,000 roubles each, numbered as follows: 307,002 to 307,016, inclusive; 133,443 to 133,447, inclusive; 133,419; 368,401 to 368,404, inclusive. German Government 3 per cent. bonds, English stamped, in the denomination of 1,000 marks each, numbered as follows: 157,700; 114,183; 114,182; 114,184; 114,181 and in the denomination of 2,000 marks each, numbered as follows: 64,515; 23,396, accompanied by a bill for $3,975, the cost of the Russian roubles, and by a bill for $1,044, the cost of the German War Bonds, English stamped, aggregating $5,019. These bonds were delivered by a clerk from Joseph Walker & Sons, who arrived at the office of Israelowitz about 2.45 p.m., October 9th, but inasmuch as Israelowitz was not in, he waited there until about 3.45 p.m., at which time Israelowitz returned to his office and gave him a cheque for $3,975 and received the bonds in exchange. On returning to Joseph Walker & Sons the clerk was informed that Israelowitz should have given an additional cheque for $1,044, whereupon another clerk was sent by Joseph Walker & Sons to the office of Israelowitz at about 4.10 p.m. for the purpose of getting the cheque for $1,044. This second cheque was handed to him by a clerk in the employ of Israelowitz. Both these cheques, the one for $3,975 and the one for $1,044 were delivered to the above-mentioned clerks after banking hours, and after Israelowitz had drawn out all the money he had at the bank upon which the cheques were given, and when Israelowitz knew

Judgment

that his account at that bank was closed, and that there were no funds to meet the cheques. The next day, October 10th, 1917, the cashier of Joseph Walker & Sons, shortly after ten o'clock in the morning, having previously ascertained that the cheques would not be honoured on presentation, went to the office of Israelowitz, taking with him the two cheques mentioned above, that he might receive others in their place. This was in response to a telephone message from Israelowitz's office on the morning of the 10th of October that Israelowitz would replace the cheques by others. When he arrived there Israelowitz was not at his office, and the cashier waited there for about an hour, when he was joined by Mr. Walker, Jr. Both men waited there for some time longer, but Israelowitz did not put in an appearance, and they returned to their own office. A photograph of Israelowitz, identified as such by the cashier of the National Park Bank of New York, being the bank upon which the said cheques were drawn, was shewn to me in Court, marked as an exhibit, and was stated by the cashier mentioned to be a fair likeness of Israelowitz. The evidence of this cashier, Ernest V. Connolly, was to the effect that on the 9th of October, 1917, Israelowitz called at the National Park Bank and opened an account, the initial deposit being $2,860, cheque of one M. I. Schwartzstein. Later in the afternoon Israelowitz deposited a further amount of $9,030 in the State Bank, included in which was a further cheque of M. I. Schwartzstein for $725 and two cheques drawn on some bank in Cincinnati, Ohio. This being a new account, the cashier held the deposits in order to get into touch with the depositor. A little later in the afternoon, Israelowitz, accompanied by one of the clerks of the bank, came to Mr. Connolly's desk. Mr. Connolly told Israelowitz that he could only draw against his deposit of $2,860 and the cheque of $725 mentioned above, totalling $3,585, and that the bank could not permit him to draw against the Cincinnati cheques until they had been collected and converted into cash. Israelowitz stated that he understood that, and would not draw against them for ten days. Mr. Connolly, after further conversation with Israelowitz, decided that the bank did not wish to have any further business relations with him, and he told Israelowitz to close his account

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CAYLEY, CO. J.

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then and there. This was on the afternoon of the 9th of October, presumably during banking hours, and it was apparently after Israelowitz knew that his account was closed that he returned to his own office on Nassau Street and issued the two cheques complained of. On these facts, as shewn in the deposition submitted, I have no difficulty in deciding that an order should go for his committal to the authorities of the State of New York under the provisions of the Extradition Act. The evidence given in the depositions would be sufficient to justify committing a man for trial on a preliminary hearing in Canada, and, having compared the photograph attached to the depositions with the features of Israelowitz, now in Court, I have no difficulty in concluding that the identity of the prisoner has been established.

It is objected by counsel for Israelowitz that there was no evidence that the bonds were to be delivered for cash, but I find that both Israelowitz and the firm of Joseph Walker & Sons both regarded them as a cash transaction, and the fact that the clerk sent to deliver the bonds to Israelowitz waited an hour in Israelowitz's office with the bonds until Israelowitz should give him a cheque for them is sufficient evidence of this, coupled with the fact that, when the amount of the first cheque proved insufficient, and a further sum of $1,044 was required to complete the payment, Walker & Sons, on their part, sent another clerk for the balance of the money, and Israelowitz, on his part, sent his clerk out with the further cheque, the two clerks meeting (as the evidence shewed) at the entrance to the building in which Israelowitz's office was situate.

Judgment

Counsel further objected that no false statement was made by Israelowitz, knowing at the time that it was false, or that the goods were parted with owing to such false representation. On these points I find against the prisoner, as also on the fact that the prisoner intended to defraud. The prisoner's conduct in handing over cheques which he knew to be worthless, after his account had been closed, in exchange for bonds was all the representation that was necessary, and the intention to defraud may be inferred.

Amongst the formal objections was one to the effect that the

information charges two offences and that there has been no proof furnished of foreign law, *i.e.*, of the State of New York, in regard to obtaining goods under false pretences and theft. The first objection, I think, is disposed of by *In re O'Neill* (1912), 19 Can. Cr. Cas. 410. The second objection may call for a more extended consideration.

It is not argued that larceny is not an offence against the law of the State of New York, but only that it has not been properly proved, but I do not think it is necessary to prove the foreign law in a case of this kind after the decision in *Re Deering* (1915), 24 Can. Cr. Cas. 133, where four judges of the Supreme Court of Nova Scotia decided that where the facts disclosed in the extradition proceedings make out a *prima facie* case of theft under Canadian law, proof that such facts constitute larceny under the foreign law might be inferred from the defendant's indictment in the foreign state for the offence. The present case is stronger, because not only have we the indictment, but the law under which the indictment was found is produced to me in the form of an extract covering the proper sections, the seal of the United States by Robt. Lansing, Secretary of New York, who is further certified to be the Second-Deputy-Secretary of State by the Secretary of State of New York, with the seal of the State of New York affixed to both. And that such seal is entitled to full faith and credit is certified to under the seal of the United States by Robt. Lansing, Secretary of State. In the *Deering* case, Ritchie, J., in delivering the judgment of the Court, at p. 136, said:

Judgment

"It is a reasonable and proper legal presumption for this Court to make and act upon, that the indictment was found in accordance with the law."

In that case, of the State of Massachusetts; in the present case, of the State of New York.

An order for extradition will go accordingly.

Application granted.

CLEMENT, J.

1917

Nov. 21.

BANK OF HAMILTON v. HARTERY

BANK OF HAMILTON v. HARTERY *ET AL.*

Judgment—Registration of after execution but before application for registration of mortgage—Priority—Land Registry Act, R.S.B.C. 1911, Cap. 127, Sec. 73.

A judgment registered in the Land Registry office on an application made after the date of the execution of a mortgage by the judgment debtor, but before the application for the registration thereof, takes priority over the mortgage by virtue of section 73 of the Land Registry Act.

Statement

ACTION for a declaration that a mortgage held by the plaintiff Bank upon certain lands of Messrs. McArthur & Harper, dated between the 10th and the 16th of March, 1916, and registered in the Land Registry office at Kamloops on an application dated the 12th of July, 1916, takes priority over a judgment held by the defendants against the said McArthur & Harper, registered on an application made between the 16th of March and the 12th of July, 1916. The facts are fully set out in the reasons for judgment. Tried by CLEMENT, J. at Vancouver on the 19th of November, 1917.

W. C. Brown, for plaintiff.
Housser, for defendants.

21st November, 1917.

Judgment

CLEMENT, J.: The material facts may be stated in few words. The plaintiff Bank holds a mortgage upon certain lands executed by McArthur & Harper between the 10th and the 16th of March, 1916, and registered in the Land Registry office at Kamloops on an application dated the 12th of July, 1916. The defendants are the holders of a judgment against McArthur & Harper, or one of them, which was duly registered on an application made on some date between the 16th of March and the 12th of July, 1916. The sole question is, which of these charges is entitled to priority? No suggestion is made of want of *bona fides* or otherwise with regard either to the mortgage or the judgment; nor is it suggested that the delay in

registering the mortgage was caused by anything which would affect or raise an equity against the defendants.

In my opinion, the question is answered by section 73 of the Land Registry Act (R.S.B.C. 1911, Cap. 127). That section reads thus:

"When two or more charges appear entered upon the register affecting the same land, the charges shall, as between themselves, have priority according to the dates at which the applications respectively were made, and not according to the dates of the creation of the estates or interests."

By virtue of the interpretation clause (section 2) of the same Act, "charge" includes a judgment; and "judgment" includes "any judgment, decree or order of any Court whereby any sum of money is payable to any person." The judgment held by the defendants answers this description.

I must confess that I can see no way of escape from the operation of this section 73. It fits exactly the case before me. But Mr. *Brown* contends that the old rule of law as expounded, *e.g.*, in *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282, that a judgment, or rather, an execution issued upon a judgment, can affect only the interest which the judgment debtor actually has in lands; in other words, that in the case before me, the defendants' judgment forms a charge only upon the equity of redemption, and does not affect the plaintiff's prior interest which, as between the plaintiff and its mortgagors, had been created before the defendants applied to register their judgment. That this rule of law still applies in this Province has been held, so Mr. *Brown* contends, by the Full Court in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51. That case raised a question under the well-known section 104 of the Land Registry Act which has no application here in one sense, as both instruments here were duly registered. But the Court did consider the construction and effect of section 27 of the Execution Act (R.S.B.C. 1911, Cap. 79), which provides, stated shortly, that a registered judgment

Judgment

"from the time of registering the same the said judgment shall form a lien and charge on all the lands of the judgment debtor in the several land registry districts in which such judgment is registered, in the same manner as if charged in writing by the judgment debtor under his hand and seal."

In *Entwisle* v. *Lenz & Leiser* the facts were that the plaintiff had bought outright a lot from the judgment debtor

CLEMENT, J.

1917

Nov. 21.

BANK OF HAMILTON v. HARTERY

and had taken possession, but for some reason had not registered his deed. After the date of this deed and of the taking of possession by the plaintiff, the defendants registered a judgment against the judgment debtor, and, relying on section 104 of the Land Registry Act, claimed a valid charge upon the lot in question. The Full Court held that the lot was not within the words "the lands of the judgment debtor," as he was a bare trustee for the plaintiff. As Mr. Justice IRVING expressed it, it was a case of taking A's land to pay B's debt. It is not for me to criticize this decision, but, as will be seen, no priority of charges was involved, and I cannot see my way to read the judgment in that case as necessarily involving the wiping out of section 73. I have before me the case of lands which undoubtedly were the "lands of the judgment debtor," against which two charges appear in the registry. I must, it seems to me, give effect to the unambiguous language of section 73, and say that the defendants' judgment forms a charge in priority to the plaintiff's mortgage.

Judgment

Action dismissed with costs.

Action dismissed.

JOHN HING COMPANY v. SIT WAY AND CHEW CHOCK.

COURT OF APPEAL

1917

Dec. 18, 19.

JOHN HING CO. v. SIT WAY

War Relief Act—Leave to take step in action—Waiver—Appeal—Party affected by—B.C. Stats. 1916, Cap. 74; 1917, Cap. 74, Sec. 8.

Injunction — Damages resulting from — Partnership — Reference — Mixed question of law and fact.

Where the parties to an action take part in the proceedings without insisting upon compliance with the provisions of section 8 of the War Relief Act Amendment Act, 1917, they are estopped from afterwards invoking the statute as to any proceedings taken in the Court of Appeal.

Per MACDONALD, C.J.A. and GALLIHER, J.A.: This section is for the protection of volunteers who are made defendants; it does not apply to plaintiffs, nor does it apply to any proceedings taken in the Court of Appeal.

The plaintiff obtained an *interim* injunction, giving the usual undertaking as to damages. Later he made a settlement with one of the two defendants, and, assuming that the defendants were partners, he discontinued the action. The other defendant, contending there was no partnership, and that his co-defendant had no power to settle the action for him, applied for an order declaring the plaintiff liable to him in damages resulting from the injunction, and that a reference be ordered to ascertain the amount of damages. An order was made directing an inquiry before the registrar to ascertain whether the defendants were partners and to report what damages, if any, were payable by the plaintiff to the said defendant.

Held, on appeal, setting aside the order of MCINNES, Co. J. (MCPHILLIPS, J.A. dissenting), that the question of whether a partnership exists is a mixed question of law and fact, and it was the duty of the trial judge to first decide whether the defendants were partners and then, if necessary, direct an inquiry as to the *quantum* of damages.

APPEAL from the order of MCINNES, Co. J. of the 26th of July, 1917, on an application by Chew Chock, one of the defendants, for an inquiry as to damages sustained by reason of an order restraining him from disposing of certain potatoes in his possession, counsel undertaking to answer for any damages occasioned by the injunction. The action was brought against Sit Way and Chew Chock in March, 1917, for breach of contract for the sale of seven tons of potatoes. An *interim*

Statement

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injunction was obtained restraining the defendants from disposing of the potatoes until the disposition of the action. The plaintiff later settled the action with Sit Way, one of the defendants. Chew Chock, who contended that Sit Way was not a partner of his, and had no power to settle the action for him, brought action in the County Court against the John Hing Company for such damages as were sustained by him by reason of the injunction, claiming that owing to the fall in the price of potatoes while the injunction was in force, the market price of the potatoes was reduced by $214. On the trial the learned judge reserved judgment, but intimated that Chew Chock should have proceeded in the original action to enforce his claim for damages. He then applied in this action for an order declaring the John Hing Company liable for damages in respect of the injunction that was granted, for an assessment of the damages, or in the alternative, a reference to ascertain the amount of damages. The learned judge ordered that an inquiry be had before the registrar as to whether Sit Way and Chew Chock were partners, and that he report what damages, if any, are payable by the plaintiff to Chew Chock by reason of the injunction. From this order the plaintiff appealed.

Statement

The appeal was argued at Vancouver on the 18th and 19th of December, 1917, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Dickie, for appellant.

J. A. Russell, for respondent, raised the preliminary objection that the plaintiff was bound to obtain leave under section 8 of the War Relief Act Amendment Act, 1917, before bringing the appeal.

Dickie, contra: The respondent is virtually the plaintiff as far as this order is concerned, as he is claiming damages, and the Act does not apply to the person seeking relief. It was proved in the action below that Chew Chock is not entitled to the benefit of the War Relief Act. In any case he has waived the right to take any objection now, as it is too late. I also contend the Act does not apply to proceedings in the Court of Appeal.

Argument

Russell, in reply.

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MACDONALD, C.J.A.: I would overrule the preliminary objection. In my opinion, section 10 of the War Relief Act, as amended by section 8 of the Act of the present year, was passed for the protection of volunteers who might be made defendants in proceedings commenced by process, such as a writ, petition, or originating summons. It would be absurd to suppose that this Act was intended to protect plaintiffs. The plaintiff goes voluntarily into Court. If he chooses to go voluntarily into Court, he must submit to any judgment which the Court may make against him. The defendant, on the other hand, does not go voluntarily into Court, and he is the person sought to be protected by this section.

Now the preliminary objection may be disposed of on two grounds: first, that this section has no application to proceedings commenced by notice of appeal which brings the matter for the first time into this Court. This would seem to be indicated by subsection (13) of section 9 of the Act of 1917, which makes provision for dispensing with certain evidence by the Supreme Court, but gives no like power to the Court of Appeal. It is true it also makes no mention of the County Court as having such power, or the Small Debts Court, or any other Court; but, whatever the effect of that may be, it does not affect the question which we now have to decide, except to this extent, that it indicates that the Legislature had in mind that such dispensation could only be made in the earlier stages of the litigation.

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There is another ground upon which the case may be decided, and that is, that by the conduct of the parties in the Court below the right to take objection has been waived. I think if parties choose to appear in proceedings without insisting upon the right which this statute gives that they are estopped from raising the objection afterwards. It is a waiver of the benefit of the statute which a party may make, and I think by what has occurred in the Court below there has been such a waiver, and it is not now open to Mr. *Russell* to take the objection.

GALLIHER, J.A.: I would overrule the objection on two

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grounds. In the first place, in my opinion, the section of the Act was never framed with the intention of making it apply to proceedings in the Court of Appeal; nor do I think, in reading the language of the Act, that we should so apply it.

And the second ground is that what is sought here is to set aside an order for a judgment below. Now that is not for the recovery of anything against the defendant. In reality, the person who claims to be defendant is the plaintiff here. He has a judgment in his favour, which he seeks to hold. No objection was taken with regard to this Act either by one side or the other, and when the matter went to judgment in one form or the other, it seems to me that is a waiver; it is ended there. But as I said, he is in reality the plaintiff, and the appellant here is applying, not to collect any moneys from the respondent, but to relieve himself really of a liability that has been adjudged against him in favour of the other party. Now that is the position. In that way, I say he is in reality the defendant. On these grounds, I do not think the Act has any application.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would deny the application to quash the appeal. When you look at the War Relief Act, the amendments, and reading the whole Act, it is plain, in my opinion, that the intention was that this application should be made some time within reasonable distance of the commencement of the action, because it speaks of the service of a writ or other proceedings. It is reasonable that this application would be anterior to judgment in the Court below. A right or privilege conferred by statute may be waived. The parties here took proceedings which could have been objected to under the provisions of the War Relief Act, but no objection was taken. In this Court the objection is taken for the first time. It is too late. I wish to state that I do not at all agree to what has been advanced by counsel, that you may look upon the plaintiff as defendant, or the defendant as plaintiff in applying the War Relief Act. The style of the cause and description of the parties as they appear on the record must govern. The whole scheme of the Act is to have this point determined when the right to stay the action accrues.

EBERTS, J.A.: I am of opinion the application should be overruled. I quite agree with the Chief Justice with reference to the position taken by the parties that there has been an absolute waiver in so far as the war conditions have to be observed and performed. And I would treat these parties as plaintiff and defendant, and defendant and plaintiff, as they appear on the record before us, with the best means at my disposal. Failing anything else that is before me, I am of opinion that no person has taken a decided objection to any other person's application in the case, and they have come before us and waived all objections, and I think, under the circumstances, that the preliminary objection should be overruled.

EBERTS, J.A.

Preliminary objection overruled.

Dickie, on the merits: The question is whether Sit Way was a partner of Chew Chock when the contract was made. The first point is a question of liability, and that should be decided by the judge himself. He also put the burden of proof on us: see *Albertson* v. *Secord* (1912), 1 W.W.R. 657 at p. 661; *Royal Bank of Canada* v. *Whieldon* (1916), 23 B.C. 436. Whether there was a partnership or not is a question of law and fact: see Lindley on Partnership, 8th Ed., 101. The discontinuance of the action does not affect the matter; one must shew that the injunction was a proper order to make: see Kerr on Injunctions, 8th Ed., 674; *Newcomen* v. *Coulson* (1878), 47 L.J., Ch. 429. On the question of what constitutes partnership see *Pooley* v. *Driver* (1876), 46 L.J., Ch. 466. Matters other than accounting cannot be referred to the registrar: see *Clow* v. *Harper* (1878), 47 L.J., Ex. 393.

Argument

Russell: There is power to make the order, as the Supreme Court Rules apply under section 77 of the County Courts Act: see also Order XIV., r. 1 of the County Court Rules; *McIlvenna* v. *Goss* (1912), 3 D.L.R. 690; *Henderson* v. *McGinn* (1912), 5 D.L.R. 205.

Dickie, in reply.

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MACDONALD, C.J.A.: I think the appeal should be allowed. The facts are very simple, and the procedure which ought to

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have been followed, the order which ought to have been made, seems to me to be also clear. The plaintiff discontinued his action after he made a settlement with either one or both defendants. I will assume that he made the settlement with one, thinking he had made it with both; thereupon he discontinued his action. Now the discontinuance of the action, of course, would not deprive the defendant of his right in respect of the undertaking, provided he were not precluded by the settlement made. The discontinuance of the action would not rob him of his right to have an inquiry as to damages arising by reason of the injunction, if the learned judge should be of the opinion that that inquiry should be had. After some false starts, the matter finally came before the learned judge on an application for an inquiry, and the learned judge, instead of deciding the question, which would either have made a reference unnecessary or would have given the registrar a basis for assessing damages, referred the matter to the registrar without determining the preliminary question of law and fact, namely, was there a partnership between these defendants or not? If he has come to the conclusion, on the evidence submitted to him, that there was a partnership, then it is conceded on both sides here that there would be no damages. If, on the other hand, he came to the conclusion that there was not a partnership, then, having made that finding, assuming that he had power to refer to the registrar a question of that kind at all (which I do not now find it necessary to decide), then he would refer it to the registrar with a finding which would give the basis upon which the registrar could assess damages. Instead of doing this, he referred it to the registrar, not only to inquire and report as to damages, but to decide as to whether a partnership existed between the defendants or not. Now I think, with great deference, that the learned judge was in error in taking that course. The clear course, according to my understanding of the practice, was to decide first the preliminary question of law, which might have disposed of the whole matter, and then, having decided that, to consider what the consequence of that decision would be as to any further proceeding. I think, therefore, the appeal should be allowed and the order set aside.

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

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MCPHILLIPS, J.A.: I would dismiss the appeal. The action was one which brought up the question of partnership or no partnership. The particular defendant asserts that he has a right to damages under the undertaking given when the injunction was granted. The action proceeded a certain distance and then the plaintiff discontinued it, therefore there was nothing for the Court to try. In effect, the plaintiff undertook to not further contend that there was a partnership. I have failed to find any case, and I would be astonished if there was one, which would entitle a party to discontinue an action which brought up the issues directly, and then contend, when he comes to meet the motion that he should pay damages consequent upon the issue of the injunction, that there was a partnership, and that this particular defendant was not entitled to prevent him obtaining possession of the goods in question, the plaintiff claiming to have purchased same from the other defendant, a member of the partnership.

A person in possession of property is entitled to the property as against the whole world; the one person who can dispossess him, though, is the true owner. Now in this particular case, this particular defendant contended that he was the true owner and was in possession of the potatoes. The plaintiff, in desisting from proceeding with the action and settling with the other defendant, who he claimed to be a partner, but not establishing the partnership, can give him no right to the potatoes. The Court has been imposed upon to the extent of granting an injunction, and now plaintiff attempts to in this way escape the consequences of it, that is, objects to an inquiry as to damages. It must be recollected that this was not an undertaking given to the defendant. This was an undertaking given to the Court; it is not a case where an action could be brought upon the undertaking: Kerr on Injunctions, 8th Ed., at p. 4. Therefore it is plain that that part of the order of the learned trial judge below is perfectly correct. I do not think that it was necessary or proper at all to go into the question of the inquiry as to whether there was a partnership. That was really the subject-matter of the action which was discontinued; otherwise

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you practically say this: a party can bring an action, discontinue or dismiss it, then, when called upon to meet an inquiry as to damages consequent upon it, reagitate the whole matter. Now the only case when that will be allowed is when there are special circumstances disentitling an inquiry. I have looked at the cases upon that point, and the first case cited has been disapproved of. Further, it does not go to anything like the length pressed here. *Smith* v. *Day* (1882), 21 Ch. D. 421, established, at any rate in my opinion, beyond the question of a doubt, that the defendant was entitled to an inquiry, quite apart from the question of partnership, as to what damages he had sustained, the assumption being that he was wrongly interfered with in regard to the possession of and property in these potatoes. It would be different if there was a settlement made out and a release from this particular defendant was produced in Court—a release from all claims and damages. That would have been pertinent. In *Griffith* v. *Blake* (1884), 27 Ch. D. 474, Lindley, L.J., at p. 477, said:

"My opinion is that the undertaking applies in all cases where the Court at the hearing determines that the plaintiff is not entitled to an injunction."

Here we have discontinuance of the action in effect the same. Then I would refer to *Re Hailstone; Hopkinson* v. *Carter* (1910), 102 L.T. 877, Cozens-Hardy, M.R. at pp. 879-80. In that case the judge had made a mistake. He proceeded on wrong evidence, and the parties were not really at fault in what they did. It was there attempted to escape liability in damages and it was held that the contention was perfectly hopeless. It was held that the undertaking was in the Probate Division, and it was for the Probate Division to enforce the undertaking. This particular defendant, the respondent in the appeal, was in possession of the potatoes and was interfered with in the possession of the potatoes and was enjoined from parting with the possession thereof and the right to sell and dispose of them. The action being discontinued, natural justice requires, the dignity of the Court requires, the enforcement of the undertaking, and the order appealed from, in directing an inquiry as to the damages, was right. There should be no inquiry as to whether any partnership existed. The plaintiff is precluded, by discontinuing the action, from having any such inquiry.

MCPHILLIPS, J.A.

EBERTS, J.A.: I am of opinion that it is perfectly right to go into the inquiry as to damages, but before that inquiry could be commenced before the registrar, the proper course of procedure would be to ascertain whether a partnership existed. Now, from the record, there was the question as to whether a partnership did exist. That was never decided by the County Court judge, but in one particular clause of the order he refers that question to the registrar to ascertain whether or not a partnership existed. But it might be possible that a judge could order a reference and report, reserving the question of partnership, and afterwards try the question of partnership if he thought that was a more expeditious way of trying the case. But that is not what is before us. He has made an absolute, definite order, saying that the matter is referred to the registrar to find out whether there is a partnership between the parties, and if there is a partnership between the parties, to assess damages and to report on that. I submit, with all due deference, that is not the course to pursue. I do not think he has the power to refer a question of law and of fact to a registrar of the Court.

EBERTS, J.A.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Dickie & DeBeck.*
Solicitor for respondent Chew Chock: *J. A. Russell.*

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McCOY v. THE NATIONAL BENEFIT LIFE AND PROPERTY ASSURANCE COMPANY, LIMITED.

Fire insurance—Fire limit by-law—Subsequent insurance—Notice of—Breach of condition—Waiver—Effect of mortgage clause—Statutory condition—Variation of—Reasonableness.

The plaintiff insured in the defendant Company for $2,000 through its general agent in Vancouver who, later, at the plaintiff's request indorsed the policy as payable to a mortgagee in the event of loss. Subsequently the plaintiff insured the same property in another company for $3,500, but failed to notify the defendant in compliance with the eighth statutory condition in its policy. The property was later partially destroyed by fire. Owing to a Fire Limit By-law in force when the policy was issued, the building could not be repaired as it was previously to the fire. An adjuster was appointed by the two companies who, after entering into a non-waiver agreement with the plaintiff, endeavoured to adjust the loss to the satisfaction of the parties but failed. He then notified the plaintiff that the companies would proceed to repair the building, having obtained the necessary permit. A week later he again, by letter, offered $1,500 in full settlement, adding that in the event of non-acceptance, then on behalf of the defendant Company he thereby gave notice that it was the intention to proceed with the repairs. The plaintiff first brought action against the second company and on the trial (before MURPHY, J.) it was held that although the actual loss was $1,600, owing to the "Fire Limit By-law" the building must be considered a total loss, which was fixed at $3,600, and judgment was given for the proportionate amount taking into account the concurrent insurance with the defendant Company. The ninth variation to the statutory conditions in the policy issued by the defendant recited that "if in consequence of any local or other by-laws the Company shall in any case be unable to repair or reinstate the property as it was it shall only be liable to pay such sum as would have sufficed to repair or reinstate the same." In an action to recover on the policy the trial judge held that the adjuster by his actions treated the policy as existing and valid, and his letters offering settlement with notification that repairs would proceed in case of non-acceptance, were outside the protection afforded by the non-waiver agreement and his duties as an adjuster, thereby constituting a waiver of the eighth statutory condition in the policy; also that the ninth variation to the statutory conditions was a reasonable one and that the defendant should pay its proportionate share taking into account the concurrent insurance as found by MURPHY, J. but only on a basis of a total loss of $1,600.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that consent

or waiver must be founded on knowledge and intention, and the conduct of the adjuster, when viewed in the light of the facts and circumstances of the case, cannot furnish ground for the inferences drawn by the Court below, and the appeal should be allowed.

Per MARTIN and MCPHILLIPS, JJ.A.: That as to the adjuster's acts as an adjuster the defendant Company is protected by the non-waiver agreement, but he entered into negotiations outside his duties as an adjuster, which operated as a waiver of the eighth statutory condition, and the appeal should be dismissed.

Held, further, on the cross-appeal, *per* MACDONALD, C.J.A. and MARTIN, J.A., that the ninth variation to the statutory conditions only applied when the liability exceeded $1,600, and if the plaintiff were entitled to judgment the amount when estimated with the sum already recovered from the concurrent insurance, should be $1,309.10.

The Court being equally divided, the appeal was dismissed.

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APPEAL by defendant and cross-appeal by plaintiff from the decision of MACDONALD, J., in an action upon a policy of fire insurance, tried by him at Vancouver on the 11th of December, 1916. The facts are set out in the head-note and reasons for judgment of the learned trial judge.

Statement

T. E. Wilson, for plaintiff.
Wilson, K.C., and *Symes,* for defendant.

MACDONALD, J.: In this action the plaintiff insured her property, situate on Alexander Street in the City of Vancouver, for the sum of $2,000 with the defendant Company. The policy was issued by the general agents of the defendant Company at the City of Vancouver (Messrs. Rutherford & Company) on the 14th of April, 1915, according to the mortgage clause attached, and also the indorsement subsequently to the date of the insurance, namely, on the 22nd of April, 1915, the Company agree that the loss, if any, under the policy should be paid to Carrie Martha Jameson, "as mortgagee as her interest might appear." The plaintiff subsequently insured the same property with The North Empire Fire Insurance Company in the amount of $3,500. On the 1st of January, 1916 the property insured was partially destroyed by fire. There is no evidence that, prior to the destruction of the property by fire, she notified the defendant Company of this subsequent insurance. After the fire occurred, an adjuster, purporting to act

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on behalf of both the insurance companies, sought to arrange or settle the amount of the loss, but having failed, after a period of time, to accomplish this result, another adjuster, Mr. Shallcross, was appointed. He took the matter in hand, and as a precautionary measure, took what is called "a non-waiver agreement," whereby the parties were allowed to go on and determine the amount of the fire loss without the question of liability being affected. The North Empire Fire Insurance Company not having paid under its policy, was sued, and the case coming on for trial before Mr. Justice MURPHY, he decided that such company was liable, and judgment was entered in favour of the plaintiff for the proportionate amount of $3,600, for which such defendant would be liable, after taking into account the concurrent insurance. No doubt that portion of the judgment has reference to the policy of insurance upon which the plaintiff is now seeking to recover. Upon this trial it is admitted that the amount of loss found by the learned judge at the previous trial, namely, $3,750 less salvage $150, should be accepted as the loss suffered by the plaintiff with respect to her property. It is at the same time admitted that the actual loss, suffered through the fire itself, only amounted to the sum of $1,600. The reason for the discrepancy between these two amounts is shewn by the fact that the plaintiff was unable, and the insurance company could not rebuild in the same manner as the building before erected had been constructed, without infringing the provisions of what is known as the Fire Limit By-law of the City of Vancouver. So that what would naturally have been a small loss, to the extent of $1,600 amounted in its result to $3,600.

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The defendant Company, under these circumstances, shortly stated, contended that it is not liable under its policy, on the following grounds: First, that the proofs of loss shew an attempt on the part of the plaintiff to defraud the Company. This point was already settled in the previous trial, and without dealing with the matter in detail, I propose to follow my brother judge. I might add that it seems to me that the value of the property was such an uncertain question in the mind of the plaintiff, that it is not to be wondered, that she differed in her estimate from time to time. As I understand it, the estimate

given by her, as to the value under the policy already sued upon, which formed the previous judgment, was $10,000, whereas the present estimate is only $6,000. On this point I find that the contention raised by the defendant Company is of no avail.

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Then it is contended that the policy does not, according to the eighth statutory condition, permit of any subsequent insurance being effected, without notifying the defendant Company of such further insurance. Applying that condition, it is submitted that the subsequent insurance effected in The North Empire Fire Insurance Company, operated so as to avoid the policy issued by the defendant Company. The defendant cites in support of that position the case of *Western Assurance Co.* v. *Doull* (1886), 12 S.C.R. 446, and other cases since decided to the same effect. I think, however, that this defence, as applied to the facts in the present case, does not operate to benefit the defendant Company. I consider the case of *Mutchmor* v. *Waterloo Ins. Co.* (1902), 4 O.L.R. 606 is an authority that I should follow. I might add that particularly in insurance cases, the aim of the Court should be, if possible, to have the decisions throughout the Dominion coincide. I feel no hesitancy in following this decision. It is referred to in Cameron on Fire Insurance at p. 412 as follows, on this point:

"No form of assent is prescribed by the condition, nor any time at which it is to be given. It, therefore, need not necessarily be manifested in writing and may be given before or after the loss. Where a subsequent insurance has in fact been effected, without notice, notice of it in writing is not a prerequisite to a valid assent. Such notice is necessary only where the insured intends to effect a further insurance thereafter, and to place the company under the obligation to dissent in writing within the prescribed time, if they object to it; their failure to do it is equivalent to an assent."

MACDONALD, J.

The facts in the *Mutchmor* case are somewhat similar to those disclosed upon this trial. I am then referred to the case of *Laforest* v. *Factories Insurance Co.* (1916), 53 S.C.R. 296, as an authority that an adjuster and agent employed by an insurance company, who makes an offer of settlement, does not, by so doing, bind the insurance company. In other words, that it does not constitute a waiver of objections, that the company might urge against the claim, *e.g.*, subsequent insurance without notice.

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I find, upon the facts of this case, that Mr. Shallcross was acting for a time as the adjuster, and in connection with the matter of settling the amount of the loss, his course was protected by the non-waiver agreement; but a portion of his actions were those outside of the protection thus afforded by this agreement. He was acting with the full knowledge and, as he states, the authority of the local general agents in endeavouring to effect a settlement of the amount to be paid under this policy. He was treating the policy as existing and valid. I consider that where a foreign company is doing business in the Province, the actions of its general agents should be binding upon the company. It is essential to the proper carrying on of insurance business at a distant point from the head office, that they should have such general authority, not only to effect insurance, but also to adjust and pay losses: see Holt on Insurance, pp. 495-6. So I feel no doubt that the statement of Mr. Shallcross, that he had authority to make an offer of settlement, was made with the necessary authority in that connection. His actions and letters were binding upon the Company and to that extent, any impediment that might arise with respect to condition 8, has been removed.

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The next point raised by the defendant Company is that the actual loss by fire only amounted to $1,600, and that the defendant should not be called upon to pay any loss that arises, not by the fire itself, but by the inability of the owner of the property to erect a building of like kind. This question of liability has already been passed upon on the previous trial, and I readily follow the decision of Mr. Justice MURPHY. I think that the policy was issued subject to the by-laws in force within the City, and that it is to be taken as part of the contract of insurance that such law in the shape of the Fire Limit By-law, would have a bearing upon the extent of the liability created under the policy.

Objection was raised that I should not follow American decisions. I have already referred during the trial to the remarks of Lord Justice Brett in *Cory* v. *Burr* (1882), 9 Q.B.D. 463 on this point, and I have thus no hesitation in following such decisions in insurance cases. So that as far as the loss suffered under the policy is concerned, I find it as stated in the previous judgment already referred to.

The question then arises whether the mortgage clause attached to the policy can be a benefit to the assured. It is contended on the part of the plaintiff that the insured having paid the mortgage, she was subrogated or rather her rights became by assignment, the same as the mortgagee. I think it well to refer to this point, as the case may go further, and I wish to shew that the contention was made by counsel for the plaintiff. I cannot agree with this proposition. I think that the privilege or additional benefit intended to be conferred by the mortgage clause, was only given to the mortgagee. It was part of the contract of insurance, as outlined by the mortgage clause, that under a certain set of circumstances, the insurance Company might be liable, whereas under other circumstances, it would not be so. It is submitted, however, that a liability having occurred after the fire, that the claim became assignable, even to the plaintiff. I do not think so. I consider that when the mortgage ceased to exist, the benefit of the mortgage clause lapsed. That plaintiff then reverted to her rights, whatever they were, under the policy of insurance, as if the mortgage did not exist, or the mortgage clause had not been added by the defendant to the policy.

The last point then for consideration is, as to whether the defendant Company can obtain any benefit, from the 9th variation in conditions of its policy. It is claimed that these variations are not in accordance with the statute, objection being taken to the form of the type not being sufficiently of a display nature. I can not accede to this contention. I think that as far as such portion of the statute is concerned, it has been reasonably followed. These variations in conditions, form a part of the contract, but by the statute they are only in force, in so far as the Court or judge before whom the question is tried shall hold them "to be just and reasonable" to be exacted by the Company. The particular condition of which the defendant seeks to obtain the benefit is as follows:

"(9) Add to condition 18 the following: 'If in consequence of any local or other laws, the Company shall in any case be unable to repair or reinstate the property as it was, it shall only be liable to pay such sum as would have sufficed to repair or reinstate the same.'"

I have not been assisted by any authority as to the construc-

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tion that should be placed upon this variation in the statutory conditions. I can readily understand why there would not be an abundance of authority, because each one of these variations stands by itself, dependent upon its particular circumstances. The question arises, as to where the onus rests, of shewing whether this condition is just and reasonable. I think that the burden rests upon the assured, of satisfying the Court that such a condition is not just and reasonable. It is, after all, only a question of argument and a matter of opinion, in which one Court might easily differ with another. My attention is drawn to the fact that the Legislature, at its recent session, has incorporated a condition amongst the statutory conditions somewhat similar (if, in fact, not the same in result) as this condition, which under this contract only operates as a variation. Of course that legislation is not retroactive, and only has a bearing upon the matter by way of an argument in support of the contention that such variation is not unjust nor unreasonable. For my part, I cannot see why the Insurance Company could not protect itself against circumstances arising such as we find here. It is insuring against fire as its main business. It is not insuring against the results that might be brought about by the by-laws of a city. The framer of these conditions, apparently had in mind, that a condition of affairs might arise where the Company could not rebuild. They may have even been so far-sighted, as to consider a position where a building erected within a growing city, had been so erected at a time when wooden buildings were permitted, and then a change in the laws took place bringing such district within the prohibitive area, and preventing the construction of any buildings other than those of brick or stone. We find that some such condition arises here. Apparently this wooden building was erected some time ago, and then, upon being injured to the extent of over 20 per cent., the by-laws of the city step in and prevent its repair to an extent that would have rendered it fit for use. It is a matter solely of the judgment that one might form as to such a condition being reasonable or unreasonable. The condition even upon a liberal construction in favour of the plaintiff, to my mind, is a reasonable one. I see

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no reason why it should not be placed in the contract, and if, in the contract, it is of course assumed that the other party to the contract was aware of its effect. It certainly is capable of quite plain reading as to its meaning. As the onus of satisfying me that it is unreasonable rests upon the plaintiff, and it has not been satisfied, I hold that the contract, with such variation, is binding upon the plaintiff.

The question then arises, whether in any event the defendant should not pay under its policy, up to the amount that would be required in order to put the building in its proper condition; in other words, the cost to repair it, leaving aside the effect of the by-law. I think the plaintiff is considerably handicapped, if not seriously prejudiced by the trial under both policies of insurance not being brought on at the same time and the rights of the parties determined at the same period. However, I have to deal with the matter as I find it. The defendant Company cannot approbate and reprobate at the same time. It cannot in one breath take the benefit of this variation, especially in view of the reference made in the previous judgment to a proportion being borne by each company, and then say in the next "the plaintiff has received from the other insurance company all that would compensate her for the actual loss by fire."

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In my opinion, therefore, the defendant Company is liable to pay its proportionate share, taking into account the concurrent insurance as found by Mr. Justice MURPHY, but it should be on a basis of a total loss of $1,600. There will be judgment for $581.80 and costs.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 17th of April, 1917, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Wilson, K.C. (*Symes,* with him), for appellant: We say in defence that, (1) there was double insurance; (2) false statements as to the value of the building; and (3) the learned judge is in error in holding that it must be held to be a total loss owing to the by-law. There was subsequent insurance taken out without notice to us and without our assent, and we contend the

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adjuster had no authority to bind us. His action, therefore, does not affect our liability. On the question of following the American decisions see *In re Missouri Steamship Company* (1889), 42 Ch. D. 321 at p. 330; *Liverpool and London and Globe Ins. Co.* v. *Agricultural Savings and Loan Co.* (1903), 33 S.C.R. 94 at p. 103. There was a false statement as to the value of the building, which vitiates the policy: see *The North British & Mercantile Insurance Company* v. *Tourville* (1895), 25 S.C.R. 177; *Levy* v. *Baillie* (1831), 33 R.R. 505; *Chapman* v. *Pole* (1870), 22 L.T. 306. The assignee of the policy stands in no better position than the assignor. On the question of double insurance see *British Columbia Hop Co.* v. *Fidelity-Phenix Fire Insurance Co.* (1914), 20 B.C. 165. As to waiver of compliance with a condition see *Keene* v. *Biscoe* (1878), 8 Ch. D. 201; *The Commercial Union Assurance Company* v. *Margeson* (1899), 29 S.C.R. 601; *Laforest* v. *Factories Insurance Co.* (1916), 53 S.C.R. 296. On the question of liability when there is additional insurance see *North British and Mercantile Insurance Company* v. *London, Liverpool, and Globe Insurance Company* (1877), 5 Ch. D. 569. As to the right of the insurer to the benefit of contracts entered into by assured see *West of England Fire Insurance Company* v. *Isaacs* (1896), 2 Q.B. 377; *Castellain* v. *Preston* (1883), 11 Q.B.D. 380; *Phœnix Assurance Company* v. *Spooner* (1905), 2 K.B. 753.

Argument

T. E. Wilson, for respondent: We have the finding of the trial judge. On the question of waiver see *Mutchmor* v. *Waterloo Ins. Co.* (1902), 4 O.L.R. 606. The adjuster had authority, was agent of the Company, and his acts are binding on the Company: see *Mahomed* v. *Anchor Fire and Marine Ins. Co.* (1913), 48 S.C.R. 546. As to there being a total loss owing to the by-law see *Hopkins* v. *Mayor, &c., of Swansea* (1839), 4 M. & W. 621 at p. 639. All persons within a city are bound to take notice of a by-law: see *The Queen* v. *Osler* (1872), 32 U.C.Q.B. 324 at p. 333. As to the effect of alienation of the property see Stone's Insurance Cases, Vol. 1, p. 496; *Ardill* v. *Citizens' Insurance Co.* (1893), 20 A.R. 605; *Guerin* v. *Manchester Fire Assurance Co.* (1898), 29 S.C.R. 139 at p. 149.

Symes, in reply: We say there was no waiver on our part, and the plaintiff did not think there was any waiver.

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MACDONALD, C.J.A.: I would allow the appeal. The respondent admittedly broke the 8th statutory condition of the policy by subsequently obtaining further insurance without the knowledge or consent of the appellant. It is sought by respondent to meet this act of avoidance by proof of consent or waiver after the fire. This consent or waiver of breach of the condition is founded on an alleged offer of settlement made by the adjuster. After a careful perusal of the evidence I am unable to draw from it the inference drawn by the learned trial judge. The adjuster was, as he says, concerned in ascertaining and fixing the amount of the loss. The question of liability was a question for the Company, not for him. He took what is called a non-waiver agreement, but the learned judge thought he did not keep within its scope.

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At the time of the alleged acts of assent or waiver (assuming the adjuster had authority to assent or waive), he knew that the mortgage clause in the policy, whereby the loss was made payable to the mortgagee, would prevent the appellant setting up condition 8 against the mortgagee's rights. That being so, he paid no attention to that condition as between himself and the plaintiff, but regarded it as not a subject for consideration. I think it is quite clear upon the evidence that the question of waiver or consent was never for a moment present to his mind.

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Now, subsequently the mortgage was paid off, and the plaintiff herself became entitled to the money, if any were payable under the policy. If the adjuster's offer was other than an offer to fix the amount of the loss, which I think it was not, then it was made on the assumption that the mortgagee's rights overrode condition No. 8. Consent or waiver must be founded on knowledge and intention, and when claimed must be decided with reference to the circumstances of the case. The conduct of the adjuster when viewed in the light of the facts and circumstances

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above alluded to, cannot, in my opinion, furnish ground for the inferences drawn by the Court below.

In this view of the case it becomes unnecessary to consider the other grounds of appeal, but I may add that, in my opinion, if she were entitled to succeed at all the plaintiff is entitled to a larger sum than that given her, *viz.*: to the sum of $1,309.10.

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MARTIN, J.A. dismissed the appeal but allowed the cross-appeal, fixing the defendant's liability at $1,309.10.

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GALLIHER, J.A.: If this case were on all fours with *Mutchmor* v. *Waterloo Fire Ins. Co.* (1902), 4 O.L.R. 606, I would have no hesitation in following that case, but there is this marked distinction: In the *Mutchmor* case what was held to constitute acts of assent cannot upon the evidence here apply. In the case at bar there was a mortgage on the property insured, and in the policy issued by defendant loss (if any) was payable to the mortgagee as her interest might appear. In such a case the plaintiff's acts could not affect the rights of the mortgagee, who was in no way a party to them. This mortgage was in existence and unpaid at the time Mr. Shallcross, on behalf of the Company, made the adjustment and also treated as to a basis of settlement with the assured. The acts upon which plaintiff relies were all done under these circumstances. Had the same circumstances obtained in the *Mutchmor* case the decision might have been, and I venture to say would have been different. The mortgage was paid off on June 29th, 1916, at a time subsequently to any negotiations or correspondence between Mr. Shallcross and the plaintiff. On the same day the mortgagee assigned her interest under the policy to the plaintiff. The plaintiff started to enforce her claim on the 18th of September, 1916, by issue of the writ herein, so that when this action was brought there was no mortgage in existence. The plaintiff, however, claims to be subrogated to the rights of the mortgagee under the assignment above referred to. I agree with the trial judge that this contention fails, and as there was a clear breach of clause 8 of the statutory conditions, and under the circumstances, as I hold, no assent by the defendants, it follows that this appeal must be allowed and the cross-appeal dismissed with costs.

GALLIHER, J.A.

McPHILLIPS, J.A.: I would dismiss the appeal, and would also dismiss the cross-appeal, being of the opinion that the learned trial judge arrived at the right conclusion.

The Court being equally divided, the appeal was dismissed; the cross-appeal also was dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Wilson & Whealler.*
Solicitor for respondent: *Thomas Evered Wilson.*

COUPLAND v. FOLEY BROS., WELCH & STEWART.

Negligence—Damages—Settlement—Subsequent claim for further damages—Accord and satisfaction—Evidence taken on commission—Reading in full dispensed with at trial—Appeal on questions of fact.

At the conclusion of the plaintiff's case on the trial, counsel for the defence intimated that he desired to put in the whole of the evidence of a witness taken on commission and that that was his whole case. The trial judge then asked that he give the gist of what the evidence was. Counsel then gave a resume of the evidence, but asked that the Court read the evidence before delivering judgment. The Court refused to read the evidence and gave judgment for the plaintiff.

Held, on appeal, that, after reading the evidence taken on commission, the Court was of opinion that it would be impossible for a judge to form a true estimate of the weight of the evidence for the defence without reading it. That the Court was not, therefore, subject to the ordinary rules as to deciding an appeal on questions of fact, and, after reading all the evidence, are of opinion the appeal should be allowed.

APPEAL by defendants from the judgment of HUNTER, C.J.B.C., of the 27th of June, 1917, in an action for damages for injuries sustained by the plaintiff while in the employ of the defendants. The plaintiff was engaged in track laying in the Rogers Pass tunnel, upon which a steam-shovel operated in

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removing the muck pile formed by the blasting close to the face of the tunnel. While so engaged, in November, 1915, a boulder rolled down from the muck pile and, striking him, broke his leg and dislocated his knee-cap. He was taken to the hospital at Vancouver, but as the leg did not heal he had to have an operation in June, 1916, and from the evidence it appeared a further operation would be necessary. He was attended by Dr. R. H. Ker, the defendant Company's physician, who, on behalf of the Company, paid the plaintiff $30 in April, 1916, and $470 in May, when the plaintiff signed a receipt acknowledging payment of $500 as compensation in full of all demands on account of the injuries he received. In July the plaintiff, by letter, asked the defendants for more money, owing to his slow improvement, and in August the defendants, through Dr. Ker, paid him an additional $200, for which he signed a receipt for payment in full of all demands. Dr. Ker shortly after went overseas, and upon action being brought, his evidence was taken on commission in England. Before trial, the parties agreed

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that in case the plaintiff succeeded, the damages should be fixed at $1,700 and costs. On the trial, after the plaintiff had closed his case, counsel for the defendants stated he desired to put in all the evidence of Dr. Ker taken on commission, that being his whole case. The learned Chief Justice then asked him what was the gist of the evidence, when counsel gave a short resume of the evidence, and after he had finished, submitted to the Court that all the evidence should be read. The learned Chief Justice then gave judgment without reading the evidence, holding that the receipts were signed under financial pressure, that there was no accord and satisfaction, and judgment should be entered for the plaintiff.

The appeal was argued at Vancouver on the 3rd and 4th of January, 1918, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

McTaggart, for appellants: The question is whether a proper settlement was arrived at. As to the amount paid having been accepted in full, the case of *Day* v. *McLea* (1889), 22 Q.B.D. 610 is in our favour, but is distinguishable, as there is no liquidated amount in this case. Counsel for the defence, after

giving the gist of the evidence taken on commission, insisted on its being all read. On question of nonsuit see *Fletcher* v. *London and North Western Railway Co.* (1892), 1 Q.B. 122; *Isaacs* v. *Evans* (1900), 16 T.L.R. 480; *Cross* v. *Rix* (1912), 29 T.L.R. 85; *Crook* v. *Hamlin* (1893), 35 N.E. 499. In this case judgment was given for the plaintiff without the defendants' evidence being read. As to reversing the trial judge on questions of fact see *Slingsby* v. *Attorney-General* (1916), 32 T.L.R. 364; 33 T.L.R. 120.

Casey, for respondent: The trial judge may, in his discretion, accept a statement of the gist of the evidence and dispense with reading it: see *Marks* v. *Marks* (1907), 13 B.C. 161; *Robinson* v. *Rapelje* (1847), 4 U.C.Q.B. 289. As to the effect of the signing of receipts see *Lee* v. *Lancashire and Yorkshire Railway Co.* (1871), 6 Chy. App. 527 at p. 534. A receipt is only evidence; it is not binding nor conclusive: *Rideal* v. *The Great Western Railway Company* (1859), 1 F. & F. 706. As to a subsequent claim for damages owing to further disabilities see *Prosser* v. *Lancashire and Yorkshire Accident Insurance Company (Limited)* (1890), 6 T.L.R. 285. The finding of fact by the trial judge should not be disturbed: see *Chong* v. *Gin Wing Sig* (1917), 2 W.W.R. 183; *Coghlan* v. *Cumberland* (1898), 1 Ch. 704.

Argument

MARTIN, J.A.: We feel it is not necessary to call upon you, Mr. *McTaggart.* The majority of the Court is of the opinion that the appeal should be allowed, and judgment should be entered in favour of the defendants. In view of the very full discussion we have had, and the evidence which has been read to us, I feel I might paraphrase the language of the Privy Council decision recently given in the case of the *Westholme Lumber Co.* v. *City of Victoria* (1917), 39 D.L.R. 805, where they affirmed the judgment of this Court, of myself and brother GALLIHER. In coming to the conclusion that the appeal should be allowed, I will simply content myself in saying that I do not feel at all embarrassed in view of the fact that the learned trial judge has not (as it must be perfectly apparent to us all) sufficient evidence before him upon which, if I might say so, he could with more advantage have reached his conclu-

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sion. Therefore, we feel we are untrammelled by any rule which would prevent us from reconsidering and reversing his judgment. The cases that have been referred to clearly justify that opinion.

I only wish to add that with regard to some misapprehension that has arisen with regard to the case of *Marks* v. *Marks* (1907), 13 B.C. 161, it should not be considered as a restriction at all on any action this Court might have taken if it had agreed to direct a new trial; that is, if we had not arrived at the conclusion that we were justified in reversing the judgment of the trial judge and entering judgment for the defendants. The rule laid down by my brothers IRVING and MORRISON (as they then were) in *Marks* v. *Marks,* in regard to the direction of the trial judge governing the admission of the evidence, must be governed by the principle laid down in the decision of the House of Lords; and those facts are set forth by my brother IRVING, where, at p. 168, he says:

"Having read the stenographer's notes of the discussion between the Chief Justice and the counsel for the plaintiff, I do not think there was a mistrial."

As the stenographer's notes are not in the report, it is impossible to say upon what facts the learned trial judge based his decision; and therefore, his otherwise general remarks on page 168, and those of my brother MORRISON at page 179, must be restricted to the particular facts as they were in that case, which we have no means of ascertaining. That is to say, the general principle enunciated there as to whether all the evidence taken on commission should be read at length, or stated in part by counsel, is a matter of discretion of the trial judge, and that broad principle should be restricted to the circumstances of the particular case.

MARTIN, J.A.

As noted, my brother IRVING mentioned, on page 167, "each case must depend upon its own circumstances." From the circumstances before us here it is quite apparent that not only did the learned counsel for the defendant not agree to the doctrine adopted by the learned trial judge as to the admission of the commission evidence, but he protested against it, and asked that the learned trial judge should not give judgment until he had read the whole of the commission evidence; and it is mani-

festly clear that it would be impossible for any judge to form a true estimate of the weight of the evidence on the part of the defendant Company without reading it. We come to this conclusion after hearing read the evidence of Dr. Ker, covering, as it does, some 24 pages.

GALLIHER, J.A.: From the evidence, and upon the letters and receipts, I find no difficulty in arriving at the conclusion there was accord and satisfaction. I think the appeal should be allowed, and judgment entered up in favour of the defendants. I come to this conclusion having in view the principles enunciated in *Coghlan* v. *Cumberland* (1898), 1 Ch. 704, and other cases that have been referred to in arguments before the Court of Appeal.

GALLIHER, J.A.

McPHILLIPS, J.A. allowed the appeal.

McPHILLIPS, J.A.

EBERTS, J.A.: I am of the opinion that the judgment of the learned trial judge was not an unreasonable judgment, and was one which might be justified, but in view of the circumstance that the counsel for the defendants, Mr. *W. B. Farris,* asked that the evidence of Dr. Ker on commission should be read over, and that it seemingly was not, I am of the opinion that there should be a new trial.

EBERTS, J.A.

Appeal allowed.

Solicitors for appellants: *Farris & Emerson.*
Solicitor for respondent: *A. H. Casey.*

MURPHY, J. (At Chambers)

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Succession duty—"Unless otherwise herein provided for," meaning of—Bond —Effect of on Crown lien—R.S.B.C. 1911, Cap. 217, Secs. 5, 17, 20 and 23.

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The phrase "unless otherwise herein provided for" in section 20 of the Succession Duty Act refers to the succeeding clause "shall be due and payable at the death of the deceased." It deals with the time of payment, not with the method. The lien of the Crown under said section continues after the issue of probate and until payment.

APPLICATION by the Montreal Trust Company, executor and trustee of the estate of Andrew Byron Crawford, deceased, for directions as to the payment of succession duty herein. Heard by MURPHY, J. at Chambers in Vancouver on the 22nd of November, 1917. A. B. Crawford died on the 1st of April, 1913. On the 30th of June following, Bertha Crawford, his wife, made an affidavit of value and relationship, which was filed. Letters probate were issued to her on the 2nd of May, 1914. On the 7th of April, 1914, she gave a bond jointly with two others, namely, H. P. Millard and P. L. Anderton, to secure payment of the succession duty. The bond was approved and accepted by the Province, and filed in the Land Registry office at Vancouver. Subsequently an action was commenced by the Royal Bank of Canada, on behalf of itself and all other creditors of the said A. B. Crawford, for the administration of the estate, and by an order in said action the Montreal Trust Company was appointed executor and trustee. In May, 1917, the Montreal Trust Company filed a declaration that the estate was insolvent and that it was being administered under the supervision of the Court under Part VII. of the Administration Act, R.S.B.C. 1911, Cap. 4. On this application, the creditors contended that as the registrar accepted a bond of the executrix, with two sureties, pursuant to sections 23 to 25 inclusive of the Succession Duty Act, R.S.B.C. 1911, Cap. 217, the estate is not liable for the duty by reason of the bond having been accepted in lieu of the statutory lien for the same.

Statement

Walkem, for Montreal Trust Company, Sureties.

H. S. Wood, for the Crown.

Sir C. H. Tupper, K.C., for the Royal Bank of Canada, a creditor.

Pearse, for the Sureties on the bond.

8th January, 1918.

MURPHY, J.: By section 5 (*a*) of the Succession Duty Act the property subject to succession duty is defined as "all property of such deceased person situate within the Province, and any interest therein or income therefrom." By section 20, the duties imposed by the Act, unless otherwise therein provided for, "shall be due and payable at the death of the deceased . . . . and such duties . . . . shall be and remain a lien upon the property in respect to which they are payable until the same are paid." It is argued that this section is intended to protect the Crown only during the period previously to the issue of letters probate, and that if then a bond is taken, instead of cash being paid, the lien is gone.

The phrase "unless otherwise herein provided for" in section 20 clearly, I think, refers to the succeeding clause, "shall be due and payable at the death of the deceased." It deals with the time of payment, not with the method. The whole scope of the Act shews, I think, that its object is to impose succession duties and to make sure that such duties will be paid. To cut down the meaning of the words imposing a lien in section 20 to the period previously to the issue of letters probate would be, in my opinion, largely to defeat said legislative objects. The protection suggested, so far as real estate at any rate is concerned, is unnecessary, for under the provisions of the Land Registry Act no title could be made by anyone until letters probate, or letters of administration, had been granted, and filed in the Land Registry office.

Judgment

The argument of *Sir Charles Tupper* implies that the Legislature intended to give the Crown the choice between insisting on a cash payment or taking a bond and releasing its lien. But by the combined effect of sections 17 and 23 of the Act, if the construction contended for is adopted, no such choice could exist in the case of duties depending on the happening of a contin-

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gency. If, however, this view is incorrect, I think the Crown is entitled to priority by virtue of its prerogative. To defeat this, the construction of the statute must go the length of holding that once a bond is given, no obligation of any kind for payment of succession duties rests upon the estate, since it has been held that there is a preference in favour of the Crown in all cases and touching all rights of what kind soever where the Crown's and the subject's rights concur and so come into competition: *New South Wales Taxation Commissioners* v. *Palmer* (1907), A.C. 179. To so hold, in view of the language used in the Act, and particularly in sections 5, 7, 9, 15, 20, 24, 34, 36, 37, 40, 42 and 52 thereof, is, I think, impossible.

Judgment

GREGORY, J. (At Chambers)

GREGORY v. PRINCETON COLLIERIES.

1918

Jan. 11.

Judgment—Execution—Debtor's lands—Prior trust deed—Unregistered—R.S.B.C. 1911, Cap. 127, Secs. 34, 73 and 104—R.S.B.C. 1911, Cap. 79, Sec. 27.

GREGORY v. PRINCETON COLLIERIES

Where judgment is recovered against a defendant who had previously executed a trust deed covering all his lands, his only interest remaining being an equity of redemption in said lands, such equity only is liable to satisfy the judgment, notwithstanding the fact that the trust deed was not registered.

Entwisle v. *Lenz & Leiser* (1908), 14 B.C. 51 followed.

Statement

APPLICATION by the plaintiff to vary the report of the registrar and confirm same as varied. The facts are set out in the reasons for judgment. Heard by GREGORY, J. at Chambers in Victoria on the 20th of December, 1917.

Whiteside, K.C., for plaintiff.
H. G. Lawson, for defendant.

11th January, 1918.

Judgment

GREGORY, J.: This is an application to vary the registrar's report and then to confirm the same as varied. In my opinion, the report must be confirmed as it stands.

The registrar was duly directed to inquire and report on what lands, etc., of the judgment debtor were liable to be sold to satisfy the judgment debt of the plaintiff Gregory. The plaintiff Gregory, subsequently to the trust deed hereafter mentioned, recovered judgment against the Collieries Company and duly registered same in the Land Registry office; all other material facts are set out in the statement of admitted facts. The contest is between the judgment creditor and the trustees under a deed of trust and mortgage made by the Collieries Company to secure an issue of debentures, and of which three-fifths have been issued. This trust deed, while filed with the registrar of joint-stock companies, has not been registered in the Land Registry office. There can be no doubt that in equity, and apart from Provincial statutes, the claim of the trustees should prevail.

The judgment creditor relies upon the combined effect of sections 34, 73 and 104 of the Land Registry Act, R.S.B.C. 1911, Cap. 127. Section 34 provides that the registered owner of a charge (and admittedly he is so registered) shall be *prima facie* entitled to the estate or interest of which he is registered, subject to other registered charges, etc. Section 74 provides that when two or more charges are registered they shall, as between themselves, have priority according to their respective dates of registration; and section 104 provides that no instrument purporting to transfer, charge, etc., an interest in land shall pass any estate or interest either at law or in equity in such lands until the same shall be registered, etc.

Judgment

Under section 34 the judgment creditor is only *prima facie* entitled to the estate or interest in respect of which he is registered, and to ascertain what that estate or interest is it is necessary to refer to section 27 of the Execution Act, R.S.B.C. 1911, Cap. 79, which is the sole authority for effecting such registration. That section provides that a judgment may be registered, and when registered "shall form a lien and charge on all the lands of the judgment debtor."

In the very similar case of *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51, the Full Court held that when an owner in fee conveyed his lands to another and the conveyance was not regis-

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tered, the owner became a dry trustee and he no longer in reality owned the lands, and this in spite of section 74 of the then Land Registry Act, which, with its amendment then in force, is identical with section 104 of our present Act. This decision is binding upon me, and appears to put an end to the case. It is true that in the present case the judgment creditor still retains an equity of redemption in the lands, but this equity the registrar's report preserves to the judgment creditor. It would therefore appear that the judgment creditor only has a lien or charge on the equity of redemption, that is, the estate or interest in respect of which he is registered, for that is all the judgment debtor really owns. Or if the judgment creditor is, in the words of the Act, *prima facie* entitled, etc., to what he now claims, his *prima facie* right is defeated by the prior equity of the trustee. The whole law applicable to contracts and conflicting equities is not done away with because of the Land Registry Act. For example, the provisions of that Act cannot be taken advantage of to enable one to commit a fraud: *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334.

Judgment

As to section 73 of the Land Registry Act, I have been referred to the decision of CLEMENT, J. in *Bank of Hamilton* v. *Hartery* [(1917), 25 B.C. 150]; (1917), 3 W.W.R. 964; but in that case the contest was between two registered owners of charges, and so, strictly within the terms of that section. In the present case the trustees have not registered their charge. It was argued that it would be absurd to now give the trustees an advantage which they would not have had they complied with section 104 of the Land Registry Act, but this argument is disposed of by the remarks of Lord Hobhouse in the Judicial Committee of the Privy Council in *White* v. *Neaylon* (1886), 11 App. Cas. 171. See also *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282, the remarks of the Chief Justice at p. 292.

Report confirmed.

THE ROYAL BANK OF CANADA v. McLENNAN.

MACDONALD, J. (At Chambers)

1917

Nov. 21.

COURT OF APPEAL

1918

Jan. 28.

ROYAL BANK OF CANADA v. McLENNAN

Contempt—Order for payment of judgment—Disobedience—Power to commit—B.C. Stats. 1915, Cap. 17, Sec. 3—Rule 585—Arrest and Imprisonment for Debt Act, R.S.B.C. 1911, Cap. 12, Secs. 2, 5 and 19.

A debtor who has disobeyed an order of the Court directing him to pay the amount of a judgment by instalments cannot be committed for contempt where the circumstances referred to in sections 15 and 19 of the Arrest and Imprisonment for Debt Act do not exist.

APPEAL by plaintiff from an order of MACDONALD, J. dismissing the plaintiff's application to commit the defendant for disobedience of an order directing him to pay a judgment by instalments. Heard at Chambers in Vancouver on the 1st of November, 1917. The facts are set out fully in the reasons for judgment of the learned trial judge.

Statement

Sir C. H. Tupper, K.C., for plaintiff.
Woodworth, for defendant.

21st November, 1917.

MACDONALD, J.: This is an application to commit the defendant for disobedience of an order, directing him to pay the plaintiff a judgment, in instalments of $200 a month. It was objected that there was not sufficient proof of the default in payment, but I think the affidavit of the solicitor for the plaintiff, coupled with the statement made during the argument by counsel for the defendant (to affect my decision), is quite sufficient to satisfy me that there has been non-compliance by the defendant. The order in question was obtained after an examination in aid of execution. The provisions, as to such examination and obtaining an order for payment of the judgment by instalments, are contained in the following portion of section 3 of Cap. 17, B.C. Stats. 1915:

MACDONALD, J.

"53B. When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may from time to time apply to the Court or a judge for an order that the debtor liable under such judgment or order be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what property

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or means of satisfying the judgment or order, before a judge or an officer of the Court, as the Court or a judge shall appoint; and the Court or judge may make an order for the attendance and examination of such debtor or of any other person, and after such examination may rescind or alter any order for payment previously made against any judgment debtor so examined, and may make any further or other order either for the payment of the whole of the judgment debt or damages recovered or costs forthwith or by any instalments or in any other manner he thinks reasonable or just."

As to the power to commit, for non-payment of money, the Supreme Court Rules and our statutes require consideration. Order XLII., r. 7, is as follows:

"A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything may be enforced by writ of attachment or by committal."

Then the trend of modern legislation, destroying imprisonment for debt, is indicated by the Arrest and Imprisonment for Debt Act, R.S.B.C. 1911, Cap. 12, Sec. 2, as follows:

"Process for contempt for mere non-payment of any sum of money, or for mere non-payment of any costs payable under any judgment, decree, or order, is abolished; and no person shall be detained, arrested, or held to bail for non-payment of money except as hereinafter in this Act is, or in any other Act of the Legislative Assembly may be, provided."

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In the face of this Act, the defendant could not be committed for disobedience of the order in question, unless the Act itself gives provision to that effect, or such legislation has been subsequently amended or repealed expressly or by necessary implication. At the time, when the provisions for examination of a judgment debtor were extended, so as to give power to the Court or judge to order payment of the judgment "by any instalments or in any other manner he thinks reasonable or just," the County Courts Act expressly provided for committal in default of payment by the judgment debtor after his examination and order made directing payment. See County Courts Act, R.S.B.C. 1911, Cap. 53, Sec. 154:

"In case a judgment debtor who has been ordered, after examination on a judgment summons, to pay the amount of the judgment recovered against him, either altogether or by instalments, fails or neglects to pay such judgment, or any instalment thereof, the judge, after personal service on such judgment debtor of notice of an application to commit, may commit such judgment debtor . . . ."

The point then is whether, without any such provision in the Supreme Court, the order is to be enforced by the application

of a practice in vogue, long prior to the original passage of the Arrest and Imprisonment for Debt Act. Further, that such an enforcement of the order is not to be affected by the rules of the Supreme Court.

The strength of the plaintiff's position is, that unless the defendant be further dealt with, by way of committal for contempt, that the order for payment by instalments becomes inoperative—that the legislation would be ineffective as far as being of any assistance in the recovery of the judgment debt. It might also be said to be a detriment, for when an order of this nature is obtained it might be contended that the judgment was controlled by such order and that any other mode of realization was held in abeyance in the meantime, or so long as the order was not varied nor rescinded.

I have been referred to *Hulbert & Crowe* v. *Cathcart* (1894), 1 Q.B. 244. It is only inferentially of assistance to the plaintiff upon this application, and turned upon the question of jurisdiction. The argument in that case, as in the one under consideration, was that the order sought to obtain sequestration, was the only mode by which the plaintiff might recover the fruit of their judgment. I am also referred to the case of *In re Oddy* (1906), 1 Ch. 93, in which the decision of Buckley, J. was reversed. It was held that the "four-day" order could not be supplemented, so as to found a right to issue writ of attachment against the defendant in default of payment within a stipulated time. The reasons for so deciding are alleged, by analogy, to assist the plaintiff's contention. These authorities, and others cited, tend to a certain extent to support the plaintiff's position. If a new jurisdiction had been conferred on the Court, by the amendment to the provisions relating to examination of a judgment debtor, then I do not think it would be a matter of discretion as to my exercising powers thus vested, and, even though it were a totally new matter, I would feel called upon to act. If the power exists, then it should be exercised. Where a statute directs a thing to be done, or not to be done, it either itself provides the means for its own enforcement, or the Legislature acts upon the supposition that the existing laws are sufficient to enforce the rights and liabilities thereunder: see Hals-

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bury's Laws of England, Vol. 27, p. 188. Where an obligation is created by a statute, but no mode of enforcing its performance is ordained, then common law sanctions and incidents will ordinarily attach: see Halsbury's Laws of England, Vol 27, p. 189. The amendment to the statute in question might be termed an "obligation," and then again it might be argued that it is simply a provision, regulating the mode of payment. It does not create a new debt or liability. It simply gives the Court power to declare that the judgment may be paid forthwith or in instalments. It is contended, however, that the mode of enforcement not being indicated, that recourse should be had to the power of the Court to commit for contempt. In other words, that the lack of means of enforcement should not prevent the attainment of the objects of the Act. It is submitted, that the intention in passing this legislation was to compel a debtor, after examination, to pay in the manner indicated, or be committed as in contempt of the terms of the order. The question is, therefore, whether, under the circumstances, by necessary implication, such a result must follow, and the enactment, destroying commitment for non-payment of debt, be in effect, repealed. I think, in a matter involving the liberty of the subject, while the position taken by the plaintiff herein is quite arguable, I should not grant the application without being certain that the grounds therefor were not based on any doubtful foundation. The Legislature, in passing such amendment, could easily have incorporated provisions for committal, similar to those contained in the County Courts Act, *supra*. I do not think it is at all clear that the legislation heretofore existing was intended by such amendment to be affected. I am strengthened in this conclusion by consideration of certain sections of the Arrest and Imprisonment for Debt Act, to which my attention was not drawn during the argument. By section 19 of such Act, a judgment creditor can apply for an examination of a judgment debtor, and under certain conditions the judge

"shall have the same power of ordering the commitment of the defendant to prison, with or without hard labour, as is provided by the said section [15]."

The conditions, under which the power is to be exercised, are

non-attendance under the order for examination or refusal on the part of the debtor to disclose his property or give satisfactory answers in connection therewith, and then the following is added as a further ground for commitment, *viz.*:

"or if any of the matters are proved to the satisfaction of the judge which, under section 15 hereof, would empower the judge to order the imprisonment of the debtor."

On referring to said section 15, it is found that the judge may order the debtor to be committed to any common gaol, with or without hard labour, for any term not exceeding twelve calendar months, unless the judgment is sooner satisfied, if, upon an application to discharge the debtor from custody it should appear to the judge, whether by the examination of the debtor or by other evidence,

"that the debtor incurred the debt which is the subject of the judgment against him, or any material part thereof, by fraud or false pretences, or that the debtor has concealed or made away with his property, or any part thereof, in order to defeat, delay, or defraud his creditors, or any of them."

It would thus appear that only to the extent outlined by these sections was the provision in the Act, as to abolishing commitment qualified. As the legislation in the County Courts Act is specific in dealing with the grounds upon which commitment for contempt existed, I think there should be a clear indication in the Supreme Court to the same effect, if it be intended that the same result should follow.

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I think that the application of the plaintiff should be refused. I believe this is a case of first impression, and, as the matter has not heretofore come before a Court for consideration, there will be no costs.

From this decision the plaintiff appealed. The appeal was argued at Victoria on the 28th of January, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Sir C. H. Tupper, K.C., for appellant: The order to pay was not obeyed, and the application to commit was made. We say the Arrest and Imprisonment for Debt Act has no application here, and does not prevent the Court from following its inherent jurisdiction: see *Miller* v. *Knox* (1838), 4 Bing. N.C. 574 at pp. 595-8; 132 E.R. 910 at pp. 918-9. The power to punish

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for contempt is inherent by the law of the land, and is not affected by any Act: see Oswald's Contempt of Court, p. 6. There is the inherent jurisdiction to enforce the Court's orders, and is enforceable by process of contempt. Where there is an order that "you shall pay," it is enforceable by contempt proceedings, and unless it can be so enforced it is of no value. Section 2 of the Arrest and Imprisonment for Debt Act is confined to a judgment, decree or order, and does not apply to an order contemplated by the 1915 Act: see *Buckley* v. *Crawford* (1893), 1 Q.B. 105 at p. 107; *Lynch* v. *Lynch* (1885), 10 P.D. 183. The Legislature does not empower the Court to do a vain thing; it must have force and effect: see *Hulbert & Crowe* v. *Cathcart* (1894), 1 Q.B. 244; *In re Oddy* (1906), 1 Ch. 93; *Pritchard* v. *Pritchard* (1889), 18 Ont. 173. As to restrictions contemplated on the Court's jurisdiction by the Arrest and Imprisonment for Debt Act see Maxwell on Statutes, 5th Ed., 596; Halsbury's Laws of England, Vol. 27, p. 149.

Woodworth, for respondent: Section 2 of the Arrest and Imprisonment for Debt Act does away with imprisonment for debt entirely, with the exception of cases set out in sections 15 and 19 of the Act. Marginal rule 581 provides for the means whereby a judgment for the payment of money may be enforced.

Tupper, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The amendment to the Supreme Court Act which was made by chapter 17 of the statutes of 1915 was intended, in my view of the provisions there found, to ameliorate the position of a defendant against whom a judgment is recovered. Without those sections judgment would go, and process could be issued to enforce it forthwith, and for the whole amount due. The Legislature apparently thought it desirable to give to the Court the power either to stay execution or to order that the judgment should be payable in instalments so as to lighten the burden. Complementary to that, the Legislature thought it right and just that the judgment creditor should be entitled to come to the Court from time to time to obtain a variation of the special terms imposed. If the variation were made, for instance, that the debtor should pay a

larger sum, the order would not, as suggested by *Sir Charles Tupper,* be an idle one. It would permit the judgment creditor to issue execution or other process for the larger amount instead of for the smaller amount provided for by the previous order. In this view of said chapter 17, I think, even if it stood alone, we could not put the construction upon it which the appellant asks for. But it does not stand alone. We have section 2 of the Arrest and Imprisonment for Debt Act. That section provides that

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"no person shall be detained, arrested, or held to bail for non-payment of money except as hereinafter in this Act is, or in any other Act of the Legislative Assembly may be, provided."

In simple language, that means that no person shall be arrested for non-payment of money unless in the Act itself, or in some other Act, it is provided that he may be arrested for non-payment of money. Now there is no such provision in the Supreme Court Act. It is not there provided that a person may be arrested and detained for non-payment of money.

The County Courts Act, which contains sections similar to the ones which we have under consideration in chapter 17, goes further, and provides that the debtor may be arrested and detained for non-compliance with an order for payment of money. That alone would indicate that, apart altogether from what I consider very clear language in both these Acts, the Legislature did not intend to go as far in enacting said chapter 17 as it had already gone in the County Courts Act. I think, therefore, the appeal must be dismissed.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion it was clearly the intention of the Legislature to confer upon the Supreme Court an additional power to meet the special cases, where justice should seem to require it to be done, of those debtors who, while not able to pay forthwith, yet could do so within a reasonable time, by instalments. That is a very merciful and appropriate provision, which would save many a man from bankruptcy. And it must be borne in mind that that section was passed after this war began, and is of the same nature as the other very beneficial sections passed during the same session of the Legislature, and assented to on the same day, namely, chapter 35, relating

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to contracts for land. It is significant that these two measures of relief both as to land contracts and as to personal contracts for the payment of money were passed at the same time. It affords, as I say, a very valuable indication of what the Legislature had in its mind. Now it must not be forgotten that in the carrying out of that mediation, the second subsection, 53B, is not, as might be suggested, something which would be futile. Far from that view, it is clearly apparent that it gives a power to the Court, or a judge, to alter or rescind, in Chambers or in Court, as the case might be, an order previously made in Court, the only stipulation being that that order shall not be made until after such examination as is therein provided for. Now it would be necessary to have a provision of that kind, because, otherwise, something which has not been alluded to must be borne in mind, which is, that by section 19 of the Arrest and Imprisonment for Debt Act, the power given therein would not extend to the newly created situation, and that, therefore, the Court or judge being applied to after judgment would not by virtue of any pre-existing power be able to reform its order duly pronounced in Court. And therefore, the subsection 53B has a very valuable effect, and one which would be necessary to meet the new situation, which might either be in favour of the creditor, provided the debtor's financial position would improve, or in favour of the debtor if his financial situation should get worse. There are four classes provided for in section 19 of the Arrest and Imprisonment for Debt Act wherein power of committal is given: (1) where the debtor does not attend, without sufficient excuse; (2) refusal to disclose his property; (3) unsatisfactory answers, or, (4) matters proved to the satisfaction of the judge, under section 15, which would justify a committal. Now, bearing in mind that these four classes of powers already existed in the Supreme Court, it would require something very far-reaching to shew me that the Legislature wished to extend those powers and add another one. I find myself quite unable to take that view. And I join with the Chief Justice in saying that, on the view of this new section alone, I should feel it quite impossible to say that any new power over the person is given to the Court. But the matter is abundantly

clear when one considers section 2, which has been already referred to both by bench and bar. And reading that also in that second connection, with the section 19, it seems to me absolutely impossible to escape from the same conclusion that was reached by the learned judge below.

For that reason I would dismiss the appeal.

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McPHILLIPS, J.A.: I also agree in dismissing the appeal. We have an organic statute which is the declared policy of Parliament, that no one shall be affected in his liberty and imprisoned for contempt for non-payment of money (see section 2 of the Arrest and Imprisonment for Debt Act, Cap. 12, R.S.B.C. 1911). I think that the Legislature has here failed to do that which it was called upon to do in proper pursuance of that organic statute, because it provides that—

"Process of contempt for mere non-payment of any sum of money, or for mere non-payment of any costs payable under any judgment, decree, or order, is abolished; and no person shall be detained, arrested, or held to bail for non-payment of money except as hereinafter in this Act is, or in any other Act of the Legislative Assembly may be, provided."

We find that this legislation, 53B, of the Supreme Court Act Amendment Act, 1915, is drawn from the legislation as applicable to the County Court, but halts at the special provision found in the County Courts Act. I can only assume that Parliament halted and hestitated, and in fact, decided not to so provide. In this particular case it cannot be said to be other than an order for payment of money. That is the order that has been made. Now if it had been any other order, *i.e.*, within the zone of a contumacious act with respect to an order of the Court, the inherent power of the Court is exercisable to see that its orders are always obeyed. That, of course, the Court is very jealous of, and rightly so; otherwise Courts would be brought into contempt. But in this particular case it is an order for the payment of money, and as I have indicated, where it is an order for the payment of money, there must be some express legislation fulfilling the requirement as to consequences of disobedience. To indicate that even the payment of the money would not purge the contempt, if it were a contempt other than the non-payment of money, I refer to the case of *Jones* v. *Macdonald* (1893), 15 Pr. 345. There Mr.

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Justice Rose pointed out (p. 346), "the imprisonment was not in any sense in execution." But there it was a contumacious act, the refusal to answer questions; and further said:

"The payment of the debt and costs would not entitle the defendant to his discharge; this was decided as long ago as [1860] 19 U.C.Q.B. in *Henderson* v. *Dickson*, p. 592; and at the expiry of the three months the defendant would be entitled to be discharged without payment of any portion of the debt and costs."

So that with respect to orders other than those within the purview of section 2 of the Act, the powers of the Court relative to contempt will remain. It would appear, though, that where a judge makes an order for the payment of money, nothing can follow on that order in the way of contempt for non-compliance with it unless Parliament has undertaken to say what shall be the responsibility and what shall follow.

EBERTS, J.A.

EBERTS, J.A.: I have very little to add to what my learned brothers have said. I am of the opinion that section 2 of the Arrest and Imprisonment for Debt Act was passed with a very firm intention that no person should be committed for contempt for mere non-payment of any sum of money. The judgment of the Court in this case is an order for non-payment of a sum of money. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Tupper & Bull.*
Solicitor for respondent: *C. M. Woodworth.*

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Contract — Commission — Pleadings — Amendment of — Verdict of jury— Answers to questions—Uncertainty of meaning—New trial.

An application for amendment of the pleadings during the course of the trial should be either granted or refused at once, and when granted, the applicant should be required to put in his amendment in writing forthwith.

When the jury's answers to questions are so insufficient and vague that it is apparent they were confused when answering them, and their meaning is not sufficiently plain for judgment to be entered upon them, a new trial will be ordered.

APPEAL by defendant from the decision of THOMPSON, Co. J. of the 16th of June, 1917, and the verdict of a jury in an action for $320 commission the plaintiff claimed was owing him by the defendant under an agreement that arose as follows: The plaintiff owed one Mutz $4,000 and some interest on a mortgage, and Mutz owed the defendant $3,200, the defendant holding Mutz's notes for $3,000 as security. In his pleadings, the plaintiff claimed an arrangement was entered into whereby in consideration of the plaintiff paying off the mortgage and the defendant thereby obtaining payment of his claim against Mutz, the defendant would pay the plaintiff ten per cent. of the $3,200. The evidence on the trial shewed the arrangement in fact was that the plaintiff should buy the $3,000 of Mutz's notes held by the defendant for $2,700, but owing to a question arising as to whether Mutz could be compelled to accept the notes as payment on the mortgage, the matter was delayed and, in fact, never carried out. Later the defendant brought action against Mutz on the notes and garnisheed Sawyer, who then paid off the mortgage, and the Mutz notes held by the defendant were paid. As the evidence shewed a different cause of action, an application was made by the plaintiff at the trial to amend the pleadings, but the trial judge took no action on the application until his written judgment was handed down, when he allowed the

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amendment and gave judgment for the plaintiff. The questions put to the jury and the answers thereto were as follow:

"(1.) Was any offer made by defendant to plaintiff on or about the 27th or 28th of October? Yes, a verbal contract.

"(2.) If your answer is 'yes,' what was the offer? Two thousand seven hundred dollars for notes of the face value of $3,000.

"(3.) Was such offer accepted by the plaintiff? According to letter, Exhibit S-4, we find that the plaintiff confirmed verbal contract on November 1st, 1916.

"(4.) If the plaintiff is entitled to recover, in what amount do you find? Three hundred dollars.

"(5.) Was there any specified time for the performance of the alleged contract by the plaintiff? If so, when? Yes, November 15th, 1916, providing defendant would assure the plaintiff in writing of his commission, which the defendant failed to do.

"(6.) Was the alleged contract performed within the specified time? Not in specified time referred to in answer No. 5."

The appeal was argued at Victoria on the 28th and 29th of January, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

A. I. Fisher, for appellant: The arrangement of payment on which the plaintiff was to receive $300 was never carried out, and the result was we brought action and garnisheed the plaintiff. The facts shew an entirely different cause of action. There was no evidence to support the finding of the jury.

Nisbet, for respondent: The defendant made an offer and it was accepted. The statement that he had not sufficient funds refers to the $4,000 mortgage. He had sufficient to carry out the arrangement with Millett.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The majority of the Court are of the opinion that there should be a new trial. I do not wish to say anything about the merits of the case, seeing that it is going back for a new trial. But I may say this, that I think the jury were confused when they answered the questions. They have not made their meaning quite plain, and hence, the interests of justice require that the action should be tried again.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the proper judgment for this Court to deliver is that there should be a new trial, on the ground that the answers of the jury are, to use the language of the Supreme Court in the case of *Lewis* v. *Grand Trunk Pacific*

Rway. Co. (1915), 52 S.C.R. 227, "so insufficient and vague that it is really impossible as a matter of justice to enter judgment thereupon." At the same time I think that, with all due respect to the conduct of the trial below by the learned judge, we would not have got into this unfortunate position if attention had been directed to the expressions which this Court so frequently make in regard to the necessity—as it is really not merely a question of propriety, but of necessity—for the attainment of justice, that these amendments, when asked for or moved during the course of the trial, should be ruled upon at once, and either made or refused. On very many occasions we have heard of this matter, and there are several references to it in the reports, and I refer only to two. The first is in *McKissock* v. *McKissock* (1913), 18 B.C. 401, wherein our late brother IRVING and myself spoke very plainly about the necessity for so doing; and the next year, in *Airey* v. *Empire Stevedoring Co.*, 20 B.C. 130 at p. 136, I took occasion to make some remarks which are very appropriate to the present case:

"The truth is that the trial drifted into confusion because the plaintiff was neither definitely required to put in a written amendment if he desired to amend, nor was he restricted to the case that was open to him on his statement of claim, as he ought to have been in default of amendment."

Now, if those very simple requirements had been attended to, we would not have been placed in this unfortunate position, and these litigants would have been saved a great deal of money.

MARTIN, J.A.

And I might also say that when this misconception of the jury became apparent, in answer to the question, the learned trial judge did not pursue the course which we of this Court have very frequently declared to be the proper course—that is to say, when the misconception became apparent that the jury had fallen into manifest error in regard to the determination of the particular question handed to them, that they should have been sent back for a further consideration of the point, so as to have had the matter cleared up then and there, and all this trouble again avoided. Therefore, I trust that when this matter is to be tried again, that some regard will be paid to the observations of this Court relative to these two vital points—the amendment, and the matter of clearing up the obvious doubts on the part of the jury—if the necessity for doing so

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should arise, and thereby avoiding all this most unfortunate expense in a matter of only $320—a most regrettable situation which could easily have been obviated.

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MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I will merely add a reference to *Jackson* v. *Galloway* (1838), 50 R.R. 608. Tindal, C.J. there, considering correspondence which took place between the parties after an alleged contract was entered into, said:

"The defendant says that this was no alteration of the contract, but merely a request made on the part of the plaintiffs for their own convenience, and acquiesced in by the defendant. I am not subtle enough to distinguish that from an alteration of the contract. Every contract consists of a request on one side, and an assent on the other."

And that is what seems to be absent here, *i.e.*, assent on the part of the defendant.

EBERTS, J.A.

EBERTS, J.A.: I quite concur with the majority opinions given by my brother judges that there should be a new trial. I think there has been a misconception on the part of the jury. I think the true issues were never placed before the jury at the trial; they gave a verdict on another matter altogether, and I think it ought to be returned to the County Court for a new trial, and the matters as they should be, the exact situation of the case, placed before the jury, when they can give a verdict in keeping with the evidence placed before them, which I do not think has been done in this case.

Fisher: May I speak to the question of costs, if we have the costs of the appeal?

MACDONALD, C.J.A.: You have the costs of the appeal.

Fisher: And as to the costs of the Court below, my Lord?

MACDONALD, C.J.A.: The general rule of this Court is that the costs of the first trial follow the event.

Fisher: In regard to the proposed amendment, we go back for a new trial; we go back with just the pleadings as they stand?

MACDONALD, C.J.A.

MACDONALD, C.J.A.: You may have leave to amend the pleadings. And I just want to add a word or two to what has been said by my learned brother MARTIN in reference to these

amendments. I have not been able to recollect the case in which I took occasion to express rather fully and carefully my opinion with respect to amendments applied for at the trial; but in that case I pointed out very clearly that where an amendment is sought at the trial it should be dealt with, and if allowed, it should be put in writing at the time: [*Pacific Coast Coal Mines* v. *Arbuthnot* (1916), 23 B.C. 267 at pp. 308-9.]

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The profession ought to be long since apprised of the view of this Court in the matter—a unanimous view, as I understand.

EBERTS, J.A.

EBERTS, J.A.: I am of the opinion that when amendments are asked for at trial those amendments should be placed on record, so that when the matter comes up for appeal we know exactly what the amendments are. We had the same trouble in Vancouver. One counsel makes one statement, and another counsel makes another statement, and not that either of them make an improper statement from his point of view, but they perhaps do not have an exact and clear idea of what was said relative to the amendment. And surely they cannot expect the Court to divine the thoughts of those who were speaking months before. And I agree with what my learned brothers have said, that where amendments are made at trials, those amendments should be specified and set out in writing on the records of the Court, so that we know exactly what we are coming to.

New trial ordered.

Solicitors for appellant: *Lawe & Fisher.*
Solicitor for respondent: *W. A. Nisbet.*

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WILLIAMS v. SHIELDS

WILLIAMS v. SHIELDS.

Sale of land — Misrepresentation — Rescission — Affirmation by purchaser after knowledge — Election — Damages — Specific performance ordered when not pleaded.

In an action for rescission of four agreements for sale of lands on the ground of fraudulent misrepresentation, and for damages, the trial judge found fraud on the part of the defendant, but also found that the plaintiff had, before launching the action, elected to abide by the contracts after full knowledge of the fraud. He refused rescission, and assessed damages at the amount of the difference between the purchase price and the actual value of the lands when purchased. There was no plea for specific performance of the agreements for sale, but a reference was ordered to inquire into the title to the lands and to take accounts on the basis of deducting from the amount of damages found the balance due on the purchase price under the agreements for sale, that there be judgment for the plaintiff for the balance, and that the defendant execute a conveyance of the land in question in the plaintiff's favour.

Held, on appeal, MCPHILLIPS, J.A. dissenting, that the judgment below be affirmed with the variation that there should be no order as to specific performance of the agreements for sale, as there was no such plea in the statement of claim, nor was it raised on the trial.

Per MACDONALD, C.J.A.: An action for specific performance lies only where there has been a refusal to perform; there has been no refusal to perform, and no such issue has been raised.

APPEAL by defendant from the decision of CLEMENT, J. in an action for rescission of four agreements for sale of land on the ground of fraudulent misrepresentation and for damages, tried by him at Cranbrook on the 6th to the 9th of June, 1916. The defendant, who owned certain lands near Cranbrook, in the Kootenay district, placed them in the hands of an agent, who advertised them for sale as orchard lands. A glowing prospectus was issued as to the fertility of the soil, the climate, water supply, cost of clearing, and the successful results in the neighbourhood from raising apples and other fruits. The plaintiff claimed that through the prospectus and inducements of the agent he entered into agreements for the purchase of 12 acres at $100 per acre and nearly 8 acres at $75 an acre. The

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plaintiff paid on account of the purchase price $395, and after living and working on the property for three years, brought this action. The learned trial judge found there was false representation on the part of the defendant, but that the plaintiff continued on the property and made payments on account of the purchase price after he had knowledge of the falsity of the statements made when he purchased. The damages were assessed at $85 an acre for the lots purchased at $100 an acre, and $60 an acre for those purchased at $75 an acre. A reference was then ordered directing the registrar to inquire into and report on whether the defendant was in a position to give a clear title, and in the event of his so reporting, the amount found owing under the agreements for sale was to be set off against the plaintiff's damages and the balance found paid by the defendant to the plaintiff, also that he execute and deliver to the plaintiff a conveyance of the lands in question. Specific performance was not pleaded, nor was it raised on the trial.

Statement

Nisbet, for plaintiff.
McCarter, for defendant.

13th October, 1916.

CLEMENT, J.: After hearing evidence in this case at Cranbrook in June last, I reserved judgment, requesting to be furnished with a copy of the stenographer's notes and with written arguments from counsel. These, with the record and exhibits, reached me on October 3rd instant. I have gone through the evidence with some care, and have considered the arguments presented, with the result that I am confirmed in the view which I had formed at the trial that the plaintiff had been the victim of a gross and cruel fraud. The prospectus on the faith of which the plaintiff bought certain lots in "Kootenay Orchards" from the defendant put forward certainly a most alluring picture; but the evidence shews clearly to my mind that it was as false as it was alluring. There is scarcely a statement as to the nature of the soil, its fertility and water supply, as to cost of clearing, as to climatic conditions and as to actual results already achieved in the immediate neighbourhood that has not been shewn to be a perversion of the truth. Under these circumstances, my inclination has been strongly to give the plaintiff

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complete relief by rescission; but I am unable to find otherwise than that he had, before launching this action, elected to abide by the contracts of purchase after full knowledge of the fraud practised on him.

He bought in 1912, went on to the land in 1913, and lived and worked on it until June of 1915. During that time he learned by unfortunate experience that he had been, as he himself expressed it, "stung." When, early in June, 1915, he wrote the letter to the defendant asking delay, and promising to pay as soon as he could, he knew for all practical purposes the full extent of the imposition which had been practised upon him. Assuming that the heavy frosts in June, 1915, did not, as he testifies, strike his crops until after the letter, he had had them every year to that date, and their occurrence in 1915 was merely an accentuation of climatic conditions with which he had become familiar. Nor can the argument be acceded to that the plaintiff did not know the law that a person who has been induced by fraud to enter into a contract has the right, when he learns of a fraud, to elect whether he will or will not abide by his bargain. The plaintiff here had, I think, full knowledge of the falsity of the prospectus in all the material factors now put forward when he, in terms, informed the defendant that he would stick to his bargain. It remains, therefore, simply to assess as best I can the damage

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the plaintiff has suffered through the deceit of which he has been the victim. The proper measure of damage, in my opinion, is the difference in value in 1912 between land which would measure up to the standard of the prospectus and the land the plaintiff actually bought.

Assuming that land such as is pictured in the prospectus was worth, in the situation of the lots in question here, what the plaintiff agreed to pay, *viz.*: $100 per acre (as to some of the lots) and $75 per acre (as to the others), their actual value at that time being such as the evidence discloses them to be was not more than $15 per acre. I therefore assess the plaintiff's damages at $85 per acre for those lots for which he was to pay $100 per acre and $60 per acre for those lots for which he was to pay $75 per acre, and those amounts should bear interest

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pari passu with the interest charges for which the plaintiff is liable under the different agreements for sale. If necessary, there will be a reference to the district registrar at Cranbrook to take the accounts between the parties on the basis I have indicated. Payments not yet due will be computed at their present worth. The plaintiff is entitled to his costs of this action, and the taxing officer will allow a counsel fee at the trial of $300.

If the parties can agree upon the figures, there will be judgment for the plaintiff for the balance in his favour which the account will undoubtedly shew. If there has to be a reference, further directions and the questions of the costs of the reference will be reserved for further consideration after the district registrar has reported.

CLEMENT, J.

There was no suggestion at the trial that the defendant had parted with his interests under the agreements for sale; and it is for that reason that I pronounce judgment as above in order that all questions between the parties may be settled in this action.

From this decision the defendant appealed. The appeal was argued at Victoria on the 29th and 30th of January, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Baird, for appellant: The learned trial judge gave damages and ordered specific performance when no such action was brought, and there was no amendment on the trial. On the question of alternative claims see *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1. He continued to hold under the agreement, and made payments on account after he knew the facts, and is estopped: see *Rice* v. *Reed* (1900), 1 Q.B. 54. On the question of inspection see *Jennings* v. *Broughton* (1853), 17 Beav. 234; *Crooks* v. *Davis* (1857), 6 Gr. 317 at p. 322; *Attwood* v. *Small* (1835), 6 Cl. & F. 232 at p. 238; *Schultz* v. *Wood* (1881), 6 S.C.R. 585 at p. 601. He stayed on the land for three years, and in fact he at first wanted to raise poultry; fruit farming was an afterthought. On measure of damages see *Waddell* v. *Blockey* (1879), 48 L.J., Q.B. 517; *Webb* v. *Roberts* (1908), 16 O.L.R. 279.

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Nisbet, for respondent: In *Webb* v. *Roberts* the purchaser was allowed damages, notwithstanding the fact that he knew of the misrepresentation before making a third payment.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: In my opinion, the appeal must be dismissed. It is conceded that the statements made to the plaintiff on behalf of the defendant with respect to frost in the Cranbrook district were, in fact, false. Of course, it is not admitted that they were knowingly false. That is a matter of inference from the circumstances surrounding the case. The learned judge came to the conclusion that they were made knowing them to be untrue, and I see no reason for reversing his finding in that respect. Nor do I see reason for concluding that the plaintiff did not rely upon the representations. I am speaking particularly of the representations with respect to frosts. I do not attach very much importance to the other representations. The evidence is that he did rely upon the first-mentioned representations, not upon his own judgment or knowledge, nor upon any knowledge which he acquired on his visit to the property before the purchase.

There is no appeal from the decision of the learned judge refusing rescission.

Damages were suffered, and the measure of them is the difference between the value of the land at the date of purchase and the price agreed to be paid, which, as I understand the judgment below, was the view adopted.

Now, that practically disposes of the whole appeal, with the exception of the objection made on the part of the appellant to the judgment below, that the learned judge, in an action in which it was not asked for, gave judgment for specific performance. There was no plea in the statement of claim for specific performance, and no suggestion of specific performance at the trial, nevertheless the learned judge, after reserving the case for further consideration, ordered, as consequential relief, specific performance of the contract. The result of his judgment was this, that the damages set off against the purchase-money would leave a balance coming from the defendant to the plaintiff, and that the purchase-money having been satisfied as a result of this judgment, it would be right to order that a deed

should be delivered by the defendant to the plaintiff. An action for specific performance lies only when there has been a refusal to perform. There has been no refusal to perform; no such issue has been raised; and therefore I think it a mistake to depart from the usual practice.

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With the variation I have just now adverted to, the judgment should be sustained.

MARTIN, J.A.: No good cause, in my opinion, has been shewn for our disturbing the judgment. I am excepting with regard to the variation of the judgment in regard to specific performance, in which matter I am of the same opinion as the Chief Justice.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The particular misrepresentations that were relied upon, in my opinion, would not seem to be of such a nature that the plaintiff could be said to have really been induced to enter into the contract upon the faith of them. Further, they are of the nature, where found fault with, of being so florid and so highly improbable, in any part of the world, that a person could not be held to have a right of action in regard to them. And in support of that view I would refer to *Bloomenthal* v. *Ford* (1897), 66 L.J., Ch. 253, Lord Halsbury, L.C. at p. 256:

MCPHILLIPS, J.A.

"A statement may be made so preposterous in its nature that nobody could believe that any one was misled."

It is quite apparent on the facts of the case that the plaintiff got this land, as I should say, on the evidence, for poultry raising, and to embark on that undertaking. I cannot see that he suffered any damages at all material in their nature, by reason of the planting of fruit trees, other than what would be admitted to be reasonable risks. That brings me to the point of damages, as to whether or not the learned trial judge has proceeded rightly in assessing these damages. I think he has gone wrong. And the case I would refer to in regard to that is *Clarke* v. *Dickson* (1858), El. Bl. & El. 148. Lord Campbell, C.J., at p. 155, said:

CLEMENT, J. "He will recover, not the original price, but whatever is the real damage sustained."

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Now, what was the situation here? Agreements for sale were entered into whereby certain sums should be paid. Only a proportion of that sum has been paid up to date. If it can be said that what has been paid now amounts to all that the property is worth, then that would be within the case of *McConnel* v. *Wright* (1903), 1 Ch. 546, where Collins, M.R. at pp. 554-5 said (dealing there also with *Peek* v. *Derry* (1887), 37 Ch. D. 541):

"It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect to come in, but it is an action of tort—it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, *prima facie*, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss. But, in so far as he has got an equivalent for that money, that loss is diminished; and I think, in assessing the damages, *prima facie*, the assets as represented are taken to be an equivalent and no more for the money which was paid. So far as the assets are an equivalent, he is not damaged; so far as they fall short of being an equivalent, in that proportion he is damaged."

Now in this particular case, taking the statement that Mr. *Baird* gave me a moment ago, $95 more has been paid than the learned judge thought the property was worth. So that if the plaintiff is to abide by his agreement, to the extent of the value of the property, the damage would only be some $95.

MCPHILLIPS, J.A.

That brings me to the other point that has been dealt with by my learned brothers in their judgments, that is to say, as to the direction in this decree that the plaintiff should be given a conveyance of this land. I agree that that is an order which in this particular case should not have been granted. It seems to me that the only thing to be done is to assess these damages upon a correct principle. Now, the correct course would be to find out what that land was worth at the time the contract was made, not what it is worth today, or at the time of the trial. To have witnesses come after the lapse of some three or four years after the contract has been made and swear to its value is absolutely futile and idle as determining what the property was worth at the time. The true value would be what he could

have gone into the market right there and then and sold the property for. We have had this point before us in other ways. We had it before us in the case of *Allan* v. *McLennan* (1916), 23 B.C. 515, where shares were in question. The date at which the value is to be assessed is the date at which the property was acquired. That is stated in Halsbury's Laws of England, Vol. 20, p. 764, par. 1738; and *Peek* v. *Derry, supra,* and other cases are referred to.

I would therefore think that there should be a reference to assess the damages, and that they be assessed upon a proper basis.

EBERTS, J.A. agreed in dismissing the appeal.

EBERTS, J.A.

MACDONALD, C.J.A.: I would add just a word to what I have already said, and that is that my judgment, and I understand, that of my learned brothers who agree with me, is based upon the value of the land at that time, and not at the present time.

MACDONALD, C.J.A.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *W. J. Baird.*
Solicitor for respondent: *W. A. Nisbet.*

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WELLINGTON COLLIERY COMPANY, LIMITED, AND ESQUIMALT & NANAIMO RAILWAY COMPANY v. PACIFIC COAST COAL MINES, LIMITED.

Practice — Pleading — Application to strike out — Unnecessary but not embarrassing.

WELLINGTON COLLIERY COMPANY v. PACIFIC COAST COAL MINES

Although there may appear in the pleadings matters which are unnecessary and superfluous, if they are not embarrassing, an application to strike them out will be refused.

A Court of Appeal will examine more carefully the reasons and pay more attention to the pleadings, and examine them more narrowly to see if any harm has been done by the rejection of the pleadings than in a case where the judge below refused to strike them out.

APPEAL by defendant from the order of MORRISON, J. of the 17th of October, 1917, dismissing the defendant's application to strike out certain paragraphs in the plaintiff's defence to the counterclaim. The action was for $25,000 damages, the value of coal belonging to the plaintiffs in the Alexandra mine, Cranberry District, Vancouver Island, and wrongfully taken and abstracted by the defendant from said mine without its knowledge, and for an injunction. The defendant counterclaimed for damages, alleging that the plaintiffs had stored in their old workings large quantities of water, which they had allowed to escape and percolate into the defendant's workings. The paragraphs in the defence to the counterclaim to which objection was taken recited particulars of the plaintiffs' title to the property they had previously worked and how it was worked, also particulars of the defendant's title to the property on which they alleged water had done damage.

Statement

The appeal was argued at Victoria on the 31st of January, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. J. Taylor, K.C., for appellant: The paragraphs referred to contain surplusage and are not material, but they are embarrassing and should be struck out. What is set out in para-

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graph 22 as to the manner in which the Fiddick property was acquired should be struck out, as the title has nothing to do with the case. The paragraph merely casts a slur on the title without attacking it.

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Harold B. Robertson, for respondents: These paragraphs are not in reply, but in defence to the counterclaim. The Alexandra mine shut down in 1901, and part of that property was afterwards included in the Fiddick mine. We have a *quasi* easement: see *Smith* v. *Kenrick* (1849), 7 C.B. 515 at pp. 563-4. We have to shew that there was no negligence on our part in working the Alexandra mine: see *Wilson* v. *Waddell* (1876), 2 App. Cas. 95. As to reservation of easements not mentioned in conveyance see *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31. The question of being out of time is material: see *Chaudiere Machine & Foundry Co.* v. *Canada Atlantic Rway Co.* (1902), 33 S.C.R. 11. The paragraphs may be unnecessary, but that is not a ground for striking them out: see Annual Practice, 1918, p. 361.

Argument

Taylor, in reply, referred to *Knowles* v. *Roberts* (1888), 38 Ch. D. 263 at pp. 270-1.

Cur. adv. vult.

1st February, 1918.

MACDONALD, C.J.A. (oral): After reading the pleadings I have come to the conclusion that while a number of the paragraphs which were objected to in the plaintiffs' reply were surplusage, that they were not embarrassing. They consisted mostly of recital of facts, almost entirely, I think, matter of history, and could, in my opinion, in no way embarrass the defendant.

MACDONALD, C.J.A.

Although there may appear in the pleadings matters which are unnecessary and superfluous, yet if they are not embarrassing and can do no harm to the other party, an application to the Court to strike them out is not justified; it is an unnecessary incurring of costs. The Court ought not to encourage such applications, striking out pleadings which, while unnecessary, are not embarrassing to the other side.

I think the appeal should be dismissed.

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MARTIN, J.A. (oral): I feel that we would not be warranted in disturbing the exercise of discretion by the learned judge below. It should be borne in mind that in applications to strike out pleadings, appeals therefrom are looked upon from two points of view, that is to say, where the learned judge below strikes out a pleading the Court would examine more carefully the reasons, and pay more attention to the pleadings, and examine them more narrowly to see if any harm has been done by the rejection of the pleading, than in the case where the learned judge below has refused to strike it out, the reason being, of course, manifest, that is to say, because where the learned judge, in the exercise of his discretion, has decided to retain that which is upon the record, there is no danger that the party would be curtailed in his defence, or his case, as it might be; whereas, if he has struck it out, there is always the fear, if the case is at all plausibly put forward, or one of any considerable consequence, that something might have been alleged that would have sooner or later worked to the prejudice of the party. In this case I may say that I do not think that the objections to any of the various paragraphs go farther than that they are merely unnecessary, and it is well established that the element of mere unnecessariness is not sufficient to warrant the Court in striking out a pleading.

MARTIN, J.A.

I might only add this, that while we are giving our judgment really today without calling upon the parties, which might be said to be a technical violation of the rule that they are supposed to have notice that judgment is to be delivered, we do so in this case because it has been suggested to us that the trial is fixed for Tuesday next; so the necessity for giving judgment at once would seem to justify us in departing from that rule.

GALLIHER, J.A. (oral): The trial judge having refused to strike out the paragraphs complained of, I think we should look at it in this way: if the pleadings are not embarrassing, if we could treat those complained of as surplusage—although I am not going so far as to say that I am deciding that they are surplusage, because I can see under certain circumstances why the pleadings might be necessary—but even supposing we grant that they are surplusage, if they are not embarrassing, to my

GALLIHER, J.A.

mind we had better take the safer course and allow the pleadings to stand. I think if the pleadings in question had been struck out, as suggested by my brother MARTIN, I would agree with his view that we might have to look into it more strictly, because in that case a real injustice might be done if they were wrongly struck out; a person might not be in a position to have his case properly tried. In this case, in the absence of embarrassment, as I see it, I think the pleadings should stand, although in the final result it may not be necessary.

MCPHILLIPS, J.A. (oral): In my opinion the appeal should be dismissed. I may say that my opinion remains the same as at the time of the argument. The discretion was with the learned judge at Chambers, and there is nothing to shew that there was anything in the nature of embarrassment. After all, what was being complained about was that the opposite party was stating certain facts, which when looked at, seem to be relevant facts, and of the *res gestæ* of the action. The judge who will try this case would need to be seized of these facts to thoroughly understand the case. And after all, I consider it was proper pleading under rule 200:

MCPHILLIPS, J.A.

"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be."

All that is being set up is virtually the chain of title, and the work which has been done on the property in the nature of mining—all matter of requisite proof at the trial. I cannot see that there is any embarrassment. If the other side want to deny the facts, they can deny them. On the other hand, if they wish to admit the facts, they can admit them. They are, as I consider, relevant facts. In my opinion, the pleading is proper, save with respect to the word "confiscated." That was improper, but as I understand it, the respondents were willing to alter it to "divested," and counsel so stated at Chambers. It is to be understood that this change will be made.

Appeal dismissed.

Solicitor for appellant: *W. J. Taylor.*

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

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WILLARD v. INTERNATIONAL TIMBER COMPANY, LIMITED.

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WILLARD v. INTERNATIONAL TIMBER CO.

Practice—Appeal books—Addresses of counsel to jury not to be included in. Master and servant—Negligence—Superintendence—Employers' Liability Act, R.S.B.C. 1911, Cap. 74, Sec. 3 (2).

It is the duty of the registrar not to allow anything in an appeal book that is not concerned in the appeal. Addresses of counsel at the conclusion of the evidence should therefore be excluded unless there is some ground of appeal founded upon the address of counsel.

While in process of loading logs onto trucks by means of a donkey-engine, owing to the incompetence of the engineer, C., who was acting as superintendent of the work, temporarily took charge of the donkey-engine and instructed the engineer how to work it. While he was so engaged, a man employed as a loader was struck by a log that was improperly lowered, and killed. The plaintiff obtained judgment in an action for damages under the Employers' Liability Act.

Held, on appeal, GALLIHER, J.A. dissenting, that C., being so engaged, was "a person having superintendence intrusted to him" within the meaning of section 3, subsection (2) of said Act, and the appeal should be dismissed.

APPEAL by defendant from the decision of GREGORY, J., of the 14th of September, 1917, and the verdict of a jury, in an action brought by the administrator of the estate of Thomas Gibson, deceased, for damages for the death of said Gibson by reason of the negligence of the defendant Company or its servant. The Company was operating a logging camp eight miles from the town of Campbell River. Deceased was employed as second loader. One Clausen was superintendent and one Stellmach was head loader. They were loading a pile of logs onto trucks (two trucks being in position for loading). Clausen was running the donkey-engine on that day owing to the incompetency of the man that had been employed for that work. He was instructing him how to work it. The loading was done with the donkey-engine by means of a pulley, the logs being raised onto the trucks. The trucks had been too far away, and Stellmach went below to help two men shove them up

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into place, deceased helping on the opposite side. They shoved them in place and were on the way back when, according to Stellmach, Gibson went ahead and got between the trucks when a log was let down, hitting the cheese-butt on the outside and instead of going on the truck it fell outside and pinned deceased on top of the brow log at the side of the truck. The jury found negligence and assessed the damages at $950.

The appeal was argued at Victoria on the 1st of February, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Robert Smith, for appellant, referred to the appeal book including *verbatim* the address to the jury by plaintiff's counsel. Objection was taken to its inclusion in the appeal book, but the registrar allowed it in.

Argument

MACDONALD, C.J.A.: The contention is that where one party incorporates the address in the appeal book and is not desirous of taking it out, and the other party objects, the registrar will allow it to stay in, though it cannot be taxed. But in that the registrar is wrong; for it is his duty not to allow anything in the appeal book that is not relevant to the appeal.

Mr. *Smith* suggested that the following words in the Rules (page 33) contemplate the insertion of counsel's argument in the appeal book:

MACDONALD, C.J.A.

"If counsel's arguments on admission or rejection of evidence are inserted in the appeal book it will be at the risk of being disallowed on taxation."

We are not blaming you, Mr. *Smith,* but we wish to lay down a correct practice with regard to this matter. It seems to me the registrar has misconceived the scope of his duty. Counsel's address to the jury, unless in the grounds of appeal some objection is taken to what counsel said to the jury, should not be included in the case when one party objects.

MARTIN, J.A.: The rule has nothing to do with the address of counsel at the conclusion of the evidence. Nobody ever suggested that, when the judges came to draw up these rules as to what was to go in the appeal book—I know for I was one of

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the judges at the time—nobody thought that the established practice of the Court should be disregarded, and the address of counsel included—unless there was some ground of appeal founded upon the address of counsel. It is the registrar's duty to reject anything of that kind, and it is the duty of counsel to their clients and their duty to this Court to see that such claims are not put forward.

The registrar in Vancouver should follow the practice of the registrar at Victoria; this is the senior registry. There seems to be a misconception there that the junior registry can establish a practice of its own, over the head of the senior registry; and that has been attempted in a number of instances. I wish it distinctly understood that the practice of the senior registry should prevail. The registry in Victoria was established for very many years before the registry in Vancouver, and had a well known established practice, which should be accepted by the junior registry for its guidance. It is for the registrar to take cognizance of what this Court says.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I cannot call to mind a case where the address of counsel has been included in the appeal book unless there is some ground of appeal based thereon.

EBERTS, J.A.

EBERTS, J.A.: I agree.

Argument

Smith, on the merits: This was wholly an Employers' Liability Act case. Clausen, who was superintendent, was at the time running the donkey-engine and was therefore a fellow servant: see *Shaffers* v. *General Steam Navigation Company* (1883), 10 Q.B.D. 356. There is no evidence to shew what was the actual cause of the accident.

C. W. Craig, for respondent: Clausen was still superintendent, being at the time engaged in instructing the engine-man. The evidence shews there was not a clear view, in which case there should be a signal system.

MACDONALD, C.J.A.: I think the appeal must be dismissed. The question was eminently one for a jury; and I think there was evidence on which the jury could rightly arrive at their conclusion.

The only question raised by counsel which has given me some anxiety is, as to whether it can be said that Clausen, who was operating the engine, was while operating it exercising superintendence? Was his negligence the negligence of a person intrusted with superintendence whilst in the exercise of it? Looking at all the evidence as it stands, and taking into consideration the admitted fact that he was the superintendent, and that there was some difficulty with respect to the running of the engine, incompetency or inexperience on the part of the new engineer, which he undertook to remedy by shewing the engineer how to act, I think it can fairly be said that he was in the exercise of superintendence at that time. That being so, I find it unnecessary to say anything further than that, in my opinion, the judgment below must stand.

MACDONALD, C.J.A.

MARTIN, J.A.: That expresses my view.

MARTIN, J.A.

GALLIHER, J.A.: I would allow the appeal. In my opinion, there is no evidence to warrant the finding of the jury of negligence on the part of the defendant.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. Upon the evidence, it seems to me a sufficient case has been made out, and an action within the purview of the Employers' Liability Act has been established.

Admittedly, apart from the Employers' Liability Act, if the employer was guilty of negligence he would be liable; no question of fellow servant could arise. Now, the policy of this Act is to deal with the person in superintendence, and that he should be responsible as the employer would be responsible. In this particular case the superintendent chooses to leave his post of general superintendence and goes to a point where particular machinery is in operation, takes over the machinery and is guiding it. It seems to me that he is still acting in the capacity of superintendent.

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There is the additional evidence that he was there instructing, demonstrating and shewing how this machine should be operated, that is, how it should be properly operated, and the accident occurred at that juncture. That being so, and there being sufficient evidence of these facts, "it was whilst in the exercise of such superintendence": Cap. 74, Sec. 3 (2). Clearly this is not a case for interference upon the part of the appellate Court. The jury's finding is reasonable upon the facts as adduced at the trial.

EBERTS, J.A.

EBERTS, J.A.: I agree.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellant: *Taylor, Harvey, Stockton & Smith.*
Solicitors for respondent: *J. A. Campbell & Company.*

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IN RE DOMINION TRUST

IN RE DOMINION TRUST COMPANY, LIMITED.

Company law—Winding-up—Petitioner—Status of—Estoppel—Registrar's list—Judgment in rem—Assets—Money owing on shares—Companies Act, R.S.B.C. 1911, Cap. 39, Sec. 182.

The petitioner for the winding-up of the Dominion Trust Company, Limited (old company), was a shareholder therein prior to the carrying out of the agreement between that Company and the Dominion Trust Company (new company), whereby the new company took over the assets and assumed the liabilities of the old company, the shareholders in the old company receiving an equal number of shares in the new company. Upon the new company going into liquidation the deputy district registrar, to whom was referred the settlement of the list of contributories, placed all the shareholders in the old company on the list, his certificate being dated the 6th of March, 1916. Some of these appealed and succeeded in having their names struck from the list, but those not appealing, of whom the petitioner was one, remained on the list. On this application, objection was taken that the petitioner had no status as he is on the list of contributories of the new company and a shareholder in that company only.

Held, that he is not on the list of contributories of the new company

because he is legally a shareholder of that company, but because by estoppel by record he will not be heard to say he is not a contributory. Such estoppel could only arise at the earliest on the date of the registrar's direction (March 6th, 1916), so that even if such estoppel operated to make him cease to be a shareholder in the old company, he would by virtue of section 182 of the Companies Act still have the status to present this petition, for he is thereby still liable as a past member to be put on the list of contributories.

A registrar's direction that a certain person be placed on a list of contributories is not a judgment *in rem*.

The moneys owing on their shares by shareholders of the Dominion Trust Company, Limited, who have not exchanged such shares for shares in the Dominion Trust Company, are assets of the old company, although the beneficial ownership of these moneys is in the new company.

PETITION for the winding-up of the Dominion Trust Company, Limited, heard by MURPHY, J. at Chambers in Vancouver on the 8th of February, 1918. The facts are set out in the head-note and reasons for judgment. Statement

Martin, K.C., for petitioner.

Cowan, Ritchie & Grant, for creditors supporting petitioner.

Savage, J. A. MacInnes, Jamieson, Hooper and *Bucke*, for the various contributories.

12th February, 1918.

MURPHY, J.: Some time ago, I handed down reasons for judgment in which the conclusion was arrived at that this Company should be wound up. Counsel, who opposed the original application, pointed out to me that, through a misunderstanding, two features had not been fully argued. I thereupon directed that the matter be set down anew and further argument took place. The two points are: (1), that the petitioner herein has no status, as he had been put upon the list of contributories of the Dominion Trust Company, previously to the filing of this petition, had not appealed and the time for appeal had elapsed before the date of such filing; and (2), that the legal position, as a result of legislation, is such that it cannot be held to be just and equitable that this Company be wound up. Judgment

In proceedings in the Dominion Trust liquidation, I held that the legislation passed in reference to the amalgamation of that Company with the Dominion Trust Company, Limited,

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did not *per se* make the shareholders of the latter Company shareholders of the former. This decision was confirmed on appeal (1916), 24 B.C. 450. In the said proceedings, it was alternatively contended that the parties then before me were estopped by their conduct from contending they were wrongfully placed on the list of contributories of the Dominion Trust Company. I held that no case of estoppel was made out against any one of them. This decision was also confirmed by the Court of Appeal, MACDONALD, C.J.A. dissenting. On the argument herein, I invited counsel, opposing the application, to distinguish the facts in the petitioner's case (apart from the fact that he was on the list of contributories of the Dominion Trust Company and had not appealed) from the facts in the cases before me in the Dominion Trust Company proceedings, but no attempt to do so was made. In fact, if I understood counsel aright, he admitted this could not be done.

The contention here is that the petitioner has no status herein because he is on the list of contributories of the Dominion Trust Company. He is, as above shewn, not on that list because he was made a shareholder by legislation nor is he on it because of his conduct previously to his acquiescence in the registrar's report. If he is on said list and if he cannot now get off it (which is assumed in favour of those resisting this application), this position, in view of the facts and decisions hereinbefore referred to, is due to his conduct in acquiescing in the registrar's action in putting him on it. He is there, not because he was legally a shareholder of that company, but because by estoppel by record he will not be heard to say he is not a contributory. Such estoppel could only arise at the earliest on the date the registrar's direction was made, which was on 6th of March, 1916, so that even if it could be said that such estoppel operated to make him cease to be a shareholder in the Dominion Trust Company, Limited, and to become a shareholder in the Dominion Trust Company, he would by virtue of section 182 of the Companies Act still have the status to present this petition, for he would thereby still be liable as a past member to be put on the list of contributories. It is argued that this direction of the registrar must relate back to at least the date

Judgment

of the order winding up the Dominion Trust Company, *viz.*, October 27th, 1914. To this, there are two answers: (1), that estoppel by record does not make him a shareholder at all, but merely places him in a position in reference to the liquidator of the Dominion Trust Company whereby he cannot dispute that he is a contributory in that Company; and (2), that even if estoppel by record did make him a shareholder, by its very nature it could not arise until the date of the adjudication put forward as creating it. Further, I think estoppel cannot be raised by the opponents of this application against the petitioner. Estoppel by record is, as shewn above, all that can be relied upon, and such estoppel can only be raised where it is mutual: Halsbury's Laws of England, Vol. 13, p. 349. Clearly no mutuality exists here.

Then it is said that the registrar's direction is a judgment *in rem.* No authority was cited for this somewhat startling proposition, and in the absence of such I would decline, under all the circumstances here—assuming that the registrar's direction is a judgment, as to which I express no opinion—to so hold. Even if it is a judgment *in rem,* to operate as desired, it is necessary that the finding should be essential to the judgment and ascertainable from the judgment itself: Halsbury's Laws of England, Vol. 13, p. 340, and authorities there cited. The finding desired to be set up here is that the shares held by Boyce in the Dominion Trust Company, Limited, have been surrendered to the Dominion Trust Company and shares in this latter Company issued to him in lieu thereof, at a date at least a year previously to the date of the filing of the petition herein, or at any rate that such must be held to be the legal effect of what has happened. The authorities cited in the Court of Appeal judgments, when the matter of contributories in the Dominion Trust Company was before them, and those judgments themselves, shew that no such finding or no such legal result is essential to the registrar's adjudication or, in fact, can be read into it without error. That adjudication did not say, and could not say, that Boyce was a shareholder in the Dominion Trust Company. All it could say, and did say, was, that by his conduct he had estopped himself from saying he should not be

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placed on the list of contributories of that Company. Even in saying that, the registrar was in error, but Boyce not having appealed, it may well be he must remain on the list. The question here is not whether he is a contributory in the Dominion Trust Company liquidation, but will he be such in the liquidation of the Dominion Trust Company, Limited. Clearly, I think, on the facts there has been no adjudication *in rem* determining this issue. I, therefore, hold he had a status to present this petition.

Then it is said it is not just and equitable that this Company be wound up: again, on the facts, this is a rather startling proposition. The ground put forward is, substantially that the Dominion Trust Company, Limited, has no assets, all its assets having by agreement, confirmed by legislation, been transferred to the Dominion Trust Company. Authorities were cited to support this contention, but they deal with the Dominion Winding-up Act. But section 192 of the B.C. Companies Act, under the provisions of which these proceedings are instituted, gives express power to make the order, even if there be no assets.

To my mind, however, there are clearly assets, *viz.*, the very moneys owing on their shares by shareholders of the Dominion Trust Company, Limited, who have not exchanged such shares for shares in the Dominion Trust Company. It is true the beneficial ownership of these moneys is in the Dominion Trust Company, subject possibly to their being applied in priority to payment of the debts of the Dominion Trust Company, Limited, but the legal ownership is in the Dominion Trust Company, Limited. The decision already referred to shews that the Dominion Trust Company cannot reach these assets in its own liquidation. It can only reach them by these present proceedings. To refuse a winding-up order, under such circumstances, would, to my mind, be to utilize the Court to defeat an honest debt.

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It was suggested that the liquidator of the Dominion Trust Company is defraying the expenses of this litigation, and that that amounts to maintenance and that, therefore, the Court should not make the order. The fact that the Dominion Trust Company is the beneficial owner, subject to the possible quali-

fication above set out, of the assets sought to be recovered herein, answers this: see Stroud's Judicial Dictionary, 2nd Ed., Vol. 2, p. 1139, subtitle "maintenance."

The previous order for winding-up is confirmed.

Order accordingly.

LINDLEY v. VASSAR *ET AL.*

Mortgage—Three mortgagors—Covenant to pay—Joint and several—Death of one mortgagor—Action on covenant—Estate of deceased not liable.

A covenant in a mortgage by three mortgagors recited that "the said mortgagors covenant with the said mortgagee that the mortgagors will pay the mortgage money and interest and observe the above proviso and will pay all present and future taxes," etc. In an action upon the covenant for payment:—

Held, that the covenant is a joint covenant only, and in case of the death of one of the mortgagors, his estate is not liable even in respect of what was due and payable at the time of his death.

ACTION to enforce a covenant for payment under a mortgage. Three mortgagors executed a mortgage in favour of the plaintiff. One Whiteman, one of the mortgagors, died. After his death the plaintiff commenced action against the surviving covenantors and the executrix of Whiteman's estate. The action was tried by CLEMENT, J. at Victoria on the 14th of February, 1918. In the course of the trial counsel for the executrix of the Whiteman estate contended that the covenant being a joint covenant only, deceased was not liable. The judgment below was then delivered and the trial was adjourned for further evidence as to what default there was, if any, prior to Whiteman's death.

Statement

A. I. Fisher and *J. S. Brandon*, for plaintiff.

Stacpoole, K.C., for defendant Mary Whiteman.

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CLEMENT, J.: If the default in performance of the covenants sued on is to be taken to have happened after Whiteman's death, then the defendant Mary Whiteman, his executrix, is, in my opinion, not liable. The covenants are clearly joint only: *White* v. *Tyndall* (1888), 13 App. Cas. 263. The case of *National Society for the Distribution of Electricity by Secondary Generators* v. *Gibbs* (1900), 2 Ch. 280, relied on by Mr. *Fisher,* does not shake the earlier decision of the House of Lords. It held that a covenant, held to be joint, apparently, made by two partners who held certain patents as a commercial speculation, to assign such patents and to covenant for validity and title, must be held to mean as to this last-mentioned covenant a joint and several covenant. Here I have the actual covenant entered into by the mortgagors, and that covenant is, in my opinion, a joint covenant merely.

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But it may be, for all that appears in evidence or on the pleadings, that the default, wholly or in part, took place in Whiteman's lifetime. What effect this would have as against his estate should, I think, be argued after the actual facts have been disclosed. Let the case be put on the trial list again on any day to suit counsel. Liberty to apply.

Statement

The action again came on for trial on the 25th of February, 1918, when the evidence disclosed that certain taxes and interest had become due and payable under the mortgage prior to Whiteman's death and were never paid.

A. I. Fisher (*J. S. Brandon,* with him), for plaintiff.

Stacpoole, K.C. (*Bradshaw,* with him), for defendant Mary Whiteman.

Judgment

CLEMENT, J.: I will have to hold that the covenant in question has no substance as against deceased's estate, even in respect of sums which were due at the time of Whiteman's death; the executrix cannot be sued. The action as against her will be dismissed with costs.

Action dismissed.

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Highways—Telephone poles—Purchase by company operating under Act—Poles cut down by second company with franchise—Right of—B.C. Stats. 1907, Cap. 55.

Where a private corporation cuts down the telephone poles of another corporation on a highway as being an obstruction on the highway amounting to a nuisance, in order to justify such action it must establish that it could not have constructed its own line without removing the property of such other corporation.

A telephone company which acquires from another company the latter's poles and wires which have been on a highway for some years without objection from the municipality, is entitled to consider that the poles and wires were on the highway with the approval of the municipality, and that it had the right to use such line as part of its system under its powers conferred by statute.

Where a telephone company has legally placed its equipment on a highway, a second company having the same powers, is not entitled to interfere with or do any act of injury to such equipment.

ACTION for damages for injuries sustained by reason of the defendant Company cutting down the plaintiff's telephone poles and wires in Garnett Valley and appropriating to its own use a portion of such material, also for a declaration that the plaintiff Company has the right to have its telephone lines maintained through said valley. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vernon on the 29th and 30th of October, 1917, and on the 4th of February, 1918, at Vancouver. Statement

W. H. D. Ladner (*G. F. Reinhard,* with him), for plaintiff.

R. M. Macdonald (*Kelley,* and *H. C. DeBeck,* with him), for defendant.

21st February, 1918.

MACDONALD, J.: This is a contest between two rival telephone companies as to the user of a public highway running through the Garnett Valley, in the Municipality of Summerland, in the County of Yale. Judgment

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Plaintiff Company is operating under a private Act of the Province, passed in 1907, and claims the right thereunder to use the streets and highways in said county, subject to certain conditions. Defendant Company carries on its business in the Municipality of Summerland under an agreement with such municipality, creating a franchise and authorizing such Company to use the streets, also subject to certain conditions outlined in such agreement.

It appears that a local company, called the Lake Shore Telephone Company, Ltd., was, for some time, operating in the Municipality of Summerland, and in the year 1911 the plaintiff Company acquired by purchase, *inter alia,* the poles and telephone wires, constructed by the Lake Shore Telephone Company in Garnett Valley, but did not purchase any franchise or right that such company had to operate in that locality. For reasons, not necessary to outline at length, the line, through this valley, thus acquired by the plaintiff, fell more or less into disuse. This was due in a great measure to lack of custom, and the defendant Company, with local support, sought to do business generally in the Municipality of Summerland, including this particular valley. It filed a plan, shewing the location of the telephone poles through such valley, and then made arrangements for the construction of its line along the highway, through its present manager, A. O. Atkins. In the summer of 1916, defendant Company not only invaded the territory, occupied by the plaintiff, and sought to occupy the field, thus so loosely held by the plaintiff, but to disregard the usual practice in constructing a telephone line upon a highway, already utilized for telephone purposes by another company. It saw fit to become the judge, as to the rights possessed by the plaintiff along such highway, and apparently decided that the plaintiff had no right to retain its poles or wires upon such highway, at any rate, where they would interfere with the defendant in constructing its line. It not only deliberately cut down poles and wires, forming a portion of the plaintiff's telephone line, but appropriated to its own use a portion of such material. It practically destroyed the plaintiff's line in that particular locality, and by placing its wires at the same height as that previously adopted by plaintiff,

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rendered it more difficult for the plaintiff to construct a new line or even repair the remaining portion of its line along such highway. It is true that the telephone line of the plaintiff was out of repair to some extent at that point; but this would not avail the defendant, as an excuse for its course of action, unless it had such a superior right to occupy the ground, it was not justified in taking this course. Such right could only be obtained by a franchise, properly obtained, for use of the highway in the manner desired, and through the plaintiff occupying the highway in such a manner as to be a nuisance, and preventing the defendant from constructing its line or utilizing such franchise.

The contention, however, is made, in the first place, that instructions were given to Atkins not to interfere with the plaintiff's telephone line, and that Atkins, and not the defendant, is to blame for what occurred. Authorities are cited as in support of this contention, but I do not think they avail to assist the defendant. Even if the statement, as to such instructions being given to Atkins, made by H. C. Miller, president of the defendant Company, be accepted, still, I do not think that he was an independent contractor, so as to relieve the defendant Company, nor were his acts of trespass and appropriation so apart from his contract as to relieve the defendant. The very fact that Miller gave instructions in connection with the contract shews that defendant retained the power of directing, not only the nature of the work to be performed, but also the manner of doing it. Defendant obtained the benefit of the damage done to the plaintiff's line, and unless it possessed a right to do so, it cannot relieve itself by placing the responsibility upon Atkins. This involves the question as to whether the poles and wires of the plaintiff on such highway were a "nuisance," and whether the defendant, a private corporation, had a right to interfere with or remove them. Assuming for the moment that they constituted a nuisance, then—

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"A private person cannot take upon himself to abate a public nuisance, unless it causes special injury to him, but where he is specially injured, to the extent that it so injures him, he may abate it. Thus, in the case of an obstruction across a highway, a private individual can only remove it so far as is necessary in order to enable him to exercise his right of passage, and he cannot justify doing any damage to the property of the person who

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has placed the nuisance, if by avoiding it he might have passed on with reasonable convenience":

see Garrett on Nuisance, 3rd Ed., 375, and cases there cited.

Jessel, M.R. in *Bagshaw* v. *Buxton Local Board of Health* (1875), 1 Ch. D. 220 at p. 224, in discussing as to who has the right to remove an obstruction on a public highway, says:

"It is clear, on the authorities, that any individual who is specially injured by the obstruction has by common law a right to remove that which unlawfully causes a special injury to him, but a private individual has no right to remove an obstruction which causes no special injury to him, but which is simply an obstruction to the road as regards the public in general, as distinguished from the individual."

Lord Russell of Killowen in *Reynolds* v. *Presteign Urban District Council* (1896), 65 L.J., Q.B. 400 at p. 402, in dealing with the right, even of a municipality, to remove obstructions upon a highway, says as follows:

"I do not mean to say that considerable weight should not be attached to the observation of plaintiff's counsel as to the propriety and desirability that questions of this kind ought not to be decided either by public bodies or private individuals with a high hand, or by taking the law into their own hands without adequate reason; and I agree that where there is any doubt as to the rights in question, local authorities should act with circumspection, and should prefer to act through judicial proceedings. But where they do choose to act on their own responsibility they take it upon themselves to run the risk. If they proceed to remove encroachments on what they believe to be highways vested in them, the burden of justification is thrown upon them, and they must take the consequences of any proceedings taken against them."

Judgment

If these precautions should be taken by a municipality, so much the more should a private corporation be careful, in interfering with the property of others upon a highway, to which it has obtained a limited right of user. Such a corporation, without even invoking the aid of the municipality, would require to proceed on very safe ground, or would be accepting great risks, should its course of action be determined to be wrong. Defendant, however, boldly takes the stand that it is within its legal rights, and that it was justified in dealing with the telephone line of the plaintiff, as being an obstruction on the highway, amounting to a nuisance. In order to succeed, it must establish that it could not have constructed its line without so interfering with the property of the plaintiff; I think it has failed to satisfy this requisite. So even if the plaintiff had no right to retain its poles and line upon the highway, defendant

was not warranted in acting as it did. If I am correct, in arriving at this conclusion, then, even though the plaintiff were trespassing upon the highway, still, the defendant had no right to wilfully destroy or appropriate its property, and is liable therefor.

Aside from the contention, that the defendant could have constructed its line without interfering with the plaintiff, the further ground was taken by the plaintiff that the defendant had not obtained the full right to construct its line, as it had not complied with the conditions as to the height that its wires should be placed above the ground, and obtained the approval of the council of the municipality in that connection. This might be a material point to be considered, if I had not already reached a conclusion as to the defendant's liability, irrespective of any question as to its franchise being effective.

If the action were simply one for damages, nothing further need be added. It would simply be a question of assessing the amount. The plaintiff, however, seeks to establish its right to have its telephone line maintained along this highway. While there does not appear any present necessity for the continuance of such a line, as part of the general system of the plaintiff, still, I have no reason to doubt its claim, that it desires such a line to remain in existence for probable future use. To obtain a declaratory judgment of this nature involves consideration of the right to the plaintiff to have the telephone line upon the highway. When the plaintiff bought the tangible assets of the Lake Shore Telephone Company, it carefully excluded in the purchase the acquisition of any franchise possessed by the company. It was apparently intended that it should become, as to this particular highway, the owner of the poles and line, then existing, without any of the conditions attached to their installation and maintenance. In other words, that it sought to incorporate into its general telephone system this portion, already constructed. Defendant contends that in so acquiring this line plaintiff must necessarily assume the burden of any restrictions or conditions, that were then being borne by its vendor. There is no doubt considerable weight is to be attached to this contention, but when one considers the circumstances under

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which the poles were located and the wires strung along this highway, the point does not seem to be so formidable. These poles and wires had been for years on the highway without objection on the part of the council. It is true that no plan of location had ever been filed, or formal approval obtained. While the principle of estoppel does not operate to any extent against a municipality, as it can only act within its statutory powers, still, after this lapse of time, it would appear unlikely that the municipality could call upon the Lake Shore Company to remove its telephone line from the highway. It could, with a prospect of legal success, object to a complete or substantial removal of its poles and wires, so long remaining undisturbed, with knowledge of expenditure involved. The council had seen fit to ignore its rights as to approval of the original location, and not asserted its position afterwards, except as to minor changes, which tended to shew approval of the general location. The Company would be in somewhat the same position as the defendants in *Toronto* v. *Toronto Electric Light Co.* (1905), 10 O.L.R. 621 at p. 627:

> "There was thus in the plaintiff's conduct much more than a mere passive acquiescence, something indeed under the circumstances I have mentioned amounting to an active encouragement to the defendants to think and believe that they the plaintiffs did not intend to claim the benefit of the forfeiture. And for these reasons I think the inference of waiver drawn by the learned Chief Justice is the only proper one upon the whole evidence."

Judgment

When the plaintiff acquired this particular telephone line, with doubtless a knowledge of it having existed for a number of years, was it necessary for the plaintiff to obtain formal approval from the council of the location of the poles and, incidentally, the stringing of the wires? Was it incumbent upon the plaintiff to meet the council and say, "We have bought such and such an amount of material useful for our purposes, and intend it to become part of our system? We find that it is located on the highway for the same purpose, as we propose utilizing it under our Provincial statute. May we assume that you are satisfied with the location?" This seems to me a useless and unnecessary procedure. If the plaintiff were constructing a new line along its highway, and submitted its plan shewing the location of the poles, the municipality could not

unreasonably withhold its approval. Then, under these circumstances, could it not be fairly presumed that the approval of the location had already in effect taken place? I think the plaintiff was entitled to consider the poles and line were on the highway with the approval of the council, and that it had the right to purchase and use such poles and line as part of its system and under its powers conferred by statute. I am of the opinion that the plaintiff, even though its line was to some extent out of repair, was lawfully utilizing the highway, and that it had a prior right of user of the highway as against the defendant, and is entitled to have the poles and line, so interfered with by the defendant, restored to the position they were in formerly.

The position of two companies thus endeavouring to utilize a highway under franchise, and the prior right of the first licensee, is indicated in Joyce on Electric Law, par. 17:

"We have seen that telegraph companies are a public necessity, and exercise a public or *quasi*-public employment; that they must employ competent and skilled servants, agents and operators, and have suitable and approved instruments and appliances; that they must exercise a high degree of skill, care and diligence, adequate to, or commensurate with, their undertaking; and that there are certain atmospheric and other natural, unforeseen and uncontrolable disturbances against which the required care, skill, diligence and duty cannot provide. It is, therefore, the rule that while telegraph companies must perform in the manner and to the extent required by law, and their relation to the public, the exact obligations imposed upon them, nevertheless they are not insurers for the safe and accurate transmission of messages under all circumstances, even though the inevitable accident or uncontrolable cause of disturbance does not come within the meaning of what is generally designated as the "act of God," although this term has sometimes been used as including that which cannot be avoided by the exercise of a proper degree of skill, care and foresight."

This statement of the law is in accordance with the Canadian authorities, *e.g., Bell Telephone Co.* v. *Belleville Electric Co.* (1886), 12 Ont. 571. In that case Wilson, C.J., at pp. 579-80, referred to the rights of the plaintiff as first licensee of the highway, as follows:

"It is sufficient to say that being in the earlier possession of the ground required for their poles the defendants have not the right to interfere with or do any act to the injury of the plaintiffs' earlier right. The defendants would not have the right to cut down or remove the plaintiffs' poles, nor to make use of them, nor to place wires or do anything else which would damage the purpose or usefulness of the poles or wires which the plaintiffs had placed there; nor to render useless or prejudice the business which

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the plaintiffs were and are authorized to carry on by means of their poles and wires; nor to cause danger to life or property by stringing their wires so near to those of the plaintiffs that life or property is endangered thereby."

The learned judge then states that the city engineer, having located the defendant's line upon the same side of the road as the plaintiff, did not confer any benefit, as the plaintiff had the first right, and the city council "had not the right to destroy or prejudice the privileges they had already granted to the plaintiff." In order to protect the plaintiff in his rights, the defendant was ordered to move his poles and wires to the other side of the road. The difficulty here is that the line in question had been practically destroyed, and the proper order to make, would be for the defendant to restore same and place it in the same condition as it was in on the 1st of June, 1916. Such work will involve the use of new material instead of old, but the actions of the defendant have brought about this result. There was a dispute as to the condition of the line, but the defendant, by its actions, destroyed the evidence as to the real condition, so it should not be entitled to any reduction in cost on that account. Plaintiff is not apparently needing this line at present, so I think, notwithstanding the course it has pursued, I should afford defendant ample time to complete this work. The estimate of the cost, as claimed by the plaintiff, is criticized and an attempt made to controvert it. By the defendant doing the work, this question is removed. So the defendant is required within three months from the date of the order for judgment, to re-establish such line in Garnett Valley. Such line to have at least four feet clearance from any telephone line of the defendant, and be in a fit, proper and safe condition to enable the plaintiff to carry on its business.

Judgment

If I am right in coming to the conclusion that plaintiff's line was properly located on the highway at the time of its destruction, then, even if the municipality, or rather its council, be friendly to the defendant, and anxious to assist, there should be no prospect of it preventing the line being re-established. While so expressing this opinion, I am not, of course, attempting to give any direction or order as against the municipality, as it is not a party to this action, and would only be bound by other proceedings.

If the defendant fails to perform such work within such time, then, the plaintiff may enter judgment against the defendant forthwith, after the expiration of such period, for the sum of $570, or it may undertake and complete the work, and will be entitled to be paid by the defendant for the cost thereof, including a fair amount for superintendence. If the amount of such cost cannot be agreed upon, then it will be referred to the registrar of the Court to determine such cost. Affidavits may be used on such reference, or oral evidence, the report of the registrar to be binding and judgment entered thereon, with costs of the action and of the reference and subsequent thereto, unless such report be modified upon application to be made to a judge within 14 days of the filing thereof. Other terms of the order may be spoken to by the parties in settling the same. Plaintiff is entitled to the costs of the action.

Order accordingly.

GREER v. GODSON.

Principal and agent—Sale of steamship—Commission—Purchaser—Subsequent agreement between purchaser and vendor—Agreement not carried out—Action premature—Costs.

The defendant, the owner of the S.S. "Zafiro," had her reconstructed, registered under the name of S.S. "Bowler" and obtained permission to transfer the flag to one of the allied nations. The plaintiff, a broker, and personal friend of the defendant, was consulted and rendered material assistance in having these changes made. The defendant then employed the plaintiff to find a purchaser for the ship at $250,000, agreeing to pay a commission of 5 per cent. Through one Robertson in Vancouver the plaintiff got in touch with one Aldridge in Seattle, who in turn communicated with one Dorr of the American Mercantile Company, who discussed the proposition with one Ward, of Saunders, Ward & Co., brokers, Seattle. Aldridge, Dorr and Ward then joined together for the purpose of endeavouring to obtain a purchaser for $275,000, intending to keep $25,000 of this for themselves. Ward then offered the ship to Thorndyke & Trenholm, of Seattle, for

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$275,000, and after negotiations, Thorndyke went to Vancouver and after viewing the ship, saw the defendant, with whom he discussed the proposed purchase and after negotiations, in which the brokers were not consulted, an agreement was entered into between the defendant and Thorndyke whereby, subject to certain conditions, the ship was sold to one Scott, of Mobile, Alabama, for $260,000. Fifty thousand dollars was to be paid as a deposit forthwith, and the balance on the fulfilment of the conditions, which were that the defendant should obtain for the ship "Bureau Veritas Rating 5/6 L.I.I." with which the ship was to be delivered on or before the 15th of November, 1917, but that if it was not delivered with said rating on that date the $50,000 deposit was to be refunded. The agreement was never carried out, and the time for delivery expired before the issue of the writ in the action. The evidence, however, shewed that the agreement, by arrangement, continued to be binding between the parties, negotiations being still in progress for the procuring of the rating, with a view to the carrying out of the sale. The plaintiff's claim was for commission on the sale and $5,000 for services rendered as to improvements, etc., to the ship prior to his services in procuring a purchaser.

Held, that there was no legal liability with respect to the $5,000 claim, as no charge was made for the services so rendered, it appearing from the evidence they were given gratuitously with a view to obtaining a commission later as plaintiff's agent in finding a purchaser for the ship.

Held, further, as to the claim for commission, that the action is premature even as to the $50,000, as the transaction between the defendant and Thorndyke was a conditional agreement for sale, the terms of which were never carried out, and the $50,000 payment was merely a deposit, to be returned in the event of the sale not being carried through.

Held, further, that as the defendant had not properly pleaded and made an issue of the defence upon which he succeeded as to the commission, and the plaintiff had failed on his $5,000 claim for services rendered, the defendant be allowed his general costs of the action and the costs applicable to the trial for one day only.

Statement

ACTION for commission for the procuring of a purchaser for the defendant's steamship "Bowler," and for $5,000 for services rendered in the reconstruction of the ship and for obtaining the registration thereof in Canada prior to its being offered for sale. Tried by MACDONALD, J. at Vancouver on the 27th of February to the 6th of March, 1918. The facts are set out fully in the head-note and reasons for judgment.

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

A. H. MacNeill, K.C., and *Haviland*, for defendant.

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MACDONALD, J.: In November, 1916, defendant became owner of the S.S. "Zafiro." It was decided to reconstruct the ship, and the plaintiff was consulted as to her earning capacity and other matters, also as to the registration of the ship in Canada.

The reconstruction of the boat proceeded and eventually she was registered under the name of S.S. "Bowler," and permission to transfer the flag of the ship to one of the allied nations was obtained. From the time the reconstruction of the ship was decided upon, and up to the 10th of September, 1917, the plaintiff frequently advised with the defendant and was employed by him as a broker to dispose of the vessel. Plaintiff was in constant communication with the defendant, who was, to his knowledge, interesting other brokers in the contemplated sale. It is true that, during this period, the position of the plaintiff towards the defendant was somewhat altered by options for purchase being given to the plaintiff. They were, however, given at the time for a particular purpose, and when they ceased to exist, the relationship of principal and agent was again resumed.

The price, at first, fixed for sale of the ship was $175,000, but, through extra expense involved, and more particularly the great demand for ships, the price was increased from time to time until it reached, and remained firm, at $250,000 for some months. If the plaintiff succeeded in making a sale at this figure he was to receive, as commission, 5 per cent., though the amount was also estimated at $10,000. Plaintiff says that this commission, if earned, would only have been divided as to one-fifth with one Robertson. He intended that the other brokers engaged in making the sale should receive their commission through disposing of the property at an increased price. As the local market for the sale of the ship was necessarily limited, it became necessary to seek purchasers abroad, and the plaintiff communicated with likely purchasers and brokerage firms at different points throughout the United States. He placed the proposition particularly before brokers in Seattle and Tacoma. Through Robertson, of Vancouver, he got in touch with Aldridge, of Seattle. He in turn got into communication with

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Dorr, of the American Mercantile Co., of Tacoma. The latter party discussed the prospects of sale with Ward, of Saunders, Ward & Co., brokers, who occupied adjoining offices. The position then, was that Aldridge, Dorr and Ward were endeavouring to obtain a purchaser of the ship at $275,000. The intention was that this coterie of brokers should divide $25,000, being the excess over the $250,000, amongst themselves as commission, should they make a sale of the property. Then Ward offered the ship for sale to Thorndyke & Trenholm, of Seattle, at $275,000, without commission to them. Extensive correspondence passed between Ward's firm and Thorndyke & Trenholm. Description was given with sufficient particularity to warrant Thorndyke in coming to Vancouver to personally inspect the ship. It was contended that his visit did not arise from the correspondence referred to, but through a chance conversation he had with two parties in Victoria some months previously. I stated, during the argument, that I did not think any weight should be attached to such contention. The nature of the correspondence was such, as to satisfy me that it formed the basis upon which Thorndyke acted. I do not think he paid the slightest attention nor acted in any way upon the interviews in Victoria. It is not, however, material, as to the state of mind which Thorndyke was in, when he came to Vancouver. Whether he was endeavouring to undermine the other brokers, and deal direct with the owner, does not affect the issues involved.

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After viewing the ship, Thorndyke called upon the defendant. He did not tell him how he obtained information as to the boat, but asked whether it was for sale and the purchase price. Defendant then quoted to Thorndyke the same figure that Ward had already given him, *viz.*, $275,000. On his return to Seattle, Thorndyke could have communicated with Ward, what had occurred and kept him advised of any progress towards completion of a sale. He did not see fit to do so, but kept in direct communication with the defendant. There were proposals back and forth, but finally terms of sale were arranged on the 10th of September, 1917. An agreement for sale was executed shewing that, subject to certain conditions, the ship

was sold to M. J. Scott, representing Scotts Agency, of Mobile, Alabama, U.S.A., for $260,000, of which $50,000 was paid as a deposit and the balance became payable upon the fulfilment of the conditions subsequently referred to. This price was net to the defendant. No commission was paid by him.

If he receives $260,000, he will thus have obtained $10,000 more than he was willing to accept, according to instructions given to the plaintiff, and if successful in this action, will also be relieved from payment of commission and thus have gained another $10,000 at least. Plaintiff contends that under these circumstances, thus shortly outlined, he should be entitled to a commission of 5 per cent. on $260,000. He also claims the sum of $5,000 for services rendered to the defendant outside of those pertaining to the duties of a broker. As to the claim of $5,000, I think it well to deal with this, in the first place. I think the plaintiff was of great assistance to the defendant in obtaining registration of the ship and in assisting towards the transfer of the flag. He also gave information as to the earning capacity of the boat. It was never intended, however, that the plaintiff should receive remuneration for these services. Both parties had been friends for a score of years and, even if the plaintiff were not hoping to receive a reward through the sale of the ship, I think he would have been inclined to assist the defendant in the manner indicated. Plaintiff made no charge for these services at the time, and was candid enough to admit, that he would not now be making a claim therefor, were it not for the refusal of the defendant to pay any commission in connection with the sale. I am thus of the opinion that there is no legal liability resting upon the defendant with respect to the claim of $5,000.

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Returning then to the more important part of the case, the plaintiff's contention, shortly put, is this: That he set the ball rolling towards, what was the ultimate goal desired, *viz.*, the sale of the ship, and thus is entitled to a commission. He, as a broker, brought about a sale.

A number of grounds were alleged by the defendant in support of his contention, that he was not liable to pay plaintiff any commission in connection with the sale. *Inter alia,* it

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was contended that the commission of $25,000 to be divided by the brokers was in the nature of an undisclosed profit on the transaction, and prevented recovery. Then, it was submitted that Thorndyke was an independent broker, also that plaintiff was not the effective agent in that, he did not produce the purchaser. Further, that even if Thorndyke & Trenholm were sub-agents of plaintiff, they were too remote from the plaintiff, to allow him to reap the benefit of their services. These and other grounds were advanced, but while I have considered them, as I have come to a conclusion that is fatal to the plaintiff's claim upon another branch of the case, I do not think it advisable for me to discuss them, much less express any opinion.

Leaving aside the question of whether Thorndyke & Trenholm were plaintiff's sub-agents, or were agents for the purchaser, and assuming even that plaintiff procured the prospective purchaser of the ship, was the transaction such as to enable him to receive remuneration? He would only be entitled to commission if he carried out the terms of his employment in their entirety or at any rate substantially. He must shew that the party produced as a purchaser was "able, ready and willing" to complete the purchase. The agreement for sale of the ship, dated the 10th of September, 1917, between the defendant, as vendor, and J. H. Scott, a member of the Scotts Agency of Mobile, provides that the purchaser shall pay $50,000 upon delivery of the agreement duly executed, and that the vendor shall execute a bill of sale, and such further documents as may be reasonably required, to enable the ship to be legally transferred. It is further provided that the ship shall have the following rating at the time of delivery, *viz.*, "Bureau Veritas Rating 5/6 L.I.I.," and that the balance of the purchase-money, *viz.*, $210,000, is to be paid, subject to certain conditions. The obtaining of the rating referred to, is not one of such conditions, but a subsequent paragraph of the agreement provides, *inter alia,* that if the vendor fails to obtain such rating, then, the instalment of the purchase-money paid by the purchaser shall be returned to him. The agreement also provided that the delivery of the ship should be on or before the 13th of

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November, 1917. This date has long since elapsed. The delivery has not taken place, but the evidence shews that the agreement is still considered binding between the parties. Plaintiff filed this agreement as a portion of his evidence. It was proved that the rating required had not been obtained, and this prevented the delivery of the boat and the carrying out of the terms of the agreement. The transaction was, in my opinion, only a conditional sale. It was important, from the purchaser's standpoint, to have this rating secured. This is established by the evidence and, in these days of great demand for ships' tonnage, it can be assumed that parties, desirous of securing the ship, would not raise an unwarranted excuse, to avoid completion of a contract of this kind. So plaintiff did not procure a purchaser, having the necessary qualifications, that would warrant him in claiming compensation. In other words, he did not produce a purchaser, who was willing to buy the ship thus offered, without any conditions. He inserted a condition in his proposed purchase, which had to be complied with, before entering into either a binding contract to purchase or making payment of the purchase price. Neither can the plaintiff, at present, at any rate, claim any commission upon the amount already paid, as it practically amounted to a deposit or evidence of good faith, and may be returned to the purchaser. Defendant admitted that some progress had been made towards obtaining this rating, and that he was desirous of making delivery of the ship. He hoped that, at any early date, the Bureau Veritas would be prepared to grant the necessary classification. Then the sale would be completed and the defendant would have received the full purchase price of $260,000. That event has not yet occurred. This action, therefore, whether the plaintiff has a claim or not for commission, in my opinion, is premature. This ground was not outlined in the statement of defence. It was argued that the denials therein were sufficient to enable the defendant to avail himself of this defence. Defendant might have some strength in taking this position, in the view that the plaintiff required to prove, that he produced a purchaser, willing to complete a sale. His difficulty, however, is that in the statement of defence, he practically

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admits that the sale was consummated. He refers to the transaction as being a completed one, as follows: "In the further alternative, the sale of the vessel referred to was consummated through the agency of Thorndyke & Trenholm, brokers, of Seattle, Wash." So I consider the pleadings did not disclose nor make an issue of the ground upon which the defendant has succeeded. The evidence, however, was before the Court, shewing the non-performance of this condition, so I require to deal with it. It was contended, that it formed a complete defence to the action. At the close of the argument, I called upon defendant's counsel to elect, whether he would adhere to the pleadings as they stood, or apply for an amendment, setting up such defence. He availed himself of the privilege, and pleaded, alternatively, that the transaction was not a sale and the plaintiff was not entitled to any commission.

Under these circumstances, the question arises as to the disposition of the costs of this expensive litigation. If the defendant had properly pleaded and made an issue of the defence upon which he succeeds, then, the plaintiff would be at liberty to pursue one of two courses. He could proceed to trial upon such issue and would have to bear the result with costs. If he, however, were satisfied that he could not successfully meet such attack, then, he could apply for discontinuance of the action, and would probably be granted leave to sue again, should he be so advised. Plaintiff, on account of the nature of the pleadings, did not have an opportunity of adopting either of these proceedings. In allowing an amendment, setting up the defence, I stated that I would impose such terms as appeared reasonable. It is a difficult matter to determine what amount of costs should be borne by the defendant through an amendment at such a stage of the proceedings. The time of the trial consumed, in connection with the issue upon which he succeeded, was very slight. I have not given an opinion, as to the effect of the other defences raised by the defendant. If the defendant had this successful issue properly raised before the Court at the trial and, at the close of the plaintiff's case, had applied for dismissal of the action on that account, I would have acceded to his request. I have also to take into account that the plaintiff,

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in my opinion, fails as to the claim of $5,000. Taking this, and other matters, into consideration, I think a fair disposition of the costs would be, in dismissing the action, to allow the defendant his general costs of the action and costs applicable to a trial for one day only. There will be judgment accordingly.

Action dismissed.

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REX v. HAM *ET AL.*

CAYLEY, CO. J.
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Criminal law—Disorderly house—Gaming club—Mixed game of chance and skill — Outsiders playing — Rake-off — Criminal Code, Secs. 226 (a) and 229.

The accused were found on a premises known as the "Sherman Club" (unincorporated) playing a game called "fan tan." A rake-off was taken by the officers of the club from each bet. A number of the players in the game were not members of the club.

Held, that the premises in question falls within section 226 (b) of the Criminal Code in two respects, firstly, that the game of "fan tan" is a mixed game of chance and skill; secondly, that outsiders were allowed to play the game and a rake-off was exacted from their winnings, which was appropriated to the uses of the club.

Regina v. *Brady* (1896), 10 Que. S.C. 539 followed.

Rex v. *Riley* (1916), 23 B.C. 192 distinguished.

APPEAL from a conviction made by Magistrate Shaw, on the 10th of December, 1917, of 34 Chinamen charged for that at the City of Vancouver on the 27th of November, 1917, they were found without lawful excuse in a disorderly house, to wit, a common gaming-house situate and being at number 174 Pender Street East, for which they were sentenced to pay a fine of $25 each. Statement

The accused were found playing fan tan in the premises known as the Sherman Club, being an unincorporated club. The game of fan tan was described by the witness, and three Crown witnesses called were not members of the club. A rake-

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off was taken from the winnings on each bet. Argued before CAYLEY, Co. J. at Vancouver on the 8th, 14th and 28th of March, 1918.

Martin, K.C., for the appellants: The game of fan tan is not an unlawful game, and the players guess the number of coins. It is therefore a game of skill: see *Rex* v. *Hing Hoy* (1917), 28 Can. Cr. Cas. 229.

J. A. Russell, on the same side: Fan tan is not a game at all, but merely a guessing contest. In any event, this case falls within *Rex* v. *Riley* (1916), 23 B.C. 192, and the rake-off is merely to pay expenses.

Argument

R. L. Maitland, for respondent: Fan tan is a game requiring two or more persons to play. The case is distinguishable from *Rex* v. *Riley,* as the players were not all members of the club, and taking a rake-off from strangers amounted to gain: see *Rex* v. *James* (1903), 7 Can. Cr. Cas. 196.

CAYLEY, Co. J.: Since giving my decision herein, dismissing the application of the defence at the conclusion of the Crown's evidence, we have had the evidence of the defendants' witnesses, who explained further the constitution and rules, and gave the cash receipts from the books, and from them it is shewn that the club took in about $12 a night from the rake-off. No evidence is given by the defence contradicting the evidence of the Crown that the witnesses mentioned for the Crown, namely, Hoy, Lam and Wong Fong, were not members of the club, and that they participated in the game and contributed to the rake-off.

Judgment

I am not called upon in this case to decide whether this club is a blind or not, nor as to whether fan tan is an illegal game or not. I think that the premises mentioned in this case fall within section 226(*a*) of the Code in these two respects: First, that the game of fan tan, as it was shewn to me in the course of this trial, is a mixed game of chance and skill. The person in charge of the game throws down certain discs on the table and immediately covers them with a small saucer. The players then make their bets as to whether, after the discs under the saucer have been counted in series of fours, there would be a

remainder over of one, two or three discs or counters. No one at a crowded table could possibly exercise any skill in determining the number of discs that might be under the saucer. Only a momentary glimpse is given of the discs thrown down on the table by the banker or person in charge, and it is his business to see that the glimpse is made as short as possible; otherwise it would be a mere matter of counting. Secondly, outsiders were allowed to play the game and a rake-off is exacted from their winnings, which rake-off is appropriated to the uses of the club. I do not see what difference it makes whether it is applied to the expenses of the club or is given as dividends to the club members. In either case, it would appear to me to bring the case within the decision of *Regina* v. *Brady* (1896), 10 Que. S.C. 539, which is clearly distinguishable on that ground from *Rex* v. *Riley* (1916), 23 B.C. 192.

Judgment

I think that if the Code allows a stated case to be presented upon appeals of this kind that I should like to see a stated case presented. As it is at present, each County Court judge may come to a different conclusion on the same set of facts, owing to the decisions not being reported by the Law Society. This does not seem to me to be a good state of affairs.

I would think, therefore, that this case falls within the provisions of section 229 of the Code. The appeal is dismissed. The question of reducing the fine is reserved.

Appeal dismissed.

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April 2.

DALTON v. DOMINION TRUST CO.

DALTON v. DOMINION TRUST COMPANY *ET AL.*

Company law—Breach of trust—Mortgages—Equitable priorities—Fraud —Companies Act, R.S.B.C. 1911, Cap. 39, Sec. 102.

The plaintiff, under arrangement with the manager of the Dominion Trust Company whereby the Company was to lend $85,000 for him on a certain property in Victoria, B.C., agreed to accept a draft for $85,000. The manager drew on him for that amount and the draft was discounted at the bank, the amount being deposited in the trust account of the Dominion Trust Company on the 11th of May, 1914, and credited to Dalton on the books of the Company. The money was never loaned on the Victoria property as arranged. When this money was deposited in the trust account there was $28,797.60 to the credit of the account. Through an agent of the Dominion Trust Company in Scotland, certain persons in Scotland represented by the defendants, and called the "Scottish investors," advanced moneys under arrangement with the agent to be loaned by the Company for them. Upon receipt of their money, the Company would send each investor what was called a guaranteed first mortgage certificate, whereby the Company undertook to lend the money advanced, and guaranteed repayment of principal and interest. Later, when the money was loaned, a back letter was sent the investor, giving particulars of the security upon which the money was loaned and that the Company held the mortgage in trust for them. The Scottish investors had sent the Company amounts aggregating $140,000, for which each received guaranteed first mortgage certificates. The Dominion Trust Company had arranged to lend one Alvo von Alvensleben, and also Alvo von Alvensleben, Limited, $140,000 on a property in Vancouver that he had purchased from the C.P.R., and upon which he was building a warehouse. Payments were made on the mortgage as the building was progressing, and a final payment of $44,000 was made on the 12th of May, 1914, when, outside of the Dalton money, only $13,000 odd remained to the credit of the Dominion Trust's trust account, the payment of $44,000 to von Alvensleben therefore including over $30,000 of Dalton's moneys. "Back letters" were written to each of the "Scottish investors" between the 20th of May and 24th of August, 1914, advising them that their money had been invested each with others in a mortgage for $140,000 to Alvo von Alvensleben on certain property that had been purchased from the C.P.R. on their reserve in Vancouver. The mortgage was not registered with the registrar of joint-stock companies, as required by section 102 of the Companies Act. The Dominion Trust Company went into liquidation on the 9th of November, 1914. In an action for a declaration that the plaintiff is entitled to a first lien or charge on the mortgage, or in the alternative for a

declaration that he is entitled to an interest in the mortgage in priority to the "Scottish investors," it was held by the trial judge that Dalton's money, being invested in the land covered by the mortgage jointly with other money, has a charge upon the property to the amount invested therein, and brings him within the class protected by section 102 of the Companies Act, and the mortgage not having been registered, he has priority over the "Scottish investors."

Held, on appeal, reversing the decision of MURPHY, J., that section 102 of the Companies Act was enacted for the benefit of purchasers, mortgagees and creditors of the Company creating the charge (von Alvensleben, Limited); that the plaintiff's lien was not a mortgage or charge created by von Alvensleben, Limited, in its land, and the section therefore does not apply to his case. The plaintiff's lien is an equitable interest not founded on express trust, whereas the defendants' interests, also equitable, are founded on express trusts, evidenced by the "first mortgage investment certificates" and "back letters." The defendants therefore having the better right to call for the legal estate, their rights must prevail.

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April 2.

DALTON v. DOMINION TRUST CO.

APPEAL from the decision of MURPHY, J. in an action for a declaration that the plaintiff is entitled to an interest in a certain mortgage held on property in the name of Alvo von Alvensleben and Alvo von Alvensleben, Limited, at the corner of Richards and Drake Streets in Vancouver, in priority to the defendants. Tried at Vancouver on the 21st, 23rd and 24th of November, 1916. The Dominion Trust Company, through its agent in Scotland, induced investors to advance money to the Company, the Company undertaking to lend the money and guaranteeing to pay certain interest and the due repayment of the principal, the Company retaining as compensation a portion of the interest obtained on the loans. On receipt of money from an investor the Company would issue a first mortgage investment certificate to the investor, undertaking to lend the money and guaranteeing payment of interest and the repayment of principal. Upon the loan being made the Company would forward the investor a "back letter" advising him of the particulars of the loan and that the Company held the security in trust for him. In the early part of 1913, the defendants the "Scottish investors" advanced in all about $140,000, for which in each case the Company issued first mortgage investment certificates. At this time the Company had entered into an arrangement for a loan of $140,000 to Alvo von Alven-

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sleben and Alvo von Alvensleben, Limited, to be secured by a mortgage on a property at the corner of Richards and Drake Streets in Vancouver. The property was in the C.P.R. Reserve and was purchased by agreement for sale by the Merchants Ice and Cold Storage Company, who had assigned their interest to von Alvensleben and von Alvensleben, Limited. A mortgage was made by von Alvensleben and von Alvensleben, Limited, to the Dominion Trust Company for $140,000 on the 1st of October, 1913. Moneys on account were advanced and improvements were made in the way of an ice plant and warehouses on the property, and on the 12th of May, 1914, a final payment of $44,000 was made, making up the total amount loaned on the mortgage. From this the final payment was made to the C.P.R. on the original purchase, and the title was then registered in the names of Alvo von Alvensleben and Alvo von Alvensleben, Limited. The mortgage was not registered with the registrar of joint-stock companies, in compliance with section 102 of the Companies Act. The plaintiff Dalton arranged with the manager of the Dominion Trust for an advance of $85,000 to the Company, the Company to lend this amount, which was to be secured by a certain property on Government Street in Victoria. Dalton agreed to accept a draft for this amount. On the 11th of May, 1914, the manager of the Company drew on Dalton for $85,000, the draft being accepted in due course. The draft was discounted at the bank and the proceeds deposited in the Company's trust account, and said amount was credited to Dalton on the books of the Company. The loan on the Victoria property, as previously arranged for, was never made. There was a balance of $28,000 odd in the trust account when Dalton's money was deposited, but owing to the issue of cheques in the meantime there was only $12,000, in addition to Dalton's money, when the $44,000 final payment was made on the moneys secured by the von Alvensleben mortgage. The payments on the mortgage were made through a company known as the B.C. Securities, but this company was merely a creature of the Dominion Trust Company. The Dominion Trust went into liquidation on the 9th of November, 1914. The action came down to a contest between Dalton and the "Scottish investors."

A. H. MacNeill, K.C., and *Haviland*, for plaintiff.

Reid, K.C., and *Douglas*, for defendants, "Scottish investors."

Martin, K.C., for the Dominion Trust Company.

6th December, 1916.

MURPHY, J.: The first point is whether the proceeds obtained by discounting the draft are to be held to be Dalton's money. Dalton's name not being on the draft, I think it doubtful that from the Royal Bank's point of view, when the discount was made, this can be said to be so. Once, however, these proceeds were placed to the credit of the Dominion Trust, the money ceased to be that of the Royal Bank and became that of the Dominion Trust. The question whether this money must be held to be Dalton's, in the circumstances of this cause, is one between the Dominion Trust and Dalton. The Scottish investors' case, on this aspect, must stand or fall with the Dominion Trust, because they claim through the Dominion Trust, though it is, of course, open to them to contend, as they do, that they have a superior equity. The point under consideration now is, not the balancing of equities, but the identification of the trust funds before any equity arose either in favour of Dalton or of the Scottish investors.

Whatever the bank's view, it is clear, I think, from the evidence, that the Dominion Trust Company intended this money to be the proceeds of the Dalton draft, and received it as such. They did not intend to utilize any credit the bank may have been willing to extend to them. They had a binding contract with Dalton that Dalton would accept the draft. They were not authorized to discount it, but they did do so, and having done so, and having such binding contract with Dalton to accept, they were bound in honesty to regard the proceeds as Dalton's money. They did so by earmarking such proceeds in their ledger to Dalton's loan account. What they in effect did was to say: "Instead of waiting for Dalton to accept and pay the draft and for the funds so provided to reach us, we borrow money from the bank, by discounting the draft, which he is bound to us to accept, and we lend said money to Dalton. We thereby have Dalton's trust funds now in hand and we, there-

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fore, so enter the matter in our books. When Dalton pays the draft we will use the money, not to constitute his trust fund, for that we have ourselves provided, but to wipe off our loan to the Royal Bank." If this be so, the Dominion Trust Company did receive tangible assets which may be followed, as is laid down in numerous cases, and is admitted in *In re Hallett & Co. Ex parte Blane* (1894), 2 Q.B. 237, cited by defendants' counsel. The distinction between that case and this is, that there no actual assets were received but merely cross entries of debit and credit, whereas here the assets of the Dominion Trust Company were in fact increased by the sum of the proceeds of the draft. It is true that these proceeds are not the money paid over by Dalton, but they have been made his money by the acts of the Dominion Trust Company, and it does not lie in the mouth of that Company to say otherwise when Dalton elects, as he does here, to hold it to the consequences of such acts.

It was not proven by defendants that any of their money was in the Dominion Trust account with the Royal Bank when what I will call the Dalton money was credited therein. Therefore, I think the Dominion Trust, in making withdrawals on the 11th of May, 1914, must be held to have first withdrawn their own money (*In re Hallett's Estate. Knatchbull* v. *Hallett* (1879), 13 Ch. D. 696), and I therefore hold, on Porter's evidence, that $30,309.79 of Dalton's money can be traced to the B.C. Securi-

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ties Company, Limited, and through them to the Canadian Pacific Railway Co., as part payment of the purchase price of the land in question herein. The B.C. Securities Company, Limited, was, in my view of the evidence, the creature of the Dominion Trust Company, and its acts are to be regarded as acts of the Dominion Trust Company in so far as this action is concerned. If the money is Dalton's, and can be thus traced into the land, it is not contested but that Dalton would be entitled to an equitable lien thereon. The contest here is between him as holder of such equitable lien and the Scottish investors as holders of back letters declaring the mortgage on the same land to be held in trust for them by the Dominion Trust Company. I leave aside, to be dealt with later, the question of the validity of the mortgage in so far as it is a

mortgage by von Alvensleben, Limited. Its validity as a mortgage from von Alvensleben personally is conceded. I hold the two classes of defendants to be in the same position, for I find as a fact the mortgage referred to by the back letters to be the mortgage finally executed sometime in May, 1914, and that this is a document distinct from any previous mortgages not finally executed in all legal essentials. I therefore hold that the entries made in the Dominion Trust Company's books, as of December 31st, 1913, are ineffective to give priority, and that the equitable claim of both sets of defendants arises later in point of time to Dalton's claim.

The case then is, in my opinion, one between holders of equitable claims each *per se* equally meritorious. For Dalton the maxim *Qui prior est tempore, potior est jure* is invoked. Against this, it is urged that the back letters give a right to the Scottish investors to get in the legal estate and thus creates a higher equity, since in law they are purchasers for value without notice. This seems to be the law if they in fact had neither actual nor constructive notice: *Taylor* v. *London and County Banking Co.* (1901), 70 L.J., Ch. 477. It is, if I understand counsel aright, conceded they had no actual notice. But it is urged they had constructive notice of Dalton's equitable claim through the Dominion Trust Company because that Company was their agent. To this, I think there are three replies. It is to be remembered that this is not a case of solicitor and client, wherein the law has gone far in fixing constructive notice upon the client (*Boursot* v. *Savage* (1866), 35 L.J., Ch. 627), but of trustee and *cestuis que trust*. The terms of that relationship and the authority given are contained in the guaranteed first mortgage investment certificates. This expressly demands that the investments be upon first mortgage security. How can the investors be fixed with knowledge acquired by the Dominion Trust Company not in pursuance of fulfilling their duties to their *cestuis qui trust* but through a breach of trust to Dalton? It is to be remembered that Dalton's money was given to them to invest in a specified and altogether different security from the one in question here. Secondly, the Scottish investors not only did not authorize the Dominion Trust Company to deal

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with investments on any other basis but first mortgages, but they expressly delegated the question of title as distinguished from investment to another party altogether, *viz.*, the Company's solicitor, and they obtained a certificate from such solicitor that they had first charges. Thirdly, there was no express trust in Dalton's favour, but only one arising from equitable principles. Even in the case of solicitor and client, the client cannot be fixed with notice of the solicitor's fraud: *Boursot* v. *Savage, supra,* at p. 630. But here the implied trust only arises because of the fraud of the Dominion Trust Company, and knowledge of its existence could only be disclosed by a disclosure of that fraud. No laches, or negligence of any kind, can be urged against the Scottish investors. I must hold them entitled, as against Dalton, to priority in so far as the execution of the mortgage by von Alvensleben personally gives them a claim. With regard to their claim arising out of its execution by von Alvensleben, Limited, other questions arise. Section 102 of the Companies Act, R.S.B.C. 1911, Cap. 39, provides that mortgages by companies not filed with the registrar of joint-stock companies shall, so far as any security on the Company's property or undertaking is concerned, be void against *bona-fide* purchasers and mortgagees for valuable consideration and the liquidator and any creditor of the Company. The von Alvensleben mortgage was not so filed. The similar section in the English Companies Act was construed in *In re Monolithic Building Company. Tacon* v. *The Company* (1915), 1 Ch. 643, as being effective even where there was express notice. It is true that that was a case when the charges were given by the company itself, but the case is cited to shew the effect of the statute. The English Act makes such mortgages void only against the liquidator or a creditor of the company. Our Act makes it void, in addition, against *bona-fide* purchasers and mortgagees for valuable consideration. It is argued that this refers to sales or mortgages only where same are made or given by the Company. There are no words in the section so narrowing its scope, and in view of what is said in the *Monolithic Building Company* case, I do not think such qualification can be judicially introduced. Again, it is argued

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that the object of the section in requiring registration is to give notice to parties dealing with the Company and therefore, in any case, since Dalton's claim arose before the mortgage was given, he cannot claim the benefit of the section. In other words, it is again proposed to introduce words into the section narrowing its scope so as to effect only purchases or mortgages coming into being after the unregistered mortgage. The views expressed in the *Monolithic Building Company* case, *supra,* are, in my opinion, such as to preclude such a construction. Dalton's money being, in my opinion, invested in the land covered by this mortgage jointly with other money, he is entitled to claim a charge upon said property to the amount of his money so invested therein: *In re Hallett's Estate. Knatchbull* v. *Hallett, supra.* Equity gives him something in the nature of a claim *in rem,* capable, it is true, of being displaced by a higher equity. This claim, it seems to me, brings Dalton within the classes protected by said section against unregistered mortgages. I think, therefore, that Dalton is entitled to priority over the Scottish investors in so far as their claim rests on the execution of the mortgage by von Alvensleben, Limited. There was some attempt to impute laches to Dalton, but when it is remembered that the relation between him and the Dominion Trust Company was that of trustee and *cestui que trust,* I can see no foundation for such imputation. As the conveyance to von Alvensleben and von Alvensleben, Limited, does not state the interests they respectively take, they, by virtue of section 52 of the Land Registry Act, must be considered as taking as tenants in common.

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From this decision the defendants (Scottish investors) appealed and the plaintiff cross-appealed. The appeal was argued at Vancouver on the 10th, 11th and 14th of January, 1918, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Reid, K.C., for appellants: The defendants Hogg and Barbour represent the Scottish investors. The question is Dalton's ability to follow the money he advanced to the Company. As to the rule in relation to following or trac-

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ing money see *Thomson* v. *Clydesdale Bank, Limited* (1893), A.C. 282 at pp. 287-8. Crediting money to an account, *i.e.*, mere entering the amount in a book, is not traceable: see *In re Hallett & Co. Ex parte Blane* (1894), 2 Q.B. 237; *Ex parte Hardcastle; Re Mawson* (1881), 44 L.T. 523; *James Roscoe (Bolton), Limited* v. *Winder* (1915), 1 Ch. 52. When they discounted the draft they made the entry in the book of the amount to Dalton's credit, but the money was used for other purposes. The relation between Dalton and the Dominion Trust was that of debtor and creditor. The position of the Scottish investors is supported by *Thorndike* v. *Hunt* (1859), 3 De G. & J. 563, and the Dalton funds cannot be followed. As to the position of a mortgage upon property for which title has not been obtained see *Terry* v. *Osborne* (1854), 1 Legge (N.S.W.) 806. A trust may be completely constituted without communication to the trustees or the *cestui que trust*: see Halsbury's Laws of England, Vol. 28, p. 20, par. 32; *New, Prance & Garrard's Trustee* v. *Hunting* (1897), 2 Q.B. 19; *Sharp* v. *Jackson* (1899), A.C. 419; *Taylor* v. *London and County Banking Co.* (1901), 2 Ch. 231; *Taylor* v. *Blakelock* (1886), 32 Ch. D. 560 at pp. 566-8; Bowstead on Agency, 5th Ed., p. 366; *Cave* v. *Cave* (1880), 15 Ch. D. 639; *Kennedy* v. *Green* (1834), 3 Myl. & K. 699; *Waldy* v. *Gray* (1875), L.R. 20 Eq. 238; *Muir's Executors* v. *Craig's Trustees* (1913), S.C. 349. A Court of Equity never takes away from a purchaser for value without notice anything he has honestly acquired: see *In re Ingham. Jones* v. *Ingham* (1893), 1 Ch. 352 at p. 361; *Heath* v. *Crealock* (1874), 10 Chy. App. 22 at p. 33; *Bassett* v. *Nosworthy* (1673), 21 Camp. R.C. 703; *Ind, Coope & Co. and others* v. *Emmerson* (1887), *ib.* 706; *Pilcher* v. *Rawlins* (1872), 7 Chy. App. 259; *Maundrell* v. *Maundrell* (1805), 10 Ves. 246 at p. 270; *Wilmot* v. *Pike* (1845), 5 Hare 14. The mortgage has not been registered under section 102 of the Companies Act. This was not pleaded, and an application to amend was made at the trial. As to the right to amend see *Aronson* v. *Liverpool Corporation* (1913), 29 T.L.R. 325. It was not a meritorious pleading and should not be allowed: see *Collette* v. *Goode* (1878), 7 Ch. D.

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842; *Newby* v. *Sharpe* (1878), 8 Ch. D. 39 at pp. 49-51; *McKissock* v. *McKissock* (1913), 18 B.C. 401. Dalton is not a mortgagee for valuable consideration: see *Halliday* v. *Holgate* (1868), L.R. 3 Ex. 299 at p. 302; *Santley* v. *Wilde* (1899), 2 Ch. 474; *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited* (1914), A.C. 25 at p. 47; *London County and Westminster Bank* v. *Tompkins* (1917), W.N. 228; *Jones* v. *Woodward, ib.* 61. As to the construction of the statute when several words are followed by a general expression see Craies's Statute Law, 2nd Ed., 181; *Great Western Railway Co.* v. *Swindon and Cheltenham Railway Co.* (1884), 9 App. Cas. 787 at p. 808; *Union Bank of London* v. *Ingram* (1882), 20 Ch. D. 463 at p. 465; Maxwell on Statutes, 5th Ed., pp. 132 and 176. As to the object of registration in the way of giving notice see *In re Cardiff Workmen's Cottage Company, Limited* (1906), 2 Ch. 627 at p. 629; *Greaves* v. *Tofield* (1880), 14 Ch. D. 563 at pp. 565 and 575; *Esberger & Son, Limited* v. *Capital and Counties Bank* (1913), 2 Ch. 366 at p. 374. The Company took over a conveyance after the mortgage was registered. They were trustees coupled with an interest: see *Trumper* v. *Trumper* (1873), 8 Chy. App. 870. But the benefit must be surrendered to those who are beneficially interested: see *Leigh* v. *Burnett* (1885), 29 Ch. D. 231; *Aberdeen Town Council* v. *Aberdeen University* (1877), 2 App. Cas. 544. The Scottish investors were not guilty of laches, but I contend Dalton was. He sent his money in May, 1914, and took no steps until the Company went into liquidation: see *Lindsay Petroleum Company* v. *Hurd* (1874), L.R. 5 P.C. 221 at p. 239; *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218.

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A. H. MacNeill, K.C., for respondent: The Company was entitled to discount the draft when authorized to draw, and the money was Dalton's on the 11th of May. The B.C. Securities was really the Dominion Trust Company. The money paid from the account between the time of the deposit of the Dalton money and the payment on the mortgage must be assumed to be from moneys in the Company's hands before the Dalton deposit. There was only $13,000 odd of the Company's money

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on deposit in addition to Dalton's money when the $44,000 was paid on the mortgage. There is therefore no question as to $30,000 odd of this money being traceable: see *In re Hallett & Co. Ex parte Blane* (1894), 2 Q.B. 237. On the other hand, the Scottish investors cannot trace one dollar of their money into this mortgage. The contention is that *Hallett's* case applies so that we are entitled to the whole $44,000 paid on the mortgage: see also *In re Oatway. Hertslet* v. *Oatway* (1903), 2 Ch. 356. He says he is entitled to call for the legal estate in the mortgage, but *In re Dominion Trust Co. and Harper* (1915), 22 B.C. 337 at p. 346 says he is not so entitled. They had constructive notice of Dalton's equitable claim, as the Trust Company was their agents: see *Bailey* v. *Barnes* (1894), 1 Ch. 25; *Brace* v. *Duchess of Marlborough* (1728), 2 P. Wms. 491. In the case of money paid into a bank by a customer that did not belong to him but over which he had control see *Thomson* v. *Clydesdale Bank, Limited* (1893), A.C. 282. As to following trust property see Smith's Equity, 5th Ed., 142; *Taylor* v. *London and County Banking Company* (1901), 2 Ch. 231; *Taylor* v. *Russell* (1892), A.C. 244 at p. 251. The Company was the *alter ego* of the Scottish investors. As to agency see *Glyn, Bart.* v. *Baker* (1811), 13 East 509. On the question of constructive notice see *Berwick & Co.* v. *Price* (1905), 1 Ch. 632; *Bradley* v. *Riches* (1878), 9 Ch. D. 189; *Dixon* v. *Winch* (1900), 1 Ch. 736; *Boursot* v. *Savage* (1866), L.R. 2 Eq. 134. As to prior equities see *In re Morgan. Pillgrem* v. *Pillgrem* (1881), 18 Ch. D. 93. On the question of the necessity of inquiring as to a trustee's actions see *In re Vernon, Ewens, & Co.* (1886), 33 Ch. D. 402 at pp. 409-10. We say Dalton is an equitable mortgagee: see *Dolphin* v. *Aylward* (1870), L.R. 4 H.L. 486; *Lister* v. *Turner* (1846), 5 Hare 281; *Buckle* v. *Mitchell* (1812), 18 Ves. 100; *Barton* v. *Vanheythuysen* (1853), 11 Hare 126. On the question as to who has the better equity see Dart's Vendors and Purchasers, 7th Ed., 836; and as to following the estate see Lewin on Trusts, 12th Ed., pp. 190 and 1100.

Reid, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: I agree with MURPHY, J. that the proceeds of the draft drawn by the Trust Company on the plaintiff on the 11th of May, 1914, must be regarded as plaintiff's money on that day. I do not find it necessary to go so far as to say that there was a prior binding agreement on plaintiff's part to accept the draft. I find there was a prior assent to the Trust Company's proposal to draw, and that is sufficient. I also agree that part of that money was, in breach of trust, loaned to von Alvensleben and von Alvensleben, Limited, or their nominees, and was used by them in the purchase of the land which they subsequently mortgaged to the Trust Company.

The plaintiff has, in my opinion, proved all the allegations contained in his statement of claim. It is not pleaded by him, nor was it suggested in argument, that the von Alvenslebens were cognizant of the breach of trust. His claim is that because his money was included in the consideration for the mortgage, he is entitled to an equitable lien on the property into which he has traced his money.

It will be convenient first to deal with the non-registration in the office of the registrar of joint-stock companies of the mortgage from the Alvenslebens to the Trust Company. The mortgagors are Alvo von Alvensleben, an individual, and Alvo von Alvensleben, Limited, a company incorporated under the provisions of the Companies Act, R.S.B.C. 1911, Cap. 39. Section 102 of that Act declares that every mortgage or charge created by a company on any land wherever situate, or any interest therein, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against *bona-fide* purchasers and mortgagees for valuable consideration, and the liquidator and any creditor of the company, unless filed with the registrar within a specified time. The mortgage in question, while duly registered pursuant to the provisions of the Land Registry Act, was not filed in accordance with the above section, and the plaintiff relies in his claim to priority over the defendants Hogg and Barbour and those whom they represent, whom for convenience I shall call the defendants, on this omission. There are other defendants, the Dominion Trust

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and one Weeks, but they are not parties to the appeal. I may add also that this section is not invoked by the plaintiff against the instruments under which the defendants claim. MURPHY, J. held that the omission to file the mortgage pursuant to this section gave the plaintiff priority over the defendants in the lands so far as they were the lands of von Alvensleben, Limited. The section has no application at all to the property of the individual mortgagor. The only question, therefore, which I have to consider is the applicability of said section to the mortgage in question so far as it is a mortgage on the property of the incorporated mortgagor.

That section was enacted for the benefit of purchasers, mortgagees and creditors of the company creating the charge. To fall within its purview, the plaintiff must be a purchaser or mortgagee or creditor in relation to von Alvensleben, Limited, the mortgagor, not a purchaser or mortgagee or creditor in relation to the Trust Company—the mortgagee.

Now, von Alvensleben, Limited, not being a party to the breach of trust of which plaintiff complains, the plaintiff could claim no interest in its lands by reason of his money having been loaned to that company by the Trust Company. It was not until the mortgage was procured by the Trust Company that the plaintiff's interest in it came into being. The plaintiff's lien became an interest in the mortgage, the property of the Trust Company, because he was able to trace into that mortgage in the hands of the Trust Company his moneys which had been misappropriated by it. But even if the plaintiff's lien can be said to have existed from the time plaintiff's money went into the land, it was not, in the language of said section 102, "a mortgage or charge created by a company" (von Alvensleben, Limited) on its land. Therefore, in my opinion, that section has no bearing on the matters to be decided in this appeal, and the rights of the respective parties before us, in the property conveyed by both mortgagors, are to be decided on this footing.

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The plaintiff's lien is an equitable interest not founded upon an express trust. The interests of the defendants are also equitable, and are founded on express trusts, evidenced by their guaranteed "first mortgage investment certificates" and their

"back letters." Even if plaintiff's equitable lien were prior in point of time, yet it would appear, on the authorities, that if defendants have the legal estate, or the better right to call for the legal estate, their rights must prevail: *Taylor* v. *London and County Banking Co.* (1901), 70 L.J., Ch. 477; *Wilkes* v. *Bodington* (1707), 2 Vern. 599; *Stanhope* v. *Earl Verney* (1761), 2 Eden 81; *Wilmot* v. *Pike* (1845), 14 L.J., Ch. 469; and *Rooper* v. *Harrison* (1855), 2 K. & J. 86.

Now the mortgage, the subject-matter of the conflicting claims of plaintiff and defendants, is held by the Trust Company, not as bare trustee for the defendants, but on a trust coupled with an interest, and while the plaintiff's equity may, and if it were necessary to say so, would, I think, attach to the beneficial interest of the Trust Company, yet, for the reasons I have given it cannot prevail as against the defendants. This appeal has to do with nothing but the priorities as between the plaintiff and the Scottish defendants. Therefore, it is unnecessary to come to any conclusion in respect of the plaintiff's right against the beneficial interest of the Trust Company in the mortgage. The plaintiff's right is a right *in rem,* which, if he were entitled to enforce, would be enforceable by sale, not by foreclosure, so that when one speaks of the better right to call for the legal estate, that doctrine, it appears to me, is not applicable to the plaintiff's right, whatever may be said in respect of its applicability to the defendants' rights. Plaintiff's money represents only a part of the total moneys secured by the mortgage, therefore he would not even, as between himself and the Trust Company, be entitled to a transfer of the mortgage to himself.

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I therefore think that the judgment below should be varied, and that it should be declared that the trusts in favour of the defendants take priority over the equitable lien of the plaintiff.

GALLIHER, J.A.: Even if there is some doubt as to whether the Dominion Trust were authorized to draw upon Dalton and that he was bound to accept, the subsequent ratification by him, in accepting the draft, relates back and is equivalent to prior authority.

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In 31 Cyc. at p. 1283, where the English and American authorities are fully collected, this principle is deduced:

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"It is a well settled rule, subject to certain exceptions, that a ratification relates back to the time when the unauthorized act was done and makes it as effective from that moment as though it had been originally authorized, and that therefore upon ratification the parties to all intents and purposes stand in the same position as though the person assuming to act as agent had acted under authority previously conferred."

One of the exceptions is that a ratification will not relate back so as to impair or defeat the rights of third persons which have intervened between the time of the doing of the unauthorized act and its ratification by the principal. If we hold, as the trial judge has, that the mortgage referred to in the back letters must be taken to be the one finally executed and completed on the 22nd of May, 1914, then the above exception has no application, as Dalton had ratified on the 20th of May, 1914.

It may be that this money was Dalton's money from the time it was placed to his credit in the books of the Dominion Trust, at all events, until such times as he would have repudiated the action, which he never did, but on the other hand, ratified it. But if this view is not maintainable, then I think what I have said above meets the case in any event. I agree with the learned trial judge's finding that Dalton's money is clearly traceable as part payment of the purchase-money of the lands in question.

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This, coupled with the transfer of the legal estate to the Dominion Trust Company, would give Dalton an equitable lien, but whether that lien is prior in point of time to that of the defendants, the Scottish investors, will depend on whether the entries in the books of the Dominion Trust Company of the 31st of December, 1913, had the effect of creating a lien in favour of the Scottish investors as of that date, or as of the date when the mortgage was executed in May, 1914, as found by the trial judge. The two groups of Scottish investors are represented by Hogg and Barbour in this action, they also being investors. There are a great many of these investors for varying amounts. The procedure adopted by the Dominion Trust was to receive the money from intending investors and issue to them a guaranteed first mortgage certificate, which certificate formed the contract between the Company and the investors. Later, when these moneys were loaned by the Company, they issued to the investors what is termed a "back letter." These

back letters earmarked the mortgage to which each investor's money had been applied. This money of these investors and others was all mixed in one general bank account, and other than as evidenced by the back letters, and the entries in the books of the Company, it is not shewn that any of these clients' actual money went into the Alvensleben mortgage. This mortgage from von Alvensleben and von Alvensleben, Limited, bears date the 1st of October, 1913, but was not fully completed until the 22nd of May, 1914, on which date it was also registered. There is no direct evidence as to the exact date on which this mortgage was signed. The affidavit of execution by von Alvensleben, Limited, bears date the 19th of May, 1914, and by Alvensleben on the 22nd of May, 1914. The Dalton moneys were paid in upon this property on the 12th of May, 1914, so that, unless we can say that the entries in the books of the Company earmarking the moneys of the Scottish investors as applicable to the Alvensleben mortgage (a mortgage not then executed) relate back and take effect as from the 31st of December, 1913, upon the mortgage being executed Dalton is prior in time. This has been found in Dalton's favour by the learned trial judge, and I think he reached the right conclusion. The Scottish investors must, I think, be taken to be purchasers for value, but it is objected that they are not such purchasers without notice. The learned trial judge's reasoning, supported by the authorities, is, in the circumstances of this case, in my opinion, sound. Now, a purchaser for value without notice is entitled to the benefit of a legal title not merely when he has actually got it in, but when he has a better title or right to call for it: *Wilkes* v. *Bodington* (1707), 2 Vern. 599. This rule is referred to by Stirling, L.J. in *Taylor* v. *London and County Banking Co.* (1901), 70 L.J., Ch. 477 at p. 488, and his Lordship, continuing, at the same page says:

"It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal title, and a subsequent purchaser for value without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him, or even to join as party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate), still the subsequent purchaser gains priority,"

citing *Wilkes* v. *Bodington, supra; Maundrell* v. *Maundrell* (1805), 10 Ves. 246, and other cases.

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Now, what was the position here on the 22nd of May, 1914? Dalton has successfully traced his money as going into the property on the 12th of May, 1914, and is prior in point of time. He has an equitable interest in the land arising by implication. The Scottish investors have, by reason of their contractual relations with the Company, also an equitable interest in the land, but subsequent in time. The legal estate was, by virtue of the mortgage, vested in the Company, and the back letters issued by the Company to the Scottish investors places the parties in the position of trustee and *cestuis qui trust* with respect to that particular mortgage. These back letters are a declaration by the holders of the legal estate (The Dominion Trust Co.) that they hold the mortgage in trust for the Scottish investors to the extent of the moneys as evidenced by the back letters, and seems to me to bring it within the language of Stirling, L.J., cited *supra*.

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The further question remains as to whether the failure to register the mortgage from Alvo von Alvensleben, Limited, with the registrar of joint-stock companies, in accordance with the provisions of section 102 of Cap. 39, R.S.B.C. 1911, operates so as to defeat the claim of the Scottish investors as against Dalton, under the mortgage from the Alvensleben Company. After the most careful consideration, and after carefully weighing the reasons of my learned brother the Chief Justice, I have come to the conclusion that this section has no application.

The appeal should be allowed and the cross-appeal dismissed, and the judgment below varied accordingly.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed and the cross-appeal dismissed. The Scottish investors (the name for convenience sake adopted in the argument as comprehensive of the defendants and those in like interest) have a priority of position to that of the plaintiff. Without deciding that the position of the plaintiff is that dealt with in Smith's Equity, 5th Ed., 143, 144, that would be at best the strongest position the plaintiff could assert and hope to establish, but in my opinion, in this action, even that position was not established. The fact that the Dominion Trust Company drew

a draft on the plaintiff and discounted same did not make the money the plaintiff's money. Upon the facts it must be held that the bank advanced the money on the credit of the Dominion Trust Company. There was no contractual relationship between the plaintiff and the bank, and I am not of the opinion that the plaintiff had contracted even with the Dominion Trust Company to accept the draft. Certainly there would not be a contract enforceable in law to accept a draft or pay money which was in its nature a breach of trust, as, what was done with this money, if it could be said to be the plaintiff's money, was indeed a breach of trust. Therefore, as I view it, the money put into the land was not the plaintiff's money. But if I were wrong in this, then the plaintiff's equitable right is displaced by the declared trust in writing, *i.e.*, by the "first mortgage investment securities" and "back letters" of the Scottish investors. They have the better right, and are entitled to insist upon the transfer to them by the Dominion Trust Company of the legal estate. The rule, as stated in Smith's Equity, 5th Ed., at pp. 143-4, reads as follows:

"Another class of considerations arises when the trust fund has been not only appropriated but converted by the trustee into property of another form; as, for instance, where trust money has been laid out in land, or trust land converted into money. In such cases the general rule is, that the *cestui que trust* may attack and follow the property that has been substituted for the trust estate, so long as its metamorphoses can be traced. As long as the property is in the hands of the trustee in any form no difficulty arises. . . . . Difficulties, however, often arise when the trust property has found its way in another form into the hands of a third person. In such cases the principle above enounced applies; the fund can be followed as long as it can be identified, in the hands of any one who has notice of the trust."

MCPHILLIPS, J.A.

I do not consider that the plaintiff has established a position coming within the rule, but were it so, still the Scottish investors have the better position. Notice and knowledge in the Dominion Trust Company would not be notice to the Scottish investors. The Scottish investors are the beneficiaries with the right to call for the legal estate, and had no notice of the trust (*Thomson* v. *Clydesdale Bank, Limited* (1892), 62 L.J., P.C. 91; (1893), A.C. 282; *Thorndike* v. *Hunt* (1859), 3 De G. & J. 563; *Taylor* v. *Blakelock* (1885), 55 L.J., Ch. 97; (1886), 32 Ch. D. 560; and *Taylor* v. *London and County*

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COURT OF APPEAL

1918

April 2.

DALTON v. DOMINION TRUST CO.

Banking Company (1901), 2 Ch. 231; 70 L.J., Ch. 477; *Blackwood* v. *London Chartered Bank of Australia* (1874), 43 L.J., P.C. 25 at pp. 29-30). The interest of the Dominion Trust Company is merely an interest out of the proceeds of the mortgage—small in amount, to cover management and the getting in of the mortgage money and interest. The present case is exactly within the proposition stated in Smith's Equity at p. 367:

"Not only where the defendant purchaser has the legal estate, but where he has the best right to call for it, equity will not grant relief against him. This will be the case where one of two or more persons who are interested in equity has, in addition to the interest which he holds in common with the others, a special equity peculiar to himself—for instance, a particular declaration of trust in his favour (*Willoughby* v. *Willoughby* (1787), 1 Term Rep. 763; *Wilmot* v. *Pike* (1845), 5 Hare 14; *Hartopp* v. *Huskisson* (1886), 55 L.T. 773; *Taylor* v. *Russell* (1892), 61 L.J., Ch. 657; *London and County Banking Company* v. *Goddard* (1897), 1 Ch. 642; 66 L.J., Ch. 261)."

MCPHILLIPS, J.A.

In Snell's Equity, 17th Ed., 21, we find this statement:

"In order, however, that this defence of *bona fide* purchase for value without notice may afford a protection against a prior equitable interest, certain conditions must be fulfilled. In the first place, it is necessary that the defendant should have obtained the legal estate, or that it should be vested in some person on his behalf. The legal estate need not be a perfect title. For instance, if a trustee's title to property is defective, he may nevertheless convey to a *bona fide* purchaser an interest which will be effective against the beneficiaries (*Jones* v. *Powles* (1834), 3 Myl. & K. 581; *Thorndike* v. *Hunt* (1859), 3 De G. & J. 563)."

It is apparent that even were it to be looked at that the plaintiff held a prior equitable interest, the situation as it presents itself gives the Scottish investors the better position. I am in agreement with the judgment of the Chief Justice relative to the non-application of section 102 of the Companies Act (Cap. 39, R.S.B.C. 1911).

EBERTS, J.A.

EBERTS, J.A.: I agree.

Appeal allowed and cross-appeal dismissed.

Solicitor for appellants: *D. S. Wallbridge.*
Solicitor for respondent: *V. H. Shaw.*
Solicitor for Dominion Trust Co.: *Geo. H. Cowan.*

NELSON v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

THE ORDER OF THE OBLATES OF MARY IMMACULATE v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

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NELSON v. PACIFIC GREAT EASTERN RY. CO.

Riparian rights—High-water mark—Fixing of—Right of access to sea—Obstruction—Damages—B.C. Stats. 1912, Cap. 36, Sec. 32.

The high-water mark in British Columbia, where there is no record of tides kept for a sufficient length of time to determine the high-water mark in different localities, should be determined by what is termed visible high-water mark," that is, the point fixed by signs on the ground, such as the state of vegetation, accumulation of drift-wood and debris.

The owners of land adjoining the sea are entitled to free access to and ingress from the sea, and are entitled to damages, even as against the Crown, where such right of access has been invaded by obstruction.

The word "damage" in section 32, Cap. 36, B.C. Stats. 1912, incorporating the defendant Company, includes a claim for compensation because of an obstruction of a riparian owner's right of access to the sea.

ACTIONS for damages because of the defendant Company, by its railway, obstructing the plaintiffs' right of access to the sea. Tried by MACDONALD, J. at Vancouver on the 12th to the 15th of February, 1918. The facts are set out fully in the reasons for judgment. Statement

Dorrell, and *Donald Smith,* for plaintiffs.
Reid, K.C., and *Gibson,* for defendant.

MACDONALD, J.: These two actions are so similar that they can be considered and decided together. Defendant Company, by Cap. 36, B.C. Stats. 1912, was authorized to construct and operate a line of railway within the Province "from the City of Vancouver to the City of North Vancouver, and thence running along the margin of Howe Sound." Thence to a junction at Fort George on the line of the Grand Trunk Pacific Railway. It assumed the benefits and burdens of an agreement entered into between Foley Bros., Welch & Stewart and Judgment

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the Province, dated the 10th of February, 1912. This agreement was confirmed by the Legislature, and made part of chapter 34, B.C. Stats. 1912, and, *inter alia,* provided, with respect to the Company to be formed:

"(*a.*) That the Company shall and will locate and construct the said line of railway by the shortest possible route, with only such deviations as may be deemed necessary in order to avoid serious engineering difficulties, and such as shall be sanctioned by the Lieutenant-Governor in Council."

Defendant proceeded with the construction of the line of railway in and from the City of North Vancouver towards Howe Sound, and saw fit, for purposes of economy, to avail itself of the following covenant, on the part of the Government of the Province, in said agreement, *viz.*:

"To convey to the Company by a free grant a right of way not exceeding one hundred feet in width for the said line of railway above described, in so far as the same extends or shall extend through vacant Crown lands of the Province of British Columbia."

The manner in which defendant sought to utilize this provision was, that after running the line for a distance on the land, to then divert it, so as to occupy a portion of the foreshore of English Bay, fronting on the Municipality of West Vancouver. It considered such foreshore as vacant Crown lands of the Province. This necessitated the construction of an embankment, 12 to 15 feet in height, in front of the property owned by both plaintiffs. Plaintiffs, as riparian owners, were thus cut off from their access to and from the sea. They both claim, to be seriously affected by the action of the defendant.

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In the first place, it is contended by the plaintiffs, that the line of railway has not been constructed in accordance with the agreement, and that as the "shortest possible route" was not adopted between the City of North Vancouver and Howe Sound, there was no right in the defendant to occupy this foreshore for railway purposes. Evidence was adduced with a view of satisfying the Court that a shorter route was possible, without any serious engineering difficulties. Three routes were discussed, marked on the exhibits respectively with yellow, red, and white lines, the latter representing the line as constructed. As to the yellow line, while it was shorter, it had a two per

cent. grade, which could only be reduced at very heavy expenditure. It was discarded on that account, even by the engineer called by the plaintiffs, and he pinned his faith to the red line as being more favourable, in his opinion. It was longer, however, than the line adopted by the defendant. I am not satisfied that the defendant did not adopt the "shortest possible route," in accordance with a reasonable and proper construction placed upon the provision. If I had come to a contrary conclusion, I do not think, that after a railway has been constructed, and in operation, it is within the purview of a Court of law, without express legislative authority, to decide that such railway has been constructed and is being operated illegally. To my mind, it would be a novel procedure in Canada, where, as to railways authorized, either by Dominion or Provincial legislation, matters of this nature are dealt with, by order in council or by the proper department of the Government. I think it was so intended in this instance, and the line, as located and constructed, was properly sanctioned.

After the line of railway had been located, the defendant instructed a survey, particularly as to the portion of the foreshore required for right of way purposes. This was necessary, not only with a view of obtaining a Crown grant of such right of way, but also in order to comply with the provisions of the Navigable Waters Protection Act. In performing this work, the surveyor was careful not to assert any claim to the land northerly, beyond high-water mark of English Bay. In other words, the intention was, at this point, not to utilize for right of way any portion of land owned by parties in that locality. Plaintiffs, however, claim that the survey thus made encroached beyond the foreshore and comprised a part of their land. In the Nelson case, this encroachment only amounts to an assertion of a right to occupy for railway purposes, while in the Oblates case it is submitted that a small portion of the embankment has actually been constructed on land owned by the plaintiff. This involves consideration of the question as to where the "high-water mark" is, with respect to the properties owned by the plaintiffs. If such mark be, at the point shewn upon plans filed by the plaintiffs, then there is such assertion of claim and

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actual encroachment in the one case. If, on the contrary, such point be, as designated on the survey of right of way made by defendant, there would only exist a claim for the destruction of the access of the plaintiffs to the sea.

In deciding the manner in which high-water mark is to be determined in this Province, I am not assisted by either statutory or judicial authority. The point is an important one. I am referred to the case of *Attorney-General* v. *Chambers* (1854), 4 De G. M. & G. 206; 23 L.J., Ch. 662 at p. 665 as a guidance in arriving at a conclusion. It was there decided that the right of the Crown to the seashore is limited by "the medium tides in each quarter of lunar revolution during the year." Such limit of the tide is high-water mark, but can only be determined by observations extending over a lengthy period. I am thus met with the difficulty, that it would be impossible to apply this case in this Province, except at a place where a record of the tides has been kept for a year at least. It is shewn that in England, there are bench marks indicating tidal movements, established by the Ordnance Department, which can be utilized to determine the high-water mark in different localities. We have nothing of a similar nature in Canada. This question arose in Ontario. It was there decided, in *Plumb* v. *McGannon* (1871), 32 U.C.Q.B. 8 at p. 14, that "The true limit" created by high-water mark "would appear to be, by analogy to tidal waters, the average height of the river after the great flow of the spring had abated, and the river is in its ordinary state." The case of *Attorney-General* v. *Chambers, supra,* as well as *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268 are referred to. This was doubtless deemed a satisfactory conclusion in Ontario, but does not avail me to any extent in deciding the point in this case. Even if this course were followed, it would also require evidence extending over a considerable period of time, and I only refer to it, in passing, as shewing how the matter was dealt with in that Province. Plaintiffs sought to apply the English definition, by adducing evidence, as to the state of the tide on particular days, at the point in question, and comparing it with the tides, as indicated by the tidal tables at the Sand-heads, near the mouth of the

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Fraser River, at the same time. This would appear, upon first consideration, quite reasonable and accurate, but the evidence convinces me that it is subject to conditions, which would create an important margin of error. In the first place, the tide tables are only a pre-calculation or prophecy, as to the state of the tide on certain days. While of great assistance, especially for purposes of navigation, they do not prove absolutely correct. Then again, to compare the high-water mark at West Vancouver with the Sand-heads, you would require to assume the same sea level, also that the conditions of wind and current are the same. Defendant called several surveyors, to shew the manner in which "high-water mark" is determined in general practice throughout the Province. They adopt what is termed "visible high-water mark." They depend upon the signs on the ground, such as state of vegetation, accumulation of drift-wood and debris to fix the point. This does not seem a very accurate mode of determining the matter. It would appear that the surveyor, at the time when he is fixing the high-water mark, under such practice, becomes a judge as to where it exists. He is uncontrolled by any authority. This practice, however, seems to be generally accepted and followed. It is to be noted that, as to signs of vegetation and probable cultivation, the case of *Attorney-General* v. *Chambers, supra,* shews that such matter was considered and had weight in that decision. The Lord Chancellor, after referring to the scarcity of authority on the point, to afford assistance, concludes:

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"In this state of things, we can only look to the principle of the rule which gives the shore to the Crown. That principle I take to be that it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil. . . . . The reasonable conclusion is, that the Crown's right is limited to land which is for the most part not dry or maniorable."

I find that there is authority in the United States, for adopting signs of vegetation, to assist in determining high-water mark. See *St. Louis, I.M. & S. Ry. Co.* v. *Ramsey* (1890), 13 S.W. 931 at p. 932:

"It is necessary to a full understanding of the rights of a riparian owner, and of the public, in the lands between the banks of a river, to determine the legal meaning of the phrase 'high water.' It does not mean, as has been sometimes supposed, the line reached by the great annual rises regardless of the character of the lands subject at such times to be over-

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flowed. But, as decided in the case of *Houghton* v. *Railroad Co.*, 47 Iowa 370; 'High-water mark, then, as the line between the riparian proprietor and the public, is to be regarded as co-ordinate with the limit of the river bed.' Whatever difficulty there may be in determining it in places, this doubtless may be said: 'What the river does not occupy long enough to wrest from vegetation, so far as to destroy its value for agriculture, is not river bed.'"

In *Howard et al.* v. *Ingersoll* (1851), 13 How. 381 at p. 427 Mr. Justice Curtis gave a definition of the bank and bed of a river as follows:

". . . Neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself."

As this case was not dealing with tidal waters, it is only of assistance upon the point mentioned, as to the condition of vegetation being considered, in fixing a high-water mark. As a similar course is generally adopted in this Province by surveyors, I do not think that I should, in the absence of a better one being followed, conclude that it was improperly used, in determining high-water mark at the point in question. Then, if I were in doubt, I must bear in mind that the onus of proving the alleged trespass rests upon the plaintiffs. They require to shew that high-water mark is, as represented on the plans prepared by their surveyor. They have failed in this respect. I am not required to go so far, as to decide, that the high-water mark is as indicated by the surveyor of the defendant. In coming to a conclusion adverse to the plaintiffs on this branch of the case, I am not overlooking the fact that Mr. Elliott, a surveyor employed by both plaintiffs, at a time when there was no controversy or cause of complaint against the Railway Company, fixed the high-water mark at practically the same point, as was subsequently adopted by the surveyor for the defendant. So I do not find, upon the evidence, there was any actual encroachment by the defendant, through the embankment, upon the plaintiffs' land, and it does not claim any right of way beyond high-water mark.

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Assuming that the foreshore of English Bay, at the point in

question, is the property of the Crown in the right of the Province and not of the Dominion, thus following the decisions to that effect, then the question arises whether the defendant can utilize such land and create an obstruction, to the detriment of the plaintiffs, without compensation. There is no doubt, by clear and distinct legislation, the Province, in dealing with civil rights, may deprive a party of his property without compensation. This power is referred to by Chancellor Boyd in *Re McDowell and the Town of Palmerston* (1892), 22 Ont. 563 at p. 564 as follows:

"The Act deals with land in Ontario, and the Legislature had power (so far as abstract competence is concerned) to change the ownership and that without making any compensation. The expediency and the justice of such legislation is another matter."

He also quotes from the judgment of Mr. Justice Day in *Ex parte Ira Gould* (1854), 2 R. de J. 376 at p. 378, that—

"The powers of legislation of the Provincial Parliament are as extensive as those of the Imperial Parliament, while they keep within the limits fixed by that statute, even if they were to interfere with Magna Charta."

The power thus existing in the Provinces before Confederation, remained thereafter, so that British Columbia has, as to property and civil rights exclusively, a supreme power of legislation. See Lord Watson's judgment in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), A.C. 437. It is contended by the defendant, that the Act incorporating such Company was an exercise of such powers of the Province, in such a way, as to deprive the plaintiffs of any right to compensation or damages, that they might otherwise possess, through the construction of the railway on the foreshore. Unless the Act has this result, there is no doubt that the plaintiffs should not be without redress for their grievances. The owners of land adjoining the sea are entitled to free access to, and egress from the sea. This is a private right distinct from the public right of fishery or navigation. It was held in *Attorney-General of the Straits Settlement* v. *Wemyss* (1888), 13 App. Cas. 192, that the occupant of such land adjoining the sea was entitled, even as against the Crown, to damages where there had been an invasion of this private right of access to the sea, through an obstruction. It was held, in the same case, that there was no distinction between the

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rights of riparian owner on a tidal river and the sea, following *Lyon* v. *Fishmongers' Company* (1876), 1 App. Cas. 662. This right to compensation is referred to in numerous cases collected in MacMurchy & Denison's Railway Law of Canada, 2nd Ed., at p. 253, and applies to the owner of land fronting upon either a waterway or landway, who has his right of access destroyed. If one considers *North Shore Railway Co.* v. *Pion* (1889), 14 App. Cas. 612, as the leading Canadian case as to the rights of an owner of property, adjoining the foreshore, then it is quite clear that, without statutory authority to the contrary, the right to compensation exists. That case resembles the present one, as the Railway Company erected an embankment on the foreshore of the St. Charles River in front of the owner's property and no compensation nor indemnity was offered to him for the damage thus suffered. Reference is made in the judgment to the necessity for a railway company complying with statutory provisions, before it is entitled to construct the railway. I am satisfied that in this case, the defendant has filed all necessary plans and taken necessary steps to comply with the statute before commencing the construction of its railway, so that the sole and only important point yet to be considered is, whether the legislation has the effect contended for by the defendant. In the *Pion* case it was held that the railway company was not relieved from liability, and the English Acts were referred to, providing for compensation. The injury suffered in that case was compared (p. 626) to the one existing in *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602, as follows:

Judgment

> "The nature of the injury done in the present case was similar, with the difference only that there the access obstructed was to a street, here to a river. In both cases alike, the damage to the plaintiffs' property was a necessary, patent, and obvious consequence of the execution of the work."

It was there held by the Privy Council that the Quebec Railway Consolidation Act of 1880 did not give authority to railway companies to thus exercise their powers and erect the obstruction upon the foreshore, with substantial damage resulting to the riparian owner, without making compensation. Here, in my opinion, if the arbitration provisions of the Provincial

Railway Act apply, then, a like result follows, and the defendant is liable. It is, however, agued that, while the Provincial Railway Act applies generally to the construction and operation of the defendant's railway, and its provisions are "incorporated in and deemed to be a part of the Act" incorporating the defendant Company, still, where any conflict arises between the two Acts, then the terms of the Act of incorporation shall govern. Such a conflict is said to exist between the provisions of the general Act as to compensation, in event of expropriation, and similar provisions for expropriation in the Act of incorporation. I think it well to outline, at length, the section of such Act providing for expropriation—1912, Cap. 36, Sec. 32:

"Whenever it shall be necessary for the purpose of securing sufficient lands for terminals, stations, or gravel-pits, or for constructing, maintaining, or using the said railway, also for any other purpose connected with the said railway, or for opening a street to any station from any existing highway, the said Company may expropriate, purchase, hold, use, and enjoy such lands, and also the right of way thereto if the same be separated from the railway; and may sell and convey the same or parts thereof from time to time as they may deem expedient; and may also make use of and dam for the purpose of said railway the water of any stream or watercourse over or near which the said railway passes, not being navigable waters, doing, however, no unnecessary damage thereto and not impairing the usefulness of such stream or watercourse. The arbitration provisions of the British Columbia Railway Act shall apply in all instances where property is sought to be taken under or where damage is claimed to have been done by the Company within the provisions of this section."

Judgment

Defendant contends that the "damages" referred to in the latter portion of this section, and which are to be dealt with under the arbitration provisions of the British Columbia Railway Act, are restricted to the particular damages referred to in such section, and would not refer to the loss sustained by the plaintiffs through the erection of the embankment. If this argument prevailed, it means that no compensation would be payable, not only to these plaintiffs, but to parties who might suffer damage through the railway being constructed, in any locality, in such a way as to cut off the access of owners of property to the streets and highways. It might even be argued that defendant could, under such circumstances, purchase one half of a lot required for its purposes, but the damage resulting to the remaining portion thereof should not be considered, because it would not be "taken" for railway purposes, though

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it would be, like the plaintiffs' property, seriously affected by the construction of the railway. I do not consider it reasonable to place such a construction upon this section. It is contrary to the general legislation throughout Canada, where railways are granted the privilege of expropriating lands for railway purposes. I do not think that the Legislature intended such a result should follow the enacting of the section. If it had been determined to thus destroy the rights of parties along the projected line of railway, it would have so stated in clear and emphatic language. It has failed to do so. In a matter of this kind, it should not admit of any doubt that the Act of incorporation, while granting the privilege of construction and expropriation, also intended that there should be confiscation of private rights. Where statutes thus attempt such encroachment they are subject to strict construction. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights: *per* Bowen, L.J. in *Hough* v. *Windus* (1884), 12 Q.B.D. 224. Plaintiffs can thus well invoke the following principle, referred to by Lord Davey in *Commissioner of Public Works (Cape Colony)* v. *Logan* (1903), A.C. 355 at pp. 363-4:

"Their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognized by the Courts of this country as a canon of construction, and was approved and acted on by Lord Watson in delivering the judgment of this Board in *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* [(1882)], 7 App. Cas. 178 at p. 188."

Judgment

So I decline to place the construction on this section contended for by the defendant and thus deprive these plaintiffs of the right to compensation. In my opinion, the "damages" referred to in the section include the claims of the plaintiffs, and they have right to compensation. Defendant has a Crown grant for the right of way in front of the land, referred to in the Oblates case, but, even with an indefeasible title, I do not think this strengthens defendant's position or relieves it from liability for impairing the value of plaintiffs' land. It has been agreed that, if such right exists, the arbitration provisions of the British Columbia Railway Act should be utilized to determine

the amount of damages. There will, therefore, be judgment for the plaintiffs, declaring them entitled to damages, and an order directing that the amount be ascertained by arbitration under the provisions of the British Columbia Railway Act. Plaintiffs are entitled to costs.

Judgment for plaintiffs.

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REX v. KONG YICK.

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Criminal law—Disorderly house—Gaming—Warrant—Unnecessary words in—Not thereby defective—Criminal Code, Sec. 641.

If a warrant issued under section 641 of the Criminal Code contains the necessary essentials, *i.e.*, "to go to the place and enter," and the statute gives the constable power to do anything contained in the warrant, it is not bad by reason of its containing the additional matter which may be looked upon as mere surplusage.

APPLICATION to quash a conviction made by Magistrate H. A. Heggie, at Vernon, B.C., on the 5th of December, 1917, whereby Kong Yick was convicted for that he was on the 24th of November, 1917, unlawfully found as the keeper of a disorderly house in the City of Vernon, to wit, a common gaming house. Heard by HUNTER, C.J.B.C. at Vancouver on the 6th of February, 1918. The warrant granted under section 641 of the Criminal Code, authorized the police officers "To enter such house, room or place, with such constables as are deemed requisite by you, and if necessary to use force for the purpose of effecting such entry whether by breaking open doors or otherwise and to take into custody all persons who are found therein and all moneys and securities for money found in such house or premises, and to bring the same before me." The case of Jack, charged with being found in a disorderly house, was argued at the same time. Statement

W. P. Grant, for the application: The warrant is defective and goes beyond the authorities conferred upon the magistrate, Argument

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there being no power for the magistrate to grant a warrant taking into custody persons, moneys, etc., and the word "search" has been left out of the warrant. In any event it must be shewn that the game is unlawful *per se*: see *Rex* v. *Hung Gee* (1913), 21 Can. Cr. Cas. 404. Furthermore, there must be evidence of the game actually played on the night of the arrest, and it must be shewn that some person gained thereby. The conviction against a person being found therein should be quashed on the ground that the officer did not ask the accused for a lawful excuse.

R. L. Maitland, for the Magistrate and the Chief of Police of Vernon, *contra*: The additional powers in the warrant should be treated as surplusage, as the police officer has power under the section to arrest and seize gambling instruments. In any event, there was evidence that fruit was sold by the alleged keeper to the players from the proceeds of the game, which shews gain: *Rex* v. *James* (1903), 7 Can. Cr. Cas. 196. The evidence of a witness describing the game of Um Gow, and the admission of the defence that Um Gow was played that night, is sufficient evidence of the game. The question of lawful excuse is one to be treated by the magistrate.

Argument

HUNTER, C.J.B.C.: The essential part of the warrant is there, which is to go to the place and enter. The warrant gives the constable power to enter and the statute gives him the power to do all the other things, therefore the words complained of are surplusage and do no harm, and the warrant is a good warrant. As to the lawful excuse, nature has endowed man with eyes to see and ears to hear, and when his eyes and ears tell him that there is gambling going on, he had better make himself scarce.

Statement

There is a *prima facie* case from the fact that he is found there, and it is for him to shew his lawful excuse. It is distinguished from the vagrancy cases, because the statute requires that the accused should be asked to give an account of himself before he can be charged with vagrancy.

I am satisfied that there was sufficient evidence before the magistrate, and must dismiss the application.

Application dismissed.

DOMINION TRUST COMPANY v. NEW YORK LIFE INSURANCE COMPANY *ET AL.*

MURPHY, J. (At Chambers)

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DOMINION TRUST CO. v. NEW YORK LIFE INSURANCE CO.

Practice—Appeal to Privy Council—Company in liquidation a party—Postponement of appeal—Application for to winding-up judge—Jurisdiction—R.S.C. 1906, Cap. 144.

An application to a winding-up judge for an order directing a liquidator to consent to the adjournment of appeals pending before the Privy Council will be refused.

Assuming that there is jurisdiction under the Winding-up Act, the Court would, in interfering with the conduct of litigation, which the liquidator has been authorized to carry on, be assuming a responsibility which it could not adequately discharge. It is impossible for a winding-up judge in an involved litigation to know all its ramifications as does the liquidator and his legal advisers, and without such knowledge, interference with the conduct of suits might well be highly detrimental to the liquidation.

APPLICATION for an order directing the liquidator to consent to the adjournment of the appeals now pending before the Judicial Committee of the Privy Council from the Easter sittings to the June sittings of that body. Heard by MURPHY, J. at Chambers in Vancouver on the 19th of February, 1918. Statement

Sir C. H. Tupper, K.C., and *Davis, K.C.,* for the application.
Wilson, K.C., for the liquidator.

25th February, 1918.

MURPHY, J.: Application for an order directing the liquidator to consent to the adjournment of these appeals now pending before the Judicial Committee of the Privy Council from the Easter sittings to the June sittings of that body. The liquidator opposes the application. The main ground put forth is that the danger of travelling, owing to the submarine menace, will be less later on than it is now. Another ground is that Mr. *Davis,* counsel for the defence in one of the cases, has not yet received the record and will not probably receive it for several weeks, rendering it impossible to properly prepare for the hearing. The question involved in these cases being Judgment

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DOMINION TRUST CO. v. NEW YORK LIFE INSURANCE CO.

primarily one of fact, and the evidence given being very voluminous, these appeals, I think, are pre-eminently appeals in which the hearing should be attended by counsel who were engaged at the trial. The point raised by Mr. *Davis,* however, is one for the appellate tribunal to consider if an application is made to it for a postponement, but is one with which it is not within my province to deal.

The liquidator questions my jurisdiction. It is admitted, of course, that I have no control over appeal proceedings before the Judicial Committee, but it is contended that, under sections of the Winding-up Act, the Court has full control of the liquidator.

It may well, I think, be urged that once the liquidator has been authorized to take legal proceedings the conduct of same is governed by the Rules of Court procedure, with which it is beyond the province of the winding-up judge to interfere. It is, however, unnecessary to decide this in the view I take of the matter. Assuming there is jurisdiction, the Court would, in interfering with the conduct of litigation which the liquidator has been authorized to carry on, I think, in general, be assuming a responsibility which it could not adequately discharge. It is impossible for a winding-up judge in an involved litigation, such as this, to know all its ramifications as does the liquidator and his legal advisers, and, without such knowledge, interference with the conduct of suits might well be highly detrimental to the liquidation. I feel, therefore, that I must decline to make the order asked for, as it would mean creating a precedent, the legal soundness of which may be doubtful, and the application of which on future occasions might involve responsibility without adequate knowledge.

Judgment

The application is dismissed.

Application dismissed.

ALBERNI LAND COMPANY LIMITED v. REGISTRAR-GENERAL OF TITLES.

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1918

April 2.

ALBERNI LAND CO. v. REGISTRAR-GENERAL OF TITLES

Land Act—Deeds—Reservation of minerals—Easements—Registration—Charge—R.S.B.C. 1911, Cap. 127—B.C. Stats. 1915, Cap. 33, Sec. 4.

Reservations in a conveyance of "all coal, coal oil, petroleum, oil springs, iron and fire-clay within, upon or under the same" are exceptions and reservations from the grant and not easements, and should not be registered as charges. A certificate of indefeasible title may issue subject to these reservations, a memorandum of which should be indorsed on the certificate.

Rights of entry and rights of way are easements and not subject to reservation, but if they are easements of necessity incidental to the getting of the minerals it is not necessary to register them as a charge.

APPEAL from the order of MORRISON, J. of the 19th of October, 1917, dismissing the appellant's petition against the Registrar-General's action in relation to an application by a purchaser of certain lands from the appellant for registration of the conveyance thereof. The appellant owned certain lands in the district of Alberni. These lands were subdivided and certain lots in Alberni Townsite and included in the subdivision were granted and conveyed in September, 1917, to one G. L. Smellie, there being a clause in the conveyance saving and reserving to the vendor all coal, coal oil, petroleum, oil springs, iron and fire-clay, with certain other rights. The purchaser applied to register the conveyance and the Registrar-General thereupon notified the vendor in writing that unless he applied within 14 days in the regular form to register a charge covering the above reservations, he would in pursuance of Smellie's application, register the conveyance and issue a certificate of indefeasible title to said lands to the said Smellie, free of such reservations. Upon the dismissal of the petition the petitioner appealed.

Statement

The appeal was argued at Vancouver on the 6th of November, 1917, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

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ALBERNI LAND CO. v. REGISTRAR-GENERAL OF TITLES

Maclean, K.C., for appellant: The reservation is part of the actual matter granted; it is not an easement and cannot therefore be registered as a charge: see *Durham and Sunderland Railway Company* v. *Walker* (1842), 11 L.J., Ex. 442. It is the duty of the Registrar to register the conveyance subject to the reservation indorsed thereon.

Argument

The Registrar-General (respondent), in person: When they severed the minerals they did not give a fee title. They also reserve the right to maintain and operate buildings, etc., and create a right by the reservation they make in the way of easements for working the mines: see Goddard on Easements, 7th Ed., 155; Gale on Easements, 9th Ed., 77.

Maclean, in reply: The distinction is that this is a reservation not an easement: see *May* v. *Belleville* (1905), 2 Ch. 605.

Cur. adv. vult.

2nd April, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. The appellant being owner in fee and holding a certificate of indefeasible title to, *inter alia,* the lands in question, sold and conveyed them to a purchaser "saving and reserving . . . . all coal, coal oil, petroleum, oil springs, iron and fire-clay within, upon, or under the same," and all rights to get and win same, and to enter and use the lands for such purposes. The purchaser applied for registration of his conveyance and for a certificate of indefeasible title. The Registrar notified the appellant that he would register the purchaser's title and issue to him a certificate of indefeasible title free of said exceptions and reservations unless appellant should apply within a specified time to register said exceptions and reservations as a charge on the lands conveyed to the purchaser. The appellant thereupon filed a petition against what the Registrar proposed to do, which came on before MORRISON, J. for hearing, and was by him dismissed. The appeal is from that order.

I am unable to take the view urged upon us by the learned Registrar, that the reservations of coal, etc., were in reality easements, and hence ought to be registered as charges on the fee in order to preserve them. In my opinion they are excep-

tions and reservations from the grant, and not easements. Section 22, subsection (1) (*h*) of the Land Registry Act clearly contemplates the issue of certificates of indefeasible title in respect of land, subject to conditions, exceptions and reservations. A memorandum of these is to be indorsed on the certificate. I do not say that apart from that section the Registrar's course herein would be right. I think it would not, but it is unnecessary to decide that question.

What I have said above I have said with reference to the corporeal property excepted from the grant, not the incorporeal rights, such as rights of entry and rights of way. The former are proper subjects of exception and reservation: the latter are not. They are easements, and by the combined effect of the decisions in *Durham and Sunderland Railway Company* v. *Walker* (1842), 2 Q.B. 940 at p. 967, and *May* v. *Belleville* (1905), 2 Ch. 605, must, I think, be taken to be grants of easements, and if they are no more extensive than the implied easements of necessity incidental to the getting of the minerals and oils excepted from the grant, there is no need to register them as a charge, but if they go beyond and are more comprehensive than easements of necessity, appellant doubtless will be advised as to what course he should take. That question is not before us for decision.

MACDONALD, C.J.A.

I am, therefore, of opinion that the certificate of title to be issued to the purchaser should have indorsed thereupon the exceptions and reservations of coal, coal-oil, petroleum, oil springs, iron and fire-clay within, upon, or under the lands described in the certificate.

MARTIN, J.A. would allow the appeal.

MARTIN, J.A.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitor for appellant: *H. H. Shandley.*
Solicitor for respondent: *J. C. Gwynn.*

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1918

April 2.

INMAN v. WESTERN CLUB

INMAN AND INMAN v. THE WESTERN CLUB.

War Relief Act—Club—Incorporated under Benevolent Societies Act—Foreclosure—Members at front—Club property held "to the use of" its members—R.S.B.C. 1897, Cap. 13, Sec. 8; B.C. Stats. 1917, Cap. 74, Sec. 2.

The War Relief Act Amendment Act, 1917, does not apply to a foreclosure action on a mortgage on the property of a club incorporated under the Benevolent Societies Act, a number of whose members are on active service in His Majesty's forces.

Per GALLIHER, J.A.: The club being a legal entity, its assets are the property of the club and not of its members.

APPEAL by plaintiffs from the refusal of a motion for liberty to proceed with an action for foreclosure notwithstanding the War Relief Act and amendments thereto. The plaintiffs held a mortgage for $40,000 on the premises of the Western Club in Vancouver. The Club was incorporated in 1901 under the Benevolent Societies Act, R.S.B.C. 1897, Cap. 13. Since August, 1914, over 100 of the Club's members enlisted in His Majesty's forces. The motion was heard by MURPHY, J. on the 28th of September, 1917, who held, under section 8 of the Benevolent Societies Act, that the Club held the property in question as trustee for its members and was therefore entitled to relief under section 2 (*d*) and (*e*) of the War Relief Act Amendment Act, 1917.

Statement

The appeal was argued at Vancouver on the 7th of December, 1917, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. H. MacNeill, K.C., for appellants: The Club was incorporated in 1901, under the Benevolent Societies Act, R.S.B.C. 1897, Cap. 13. The Company is not trustee for the members of the Club. The members are not personally liable. The difficulty is the construction of the words "for the use of" in section 8, and the trial judge held the property was held in trust for the members at the front. On the question of trus-

Argument

teeship, see *Bowman* v. *Secular Society, Limited* (1917), A.C. 406 at pp. 435 and 478. *Parsons* v. *Norris* (1917), 24 B.C. 41 was decided before the amendment to the War Relief Act. I contend the Club is not trustee for the members, and that is the sole point in the case.

O'Brian, for respondent: The Friendly Societies Act in England (59 & 60 Vict., Cap. 25) is the same as our Benevolent Societies Act. The Club and presiding officers are not the beneficial owners. They hold in trust for the members: see Halsbury's Laws of England, Vol. 15, p. 169, par. 348. This is the distinction between a company and a friendly society. Each member has an undivided interest in the concern: see *Metford* v. *Edwards* (1915), 1 K.B. 172, in which *Graff* v. *Evans* (1882), 8 Q.B.D. 373 was followed; see also *Humphrey* v. *Tudgay* (1915), 1 K.B. 119; *In re Customs and Excise Officers Mutual Guarantee Fund. Robson* v. *Attorney-General* (1917), 2 Ch. 18. The 1917 amendment to the War Relief Act extends the 1916 Act. Section 2 extends it to "trustee of any such person." Where the words of the statute are unambiguous, the statute must be followed: see Halsbury's Laws of England, Vol. 28, pp. 12-13, pars. 17 and 18.

Argument

MacNeill, in reply.

Cur. adv. vult.

2nd April, 1918.

MACDONALD, C.J.A.: The neat point in this case is whether the mortgagee of the real property of a club, incorporated under the provisions of the Benevolent Societies Act, is affected, in his proceedings to realize his security by foreclosure, by the provisions of the War Relief Act as amended in 1917, by reason of the fact that several of the club's members had joined His Majesty's forces. Section 8 of the Benevolent Societies Act provides that the members of a society incorporated under this Act may, in the name of the society, "acquire and take by purchase, donation, devise or otherwise, and hold for the use of the members of the society, or any branch society, and according to the by-laws, rules, and regulations thereof, all kinds of personal and also real property in this Province."

MACDONALD, C.J.A.

The property in question here is held by the society under

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the power conferred by the language quoted. It is contended on behalf of the Club that property vested in the society "for the use of the members" is property vested in the trustee for the members jointly and severally, and that applying the language of the said amendment to the War Relief Act to this situation, the mortgagor cannot proceed with the action. The Act prohibits or stays proceedings to enforce a lien or encumbrance "(*d*) against any trustee of such person." Had the statute used the words "for the use of the society" instead of "for the use of the members," I am quite satisfied that the Club's contention would not even be arguable. Unlike societies registered in England under the Friendly Societies Act, 1896 (59 & 60 Vict., Cap. 25), the Club is a true, not a *quasi*-corporate body. Its members bear the same relationship to the corporate body in general as do the members of a company incorporated under the Companies Act, and it is settled law that the shareholders of the latter have no property in the legal sense in the assets of the company: *In re George Newman & Co.* (1895), 1 Ch. 674 at p. 685; *Watson* v. *Spratley* (1854), 24 L.J., Ex. 53. Did the Legislature mean then, by the words "for the use of the members," to give the members a particular right of property in the real and personal estate of the Club? Reading the whole Act (Benevolent Societies Act) with special attention to section 4, subsection (6) and section 18, I cannot give any other interpretation to it than that the expression "for the use of its members" means nothing more nor less than "for the use of the corporate body"—the members collectively constituting the legal entity.

MACDONALD, C.J.A.

But for section 13 of the War Relief Act as amended as aforesaid, the decision of this appeal would be of far-reaching importance. That amendment gives power to the judges of the Supreme Court to grant relief from the intolerable delays which sometimes ensue from advantage being taken of an Act crudely drawn and open to conflicting constructions. This amendment opens the way to a wise and just disposition of the many rights affected by the Act. It permits a reasonable application of the provisions of the Act, while doing full justice to those who are really deserving of its protection.

I would allow the appeal.

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GALLIHER, J.A.: The sole question here is, is the defendant entitled to the benefit of the War Relief Act (B.C. Stats. 1917, Cap. 74)? The claim is made under subsection (*d*) of section 2 of the Act. The defendant is a body corporate incorporated under the Benevolent Societies Act (R.S.B.C. 1897, Cap. 13), and is the registered owner of certain real estate, with the building thereon, which is used as the club premises. The transfer was direct to the company. The company mortgaged to the plaintiff, and the mortgage money and interest being in arrears, action was brought for a personal judgment and for foreclosure. Application was then made for leave to proceed, and defendant claimed the benefit of the War Relief Act. Mr. Justice MURPHY refused the application, and from his order this appeal is taken. Several members of the Club are on active service overseas. The first point is, is the Club a trustee of the property for its members? In *Watson* v. *Spratley* (1854), 24 L.J., Ex. 53 at p. 57, Parke, B. says, in speaking of companies incorporated under the Companies Act (Imperial):

"In all such cases the individual shareholders are quite distinct from the corporation; they are entitled to no direct interest in the land; no part of the realty is held in trust for them . . . ."

Martin and Alderson, BB., although they differ from Parke, B. on another phase of the case, do not do so on this.

GALLIHER, J.A.

The words relied upon in section 8 of our Benevolent Societies Act are:

"The members of any society . . . . incorporated under this Act may, in the name of the society . . . . acquire and take by purchase . . . . and hold for the use of the members of the society . . . . real property."

If it were not for this provision there could not, I think, be any question that the society being a legal entity, its assets are its property, and not the property of its members. Do the words "hold for the use of the members of the society" alter that position and create the society a trustee of the property for its members? In my opinion, the ownership of the property is vested in the society; no individual member has any ownership or right to ownership in the property. The society holds it as owners, and the trusteeship that is imposed by the Act is that when owned it shall be held for the use of the members for the time being, or they are further empowered by the

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Act to sell or dispose of it, or exchange, mortgage or lease, and with the proceeds acquire other lands, etc.

I do not think the word "trustee" in the War Relief Act should be extended so as to cover a case where the member on active service has no property interest in the land but merely an interest to have it retained as a club to which he can resort for social purposes.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the Chief Justice that the appeal should be allowed.

EBERTS, J.A.

EBERTS, J.A., allowed the appeal.

Appeal allowed.

Solicitors for appellants: *Bayfield & Harvey.*
Solicitor for respondent: *C. MacL. O'Brian.*

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MORTGAGE COMPANY OF CANADA v. HALL.

War Relief Act—Mortgagee—Husband enlisted for active service—Later discharged—Wife not supported by husband—Effect of—New evidence after trial—Costs—B.C. Stats. 1916, Cap. 74; 1917, Cap. 74.

MORTGAGE COMPANY OF CANADA v. HALL

In the case of a husband enlisting for active service, although his wife may not be actually dependent upon him for support she is nevertheless entitled to the benefit of the War Relief Act.

Parsons v. *Norris* (1917), 24 B.C. 41 followed.

Statement

APPEAL from the decision of MORRISON, J., of the 26th of February, 1917, in a foreclosure action. The mortgage in question was made in December, 1911, by one S. W. Hopper, in favour of the plaintiff, on certain property on Dunbar Street, in the city of Vancouver. In January, 1912, Hopper conveyed the equity of redemption to Sir Charles Hibbert Tupper, said conveyance being duly registered. Subsequently the said

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Tupper conveyed the property to the defendant Bertha F. Hall, the conveyance not being registered. The defendant Alfred Hall claimed an interest in the equity of redemption, and in January, 1912, covenanted, by instrument in writing, to pay the mortgage. On the trial in January, 1917, the defendants took the objection that they were entitled to relief under the War Relief Act, it appearing that the defendant Hall had enlisted, but was discharged in October, 1916, as medically unfit. The learned trial judge found that Alfred Hall had no right to redeem, and that Bertha F. Hall was not entitled to relief, as he considered she was not a dependant under the Act, the evidence disclosing that the husband did not, in fact, support her. From this decision the defendant Bertha F. Hall appealed. On the hearing of the appeal, on the plaintiff's application, the Court allowed in evidence of a certain matter that took place after the trial, namely, that after notice of appeal was given, and after the 1917 amendment to the War Relief Act, an order was made, on plaintiff's application, by GREGORY, J., in July, 1917, dispensing with the restrictions imposed on the plaintiff by the Act, and from this order no appeal was taken.

Statement

The appeal was argued at Vancouver on the 20th of December, 1917, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Gillespie, for appellant: This is a foreclosure action, the Halls having purchased the property from one S. W. Hopper, the original mortgagor. Alfred Hall enlisted, but he was discharged as medically unfit before the trial took place. My contention is that Hall is, nevertheless, entitled to the benefit of section 2 of the War Relief Act. His wife is also entitled as a dependant: see *Parsons* v. *Norris* (1917), 24 B.C. 41.

Griffin, for respondent: Hall has never been mobilized. The learned judge found the wife was not a dependant: see *Copethorne* v. *Elliott* (1916), 34 W.L.R. 943. As to the legal position of overseas forces and the militia see *Calgary Brewing & Malting Co.* v. *McManus* (1916), 10 Alta. L.R. 1. Mrs. Hall's interest is not registered. It is in the name of Sir Charles Hibbert Tupper. She cannot, therefore, claim the benefit of

Argument

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Argument

the Act: see *Goddard* v. *Slingerland* (1911), 16 B.C. 329; *Chapman* v. *Edwards, Clark and Benson, ib.* 334. All she had was an unregistered agreement for sale of the property. I am entitled to judgment as the law is at present, as *Parsons* v. *Norris* was decided before the amendment to the Act in 1917 (B.C. Stats. 1917, Cap. 74, Sec. 9). When the case comes up on appeal it is a rehearing, and the statute then in force should apply: see *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672; *Ponnamma* v. *Arumogam* (1905), A.C. 383 at p. 390; *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (1912), A.C. 788.

Gillespie, in reply, referred to *North American Life Assurance Co.* v. *Gold* (1917), 24 B.C. 50 at p. 51.

Cur. adv. vult.

2nd April, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal from an order of MORRISON, J. of the 6th of February, 1917, deciding, *inter alia,* that the defendant Bertha Fulton Hall was not entitled to the benefit of the War Relief Act, 1916. She claimed the benefit of that Act by reason of the fact that her husband had enlisted and had become mobilized in His Majesty's forces. The action was one of foreclosure, the husband and wife being parties defendants. The learned trial judge held that the land was that of the wife and not of the husband, and that she alone had the right to redeem, the husband being liable upon his personal covenant only. In his reasons, the learned judge says that the appellant was not a dependant, and that while the husband was entitled to the stay effected by the Act, the wife was not. At that time *Parsons* v. *Norris* (1917), 24 B.C. 41, had not been decided by this Court. Had it been, the learned judge would no doubt have followed it and held that the wife was entitled to the benefit of the Act. I do not quite understand what the learned judge meant when he said in his reasons for judgment: "I do not think she is a dependant within the meaning of the Act." If this was intended to be a finding that she was not dependent for support on her husband, and hence, not entitled to the benefit of the Act, I think the learned judge overlooked

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the circumstance that a wife gets her protection *qua* wife, and not *qua* dependant. But I will assume that the decision is founded on the fact that it was her own property, and that in such case the wife is not protected. The answer to that is our decision in *Parsons* v. *Norris, supra.*

On the hearing of the appeal respondent's counsel moved for leave to put in further evidence—evidence of events which had transpired since the date of the order appealed from.

The new evidence was not read, and I must say that its purport was not made clear to my mind by counsel at the time. On reading this evidence now, I find that it discloses the fact that after this appeal was taken, and after the amendment in 1917 to the War Relief Act, which gives power to a judge of the Supreme Court to dispense with the restrictions imposed on suitors by the Act, respondent made an application to GREGORY, J. and obtained an order dispensing with such restrictions in this case. That order appears not to have been appealed from. The situation, therefore, is that when this appeal came on for hearing, nothing was at stake but the costs. It was the duty, I think, of counsel on both sides to bring these circumstances to the notice of the Court at once, whereupon we could have decided whether or not we should hear the appeal for the purpose of disposing of the costs thereof. As that course was not pursued, and as I have made up my mind that the order appealed from was wrong, I would allow the appeal, and would deprive the appellant of her costs except those incurred up to the time of the making of the order of GREGORY, J.

MACDONALD, C.J.A.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

EBERTS, J.A. allowed the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitor for appellant: *W. D. Gillespie.*
Solicitor for respondent: *W. Martin Griffin.*

MURPHY, J.

1916

Nov. 27.

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Dec. 21.

A. R. WILLIAMS MACHINERY CO. v. GRAHAM

THE A. R. WILLIAMS MACHINERY COMPANY OF VANCOUVER, LIMITED v. GRAHAM.

Fire insurance—Portion of property subject to seller's lien—Insurance made payable to seller "as his interest may appear"—Property destroyed—Assignment for benefit of creditors—Security held by creditor—Statement of—R.S.B.C. 1911, Cap. 13, Sec. 31.

The plaintiff sold machinery to a company retaining the right of ownership in themselves. It was at the same time arranged that schedule insurance should be obtained on the whole of the Company's plant, $12,000 of which should in case of loss be made payable to the plaintiff "as its interest may appear." Shortly before a fire destroying the plant all the insurance policies (with the exception of one for $3,000 that had been made payable to the plaintiff in case of loss) ran out, and arrangement was in progress for further schedule insurance up to $40,000, only $18,000 of which was actually placed before the fire took place, it being the intention to make $9,000 of the new insurance payable to the plaintiff in case of loss. The Company went into liquidation immediately after the fire and the liquidator was compelled to bring action for the $18,000 insurance obtained immediately prior to the fire. Pending the action liquidation proceedings continued and the plaintiff filed its claim and valued its securities at $3,700 (being the unexpired $3,000 policy and a boiler recovered from the fire, valued at $700). Upon the assignee recovering the $18,000 insurance, the plaintiff brought action to enforce its claim to $9,000 of the insurance money so recovered. It was held by MURPHY, J. on the trial that the insurance was in the nature of additional security, and was subject to the provisions of section 31 of the Creditors' Trust Deeds Act, and the plaintiff having failed to value the security he now claims, as required by said section, and not having the right to revalue his security after the recovery of the insurance moneys as it would work an injustice to the unsecured creditors, who shared in the expense of the litigation, he could not succeed.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that the learned trial judge had reached the right conclusion and the appeal should be dismissed.

Statement

APPEAL from the decision of MURPHY, J. in an action tried by him at Vancouver on the 16th, 17th, 20th and 21st of November, 1916, for a declaration that the defendant, assignee of the Westminster Woodworking Company, Limited (in liquidation), holds as trustee for the plaintiffs $9,000 of certain

moneys collected by him on certain fire-insurance policies or, in the alternative, that the plaintiff is entitled to $9,000 out of the proceeds of said insurance policies. The Westminster Woodworking Company had purchased from the plaintiff Company machinery required for its business and lien agreements were entered into to secure the plaintiff. The agreements provided that the Woodworking Company should insure the property in a sufficient sum to secure the plaintiff for the balance of the purchase price and be made payable to the plaintiff. Policies were taken out and four of them, aggregating $12,000, were made payable to the plaintiff Company. Three of these policies with others held by the Woodworking Company expired in the early part of February, 1914, and on the 13th of February, 1914, arrangements were entered into by the Woodworking Company and one H. H. Lennie, an insurance agent in New Westminster, for further insurance to the amount of $40,000 in lieu of the expired policies, and in the course of the negotiations Lennie was told by the manager of the Woodworking Company that he would have to have covering for the Williams Machinery Company for $9,000. The Woodworking Company's plant was destroyed by fire on the 15th of February, 1914, and the Company went into liquidation. Only $18,000 of insurance had been actually placed by Lennie, and this was recovered only after action had been brought by the liquidator (see (1915), 22 B.C. 197). The plaintiff Company, whose debt at the time of fire was $13,267, filed a claim with the assignee without valuing its securities, which consisted of a boiler saved from the fire, valued at $700, and an unexpired insurance policy for $3,000, at the time it being problematical whether the further insurance arranged for would be recovered. After the claim had been filed the assignee asked the appellant to value its securities, pursuant to section 31 of the Creditors' Trust Deeds Act, and the appellant valued its securities at $3,700 (the value of the boiler and the unexpired policy referred to), not mentioning any interest in the policies then in litigation and upon which the claim is made in this action.

Statement

J. A. Russell, and *Wismer,* for plaintiff.
Griffin, for defendant.

MURPHY, J.

27th November, 1916.

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1917

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MURPHY, J.: I find what plaintiff was entitled to have was $9,000 of schedule insurance, and I find that Brooks intended to procure that for it. This would mean that it would hold insurance not on its insurable interest in the machinery under its liens but on the whole plant and buildings and, in short, on everything in the schedule intended to be attached to the policies. In case of partial loss it would be entitled to a proportionate part of the insurance collected, whether the loss was on its lien machinery or on anything else set forth in the schedule. This may possibly be a legal bargain within *McPhillips* v. *London Mutual Fire Ins. Co.* (1896), 23 A.R. 524, though it is to be noted that was an assignment of a policy, whereas the bargain here was for policies payable to plaintiff "as its interest may appear." In my view of this case it is not necessary to decide this point. Assuming the legality of the arrangement, I cannot see how plaintiff's $9,000 of schedule insurance can be said to be so identified with the lien machinery as to actually take its place under the liens, thereby enabling plaintiff to claim it after an assignment for the benefit of creditors as they could the machinery by virtue of the provisions of the lien agreement. No authority was cited that would support such a proposition. The nature of the bargain for schedule insurance shews it, if legal, I think, to be additional security to the liens. In the case of a partial loss on the property insured the plaintiff could proportionately recover although no part of the lien machinery had been injured. How can it be so identified with the lien machinery in the case of a total loss as to actually take the place of such machinery, whilst in case of partial loss it is so disassociated from the machinery as to be collectable even though no part of the machinery is destroyed. In my opinion, this promised insurance was clearly in the nature of additional security to the liens. If so, it came under the provisions of section 31 of the Creditors' Trust Deeds Act (R.S.B.C. 1911, Cap. 13) when the assignment was made, if the plaintiff elected to come in under the assignment, as they in fact did. The assignee pressed for compliance with this section by plaintiff, but it was, I think, only by holding up the cheque on the policy which was actually in

plaintiff's possession at the time of the fire and by threatening to enforce valuation by the Court, that he eventually succeeded in obtaining a valuation of their security by plaintiff. It is now contended in reference to the proof so filed, first, that the wording does not necessarily impart that the insurance security in question herein was valued at all, and secondly, that, if it were, a mistake of law was made and plaintiff has a right to revalue. In my opinion, neither of these positions can be taken by plaintiff in view of *Box* v. *Bird's Hill Sand Co.* (1913), 23 Man. L.R. 415. This case construes the section in the Manitoba Act corresponding to section 31 of our Creditors' Trust Deeds Act. It shews that rectification of a valuation is allowable but only when it is still feasible to have the security valued under section 31 and when the insolvent's estate can be administered without injustice to anyone. At the time plaintiff made its valuation, to its knowledge, this insurance was a subject of litigation, the success of which depended on the proving of facts, the establishing of which was highly problematical and, if established, involving decision of a somewhat novel point of law. It might well be that whoever carried on this litigation would fail therein and find himself saddled with heavy costs. The plaintiff stood by and saw the assignee run this risk for the estate. Whether it intended to value its claim on this insurance fund or not, it certainly led the assignee to believe it had done so and thereby prevented him from invoking the power of the Court to compel such valuation as he had notified it he intended to do. It has, in my opinion, knowingly allowed him to run all the risks and knowingly deprived him of his power to make it declare its position, and thereby be enabled either to accept its valuation and be rid of its claim on this fund or else to compel it to share in the risks of the litigation. In view of this, it would, in my opinion, be a manifest injustice to allow it, now that the litigation has been successful, to deplete the estate by the sum of $9,000 or any sum, thereby reducing *pro tanto* the dividend to the other creditors.

The action is dismissed.

From this decision the plaintiff appealed. The appeal was

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argued at Vancouver on the 23rd of April, 1917, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

J. A. Russell (*Wismer,* with him), for appellant: Owing to the uncertainty of recovering the later insurance it was not included in our valuation, and even if we should have included it, it was a mistake in law, and we are not thereby estopped from claiming the insurance under our agreement with the Company: see *Beattie* v. *Lord Ebury* (1872), 7 Chy. App. 777; *Box* v. *Bird's Hill Sand Co.* (1912), 8 D.L.R. 768; (1913), 23 Man. L.R. 415.

Griffin, for respondent: The *Box* case is in our favour, as the right to revalue is not given when it amounts to an injustice. When the renewal of the insurance was taking place the agent was instructed to allocate $9,000 to the plaintiff, but this was done on a basis of $40,000 insurance being obtained, whereas there was only $18,000: see *Lees* v. *Whiteley* (1866), L.R. 2 Eq. 143; *Sinnott* v. *Bowden* (1912), 2 Ch. 414. On the question of valuation of security see *Re Richard P. Street* (1879), 15 C.L.J. 86; *Re Payne and Union Bank of Canada* (1915), 8 O.W.N. 614; *Bank of Ottawa* v. *Newton* (1906), 16 Man. L.R. 242; *Ex parte Norris. In re Sadler* (1886), 17 Q.B.D. 728. As to estoppel owing to non-compliance with the statute see Parker on Frauds on Creditors and Assignments for the Benefit of Creditors, 303. Upon realizing on his security, he cannot come in as an unsecured creditor for the balance: see *Deacon* v. *Driffil* (1879), 4 A.R. 335; *Re Beaty* (1880), 6 A.R. 40. The question of mistake in law, as in *Beattie* v. *Lord Ebury* (1872), 7 Chy. App. 777, does not apply here: see Kerr on Fraud and Mistake, 4th Ed., 57; see also Bunyon on Life Insurance, 5th Ed., 33. As to the interest of third parties provided for in the policy see *Lees* v. *Whiteley* (1866), L.R. 2 Eq. 143; *Sinnott* v. *Bowden* (1912), 2 Ch. 414.

Argument

Russell, in reply: An interest in a policy may be validly assigned to a third party when the insured remains owner: see *McPhillips* v. *London Mutual Fire Ins. Co.* (1896), 23 A.R. 524 at p. 528. A secured creditor is entitled to prove for the whole of his debt: see *Rhodes* v. *Moxhay* (1861), 10 W.R.

103; *Kellock's Case* (1868), 3 Chy. App. 769; *Eastman* v. *Bank of Montreal* (1885), 10 Ont. 79 at p. 83; *Beaty* v. *Samuel* (1881), 29 Gr. 105.

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MACDONALD, C.J.A.: I would dismiss this appeal. Starting with the assumption that but for the course pursued by the appellant, it could have succeeded in recovering the whole or part of the insurance moneys in dispute, I have arrived at the conclusion to which the learned trial judge came—that appellant is estopped from asserting its claim in this action.

The appellant filed a claim with the assignee without valuing its securities. These securities consisted of a lien on an engine and boiler saved from the fire, a policy of insurance unexpired at the time of the fire, by which the loss was made payable to the appellant, and its right, if any, to insurance moneys now in question. At the time the appellant filed its claim with the assignee, it was problematical how much (if any) of the insurance bespoken by the Company now in liquidation, but not fully placed, and for none of which had policies been issued, could be recovered.

Appellant's interest in the last mentioned insurance was merely an interest in the outcome of a lawsuit, the question being whether the insurance had in fact been bespoken, and, if so, whether a parol agreement to insure was enforceable as an interim contract. There were no available assets of the insolvent to pay the costs of suit, and a plan of voluntary contribution on the basis of the amount of each creditor's claim against the estate was resorted to to carry on the litigation. Creditors who had no preferential claim on the money sought to be recovered contributed on the same basis as did the appellant, and no specific claim was made by appellant to a preference until after the assignee had succeeded in the action. But this is not all. Some time after it had filed its claim, the assignee asked the appellant to value its securities pursuant to section 31 of the Creditors' Trust Deeds Act. I attach very great importance to the correspondence which ensued, and which resulted in the appellant filing an amended claim in which it

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valued its securities at $3,700, being the value of the engine and boiler and of the unexpired policy above referred to. Appellant in that statement ignored the contingent interest now claimed. In the correspondence above referred to, appellant's solicitors mentioned the insurance in question and said:

"We presume in view of the undecided condition of these matters that you do not wish to insist upon the value being placed upon same. Would you write us in this connection."

As I read the correspondence which followed, the assignee did insist upon a value being placed on all securities which appellant claimed to possess or rely on, and when, on the insistence of the assignee, the securities were finally valued without making the claim now insisted on, the matter was closed by a letter from the assignee's solicitors advising appellant that its valuation had been acquiesced in, and that "your claim will be reduced by the amount of the valuation, and you will be entitled to prove as an unsecured creditor for the balance."

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Apart from the estoppel, which I think was raised by appellant's conduct in standing by, well knowing that the assignee was carrying on a suit against the insurance company in the belief that the fruits of the litigation would belong to the estate, or to the creditors voluntarily contributing to the cost thereof, the fair inference from the circumstances I have mentioned, evidenced by the correspondence, is that the appellant abandoned all preferential claims except those mentioned in the amended claim.

MARTIN, J.A.

MARTIN, J.A. dismissed the appeal.

GALLIHER, J.A.

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

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MCPHILLIPS, J.A.: The judgment of Mr. Justice MURPHY as I understand it, under appeal, would have been for the appellant had not the learned judge been of the opinion that there was estoppel in that the appellant, having valued its claim, was disentitled from claiming the $9,000 as being due to it out of the insurance moneys realized, *viz.*: out of the $18,000 already collected and got in. It is clear that the appellant was protected by insurance placed by the Westminster Woodworking

Company to the extent of $9,000, and it is abundantly clear from the evidence of Lennie that the insurance in favour of the appellant was continued. In fact, that insurance was placed with loss payable to the appellant to the extent of $9,000 is not disputed by the respondent. Difficulty arose after the loss by fire in getting in the insurance moneys, and up to the present $18,000 only has been got in by the assignee. As against one company suit had to be brought (see *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 22 B.C. 197). It will be seen upon a perusal of the report of the case last referred to that no policies in respect of any of the insurance moneys in question in fact issued, but nevertheless, it was held that there was legal liability, and this company (Stuyvesant Insurance Co.), as well as others, made payment of the amounts carried by them, there still remaining an action for $10,000 against a company in New York State. The total loss was about $37,000, and of the property destroyed there was machinery to the value of about $19,000, and the appellant had sold to the Westminster Woodworking Company—of which Company the respondent is assignee under the Creditors' Trust Deeds Act (R.S.B.C. 1911, Cap. 13)—a considerable portion of this machinery, and there was still due to it at the time of the fire loss some $13,207.18—the appellant having lien notes upon the machinery sold—and out of the insurance placed by the Company (I refer to the Westminster Woodworking Company throughout as "the Company") the appellant was specifically protected to the extent of $9,000. Therefore in getting in the insurance moneys to the extent of $9,000 the moneys must be held to have been received for the use of the appellant. The insurance was admittedly placed and effected by the companies upon this basis. It is, however, attempted to evade this liability upon two grounds: (1), that having valued the security held within section 31 of the Creditors' Trust Deeds Act and not having valued the insurance security beyond $3,700 no further claim can be made; (2), that, in any case the appellant had no insurable interest, and that no claim can, by reason of this, be given effect to in a Court of Law. Now, with respect to the first contention, that the security held by way of insur-

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ance came within section 31 of the Creditors' Trust Deeds Act, without deciding this, but assuming that it did, in my opinion, no valuation whatever was placed upon the security by way of insurance now in question, and it is not difficult to see why it was not done (save as to the insurance covered by existing policies). The insurance was all by verbal contract, and there was nothing tangible upon which to place a valuation. But that the appellant was not claiming to be entitled under this insurance it is impossible to contend, and to the knowledge of the respondent, and there never was any waiver or abandonment of this position. The valuation made was plainly as to the insurance covered by existing policies, and the evidence amply supports this.

It is to be observed that in paragraph 3 of the statutory declaration what is said is this: "covering portion of insurance on the machinery, which security we value at $3,700." This is quite understandable and is not capable of any misunderstanding. The insurance there referred to was that covered by the existing policies, *i.e.*, the Phœnix, and the Liverpool and London and Globe.

In the letter of the respondent of the 1st of June, 1915, the point was taken that the appellant had no interest in the insurance. This, in the light of the facts, cannot be characterized other than as being unconscionable and inequitable. The insurance placed, as I have already pointed out, specifically protected the appellant to the extent of $9,000, and it is idle to contend that this was not the position of matters, and it is in respect of this self-same insurance that to date $18,000 has been got in by the assignee. No valuation was made, in my opinion, in pursuance of section 31 of the Creditors' Trust Deeds Act, of the remaining security upon the insurance moneys yet to be got in. It is clear there was no abandonment and the security may still be valued, and no injustice will follow. The moneys have been held, not distributed (an injunction was granted by the Court withholding the distribution of the moneys). What right have the other creditors of the estate to these moneys of the appellant? None whatever. The legal duty that rests upon the respondent is to account to the appellant in respect to the

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moneys got in, which are the moneys of the appellant by reason of the specific protection and appropriation accorded by the contracts of insurance entered into. Here there is an obligation by contract, binding upon the Company, which the assignee must carry out, and the assignee can only be held to be in possession of the moneys, subject to the appellant's claim. Equity looks upon that as done which ought to be done, and is it not patent what ought to be done in the present case? That is, account to the appellant for moneys received, which must be held to be moneys received by the respondent to the use of the appellant. Otherwise stated, the moneys can only be said to be held by the respondent as trustee for the appellant, and for which he must account, subject, though, to the due administration of the estate under the Creditors' Trust Deeds Act. Had the insurance companies who have already paid insisted upon it, it would have been necessary for the respondent, before being entitled to receive the moneys, to have produced a release from the appellant.

The learned trial judge referred to *Box* v. *Bird's Hill Sand Co.* (1913), 23 Man. L.R. 415; 24 W.L.R. 706, a decision of the Court of Appeal of Manitoba affirming the judgment of Mathers, C.J.K.B. (1912), 23 Man. L.R. 415 at pp. 418-22; 22 W.L.R. 871; 8 D.L.R. 768.

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With great respect to the learned judge, I am entirely unable to accept the view arrived at by him, and I would particularly call attention to the language of Cameron, J.A. (23 Man. L.R.) at pp. 431-33; and 24 W.L.R. at pp. 714-16.

In Halsbury's Laws of England, Vol. 5, at p. 520, it is said, speaking of a creditor under the Bankruptcy Act, that he (the creditor) may prove for his whole debt if he surrenders his security (Bankruptcy Act, 1883, 46 & 47 Vict., c. 52, Sched. II., r. 10). "If he proves for his whole debt, or votes in respect of it, he thereby elects to surrender his security; but the Court may allow him to amend his proof in case of inadvertence (*In re Henry Lister & Co., Limited. Ex parte Huddersfield Banking Company* (1892), 2 Ch. 417; Companies (Winding-up) Rules, r. 135. As to what is inadvertence, see *In re Safety Explosives, Limited* (1904), 1 Ch. 226; *In re*

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Rowe. Ex parte West Coast Gold Fields, Limited (1904), 2 K.B. 489; *Ex parte Clarke. Re Burr* (1892), 67 L.T. 232."

The situation in the present case is one of no possible injustice; the moneys in question have not been paid over, and the fact that the general body of creditors undertook the risk of the litigation constitutes no injustice. The appellant contributed to these costs as well, and the estate profits by the result of the litigation. The moneys of the appellant under the insurance security do not exhaust the fund. In fact, if no further moneys be recovered and the appellant should be entitled to the $9,000, there would still remain $9,000 for distribution.

Then, as to the estoppel objection, this is likewise an untenable contention. It is less arguable than the estoppel urged in *Box* v. *Bird's Hill Sand Co., supra.* The contractual obligation existing that protection to the extent of $9,000, by way of insurance, was to be given to the appellant is clear, and the language of Sir W. Page Wood, quoted by Cameron, J.A. at p. 431 (23 Man. L.R.) and at p. 714 (24 W.L.R.) well demonstrates the legal position:

> " 'The bargain by my debtor is that he will pay me, and I am entitled to insist upon that. I have also a pledge in my hands, which no one can take away from me without paying me in full, and it is for me to say when I will choose to realize that pledge.' "

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In the present case the respondent has realized $18,000 and may realize $10,000 more. The valuation which the appellant would, in my opinion, be entitled to now make would be a pure formality, and would be fixed at $9,000, and as that sum, and more, has been realized, the appellant is entitled to have a declaration from the Court, as claimed in the statement of claim, that it is entitled to the sum of $9,000 out of the proceeds of the insurance moneys got in by the assignee, unless upon the last ground which is urged the appellant has no insurable interest to the extent of $9,000. The evidence would not appear satisfactory upon this point, but there is evidence that the appellant had lien notes upon machinery which was upon the premises at the time of the fire and that there was a fire loss in respect thereof, and I am unable to come to the conclusion that there was no insurable interest. The Company was the purchaser of the machinery from the appellant: see MacGillivray on Insurance Law at p. 132.

There is always the presumption of insurable interest: *Stock* v. *Inglis* (1884), 12 Q.B.D. 564, Brett, M.R.; MacGillivray's Insurance Law at p. 104. *Waters* v. *Monarch Fire and Life Assurance Co.* (1856), 5 El. & Bl. 870, 882 (103 R.R. 786) is an instructive case, and this case has been referred to in the following cases: *Seagrave* v. *Union Marine Insurance Co.* (1866), L.R. 1 C.P. 305, 319; 35 L.J., C.P. 172, 14 L.T. 479; *North British Insurance Co.* v. *Moffatt* (1871), L.R. 7 C.P. 25, 30, 41 L.J., C.P. 1, 25 L.T. 662; *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L.R. 8 C.P. 596, 615, 42 L.J., C.P. 305, 29 L.T. 479.

In the present case the appellant's insurable interest in particular was in the machinery, upon which liens were held, and the company likewise had an insurable interest therein. Further, the appellant may well be said to have been in like position to the plaintiff in *McPhillips* v. *London Mutual Fire Ins. Co.* (1896), 23 A.R. 524. In effect, the direction to the broker to provide protection to the appellant to the extent of $9,000 was an assignment, or order to the companies to make payment to that extent to the appellant.

It is strongly contended that the appellant is in the position of not being entitled to recover anything in respect of the insurance moneys, as the statute stands in the way, *viz.*: Life-insurance Policies Act (R.S.B.C. 1911, Cap. 115, Sec. 30; 14 Geo. 3, c. 48). It is somewhat singular that a life-insurance policies Act covers fire-insurance policies, but it would seem so. That is, section 30 thereof does, but section 33, however, excludes insurance on ships, goods or merchandise. Dealing with the Imperial Act, see MacGillivray on Insurance Law at pp. 110-11, and 146, and see *Lucena* v. *Craufurd* (1802), 3 Bos. & P. 75; 6 R.R. 623:

"Insurance is a contract of indemnity. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction (*per* Lawrence, J., p. 686)."

And see at pp. 721-23.

In the present case, in my opinion, there can be no question that there was sufficient insurable interest in the appellant, and the Company was entitled to effect the insurance which it did,

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and provide for the loss to the extent of $9,000 being payable to the appellant. Therefore any objection in this respect, in my opinion, falls to the ground.

With further reference to the contention that there is estoppel, and which is really the point which was most pressed and upon which the judgment under appeal is sought to be supported, coupled with the finding that there was a valuation, although the valuation has reference only to the then existent policies of insurance, and abandonment of all other insured security, I would refer to *Beattie* v. *Lord Ebury* (1872), 7 Chy. App. 777 at pp. 800, 802. Upon the point that there was representation or conduct binding upon the appellant, that the insurance security was valued, and that there was abandonment of any other security than as valued in the statutory declaration the valuation must speak for itself. It is futile to write letters and put a construction upon same which they do not bear, and then contend that in the absence of any denial for some time that the position as claimed is the legal position. This is idle contention and is not the law. Further, neither the agent nor the solicitor was clothed with any authority to do that which has been held to be the effect of what was done, *i.e.*, that the valuation made was in respect to all the insurance security. The respondent, in assuming or acting upon the valuation as being a valuation of all the insurance security held by the appellant, made a mistake in point of law, and anything that the agent or solicitor for the appellant may have done or said cannot avail against or be effectual to prevent the appellant insisting that no such valuation to the extent claimed ever was made.

Now, at most, all that is contended for in the present case to support the estoppel is the statutory declaration and the letters written by the respondent or his solicitors to the solicitors for the appellant, and no dissent for some time, that the appellant was to have after the valuation made, no position other than a position amongst the general body of creditors. Can any such contention be given effect to? I do not think so. One thing that a solicitor cannot do is "to compromise a claim on behalf of his client before an action has been commenced in respect thereof": *Macaulay* v. *Polley* (1897), 2 Q.B. 122; 66 L.J., Q.B. 665;

Bowstead on Agency, 5th Ed., 100, and the authority of counsel is restricted to compliance with any express instructions (see *Neal* v. *Gordon Lennox* (1902), A.C. 465; 71 L.J., K.B. 939). The evidence does not support any authority from the appellant to abandon its claim; the evidence is all to the contrary; and the insurance security was claimed at meetings of the creditors after the putting in of the statutory declaration. The legal fallacy throughout on the part of the solicitors for the respondent, and given effect to, is the acceptance of what was nothing but a partial valuation, *i.e.*, of securities *in esse*, as being a valuation of all the insurance security.

The facts of the present case establish a special contract, complete in its nature, and executed, whereby the Company placed the insurance, and the insurance companies undertook the risk with the provision that to the extent of $9,000 the lien holder, the appellant, the creditor of the Company, should be entitled out of the moneys payable under the policies (which had it not been for the fire would have issued) to $9,000 (*Lees* v. *Whiteley* (1866), 35 L.J., Ch. 412; *Poole* v. *Adams* (1864), 33 L.J., Ch. 639; *Rayner* v. *Preston* (1881), 50 L.J., Ch. 472). In *Sinnott* v. *Bowden* (1912), 81 L.J., Ch. 832 at p. 835, Parker, J. said:

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"It is, I think, clear that, apart from special contract or the provisions of some statute, a mortgagee has no interest in the moneys payable under a policy of insurance effected by a mortgagor on the mortgaged premises."

For the reasons here stated I am of the opinion that the appeal should succeed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Russell, Mowat, Wismer & McGeer.*
Solicitors for respondent: *Martin Griffin & Co.*

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MEADOW CREEK LUMBER COMPANY v. ADOLPH LUMBER COMPANY.

Contract—Breach of—Regular delivery of lumber—Slow delivery—Cancellation of contract by receiver of lumber—Acquiescence in breach—Estoppel.

The failure of a lumber dealer who had contracted to supply lumber regularly, to ship the amount agreed upon does not justify a purchaser in repudiating the contract (MARTIN and MCPHILLIPS, JJ.A. dissenting).

Statement

APPEAL from the decision of CLEMENT, J. in an action for damages for breach of contract, tried by him at Fernie on the 21st and 22nd of May, 1917. The plaintiff Company and defendant Company entered into an agreement in October, 1915, whereby the plaintiff was to supply 2,000,000 feet of lumber sawed in certain lengths and thickness and load it on cars from its mills for shipment. It was agreed that the plaintiff should start shipping on the 10th of November, 1915, and continue to ship regularly until the 2,000,000 feet were shipped. There were approximately 25,000 feet of lumber to the car-load, and it was understood that about 20,000 per day should be shipped. The plaintiff commenced shipping at the time stipulated from its mill, three miles from Newgate, and delivered to the defendant at Baynes, about 20 miles from Newgate. The plaintiff was, however, slow in making its shipments, and on the 30th of November the defendant wrote the plaintiff cancelling the contract. Up to the 30th of November, six car-loads of lumber had been received by the defendant and three other cars were in transit at the time the plaintiff received the defendant's letter of cancellation on the 2nd of December. The manager of the plaintiff Company then asked the defendant's manager to accept the cars in transit, to which the defendant consented. There was also evidence of the plaintiff's manager then remarking that he could not blame them for breaking the contract. The plaintiff Company claimed damages for breach of the contract in the sum of $4,985.

A. I. Fisher, for plaintiff.
Sherwood Herchmer, for defendant.

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CLEMENT, J.: After a careful perusal of the evidence and a consideration of the argument of counsel, I have come to the conclusion that this action must be dismissed upon the short ground that what took place early in December, 1915, amounts to a cancellation by consent of the contract, for an alleged breach of which this action is brought.

The plaintiff Company was in pronounced default at the date of the letter of cancellation; a default for which no excuse was attempted at the time, although the plaintiff Company knew that regular shipments were essential for the economic operation of the defendant Company's mill. With the parties only a few miles apart, it is difficult to make any excuse for this cavalier treatment of its obligations by the plaintiff Company, just as it is difficult to excuse the action of the defendant Company in peremptorily cancelling the contract without asking any explanation. Mr. Murphy, of the plaintiff Company, within a few days went to the defendant Company's mill. I accept substantially the testimony of Morrow and Griffiths as to what took place. There was absolutely no protest on Murphy's part; on the contrary, he said he could not blame the defendant Company and he asked as a concession that the lumber he had still on the cars at Newgate should be accepted by the defendant Company. The concession was granted, and then, as Murphy suspected, the defendant Company's mill was shut down. Three months or thereabouts afterwards a claim is put forward of breach of contract. I think the matter may be put in either one of two ways: either that what took place was a cancellation by consent or that the plaintiff Company is estopped from denying that the cancellation or repudiation by the defendant Company was justified. I think myself that at the time both parties were contented to drop the contract, and did so by mutual consent. But the other ground I have suggested, *viz.*, estoppel, seems to me to emerge on the facts. The defendant Company's attitude was one of challenge of the plaintiff Company's ability to "ship regularly," which, on the evidence, I take to mean at the average rate of one car a day, and Murphy's was one of

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quick acceptance of the situation, no plea being then put forward of a shortage, merely temporary, to be remedied in the future. Under these circumstances, the defendant Company having changed its position by reason of Murphy's attitude, I think the plaintiff Company now estopped from alleging that it was ready and willing and able to perform the contract.

The action is dismissed with costs.

From this decision the plaintiff appealed. The appeal was argued at Victoria on the 22nd and 23rd of January, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

MEADOW CREEK LUMBER CO. v. ADOLPH LUMBER CO.

Davis, K.C. (*A. I. Fisher,* with him), for appellant: The action is for breach of contract. The plaintiff was to ship 2,000,000 feet and ship regularly. Shipping commenced according to contract on the 9th of November, but got behind, and the defendant on the 27th of November wrote a letter cancelling the contract. Delay is not a ground for cancelling the contract: see *Mersey Steel and Iron Company* v. *Naylor* (1882), 9 Q.B.D. 648. The learned trial judge finds it was not warranted in cancelling the contract on account of delay, but by the action of the parties the contract was dropped by mutual consent. Even if a man says "I am not going to sue you," he can still bring an action. There must be accord and satisfaction.

Argument

S. S. Taylor, K.C., for respondent: The question is, what does "shipping regularly" mean? It was understood 20,000 feet could be shipped per day, and plaintiff was far short of this in its deliveries. The contract had not been complied with: see *Bowes* v. *Shand* (1877), 2 App. Cas. 455; Benjamin on Sales, 5th Ed., pp. 735-6. On the question of the plaintiff assenting to the termination of the contract see *Davis* v. *Bomford* (1860), 6 H. & N. 245. I contend the obligation is extinguished under the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2 (33). When Murphy wanted the defendant to take the extra cars, which was agreed to, that cleared the whole situation: see Fry on Specific Performance, 5th Ed., pp. 502-5; *Hill* v. *Gomme* (1839), 1 Beav. 540 at p. 554.

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Davis, in reply: There must be an agreement to deprive the plaintiff of right of action. It must go to the root of the contract: see *Rhymney Railway* v. *Brecon and Merthyr Tydfil Junction Railway* (1900), 69 L.J., Ch. 813. *Bowes* v. *Shand* (1877), 2 App. Cas. 455 was a case of warranty and does not apply.

Cur. adv. vult.

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MACDONALD, C.J.A.: Appellant's default in deliveries under the contract was not such as to entitle the respondent to treat the contract as at an end. Respondent's cancellation of the contract was a repudiation thereof, which entitled the plaintiff to sue for damages. This case is of the same class as *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208; *Simpson* v. *Crippin* (1872), L.R. 8 Q.B. 14; *Mersey Steel and Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434. It is clearly distinguishable in its facts from *Bowes* v. *Shand* (1877), 2 App. Cas. 455, to which respondent's counsel referred us. The latter was not a case of delivery by instalments, as was the case at bar—a distinction of importance in cases of this sort.

The learned judge does not indeed rest his decision on a finding that the repudiation of the contract by the respondent was in the circumstances justifiable. He founds his judgment on acquiescence in the breach, or on estoppel. The evidence upon which he relies may be shortly stated as follows: Appellant did not protest against the breach. Its manager, Mr. Murphy, made the remark to a member of respondent's staff that he did not blame respondent in the circumstances for cancelling the agreement; that Murphy requested respondent to take, notwithstanding the cancellation, some lumber already loaded on cars; that appellant afterwards endeavoured to dispose of the lumber to others, and suggested that the respondent itself might take the rough lumber later in the year. All this occurred after breach and when appellant had a complete right of action. The request to take the loaded cars, to which respondent consented, has no bearing on either acquiescence or estoppel, nor was it a new agreement in settlement of the breach. It was not put forward as such by Mr. Murphy, but was, as I

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understand the circumstances, intended merely to minimize the loss. The appellant's effort to dispose of the lumber, either to strangers or to respondent, was in accord with its duty to mitigate damages. Failure to protest against a wrong after its committal is no estoppel, and the remark of Mr. Murphy that he did not blame respondent in the circumstances, even if it were beyond doubt referable to respondent's treatment of the appellant and not to respondent's own situation, amounts to nothing. I would refer to *Cook* v. *Cook* (1914), 19 B.C. 311; and particularly to my reference therein to *Stackhouse* v. *Barnston* (1805), 10 Ves. 493.

There is no evidence that respondent altered its position to its prejudice because of appellant's conduct: estoppel is not even pleaded.

MACDONALD, C.J.A.

The question of damages was reserved by the trial judge, and as I think the judgment should be set aside, and the plaintiff's right to damages declared, there should be a new trial for the purpose of assessing them.

MARTIN, J.A.

MARTIN, J.A. agreed with the learned trial judge, and dismissed the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: In my opinion the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. (33), does not apply to this case.

I do not think it can be said, upon the evidence, that there was part performance expressly accepted by the plaintiff in satisfaction, nor was it rendered in pursuance of an agreement for that purpose, following the wording of the section. The acceptance and payment by the defendant for the two or three cars of lumber (loaded on the cars under the contract) after repudiation by the defendant, is not without more sufficient to establish accord and satisfaction. Assuming that Murphy, the plaintiff's manager, and a part owner, did use the words attributed to him (which he denies), that if the lumber was not coming in in such a way as to make the venture pay, he did not blame them for repudiating; that, to my mind, is too indefinite. No use of loose words are sufficient—there must

be something from which a Court can infer an intention to acquiesce in the stand taken by the opposite party.

As to whether cancellation was justified, the cases cited by Mr. *Davis, viz.*: *Mersey Steel and Iron Company* v. *Naylor* (1884), 53 L.J., Q.B. 497 at p. 501 and *Rhymney Railway* v. *Brecon and Merthyr Tydfil Junction Railway* (1900), 69 L.J., Ch. 813, would seem to cover the point as applied to the facts of this case. Here, while it was stipulated that plaintiff should start shipping by the 10th of November, and continue shipping regularly, and it was estimated that the cut of the mill was approximately 20,000 feet per day, and it seems to have been understood, outside the written contract, that the shipments would amount to about 20,000 feet per day, the fact that these shipments fell short of that at first, but were for the last few days before defendant repudiated the contract, equal to that, and taking into consideration that the plaintiff's mill had not been in operation for about two years before the contract, and that delays would likely occur until everything was in smooth running order, it seems to me the action of the defendant in peremptorily and without any inquiry repudiating their contract was not warranted. Nor do I think the breach, if breach there was, on the part of the plaintiff in shipping was one that went to the root of the contract. Nor do I see that there was anything in the conduct of the plaintiff or its manager Murphy that amounts to acquiescence. It is true no demand was made upon the defendant for some three months after they repudiated, and in the meantime Murphy was endeavouring to make a sale elsewhere, but this latter would be quite consistent with an endeavour to mitigate damages.

GALLIHER, J.A.

I am, with respect, impelled to the conclusion that the judgment below should be set aside and judgment entered for plaintiff, with a reference to assess damages.

McPHILLIPS, J.A.: The learned trial judge held, upon the facts, that the appellant was "in pronounced default at the date of the letter of cancellation" of the contract sued upon. The letter of cancellation was that of the respondent. The contract was for the shipment of lumber in its rough state, the respondent

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having a planing mill, at which the lumber would be dressed and treated and placed upon the market in a manufactured state, and the non-receipt of the lumber in accordance with the terms of the contract meant the idleness of the plant and workmen of the respondent, and greatly increased the cost of its production; in fact, it was not a commercial proposition for the respondent to carry on under the circumstances. I do not think it necessary to enter into the details and analyze the evidence adduced, as the appellant, in my opinion, and with deference to the learned counsel for the appellant, has failed to shew that the learned trial judge arrived at a wrong conclusion. In fact, the learned counsel at this bar admitted that his client was in default in shipments under the terms of the contract, but upon the law, contended that the respondent was disentitled to take the course it did. The submission was, on the part of the appellant, that at the time of the cancellation letter there was a cause of action for breach of contract founded upon the repudiation thereof, capable only of being met by a release under seal, that following upon the receipt of the letter the appellant was rightly entitled to do what it did—shut down its mill and in that way mitigate damages as much as possible. Counsel for the appellant further contended upon the evidence that there was no sufficient evidence of cancellation of the contract after breach by mutual consent of the parties thereto. I may say that I wholly agree with the learned judge's findings of facts. The matter for consideration now is, whether the learned judge erred in law in dismissing the action. *Mersey Steel and Iron Company* v. *Naylor* (1882), 9 Q.B.D. 648 (affirmed on appeal by the House of Lords (1884), 9 App. Cas. 434), is greatly relied upon by the appellant. In my opinion that case cannot be said to be decisive upon the facts of the present case. Time is of the essence in mercantile contracts (see *Reuter* v. *Sala* (1879), 4 C.P.D. 239, *per* Cotton, L.J. at p. 249; 48 L.J., C.P. 492; Pollock on Contracts, 8th Ed., 289); and admittedly there was default of shipment such as, under the known circumstances, rendered the position an impossible one for the respondent, and highly inequitable, that the contract should be on its part further complied with,

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and there was the right of rescission. The language of the Earl of Selborne, L.C. in the House of Lords in the *Mersey* case, which completely meets the present case as I view it, is the following at pp. 439-40:

"But quite consistently with this view, it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion?"

In my opinion the facts in the present case fully justify that conclusion, and are succinctly set forth in the learned trial judge's judgment. Lord Blackburn, in the *Mersey* case, said at pp. 443-4:

"The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage* v. *Cole* [(1607)], 1 Wms. Saund. 548, Ed. 1871), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'"

In my opinion, *Hoare* v. *Rennie* (1859), 5 H. & N. 19, which was dissented from by Brett, L.J. but affirmed by Bramwell and Baggallay, L.JJ. in *Honck* v. *Muller* (1881), 7 Q.B.D. 92—and see *Reuter* v. *Sala* (1879), 4 C.P.D. 239; *Brandt* v. *Lawrence* (1876), 1 Q.B.D. 344; Chitty on Contracts, 16th Ed., 777)—is decisive in the present case. This case was also referred to by Lord Bramwell at pp. 446, 447 in the *Mersey* case. Then we have *Norrington* v. *Wright* (1885), 115 U.S. 188, a case very much in point in the Supreme Court of the United States. This case is referred to in Chitty on Contracts at p. 778, and we find it stated that:

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"In *Norrington* v. *Wright*, the contract was for the sale of 5,000 tons of iron rails for shipment at the rate of about 1,000 tons per month beginning February, 1880, but whole contract to be shipped before August 1st, 1880. The Court held that, the sellers were bound to ship 1,000 tons in each month from February to June inclusive, except that slight deficiencies might be made up in July; and that where only 400 tons were shipped in February, and 885 tons in March, and the buyers accepted and paid for the February shipment on its arrival in March in ignorance that no more had been shipped in February, and were first informed of that fact after the arrival of the March shipments, and before accepting or paying for

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either of them, the buyers might rescind the contract for the non-shipment of about 1,000 tons in February and March."

In Pollock on Contract, 8th Ed., 285, reference is made to *Norrington* v. *Wright*. The reference is:

"The Court [referring to the Supreme Court of the United States in *Norrington* v. *Wright*] went on to review the English cases, which did not in their opinion establish any rule inconsistent with the decision arrived at in the case at bar. All will agree with them that 'a diversity in the law as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated' (115 U.S. at p. 206). And although the decision is not authoritative in this country, we may expect that an opinion of such weight, and so carefully and critically expressed, will receive full consideration whenever the point is again before the Court of Appeal or the House of Lords. It is a notable addition of force to the modern tendency to eschew stiff and artificial canons of construction, and to hold parties who have made deliberate promises to the full and plain meaning of their terms."

It is clear that upon the facts of the present case and bearing in mind the excerpts from the judgments in the *Mersey* case, that there is no decision which is authoritative or binding upon this Court which prevents it being held, in the language of the Earl of Selborne, L.C. (*Mersey* case at p. 440) "that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract." In the present case we have the language of the learned trial judge: "I think myself that at the time both parties were contented to drop the contract, and did so by mutual consent." Further, in my opinion, the respondent was rightly entitled to exercise the option which he did "to relieve himself from a future performance of the contract."

MCPHILLIPS, J.A.

For the foregoing reasons I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. allowed the appeal.

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

Solicitors for appellant: *Lawe & Fisher.*

Solicitors for respondent: *Herchmer & Martin.*

HUDSON BAY INSURANCE COMPANY v. CREELMAN AND BERG.

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HUDSON BAY INSURANCE CO. v. CREELMAN

Company law—Real property—Right to acquire—Limited to their own business purposes—Land as purchased—Subsequently sold—Right of company to enforce sale—Can. Stats. 1910, Cap. 110, Sec. 14.

Property legally and by formal transfer or conveyance transferred to a corporation in law duly vests in the corporation, even though the corporation was not empowered to acquire such property. Where, therefore, a company acting beyond its powers obtains an indefeasible title to certain land and then enters into an agreement to sell it, such agreement may be enforced against a purchaser who had knowledge of the state of the company's title.

APPEAL from the decision of MORRISON, J., of the 12th of July, 1917, dismissing the plaintiff Company's action to recover certain payments upon the covenants in an agreement for sale of lands. The defendant Creelman was managing director and the defendant Berg a director in the plaintiff Company. The Company, desiring to sell stock, negotiated with one Charles W. Elderkin, who owned certain property on Seaton Street in the City of Vancouver, and an arrangement was arrived at whereby Elderkin was to buy 170 shares of the Company's stock, in consideration for which he was to transfer the Seaton Street property to the Company and the defendants Creelman and Berg, under an agreement for sale with the Company, were to purchase the property for $35,000, payable in instalments. The arrangement was carried through, and the defendants, after paying certain instalments, amounting to $9,025, were in default and made no further payments. The plaintiff sued for the balance of the purchase price, and the defendants counterclaimed for a refund of the payments they had made on the ground that the plaintiff Company under its charter had no power or authority to hold real estate other than what was required for its business, and the land in question was some distance from the Company's offices, and was not used for any business purpose whatsoever; that any dealing with

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the land in question by the Company was *ultra vires* of the Company and therefore null and void. It was held by the learned trial judge that the Company had no power to purchase the property in question, and that the action should therefore be dismissed. The plaintiff appealed.

The appeal was argued at Vancouver on the 17th of January, 1918, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C., for appellant: Notwithstanding the provisions of section 14 of the private Act, there are circumstances under which the Company can hold property. Sections 123 and 139 of the Companies Act (R.S.C. 1906, Cap. 79) gives powers as to purchase of property, and what they did is a use of the property for the purpose of the Company: see *M'Diarmid* v. *Hughes* (1888), 16 Ont. 570 at p. 578. Secondly, this is a matter no one can take advantage of but the Crown. The defendants cannot raise it: see Halsbury's Laws of England, Vol. 1, p. 306, par. 675; *Fritts* v. *Palmer* (1889), 132 U.S. 282. Thirdly, we have an indefeasible title under the Land Registry Act (R.S.B.C. 1911, Cap. 127, Sec. 22), as amended by B.C. Stats. 1913, Cap. 36, Sec. 8: see *Rogerson & Moss* v. *Cosh* (1917), 24 B.C. 367. The only right they have is to ask for a transfer; this we can give them. As to counterclaim, the payments were made voluntarily. If there was a mistake, it was a mistake in law. They have been in possession for years: see *Sinclair* v. *Brougham* (1914), A.C. 398 at p. 451; *R. Leslie, Lim.* v. *Shiell* (1914), 83 L.J., K.B. 1145.

Argument

S. S. Taylor, K.C., for respondents: The lot in question is several blocks from the Company's office and has no buildings on it. The Company could take security for a debt in real estate, but this transaction is different and the *M'Diarmid* case does not apply. They have no powers except what their Act gives them: see *Bonanza Creek Gold Mining Company, Limited* v. *The King* (1916), 1 A.C. 566 at pp. 578 and 584; *Great North-West Central Railway* v. *Charlebois* (1899), A.C. 114 at pp. 123-4; *Pacific Coast Coal Mines, Limited* v. *Arbuthnot* (1917), A.C. 607 at pp. 615 to 618; *Bank of Toronto* v. *Perkins*

(1882), 8 S.C.R. 603 at pp. 609-10. On the question of *ultra vires* the American cases should not be cited as they cannot be applied to Canada. The cases of *Cherry and M'Dougall* v. *The Colonial Bank of Australasia* (1869), L.R. 3 P.C. 24 and *Ayers* v. *The South Australian Banking Co.* (1871), *ib.* 548 are discussed by Sir Henry Strong and distinguished in *Bank of Toronto* v. *Perkins, supra.* On the question of estoppel, estoppel does not apply when *ultra vires* intervenes: see *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (1887), 18 Q.B.D. 714; *Bishop* v. *Balkis Consolidated Company* (1890), 25 Q.B.D. 77 at p. 84; *Balkis Consolidated Company* v. *Tomkinson* (1893), A.C. 396 at pp. 407 and 415. As to recovering back what the defendants have paid see *Re Phœnix Life Assurance Company* (1862), 31 L.J., Ch. 749 at p. 752; *Flood* v. *Irish Provident Assurance Company, Limited* (1912), 2 Ch. 597 at pp. 600 and 602. The Provincial Acts cannot put a title in a company that the Dominion Act says they cannot hold. The Land Registry Act has no application.

Argument

Davis, in reply: We have a case that no alien can hold land by statute, but if he gets it he can hold it and give a good title. We got the land in question, and we can give a good title.

Cur. adv. vult.

2nd April, 1918.

MACDONALD, C.J.A.: The appellant was incorporated by Act of the Dominion Parliament, by which it was given power to acquire and hold land "for the purpose, use or occupation of the Company but not to exceed in British Columbia an annual value of $10,000." Notwithstanding this limitation of its powers, the Company entered a transaction by which it acquired a parcel of land, which, I think, on the face of the transaction, was not required by the Company for the purposes aforesaid, in exchange for shares in its capital. The land was formally conveyed to the Company, and it in due course obtained from the registrar of titles a certificate of indefeasible title. Contemporaneously with this transaction, and I think as an integral part of it, the Company entered into an agreement with its managing director and another director, the defendants

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in this action, to sell the same land to them for a price which would equal the value of the shares given in exchange for the land. The purchase-money was made payable by instalments, and several of the instalments together with interest were paid by the defendants from time to time. Eventually they made default, and this action was brought to recover arrears. The defendants resisted on the ground that the transaction was *ultra vires* of the Company, and they counterclaimed to recover back the moneys which they had already paid, amounting to upwards of $9,000. Judgment was given at the trial in their favour on both these issues, and from that judgment the plaintiff appeals.

In my opinion the acquisition of this land by the appellant was *ultra vires*. What then are the rights of the parties so far as this litigation is concerned? The land has been conveyed to the Company by a proper and formal conveyance, and the effect of that is to vest the property in the Company. In Bryce on Ultra Vires, 3rd Ed., 84, this proposition is stated:

"Property legally and by formal transfer or conveyance transferred to a corporation in law duly vests in such corporation, even though the corporation was not empowered to acquire such property."

This is founded, *inter alia,* on the language of the Privy Council in *Ayers* v. *The South Australian Banking Co.* (1871), L.R. 3 P.C. 548, where it was said:

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"But the only point which it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause [prohibiting the transaction] may have, it does not prevent property passing, either in goods or lands, under a conveyance or instrument which, under the ordinary circumstances of law, would pass it."

The property then being vested in the Company, what is it to do with it? It is unlawful to hold it. It must get rid of it, or at all events it is right that it should, and the question is whether or not it can enter into a valid agreement to sell it. Whatever might be said against enforcing the contract of sale against a purchaser entitled to a good title, when the circumstances of this case are considered, I think nothing can be said against enforcing the agreement against the defendants. As I read the evidence, they, or at least the defendant Berg, engineered the whole transaction. The agreement for sale from the plaintiff to the defendants is dated the 30th of December, 1911, and

the minutes of the directors shew that the Company agreed to take the property from Elderkin, the vendor to the Company, in exchange for shares on the 12th of January, 1912, that is to say, these defendants agreed to buy the property before it was acquired by the Company. Now, they are presumed to know the law, and knowing the law, if they choose to enter into an agreement to buy property, the plaintiff's title to which they were cognizant of, I think they are bound to take such title as the plaintiff can give them, and leaving the question of estoppel out of consideration altogether, are not entitled to object to the title which they agreed to buy. Assuming that the exchange made between Elderkin and the plaintiff can be set aside by the shareholders on the ground that it was *ultra vires* of the Company to enter into it, still such action is only a contingency affecting the title. The plaintiff's title is analogous to a fee simple subject to be divested by the happening of some uncertain event, and if a purchaser with full knowledge of such a title, choose to agree to take it, he cannot insist upon something better.

MACDONALD, C.J.A.

It was argued by Mr. *Davis,* counsel for the plaintiff, that no one but the Crown could object to the breach by the Company of the provisions of its Act of incorporation. While I doubt that proposition, I do not find it necessary to decide the question. I prefer to found my judgment on the reasons I have above stated. I would, therefore, set aside the judgment appealed from, and direct that judgment should be entered for the plaintiff, which if the sum is not agreed upon, may be settled by a reference to the registrar.

GALLIHER, J.A.: I would allow the appeal for the reasons given by the Chief Justice.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The appeal is one from the judgment of Mr. Justice MORRISON, in which he dismissed the action with costs. The action was brought upon an agreement for sale of land, the amount claimed being the balance due, *viz.,* $17,694.38, together with interest thereon, and that in default of payment the agreement be declared to be cancelled and void and all moneys payable thereunder be forfeited, foreclosure, and possession of the lands.

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The plaintiff, the appellant, is an incorporated Company, being incorporated by private Act of the Parliament of Canada (Cap. 110, 9-10 Edw. VII.). The lands agreed to be sold to the defendants, the respondents, are situate in the City of Vancouver, B.C. The respondents in their defence plead that the appellant had no right, power or authority to hold or sell the lands or give any agreement for the sale thereof, and the agreement for sale entered into between the appellant and the respondents was illegal, null and void, and claimed the return of the purchase-moneys already paid in pursuance of the terms of the agreement for sale. The learned trial judge not only dismissed the action but gave judgment for the return of the purchase-moneys paid in respect of the agreement for sale, that is, allowed the counterclaim of the defendants.

The learned trial judge, in his reasons for judgment, said: "From the evidence I find that the property in question was not required for the purpose, use or occupation of the new Company [the appellant] and that the Company had no power to purchase it." It is to be noted that the statute and the section thereof upon which the respondents relied, as shewing the illegality in the holding of the lands or that it was an *ultra vires* holding, was not specifically pleaded. The section as contained in the private Act of incorporation upon which the learned judge proceeded, and as quoted by him in his reasons for judgment, reads as follows:

MCPHILLIPS, J.A.

"14. The new Company may acquire, hold, convey, mortgage, lease or otherwise dispose of any real property required in part or wholly for the purposes, use or occupation of the new Company, but the annual value of such property held in any Province of Canada shall not exceed five thousand dollars, except in the Province of British Columbia where it shall not exceed ten thousand dollars."

It will be seen that there is really no prohibition against the holding or the disposing of lands, unless it could be said to be inferential prohibition—the provision is one of a restrictive nature.

Evidence was led to shew that the lands in question in the action were purchased by the appellant from one Elderkin, and the managing director, one of the respondents (Berg), was an active party in bringing about the purchase, and represented to the appellant, the Company, that the lands could be immediately

after the acquirement thereof sold for at least the purchase price, the object of the transaction being that in the result Elderkin would become a shareholder to the extent of 170 shares at $130 a share for shares of $100 each fully paid, and this was carried out, the purchase price of the lands paying for the shares. It was not part of the necessary proof of the appellant in the action to in any way go into the prior transaction. It is a matter for further remark that the other respondent in the appeal—Creelman—was a director of the Company and seconded the resolution to carry out the transaction of purchase of the lands. It is now said, and it was submitted as well at the trial, that the transaction was illegal, void and *ultra vires* of the Company, and that contention was given effect to by the learned trial judge, that is, he held "that the property in question was not required for the purpose, use or occupation of the new Company and that the Company had no power to purchase it." With great respect to the learned judge, all that was before him was whether the agreement for sale could be enforced. The purchase was an executed contract and Elderkin, the vendor to the Company, is not a party to this action. The matter for consideration, it seems to me, upon this appeal, is solely whether the agreement for sale is an enforceable contract. Admittedly the appellant is vested with an indefeasible title in the lands, even as against the Crown. Section 8 of the Land Registry Act Amendment Act, 1913, amending section 22 of Cap. 127, R.S.B.C. 1911, reads as follows:

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"22. (1) Every certificate of indefeasible title issued under this Act shall, so long as same remains in force and uncancelled, be conclusive evidence at law and in equity, as against His Majesty and all persons whomsoever, that the person named in such certificate is seized of an estate in fee-simple in the land therein described against the whole world, subject to . . . . ."

And no action is maintainable for the recovery of any land for which a certificate of indefeasible title has issued, save as provided in section 25A as enacted in section 14 of the Land Registry Act Amendment Act, 1914, Cap. 43, which reads as follows:

"25A. No action of ejectment or other action for the recovery of any land for which a certificate of indefeasible title has issued shall lie or be

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sustained against the registered owner for the estate or interest in respect to which he is so registered, except in the following cases, namely:—

"(*a.*) The case of a mortgagee or encumbrancee as against a mortgagor or encumbrancer in default:

"(*b.*) The case of a lessor as against a lessee in default:

"(*c.*) The case of a person deprived of any land by fraud as against the person registered as owner through fraud in which such owner has participated to any degree, or as against a person deriving his right or title otherwise than *bona fide* for value from or through a person so registered through fraud:

"(*d.*) The case of a person deprived of any land improperly included in any certificate of title of other land by wrong description of boundaries or parcels:

"(*e.*) The case of a registered owner claiming under an instrument of title prior in date of registration under the provisions of this Act, or in any case in which two or more certificates of title may be issued under the provisions of this Act in respect to the same land:

"(*f.*) For rights arising or partly arising after the date of the application for registration of the title under which the registered owner claims:

"(*g.*) For rights arising under any of the clauses of section 22 of this Act."

It will be therefore seen that, so far as conveying a good title to the respondents, the appellant is capable of doing this even as against the Crown. In this connection the case of *M'Diarmid* v. *Hughes* (1888), 16 Ont. 570, is much in point. It was there held:

"A conveyance of lands to a corporation not empowered by statute to hold lands is voidable only and not void under the statutes of mortmain, and the lands can be forfeited by the Crown only. Where, too, a corporation is empowered by statute to hold lands for a definite period, without any provision as to reverter, and holds beyond that period, only the Crown can take advantage of it, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute."

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In any case, if it be that the appellant rightly acquired the lands, no question can arise, and as to this I am of the opinion that the evidence does not support the contention made that the agreement for the sale of the lands is in its nature an illegal contract or *ultra vires* of the appellant. The words of the statute already quoted, in part, read as follows:

"May acquire, hold, convey, mortgage, lease or otherwise dispose of any real property required in part or wholly for the purposes, use or occupation of the new company."

It will be observed that the word "purpose" is severable from "use or occupation." Now, it may well be argued that the acquirement of the lands was in the way of carrying out the

purposes of the Company, *i.e.*, to sell shares and thereby obtain further capital to carry out the undertaking in the way of the "purposes" of the Company, although, I admit, that there is room for considerable argument to the contrary. Yet, the language of the Legislature is not to be read in too confining a manner, but should be read in a workable manner. It is a subject for comment that even the Legislature admits of land being acquired, which shall not be "wholly for the purposes" of the Company. With some considerable hesitation I admit, I take the view that it cannot be said that the appellant in executing the agreement for sale, executed a contract illegal in its nature or *ultra vires* of its powers, and that it is a contract which is capable of enforcement. The facts, in my opinion, fall short of shewing that the lands agreed to be sold are not lands completely vested in the appellant, with the right of sale thereof.

In *Houston* v. *Burns* (1918), 34 T.L.R. 219, the House of Lords had for consideration a will which had these words, "public, benevolent or charitable," and stress was laid on the punctuation. Here we have the same punctuation. There is a comma after the word "purposes," and at p. 220 the Lord Chancellor is reported as follows:

"The Lord Chancellor then referred to the authorities as to the effect to be given to punctuation in a will. These authorities, he said, were not quite uniform, but he thought that for this purpose the punctuation of the original will might be looked at, and reading this clause as punctuated the words 'public, benevolent or charitable' were clearly to be read disjunctively."

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The contract sued upon is not in its nature illegal, nor is it declared by statute to be void, and it is a contract dealing with land vested in the Company. Can it be that the situation is that of an *impasse*—and inhibition exists against the sale thereof? I do not consider that I am constrained by statute or other law to so decide. Further, the defence here is a most remarkable one, the respondents being, at the time of the transactions under review, directors of the Company (one of them being the managing director), and the active and moving parties throughout, now contend that all that was done in the way of the acquirement of the lands and the agreement for sale thereof to themselves were transactions in their nature

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illegal or *ultra vires,* and liability is resisted upon this ground. Here all that was contracted for by the respondents is capable of being conveyed, and, in my opinion, there is no prohibition against the appellant from selling the lands in question. Upon this point I would refer to the language of Jessel, M.R. in *Yorkshire Railway Waggon Company v. Maclure* (1882), 51 L.J., Ch. 857 at p. 859.

In *Montreal and St. Lawrence Light and Power Co.* v. *Roberts* (1906), 75 L.J., P.C. 33, Lord Macnaghten, at p. 34, said:

> "The company acting *bona fide* must be the sole judge of what is required for the purpose of its business. It appears, therefore, to their Lordships that the transaction in itself was not *ultra vires,* and consequently the first question must be answered in the affirmative."

There can be no question that if it were established that upon the true construction of the statute incorporating the appellant the particular contract challenged in the present action is prohibited expressly or impliedly, then it is the duty of this Court to hold that the contract is illegal and void, and the judgment of the learned trial judge would be right, even to the extent of directing the repayment of the money paid (*Baroness Wenlock* v. *River Dee Company* (1885), 10 App. Cas. 354, 362; *Attorney-General* v. *Great Eastern Railway Co.* (1880), 5 App. Cas. 473 at p. 486; *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409, 433; *British South Africa Company* v. *De Beers Consolidated Mines, Limited* (1910), 1 Ch. 354 at p. 374, affirmed in (1910), 2 Ch. 502; *Sinclair* v. *Brougham* (1914), A.C. 398 at pp. 440, 451; *Bonanza Creek Gold Mining Company, Limited* v. *The King* (1916), 1 A.C. 566 at pp. 577-8; and *Attorney-General for Ontario* v. *Attorney-General for Canada* (1916), 1 A.C. 598; 85 L.J., P.C. 127; 114 L.T. 774). This appeal would be easy of determination were it possible to rely on *Ayers* v. *The South Australian Banking Co.* (1871), 40 L.J., P.C. 22, but the difficulty in placing complete reliance thereon arises from the fact that what was there being considered was the charter of the bank (*British South African Company* v. *De Beers Consolidated Mines, Limited, supra,* was also the case of a charter), but in the present case it is one of possible statutory restriction (see *Bonanza Creek Gold Mining*

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Company, Limited v. *The King, supra,* at pp. 583, 584). Could the *Ayers* case be relied upon to support the present case, the language of Lord Justice Mellish, at p. 27, would be very much in point.

The onus, however, was upon the respondents of demonstrating that the contract is void, *i.e.,* is in excess of the Company's powers (*Hire Purchase Furnishing Company* v. *Richens* (1887), 20 Q.B.D. 387, and *per* Erle, J. in *Mayor of Norwich* v. *Norfolk Railway* (1855), 4 El. & Bl. 397, 413), and not on the Company, which is relying on it to on its part shew that the corporation was authorized to enter into it, and in view of all the surrounding circumstances, the defence is so unconscionable that I cannot persuade myself that the case is so clear that effect must be given to the defence, as unquestionably it would appear to me to be beyond all controversy that the respondents can be conveyed an absolutely indefeasible title to the lands which they have contracted to purchase. The onus which was upon the respondents, in my opinion, has not been effectually discharged, and were I wrong in this, the further question might arise whether the respondents would be rightly entitled upon the special facts of this case to recover upon their counterclaim the purchase-moneys already paid. Smith on Equity, 5th Ed., at p. 800, states a well-known maxim:

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"'He who comes into equity must come with clean hands'; and as a rule no relief will be given to one who has been guilty of any unconscientious dealing respecting the subject-matter of the suit."

I would, with great hesitation though, allow the appeal.

EBERTS, J.A. agreed in allowing the appeal.

EBERTS, J.A.

Appeal allowed.

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

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

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ROYAL BANK OF CANADA v. SKENE AND CHRISTIE.

Judgment—Action on contract—Accounts agreed to on basis of judgment—Consent judgment—Appeal—Jurisdiction.

ROYAL BANK OF CANADA v. SKENE

The judgment in an action on a contract for work done and material supplied allowed two certain items as extras, the amount to be determined by a reference. The parties then agreed as to the amount of the items. The formal judgment, on being drawn, was assented to by the defendant, and recited: "The parties hereto having settled the entire accounts between them on the basis of this judgment, and after making all proper deductions and allowances on both sides, and it appearing from such accounts that the defendants are indebted to the plaintiff in the sum of," etc. The defendants appealed from the judgment and the plaintiff took the preliminary objection that there was no jurisdiction to hear the appeal by reason of the form in which the judgment was entered.

Held (MACDONALD, C.J.A. dissenting), that as the judgment states that the parties have settled the entire accounts after making proper deductions and allowances, the result of which a certain amount is owing, the judgment is *extra cursum curiæ*, and there is no appeal.

APPEAL from the decision of MACDONALD, J. of the 9th of November, 1917, in an action for work done and material supplied pursuant to a written contract between the National Iron Works and the defendants for supplying and installing skylights, louvres, roofs and flashings on the Hotel Vancouver, and for extras, said contract and claim for extras having been assigned in writing by the National Iron Works to the plaintiff. Of the extras claimed by the plaintiff, two items were allowed by the trial judge, and a reference was ordered to fix the amounts. The parties, however, came together and agreed on the sums that should be allowed on these items. The judgment was drawn by the plaintiff and consented to by defendants' solicitors. The judgment recited:

Statement

"The parties hereto having settled the entire accounts between them on the basis of this judgment, and after making all proper deductions and allowances on both sides and it appearing from such accounts that the defendants are indebted to the plaintiff in the sum of," etc.

The defendants appealed from the judgment, and on the

hearing the plaintiff raised the preliminary objection of want of jurisdiction, as the judgment appealed from was a consent judgment.

The appeal was argued at Vancouver on the 5th of April, 1918, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

McMullen, for appellants.

Sir C. H. Tupper, K.C., for respondent, raised the preliminary objection that there was no jurisdiction to entertain the appeal, as the judgment from which the appeal was taken was settled *extra cursum curiæ*. Certain extra items were allowed by the trial judge and the parties agreed to a lump sum, thereby avoiding a reference. The parties agreed to the judgment, which recited that "it appearing from said accounts that the defendant is indebted to the plaintiff in the sum of," etc. He is bound by the wording of the judgment to which he has assented.

Argument

McMullen, contra: It was understood between the solicitors that assent was given as to the amount of the items allowed by the learned judge as extras, provided he was right in allowing such items. There was assent to the amount, but never to the liability, and this is apparent from the judgment, as the language does not deal with the liability at all.

MACDONALD, C.J.A.: I would overrule the objection that has been taken by *Sir Charles Tupper*. Reading the judgment as it stands, the formal judgment, I can quite understand the position taken by Mr. *McMullen*. There was a contest as to whether certain items were included in the contract, or were extras. That contest was had before the learned trial judge, who decided that certain items were extras and not within the contract The question then arose as to whether those items were right in amounts. In the ordinary course the judge would have either decided the amounts or have referred it to the registrar to do so. It was suggested, however, that the parties themselves might agree upon the amounts. It was a question of measurement. The parties did come together and they had measurements taken and agreed upon the amounts, and the

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judgment was drawn up accordingly and it recited the settlement of "the entire accounts between them on the basis of this judgment," that is to say, assuming that the judgment was correct on the question of liability, the parties met, and arrived at the amounts on that basis. The language of the judgment, so far as it affects the point in question is: "The parties hereto having settled the entire accounts between them on the basis of this judgment, and after making all proper deductions and allowances on both sides, and it appearing from such accounts that the defendants are indebted to the plaintiff in the sum of," etc., that is to say, on the assumption that the judgment is correct so far as it decided the liability. Now I see nothing inconsistent in that with the right to appeal from the finding of liability, which was in dispute, and therefore I think that the preliminary objection ought to be overruled.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion we have to do what Lord Watson said we ought to do in the case to which my brother MCPHILLIPS has referred (*Hatton* v. *Harris* (1892), A.C. 560), and that this judgment should stand. The moment you interpolate anything into it and put all sorts of recitals and speculations on the circumstances of what should be done, and of how the parties should have considered the matter, you simply get into a bog and quagmire. We have the language perfectly plain and clear. It states that the parties have settled it, and not only that, but after making proper deductions and allowances, and it recites that as the result of that settlement there is an indebtedness. That is the definition and determination of liability as so much. As far as I am concerned, that is an end to the matter. Lord Watson says, in such circumstances, if you are not satisfied with the record, you ought to have gone to the judge below, and got him to settle, or put in some of these things which you most unfortunately left out.

MARTIN, J.A.

MCPHILLIPS, J.A.: I am in agreement with what my brother MARTIN has said. It would seem to me that the judgment as entered in apt language sets forth that the parties have by agreement amongst themselves settled the accounts, and there

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would be no appeal maintainable. I cannot read the judgment in any other way. How can this Court read it in any other way? It is unfortunate if the judgment as entered is not in conformity with the judgment as pronounced; but if the judgment as entered is not in conformity with the judgment as pronounced, there is a way out of that, and as Lord Watson stated, in the case referred to by my brother MARTIN, and which I previously referred to, it was not for the Court of Appeal on the rehearing to go into that question; that must be the subject-matter of a motion in the Court below: see Annual Practice, 1918, at pp. 467-8, Lord Watson in *Hatton* v. *Harris* (1892), A.C. 560; *Stewart* v. *Rhodes* (1900), 1 Ch. 386 at p. 394; and *The King (Jackson)* v. *Cork County Council* (1911), 2 I.R. 206; also see *Preston Banking Company* v. *William Allsup & Sons* (1895), 1 Ch. 141; Farwell, L.J. in *In re Calgary and Medicine Hat Land Company, Limited* (1908), 2 Ch. 663; and A. L. Smith, L.J. in the *Preston* case, *supra,* at p. 144.

Appeal quashed, Macdonald, C.J.A. dissenting.

Solicitor for appellants: *J. E. McMullen.*
Solicitors for respondent: *Tupper & Bull.*

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NORTH PACIFIC LUMBER CO. v. SAYWARD

NORTH PACIFIC LUMBER COMPANY, LIMITED v. SAYWARD.

Timber lease—Pre-emptor's Crown grants issued subsequently—Surrender of timber lease under renewal issued—Renewal subsequent to pre-emptor's Crown grant—Renewal lease subject to Crown grants—C.S.B.C. 1888, Cap. 66, Secs. 14, 15 and 54; B.C. Stats. 1901, Cap. 30, Sec. 7.

The plaintiff's predecessors in title obtained a 30-year timber lease in 1888. Under the provisions of section 7 of the Land Act Amendment Act, 1901, this lease was surrendered and a renewal thereof issued in 1902. The defendant's predecessors in title recorded pre-emptions of a portion of the same lands in 1891 and 1892, for which Crown grants were issued in 1893 and 1894. An action for a declaration that the Crown grants held by the defendant were void was dismissed.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C. (MCPHILLIPS, J.A. dissenting), that the surrender of the old lease and taking the renewal thereof under the Act operated as a matter of law to destroy the priority which the first lease gave, and the timber thereby became the property of the defendant.

With regard to the plaintiff's attack upon the Crown grants by reason of irregularities in relation to the pre-emption records which were the root of title:—

Held, that in an ordinary suit between subject and subject irregularities alleged to have occurred leading up to documents of title, such as Crown grants, cannot be set up unless the Crown be made a party. This particularly applies where the defendant is a purchaser for value without notice of such irregularities.

Statement

APPEAL by plaintiff from the decision of HUNTER, C.J.B.C. of the 26th of June, 1917 (24 B.C. 273), dismissing an action for the cancellation of Crown grants designated as lots 151 and 163, held by the defendant, and for a declaration that they are subject to the rights of the plaintiff under timber lease No. 51, Sayward District, or the renewal thereof. The plaintiff's predecessors in title obtained from the Crown timber lease No. 51 in the year 1888, which was for 30 years. In pursuance of the Land Act Amendment Act, 1901, which provided for the surrender of such leases at the option of the lessee and the renewal thereof for the unexpired period, and for consecutive and successive periods of 21 years, the plaintiff, in 1902,

obtained a new lease, which provided that for the unexpired portion of the term of the old lease the plaintiff held under the same conditions as in the old lease and as to the balance of the 21 years for which the lease was renewed, it was subject to such terms, etc., as might be in force by statute at the time the surrendered lease would expire. It also excepted and reserved thereout all existing private and public rights. In 1891 and 1892 the predecessors in title of the defendant obtained pre-emption records under the Land Act of a small part of the land covered by the lease, and in 1893 and 1894 Crown grants were made in respect to the pre-emptions. The lease contained 23,600 acres, but the Crown grants only included 631 acres.

Statement

The appeal was argued at Vancouver on the 13th and 14th of November, 1917, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Wilson, K.C., for appellant: Upon the question of our right to maintain the action without making the Crown a party see *Alcock* v. *Cooke* (1829), 5 Bing. 340; *Gledstanes* v. *The Earl of Sandwich* (1842), 4 Man. & G. 995; *Vigers* v. *Dean of St. Paul's* (1849), 14 Q.B. 909; *Great Eastern Railway Co.* v. *Goldsmid* (1884), 9 App. Cas. 927; *City of Vancouver* v. *Vancouver Lumber Company* (1911), A.C. 711 at p. 721; *Boulton* v. *Jeffrey* (1845), 1 E. & A. 111; *Brohm* v. *B. C. Mills* (1907), 13 B.C. 123; *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412; *North Pacific Lumber Co.* v. *British American Trust Co.* (1915), 23 B.C. 332. The defendant's predecessors in title had not complied with the statutory conditions prior to the issue of the grant. The ground contained more than 5,000 feet of timber to the acre, and they had not remained on the ground after pre-emption as required by the amendment to section 14 of the Land Act of 1888: see *Assets Company, Limited* v. *Mere Roihi* (1905), A.C. 176; *Tooth* v. *Power* (1891), A.C. 284 at p. 287; *Esquimalt and Nanaimo Railway Co.* v. *Hoggan* (1908), 14 B.C. 49; *Minister for Lands* v. *Coote* (1915), A.C. 583; *Cumming* v. *Forrester* (1820), 2 J. & W. 334; 22 R.R. 157; *Rustomjee* v. *The Queen* (1876), 1 Q.B.D. 487; *Ramsay* v. *Margrett* (1894), 2 Q.B. 18; *Victor* v. *Butler* (1901), 8 B.C. 100;

Argument

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The Queen v. *Hughes* (1865), L.R. 1 P.C. 81; *Farah* v. *Glen Lake Mining Co.* (1907), 17 O.L.R. 1; *Zock* v. *Clayton* (1913), 28 O.L.R. 447; *The King* v. *Powell* (1910), 13 Ex. C.R. 300. We retain our right of priority notwithstanding our surrender of the old lease on obtaining the new one: see Halsbury's Laws of England, Vol. 13, p. 375, par. 532; Vol. 24, p. 292, par. 526; *Blackwood* v. *London Chartered Bank of Australia* (1874), L.R. 5 P.C. 92 at p. 112; *Ontario Mining Company* v. *Seybold* (1903), A.C. 73 at p. 79.

Argument

Maclean, K.C., for respondent: Sayward did not buy for speculation purposes. He bought because he expected Duncan Bay to be developed. He did not figure on the timber at all. The plaintiff abandoned attack on title in the Court below. The plaintiff's lease is not a demise of land but only a licence to enter and take the timber. The power to pre-empt is given by statute. There is no limitation: see C.S.B.C. 1888, Cap. 66, Sec. 5. The renewal is given under B.C. Stats. 1901, Cap. 30, Sec. 7. Under the Act the renewal lease does not oust the defendant's prior title. There must be express statutory provision to do so: see *In re Cuno. Mansfield* v. *Mansfield* (1889), 43 Ch. D. 12 at p. 17; *Lyon* v. *Reed* (1844), 13 M. & W. 284. As to the necessity of having the Attorney-General as a party see *Farmer* v. *Livingstone* (1883), 8 S.C.R. 140. Irregularities alleged to have occurred leading up to the obtaining of the Crown grant cannot be set up: see *Stringer* v. *Young* (1830), 3 Pet. 320 at p. 342; *Field* v. *Seabury et al.* (1856), 19 How. 323 at p. 331. Sayward purchased for value without notice: see *Pilcher* v. *Rawlins* (1872), 7 Chy. App. 259 at p. 273; *United States* v. *California &c. Land Co.* (1893), 148 U.S. 31 at p. 41.

Wilson, in reply.

Cur. adv. vult.

2nd April, 1918.

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MACDONALD, C.J.A.: I do not find it necessary to decide whether the attack on respondent's grants could be entertained in the absence of the Attorney-General as a party. Assuming that he were present, there is no satisfactory evidence to sup-

port the attack. Evidence that these tracts of land today contain timber in excess of 10,000 feet to the acre is no proof that twenty years ago they were timbered in excess of that amount. The accretion by natural growth of the young trees in that period of time must have been very considerable, and may well account for the discrepancy (if any) between the quantity then declared and that now sworn to. The respondent has the trial judge's finding in his favour on that branch of the case, and I can see no reason for disturbing it.

Then as to the effect of the amendment to the Land Act made by the statutes of 1901, Cap. 30, Sec. 7. I agree with the reasons of the learned Chief Justice of British Columbia, who tried the action. The question is one of construction. By his Crown grant, respondent, on the expiration of appellant's original lease on the 3rd of February, 1918, would become the owner of the fee, subject to certain reservations contained in the grant, which have no bearing on the question at issue between these parties. Appellant's claim is tantamount to this: that the said statute gave it rights in derogation of respondent's rights; that the statute enlarged them so as to extend the term of its lease at the expense of the respondent. If this be the true interpretation of the statute, it amounts to confiscation. Now there is no canon of construction better established than this: that a statute shall not be construed so as to take away a vested right unless the intention to do so is clearly expressed, or must necessarily be implied. In my opinion, it would be a plain violation of that principle to construe the statute in question otherwise than as it has been construed in the Court below.

MACDONALD, C.J.A.

It has been suggested that as the statute speaks of the surrender to the Crown of the old lease before extension will be granted, this shews an intention to ignore the rights of others such as the respondent; because it is argued that there can be no surrender of the term except to the remainder man, who in this case would not be the Crown, but the respondent. But this weapon cuts both ways. It may just as well indicate the intention of the Legislature to confine the right of renewal to lessees who could surrender to the Crown; to give the exten-

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sion when it could justly be given when the rights of third parties would not be prejudiced.

I would dismiss the appeal.

MARTIN, J.A., dismissed the appeal.

GALLIHER, J.A.: I am in entire accord with the conclusions of the learned Chief Justice below, and for the reasons given by him that it is not open to either party in these proceedings to attempt to set up irregularities as against the Crown grant on the one side or the leases on the other. Such being my view, it comes down to what is the effect of the surrender of the timber lease in 1902? When the Crown grants were issued, they were subject to the plaintiff's predecessors' lease of 1888, *i.e.*, they were entitled to enjoy all the rights and privileges granted by that lease, which was prior in date to the pre-emption. The lease was for 30 years at a certain specified yearly rental, and would expire in February, 1918. Had there been no surrender of that lease, what then would have been the position of the parties? The lease provided for no renewal. Upon the expiry, the defendant, who derived title through the Crown grantees, would have acquired all rights to the lands in question except such as were reserved in the Crown grant (the timber was not so reserved), and would have been in a position to deal with the property as he saw fit. But by virtue of an amendment to the Land Act (B.C. Stats. 1901, Cap. 30, Sec. 7), all holders of leases of Crown timber limits granted prior to the passing of the Act, and then in force, had the privilege of renewing for consecutive and successive periods of 21 years, provided the existing leases should be surrendered within one year.

GALLIHER, J.A.

And it was further provided that such leases might be renewed for the unexpired portion of the term mentioned in the leases to be surrendered on the same terms, conditions, rents and royalties as specified in the lease to be surrendered, and the remainder of the term of 21 years for which the lease shall be renewed upon surrender would be subject to such terms, etc., as might be in force by statute at the time the existing surrendered leases under the conditions of the section would expire. The plaintiff availed itself of this amendment, and

surrendered its original lease on the 3rd of February, 1902, taking a new lease which provided that as to the unexpired portion of the term of the old lease it held under the same conditions as in the old lease, and as to the balance of the 21 years for which the lease was renewed, the terms were as set out in the preceding paragraph. The new lease contained this exception: "Except and also reserved thereout all existing private and public rights."

If we give effect to the plaintiff's contention, it means that by successive renewals of its lease it can render the lands valueless to the defendant, and prevent his dealing with them or utilizing them for any material purpose. This, however, must not deter us if we come to the conclusion that the plaintiff's rights are such as it claims. At the time the first lease was granted (which lease also contained the exception as to private rights), there were no private rights then in existence, at least so far as the defendant or his predecessors in title are concerned, and had there been no surrender of this lease, so long as it remained in effect the lessees could exercise all their rights under it—that would be up to the 3rd of February, 1918.

Now, there is no provision in the Act dealing with the rights of private parties acquired prior to surrender and renewal, but there is the provision, and that provision is carried out in the new lease, that for the unexpired term of the old lease they shall hold on the same terms, conditions, rents and royalties as specified in the old. But would that carry with it a continuance of priority over the defendant's rights which plaintiff undoubtedly had under the old lease? I do not think the words of the statute are sufficient to cover that, and that the right only to hold as above is granted, and that the plaintiff, by surrendering its lease, has by operation of law, in the absence of explicit statutory enactment or words from which we could infer that such was the intention of the Legislature, lost its rights to the timber in question, at all events after the expiry of the term in the old lease, if not at the time of surrender.

GALLIHER, J.A.

Bowen, L.J., in *In re Cuno. Mansfield* v. *Mansfield* (1889), 43 Ch. D. 12 at p. 17, in referring to the decision in *Reid* v. *Reid* (1886), 31 Ch. D. 402, says:

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"The decision, which seems to me to be a correct decision, went on the principle that, in the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the Legislature."

The appeal should be dismissed.

NORTH PACIFIC LUMBER CO. *v.* SAYWARD

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion this appeal may be disposed of upon the one point, that being as to whether the lease from the Crown of the 3rd of February, 1902, which issued as a renewal lease of that of the 3rd of February, 1888, is effective as against the Crown grants of lots 151 and 163 Sayward District, dated respectively the 11th of December, 1893, and the 5th of March, 1894, *i.e.*, whether or no the Crown grants are to be read as subject to the outstanding leasehold interest? The appellant is the successor in title in respect of the leasehold, and the respondent is the successor in title to the lands conveyed by the Crown grants. The leasehold is a demise of timber from the Crown extending over 23,600 acres. The Crown grants cover in area only 320 and 311 acres respectively. At the time that the predecessors in title of the respondent (the Crown grantees of the land) obtained pre-emption records under the then existing Land Act of the Province, *viz.*, on the 7th of December, 1891, and the 29th of February, 1892, there was then existent the lease of the 3rd of February, 1888, and the pre-emptions were subject to the then outstanding demise of the timber and when the Crown grants were delivered they had the following indorsements on the back thereof:

"This grant is issued and accepted upon the express understanding that the said J. J. Brown and J. Crawford their heirs, executors, administrators, or assigns shall only be entitled during the term of a certain lease to J. G. Ross and J. MacLaren dated 3rd February, 1888, to cut such timber as they may require for use on their claim, and if they cut timber on the said land for sale or for any other than for such use as aforesaid or for the purpose of clearing the said land, they shall absolutely forfeit all interest in the said land."

"This grant is issued and accepted upon the express understanding that the said John G. Campbell and James Smith, their heirs, executors, administrators or assigns shall only be entitled during the term of a certain lease to J. G. Ross and James MacLaren, dated 3rd February 1888, to cut such timber as they may require, for use on their claim, and if they or them cut timber on the said land for sale or for any other than for such

use as aforesaid or for the purpose of clearing the said land, they shall absolutely forfeit all interest in the said land."

It may be said that the declared statutory policy of the Crown, as evidenced in the Land Act and its many amendments, down to the present day has been that land carrying timber in what is deemed to be commercial quantities should not be capable of acquirement from the Crown and in acquiring pre-emption rights the timber has always been dealt with by the Crown as distinct property apart from the surface or other rights from time to time conferred. The lands in question in this action (631 acres out of the 23,600 acres covered by the lease, according to the evidence, speaking generally) shewed a good stand of timber (about 44,000 feet per acre), which would mean something under 28,000,000 feet upon the 631 acres, demonstrating at once that the lands were timber lands within the purview of the Land Act, not agricultural lands, as at the time of pre-emption any lands carrying more than 10,000 feet to the acre were deemed to be timber lands.

The statutory provision existent at the time of the pre-emption, and as set forth in the Land Act Amendment Act, 1890, was as follows:

"2. Notwithstanding anything in any Act contained no person shall be entitled to record or pre-empt any land included in any timber lease, if the land which it is proposed to record has on each eighty acres thereof milling timber to the extent of ten thousand feet per acre."

It is evident that the land pre-empted was land not open for pre-emption record. However, it was pre-empted, the Crown recognized the pre-emptors, and later, as we have seen, issued Crown grants stated to be subject to the existing lease. A great many exceptions are taken to the anterior proceedings, that is, non-compliance with the statutory conditions, all going to the contention that the Crown grants are void. I do not consider it necessary to consider these, nor the question as to whether the Crown should be a party to the action, as I consider the appeal may be disposed of without going into the question of the alleged invalidity of the Crown grants. The view I take is this, that even assuming, but without so deciding, that the effect of the Crown grants was to convey title to the lands in question, subject only to the named leasehold

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interest as indorsed upon the Crown grants, the result would not necessarily follow that the judgment of the learned Chief Justice of British Columbia should be sustained With great respect, I cannot agree with that portion of the judgment of the learned Chief Justice commencing with the paragraph at the foot of p. 275 to the end of p. 277 (24 B.C. 273).

The lease-hold interest which the learned Chief Justice holds to be inoperative as against the Crown grants was a renewed lease of the leasehold previously held by the predecessor in title of the appellant, which lease had at the time a period of 16 years yet to run. With this state of facts the case must certainly be one of the clearest kind, which would entitle it being held that the taking of the new lease by operation of law resulted in the leasehold interest being vacated, and that the Crown grants immediately operated, to the displacement of any leasehold interest whatever, that is, that the renewed lease is ineffective as against the respondent the owner of the lands, whose root of title is the Crown grants. Were the situation one between subject and subject, and the conveyance was stated to be subject to a lease, and no provision for a renewal, the lapse or surrender of the lease would certainly vacate the leasehold interest and no renewal thereof would be effectual. But the situation here is entirely different. The Legislature has expressly enacted that a certain thing may be done. Surely this alone would impel one, unless confronted with intractable law, to conclude that the intention was to further continue the leasehold interest, and not admit of the effect being that the interest should be vacated by operation of law. Principles of law may be abrogated, in fact, absolutely displaced, if the Legislature—paramount as to the subject-matter, *i.e.*, property (British North America Act, 1867, Sec. 92, Subsec. (13)—in apt language enacts that which may be done, and in the doing of it there cannot be invoked any principle of law which would have the effect of creating a forfeiture of estate or interest; otherwise stated, to so hold the parties would be held to be entrapped by complying with the statute law. To so hold would be derogatory to Parliament, the highest Court of the land. To well understand the matter it is necessary to con-

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sider the express legislation upon the point, which is to be found in the Land Act Amendment Act, 1901, section 7 thereof reading as follows:

"7. Section 42 of said chapter 113, as enacted by section 7 of chapter 38 of the statutes of 1899, is hereby amended by adding the following sub-section:—

"(3) All leases of unsurveyed and unpre-empted Crown timber lands, which have been granted for a period of twenty-one years, may be renewed for consecutive and successive periods of twenty-one years, subject to such terms, conditions, royalties and ground rents as may be in force by statute at the time of the expiration of such respective leases: Provided that such renewal is applied for within one year previous to the expiration of the then existing lease; and provided that all arrears of royalties, ground rents and other charges are first fully paid:

"All existing leases of Crown timber limits which have been granted previous to the passage of this section of the Land Act, and now in force, may be renewed for consecutive and successive periods of twenty-one years, provided that such existing leases shall be surrendered within one year from the date of the enactment of this section.

"And it is further enacted that such leases may be renewed for the unexpired portion of the term mentioned in the leases to be surrendered on the same terms, conditions, rents and royalties as so specified in the said leases to be surrendered; the remainder of the term of twenty-one years for which the said leases shall be renewed on surrender shall be subject to such terms, conditions, royalties and ground rents as may be in force by statute at the time the existing leases, surrendered under the conditions of this section, would expire."

Now it is to be observed that the word "surrender" is used, but upon the facts there was no surrender as understood in law, unless it could be said that the Crown was "the owner of the immediate reversion expectant on the term": see Halsbury's Laws of England, Vol. 18, p. 547, par. 1059, and pars. 1060, 1061. This might be the case were the title to the timber to be looked upon as always in the Crown notwithstanding the issue of the Crown grants (and in my opinion the use of the word "surrender" plainly imports that the Legislature recognized that the title to the timber was in the Crown), but upon the view that the Crown grantees were the owners subject only to the original lease, there was not, upon the facts, a surrender in law. It is plain that to the statute law we must look—and what may be said to be its effect? Even assuming that the respondent was the "owner of the immediate reversion expectant on the term," and that what took place was an effectual surrender, the Legislature, by express enactment, provided for

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renewal leases, and stipulated how this could be accomplished, that is, defined the procedure which, being followed, renewal leases would be granted. The predecessors in title of the appellant, in pursuance of the above set forth statute law, were granted a renewal lease for 21 years from the 3rd of February, 1902, with the right of further renewal for successive periods of 21 years, and the area as described in the renewal lease is as described in the original lease, and is inclusive of the lands of the respondent, in area 631 acres, the total area as described being 23,600 acres. Then, approaching the matter in this way—that the respondent could only be affected in his title by the lease existent at the time of the issue of the Crown grants, and as specifically indorsed thereon—nevertheless the Legislature has legislated in such a way as to provide for, and a lease has been given of timber limits, which in area include the property of the respondent. But if this be so, can it be said to be ineffectual or beyond the power of the Legislature? It is only necessary upon this point to cite *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), 76 L.J., P.C. 85; (1906), 12 B.C. 257. Sir Henri Elzear Taschereau, in delivering the judgment of their Lordships of the Privy Council, said at p. 86:

"First, as to the true construction of the Act. On that point, it seems to their Lordships unquestionable that the Act would be altogether abortive and meaningless if the view taken of it by the Supreme Court of British Columbia were to prevail. . . . . In their Lordships' opinion this enactment in a remedial Act, read with the other parts of it, means clearly that a grant in fee-simple, without any reservations as to mines and minerals, of any of the land therein mentioned (including the lot in question), if applied for within twelve months (as was done by the appellant), should be issued to the settlers therein mentioned (including the appellant as to the particular lot in dispute), though previously such a grant could not legally have been issued, because the said land had already been granted, with its mines and minerals, to the Dominion Government by the Provincial Act of 1883, and subsequently by the Dominion Government to the respondents. If the Act of 1904 did not apply to this lot, amongst others, because the title to it was then vested in the respondents, it would have no possible application at all. Such a construction would defeat the clear intention of the Legislature."

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If section 7 of the Land Act Amendment Act, 1901, is to be read as it has been read by the learned Chief Justice of British Columbia, the result would be that wherever Crown grants had issued covering any of the area as comprised in the timber

limits in then existent leases, the renewal leases would be inoperative as to such area. "Such a construction would defeat the clear intention of the Legislature": Sir Henri Elzear Taschereau in *McGregor* v. *Esquimalt and Nanaimo Railway, supra,* at p. 86. I do not consider it necessary to travel over the many points of law discussed in the very elaborate and able arguments addressed to this Court on behalf of the appellant as well as the respondent, but content myself in saying that here we have a statute which concludes the matter. In such a case it is idle to advance principles of law in antagonism thereto, or urge that those principles must be decisive and determinative. We here find in the language of Lord Robson in *Rex* v. *Lovitt* (1911), 81 L.J., P.C. 140 at p. 143, "apt and clear words in a statute for the purpose," and at the same page Lord Robson further said:

"The question now to be determined is whether that has been done in the present case by a Legislature having full authority in that behalf."

(Also see *Re Succession Duty Act and Boyd* (1916), 23 B.C. 77 at pp. 82-4; (1917), 54 S.C.R. 532.) Unquestionably the Legislature had "full authority," and, as we have seen in the *McGregor* case, that authority extends to the taking of property of one person and vesting it in another, and this appeal may be determined upon that point alone. The leasehold area included the land of the respondent, that is, it was a leasehold of timber limits which comprised, *inter alia,* the land of the respondent, holding through predecessors in title who took title under Crown grants issued subsequently to the creation of the demise of the timber limits. The Legislature, in precise terms, enacts that there may be renewals of leasehold interests of timber limits, and in pursuance of the statute the appellant obtains a renewal lease. It is impossible, in my opinion, with every deference to contrary opinions, to hold otherwise than that the lease is an effectual and operative lease. Sir Henri Elzear Taschereau at p. 86 in *McGregor* v. *Esquimalt and Nanaimo Railway, supra,* said:

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"The appellant has to concede that, but for the British Columbia Act of 1904 and the grant to him under its provisions, the respondents' title to the mines and minerals in question would be incontrovertible; so that the only questions for determination on this appeal are—first, Did the Act of 1904 and the grant to the appellant under its provisions have the

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effect of superseding the respondents' title under the grant to them by the Dominion and legalizing the grant to the appellant? and secondly, if so, had the British Columbia Legislature the power to enact it?"

In the present case, if it be viewed only from the point that I have assumed, that upon the surrender of the lease (although that surrender was not to the respondent) there was a merger of the term and the respondent's title was freed of the leasehold interest, the renewal lease immediately intervenes and to that extent supersedes the respondent's title, it being a statutorily authorized and legalized demise. Mr. Justice Warrington, in *Robbins* v. *Whyte* (1905), 75 L.J., K.B. 38 at p. 41, said:

"A surrender, it is well-settled law, is good only if made to the person who has the reversion expectant on the term, for if it were otherwise there could be no merger of the term."

Again, principles of law must be subordinated to express statutory enactment, and it cannot be questioned that a good and effectual renewal lease was created—a statutorily legalized demise. There is this to be considered as well: that the intention of the Legislature is clearly indicated that the property in the timber is in the Crown, and any other estate by previous grant, or acquired by operation of law, stands displaced. In passing, it may be remarked that timber limits throughout the Province are one of the most, if not the most, valuable assets of the Crown, from which a great revenue is reaped, and the rentals paid and payable by the appellant amount to thousands of dollars per annum, independently of royalties also payable when the timber is cut. It never was the intention that the respondent, or those in like position, should in the manner contended become entitled to the timber. In this connection I would adopt the language of Jessel, M.R. in *Yorkshire Railway Wagon Company* v. *Maclure* (1882), 21 Ch. D. 309 at p. 316; 51 L.J., Ch. 857 at p. 860:

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"Therefore, I am not afraid of saying in this case that, in my opinion, that which I characterized during the argument as an unconscionable defence ought not to prevail . . . ."

The proper judgment in my opinion, upon this appeal would be a declaratory judgment that the respondent's title under the Crown grants is subject to the existing timber lease and any renewals that may be made thereof, and that the lessees did

not lose their priority by taking a renewal under the Land Act Amendment Act, 1901 (see *Brohm* v. *B.C. Mills* (1907), 13 B.C. 123 and *North Pacific Lumber Co.* v. *British American Trust Co.* (1915), 23 B.C. 332). The certificates of title held by the respondent cannot avail against the appellant's title to the timber under the lease statutorily legalized, and all proper entries should be made in the books of the Land Registry office and upon the outstanding certificates of title to give full effect thereto (see *Howard* v. *Miller* (1915), A.C. 318).

I would allow the appeal for the aforesaid reasons.

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EBERTS, J.A. agreed in dismissing the appeal.

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Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Wilson & Whealler.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

CLEUGH v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Master and servant—Negligence of mate on ship—Evidence of—Finding of jury—Deck-hand—Applicability of Act to—Employers' Liability Act, R.S.B.C. 1911, Cap. 74, Sec. 3(2).

The verdict of a jury that an accident was due to the neglect and lack of proper supervision of the officer in charge, in not having a gang-plank on a ship sufficiently manned, will be set aside where the evidence is equally consistent with the occurrence being attributable to the impetuosity of one or more fellow servants.

Per MARTIN and MCPHILLIPS, JJ.A.: The Employers' Liability Act does not apply to a seaman.

APPEAL by defendant from the decision of GREGORY, J. and the verdict of a jury in an action tried at Vancouver on the 23rd and 25th of May, 1917, for damages for injuries sustained by the plaintiff while in the employ of the defendant Company.

Statement

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Statement

The plaintiff was engaged in moving the gang-plank on the "Princess Beatrice" on the 11th of June, 1916. As the ship was about to be made fast to a wharf in Vancouver, the second mate ordered the plaintiff, with four others, to move out the gang-plank. The rail at the side was removed and as they were about to heave, the plaintiff was standing close to the rail on the stern side of the plank. When the plank was lifted it swung forward and towards the stern, striking the plaintiff on the leg. He lost his balance and fell overboard between the ship and the wharf. He struck a log as he fell, injuring his leg and breaking three ribs. He claimed to have been further injured by being landed back onto the deck by a rope around his body with a running noose. The jury found negligence, stating it as "neglect and lack of proper supervision of the officer in charge of the gang-plank," and fixed the damages at $2,880 under the Employers' Liability Act. The defendant appealed on the grounds that there was no evidence upon which the jury could reasonably find that the accident was due to the negligence or want of supervision of the mate, and that the Employers' Liability Act does not apply to sailors or crews of vessels.

The appeal was argued at Vancouver on the 4th and 5th of December, 1917, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

McMullen, for appellant: They have to shew the accident was due to the mate's improper supervision. Assuming the accident was due to the plank swerving owing to the men on the opposite side shoving too hard, this does not bring home negligence on the part of the mate. It must also be shewn that this negligence was the cause of the accident: *Harris* v. *Tinn* (1889), 5 T.L.R. 221; *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41 at p. 44. The evidence does not amount to evidence of negligence: see *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193. It must be concluded from the evidence that there were five men on the plank and that it was sufficiently manned. The plaintiff has not made out a sufficient case: see *Latham* v. *Heaps Timber Co.* (1912), 17 B.C. 211; *Coyne* v. *Union Pacific Railway*

Co. (1890), 133 U.S. 370. The Act does not apply to sailors or "crews of vessels." The words in the Act "otherwise engaged in manual labour," only apply to working on the land. The labour must be of the same kind as that previously enumerated: see *Hanson* v. *The Australasian Steam Navigation Company* (1884), 5 N.S.W.L.R. 447; *Froy* v. *Balmain Steam Ferry Co.* (1886), 7 N.S.W.L.R. 146. With reference to the *ejusdem generis* rule see *Cook* v. *North Metropolitan Tramways Company* (1887), 18 Q.B.D. 683. The Imperial Act of 1875 expressly eliminates sea servants.

F. G. T. Lucas, for respondent: It is admitted on the pleadings the plaintiff is a labourer. On the definition of a seaman see *Chislett* v. *Macbeth and Co.* (1909), 25 T.L.R. 761. There is nothing in the Employers' Liability Act to exclude seamen from the word "labourer," and the point was not pleaded or raised in the Court below: see *London, Chatham and Dover Railway Co.* v. *South-Eastern Railway Co.* (1888), 40 Ch. D. 100. I contend men employed at sea come under the Act: see *Nash* v. *Cunard Steamship Company* (1891), 7 T.L.R. 597. The Company is liable for the mate's negligence: see *Osborne* v. *Jackson* (1883), 11 Q.B.D. 619.

Argument

McMullen, in reply.

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MACDONALD, C.J.A.: The question to be decided is, was plaintiff's injury brought about by the negligence of the second officer of the defendant's vessel in the exercise of superintendence within the meaning of section 3, subsection (2), of the Employers' Liability Act? The second officer of the ship undoubtedly, in the exercise of superintendence, ordered the gang-plank to be put out, and in obedience to the order the plaintiff and several other deck-hands, whose duty it was to do so, put out the plank, and in the operation the plaintiff was pushed overboard and injured.

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The jury found the second officer's negligence to have been "neglect and lack of proper supervision." The only neglect and want of supervision suggested in the evidence is that he did not have the plank fully manned. There is evidence of witnesses on both sides that there were five men, including the plaintiff, at the plank. There is no satisfactory evidence, indeed

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no evidence of any value, that there were fewer than five, and there is no evidence of any value that there ought to have been more than five, and none whatever that it was customary to have more than five. The second officer himself says that to have only three or four men at the plank would be "short-handed." The plaintiff does not say that to have only five men would be to have the plank under-manned; he was under the erroneous impression that there were only three at the plank, and his evidence would indicate that three men could have put it out without accident. He there said:

"If there had only been three and they had been differently distributed, it is not likely it would have occurred."

According to Boyer, a witness for the plaintiff, someone must have jerked the plank, causing it to swerve and push the plaintiff overboard. Now, at one place this witness says he does not know how many men were at the plank, speaking of those other than the plaintiff and himself. He said: "There might have been three or four for all I know." Later on, he ventures the opinion that there was not a sufficient number of men, and again he says it would be pretty hard work for four to put out the plank, and again, "five men were at the plank."

The witness Mackie thus describes the accident:

"Mr. Cleugh was at the corner of the gang-plank just the same as this [shewing]. He was on this corner [shewing]. Three fellows on one side and two on the other shoved the plank out in a rush. Mr. Cleugh kind of lost his feet some way, and went overboard."

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And again:

"He fell by the rush of the plank; the shoving of the plank out. He lost his legs by the rush."

And again the same witness says:

"You want six men in case one man is stronger than another, is that it? You don't want six men to put it out if everybody lifts together."

And again:

"It is not a question of numbers; it is a question of equality of strength? Strength, yes."

The evidence, in my opinion, is just as consistent with the occurrence being attributable to the impetuosity of one or more of the fellow servants of the plaintiff as with the suggestion that the work was being done with an insufficient number of men. The operation was of the simplest and commonest kind, and if in the performance of this daily round of putting out the plank

it is the duty of the employer or superintendent to stand over the men and direct each one of them and assign each to his place, and as to what strength he should put forth, it must be on the assumption that the men themselves have neither intelligence nor responsibility.

In this result it becomes unnecessary to decide whether the plaintiff is within the class of persons entitled to the beneficial provisions of the Employers' Liability Act. In view of the admission by the statement of defence that plaintiff was a "labourer," and in another and later paragraph of the same statement of defence an indirect denial that he was a labourer, and having regard to our rules of pleading, I have grave doubts whether it is open to us to say that he was not a labourer, assuming that a seamen is not within the Act, but for the said admission plaintiff must have put facts in evidence to shew that he was not of the ship's company. I refer to this branch of the case only to make it clear that I do not decide it.

MACDONALD, C.J.A.

I would allow the appeal.

MARTIN, J.A. allowed the appeal.

MARTIN, J.A.

GALLIHER, J.A.: The case really simmers down to one very narrow point, was the plank undermanned and was it that undermanning that caused the accident? The jury's answer to the question, "In what did the defendant's negligence consist?" is "Neglect and lack of proper supervision of Officer Thompson." That might mean as to how the men were placed, but would also include the number of men used. The weight of evidence is, I think, rather in favour of five men, but it certainly establishes that at least four men were engaged in the operation of putting out this gang-plank. As to the weight, there is a conflict of evidence, and it seems a pity the plank was not weighed by defendant, if it could conveniently have been done. The witnesses for the defence say it weighed from three to four hundred pounds. For the plaintiff, Boyer, one witness said: "I guess it would weigh eight or nine hundred pounds," and the plaintiff himself said: "Well, if you had said it weighed nearer 800 I would think you were better informed," and Mackie, another witness for the defence, described it as a

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heavy plank. Both sides were merely guessing at the weight of the plank, and the jury must exercise their common sense. No doubt they have seen these planks many times, I know I have scores of times on the different ships crossing from Victoria to Vancouver. It is not for me to hazard a guess, but I think the common sense of the jury would not warrant their concluding (if they did) from the evidence as to the size and construction of the plank that it weighed 800 pounds. But supposing that they were entitled to so believe, when you consider the evidence as to the condition of the tide at the full, the ship's deck from which the plank was being launched from 2 to 4 feet above the dock, the manner in which the plank was rushed out and that the impetus carried the plank 18 inches beyond the vessel's side, it is not a reasonable finding that the plank was undermanned—when I say reasonable I mean reasonable in the sense that Courts of Appeal should regard the findings of juries. The description of how the accident occurred as given by any of the witnesses, would not support that finding.

GALLIHER, J.A.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The action was one at common law and in the alternative under the Employers' Liability Act (Cap. 74, R.S.B.C. 1911). The jury found a verdict under the Employers' Liability Act. The *onus probandi* was upon the plaintiff (respondent) to establish that he was within the scope of that Act, but it is clear, upon the evidence, that he was a seaman and therefore would not be within its provisions (see *Hanson* v. *Australasian Steam Navigation Co.* (1884), 5 N.S.W.L.R. 447; *Froy* v. *Balmain Steam Ferry Co.* (1886), 7 N.S.W.L.R. 146). It is urged though that this was not pleaded. In my opinion where, in the statement of claim the Act relied upon is stated and the facts in relation to the claim are pleaded, that the defence need only go to a denial of the facts; "neither party is bound to place on his pleading an objection in point of law": Bullen & Leake's Precedents of Pleadings, 7th Ed., 911. The claim the plaintiff made in his statement of claim in part, par. 11, reads as follows:

"In the alternative the plaintiff claims to recover against the defendant under the Employers' Liability Act."

We find this language at p. 446 of Bullen & Leake:

"If a plaintiff in his statement of claim asserts a right in himself without shewing on what facts his claim of right is founded, or asserts that the defendant is indebted to him or owes him a duty without alleging the facts out of which such indebtedness or duty arises, his pleading is bad (see *ante*, p. 36) and may be struck out. If, however, the plaintiff asserts certain facts and then states the inference of law which he draws from them, the defendant must deny those facts, or they will stand admitted. But he need not, and should not, deny that they create the alleged right or duty. That is a question of law, which he should raise by an objection in point of law, on the argument of which he will be taken to have admitted the facts *ad hoc*."

The facts alleged as supporting the action under the Employers' Liability Act were denied. The plaintiff's evidence established that the plaintiff was a deck-hand on the "Princess Beatrice," a ship of the defendant (appellant), and the accident took place at the time of the launching of the gangplank at No. 7 Dock at the City of Vancouver, and the plaintiff was at the time acting in obedience to an order of the second mate, that officer acting in superintendence at the time. Were the action one maintainable under the Employers' Liability Act, I am clearly of the opinion that the verdict of the jury could not be disturbed or the judgment entered thereon by the learned trial judge in favour of the plaintiff.

That a deck-hand is a seaman cannot admit of any doubt, and the ship was at the time being propelled by her own steam and coming to the dock to be made fast thereto. It is not open to any doubt that the employment of the plaintiff was that of a seaman upon a ship. The plaintiff was not "employed in a casual and temporary employment of this character when the vessel was not employed in a self-navigating manner": Farwell, L.J. in *Chislett* v. *Macbeth and Co.* (1909), 25 T.L.R. 761; and that case is quite distinguishable. With deference to the very careful and able argument of counsel for the respondent, I cannot accede to the contention advanced that the defendant is now precluded from raising the point of law, that the plaintiff cannot succeed under the Employers' Liability Act. The case relied upon, *London, Chatham and Dover Railway Co.* v. *South-Eastern Railway Co.* (1888), 40 Ch. D. 100, was one of a number of cases of like nature where the Court, after delay in insisting upon the right to arbitration, refused to give effect

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to it. Lindley, L.J., at p. 107, concisely states the point of decision:

"They give [referring to sections 4 and 26 of the Railway Companies Arbitration Act, 1859] either railway company a right to insist on going to arbitration under the Act, and to exclude the case from the jurisdiction of the Courts; but to say that the Court has no power to determine the dispute if the parties waive their right is quite another matter. Having regard to the course which was adopted in the Court below, I think the defendants must be treated as having waived this objection in the Court below, and it would not be right for us to entertain it on appeal."

In the present case the objection is one of law and goes to the root of the matter. In short, is the action one which is maintainable, one which ought to have gone to the jury, and is it one that, upon the verdict of the jury, the learned judge in the Court below rightly entered judgment? The Court of Appeal, in the exercise of its jurisdiction, "shall have the power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require": Order LVIII., r. 4. It is true that to raise this point of law for the first time in the Court of Appeal is a late stage at which to raise it, yet I am not able to satisfy myself that it is a fatal objection (see *Ex parte Firth* (1882), 19 Ch. D. 419; *Misa* v. *Currie* (1876), 1 App. Cas. 554 at p. 559; *The "Tasmania"* (1890), 15 App. Cas. 223 at p. 225; *Karunaratne* v. *Ferdinandus* (1902), A.C. 405; *Connecticut Fire Insurance Company* v. *Kavanagh* (1892), A.C. 473).

GALLIHER, J.A.

I cannot see, upon the facts as I view them, that anything would be gained by directing a new trial, as it would not be possible by way of evidence to shew that the plaintiff was other than a seaman, therefore, in my opinion, the appeal should succeed, but I think there is good cause for depriving the defendant of any costs here or in the Court below, the point not being taken at the trial and presented for the first time in this Court (*In re O'Shea's Settlement* (1895), 1 Ch. 325; *Montefiore* v. *Guedalla* (1903), 2 Ch. 31; *Jenkins* v. *Price* (1908), 1 Ch. 10).

EBERTS, J.A.

EBERTS, J.A. allowed the appeal.

Appeal allowed.

Solicitor for appellant: *J. E. McMullen.*
Solicitor for respondent: *F. G. T. Lucas.*

WESTHOLME LUMBER COMPANY, LIMITED v. GRAND TRUNK PACIFIC RAILWAY COMPANY.

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Railway — Navigable waters — Obstruction — "Continuation of damage," meaning of—R.S.C. 1906, Cap. 37, Sec. 306.

Section 306 of the Railway Act applies to an action for damages owing to the illegal obstruction of access to the sea by a railway company, and it must be brought within one year from the completion of the obstruction.

Chaudiere Machine & Foundry Co. v. *Canada Atlantic Rway. Co.* (1902), 33 S.C.R. 11 followed.

Decision of MURPHY, J., 23 B.C. 323, affirmed.

APPEAL from the decision of MURPHY, J. of the 26th of September, 1916 (23 B.C. 323), in an action for damages owing to the obstruction by the defendant of the navigable waters of Cameron Bay in Prince Rupert townsite, whereby the plaintiff is deprived of the right of access to such waters. The plaintiff, in carrying on a contracting business, purchased large quantities of lumber, coal, sand and other material. It leased certain lots in Prince Rupert, fronting on Cameron Bay, for warehouse and yarding purposes, and built wharves and warehouses on the lots, a large portion of the material required in its business being shipped by boat and scows to and from their wharves *via* Cameron Bay. In 1910 the defendant Company built an embankment through Cameron Bay, thereby cutting off plaintiff's access from its lands to the open sea, and converting Cameron Bay into dry land. In consequence of the obstruction, the plaintiff Company had to purchase other property fronting on the sea and build there wharves, warehouses and hoists necessary for its business. The embankment through Cameron Bay was completed in the fall of 1909, and this action was commenced in November, 1915. The learned trial judge dismissed the action on the ground that it had not been brought within one year from the completion of the obstruction, as required by section 306 of the Railway Act. The plaintiff Company appealed.

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The appeal was argued at Vancouver on the 15th and 16th of November, 1917, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

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Argument

Mayers, for appellant: The approval by the minister, of the line of railway, is subject to the railway paying compensation: see *Grand Trunk Pacific Railway* v. *Fort William Land Investment Company* (1912), A.C. 224. They built without authority. They never filed their route plan and they failed to comply with section 159 of the Railway Act. They are thereby precluded from going on with the work: see *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602; *North Shore Railway Co.* v. *Pion* (1889), 14 App. Cas. 612. As to the contract between the Government and the railway, they try to import into the contract something that neither the Government nor the railway have power to contract about. There was nothing in the contract with reference to a solid fill. The auctioneer for the sale of the lands (which included the lots the plaintiff leased) said there would be no obstruction to the sea, and on this the plaintiff relied when acquiring the lease. The Government has no right to enter into a contract that interferes with navigation. Estoppel cannot be invoked against the Crown: see *Humphrey* v. *The Queen* (1891), 2 Ex. C.R. 386. Paragraph 9 of the agreement, which is a schedule to Can. Stats. 1903, Cap. 71, is what they rely on as making the Railway Act not applicable. I contend the Court can order this work to be removed: see *Grand Trunk Pacific Rway. Co.* v. *Rochester* (1912), 48 S.C.R. 238. As the freehold was not registered, the registrar refused to register our leases, but we have a right to registration, and consequently, the right to bring action: see *Dorrell* v. *Campbell* (1916), 23 B.C. 500. The Crown can make grants which need not be registered: *Barry* v. *Heider* (1914), 19 C.L.R. 197. The wrongdoer has no right to interfere with my title: see *Lyon* v. *Fishmongers' Company* (1876), 1 App. Cas. 662 at p. 671. They say I was late in my action. The obstruction was in February, 1910, and the embankment was finished in the summer of 1913. I do not come within section 306 of the Act, as the Railway has ignored all the provisions of the Act and they cannot plead this section. In *M'Arthur*

v. *Northern & Pacific Junction R.W. Co.* (1890), 17 A.R. 86, the Court was equally divided; see also *Carr* v. *Canadian Pacific R. Co.* (1912), 14 Can. Ry. Cas. 40; *Lumsden* v. *Temiskaming and Northern Ontario Railway Commission* (1907), 15 O.L.R. 469. As to subsection (1) of section 306 see *Snure* v. *The Great Western Railway Co.* (1855), 13 U.C.Q.B. 376; *Wismer* v. *The Great Western Railway Co., ib.* 383; *Chaudiere Machine & Foundry Co.* v. *The Canada Atlantic Rway. Co.* (1902), 33 S.C.R. 11. I say it is a continuing nuisance: see Halsbury's Laws of England, Vol. 21, p. 560, par. 966; *Thompson* v. *Gibson* (1841), 7 M. & W. 465 at p. 460; *Battishill* v. *Reed* (1856), 18 C.B. 696 at pp. 707-8; *Ross* v. *Hunter* (1882), 7 S.C.R. 289 at p. 313. This is a case of recurrent cause of action: see *Harrington (Earl of)* v. *Derby Corporation* (1905), 1 Ch. 205 at p. 227; *Hague* v. *Doncaster Rural District Council* (1909), 100 L.T. 121; *McCrimmon* v. *B.C. Electric Ry. Co.* (1915), 22 B.C. 76 at p. 84. *Kerr* v. *The Atlantic and North-West Railway Company* (1895), 25 S.C.R. 197 at p. 199 is not an authority that applies to this case; the fact of an injury being permanent does not prevent it being continuous: see *Arthur* v. *Grand Trunk R.W. Co.* (1895), 22 A.R. 89 at p. 96. An order was made by the Railway Board that there should be a 30-foot opening in the embankment, but they disregarded it. Section 427 of the Act makes them liable for damages: see *Canadian Northern Railway Company* v. *Robinson* (1911), A.C. 739. The trial judge would not let me put in photographs because I could not produce the photographer who took them. He held a witness who saw the pictures taken and could swear to their correctness was insufficient: see Halsbury's Laws of England, Vol. 13, p. 482, par. 662; *Regina* v. *Tolson* (1864), 3 F. & F. 103 at p. 104; *Regina* v. *The United Kingdom Electric Telegraph Company (Limited)* (1862), 3 F. & F. 73 at p. 74; *Lucas* v. *Williams & Sons* (1892), 2 Q.B. 113 at p. 116.

Argument

Davis, K.C. (*Patmore,* with him), for respondent: By the conveyances we have, the right of the plaintiff to access to the sea is taken away from him. There are two rights in connection with foreshore, first, the public right, in which the Attor-

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ney-General only can bring action. Second, the right of a riparian owner, but he must first establish he has a private right illegally interfered with. He has divested himself of that right by agreement with us. The conveyances shew we were to put a track across Cameron Bay. The plans filed must be accepted in evidence with the instruments: see *Kell* v. *Charmer* (1856), 23 Beav. 195; *Shore* v. *Wilson* (1839), 9 Cl. & F. 355 at p. 555; *In re Cliff's Trusts* (1892), 2 Ch. 229. The leases to the plaintiff were not in existence until after the plan shewing the solid fill was registered. We have a certificate of indefeasible title. If you have an implied easement it is not necessary to register it: see *Israel* v. *Leith* (1890), 20 Ont. 361. *Attorney-General of the Straits Settlement* v. *Wemyss* (1888), 13 App. Cas. 192. He must rely on his personal right of access and not on the public right. The Government is in the same position as any ordinary owner, and when we were given the right to put the railway across the bay there is no implied right of access to the sea reserved: see *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31; *Union Lighterage Company* v. *London Graving Dock Company* (1902), 2 Ch. 557. We had an agreement with the Government to put in that fill. As to the King doing no wrong see Broom's Legal Maxims, 8th Ed., 39. Appellant refers to the order of the Board to make a 30-foot gap, three years after the fill was put in, and that therefore they have a right of action. This was not raised on the pleadings or argued below. A photograph must be proved regularly: see Phipson on Evidence, 5th Ed., 513. The action is not brought in time. They cannot escape on the ground of continuing damages. This was settled in *Chaudiere Machine & Foundry Co.* v. *Canada Atlantic Rway. Co.* (1902), 33 S.C.R. 11. There are all sorts of decisions on the question of continuing damages, but the *Chaudiere* case is exactly the same as this, and being a Supreme Court judgment, should be followed.

Argument

Mayers, in reply: The Crown and the Railway could not contract for a solid embankment, because it interfered.

Cur. adv. vult.

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MACDONALD, C.J.A.: I connot agree with Mr. *Mayers's* contention that the case does not fall within section 306 of the Railway Act, Cap. 37, R.S.C. 1906, nor with his submission that the damage was continuing damage within the true meaning of said section.

I entirely agree with the reasons for judgment of MURPHY, J., who tried the action, and would therefore dismiss the appeal.

MARTIN, J.A. dismissed the appeal.

MCPHILLIPS, J.A.: In my opinion, it has not been established that the learned trial judge came to a wrong conclusion in dismissing the action upon the ground that the action was barred under section 306 of the Railway Act (Cap. 37, R.S.C. 1906).

The action was not brought within the one-year limitation, and when the pleadings are looked at, it cannot be said that any cause of action was alleged which would admit of it being considered whether the injury complained of was in its nature "continuation of damage," nor would it appear that the jury allowed any sum upon any such claim, or for recurrent damage from time to time occurring beyond the time of the construction of the obstruction, but went wholly upon the claim as advanced, that the appellant suffered special damage by reason of the closure of access to the sea, and by reason thereof was compelled to make other provision upon other lands for shipping facilities, *i.e.,* construction of wharf, retaining wall, electric hoist, and other works necessary and proper under the circumstances, and the jury allowed damages therefor. There can be no question that the obstruction of access to the sea was by reason "of the construction or operation of the railway" and within the meaning of section 306, as the railway—one of the transcontinental lines of railway of Canada—passes over the *locus in quo,* and in its construction caused the damage complained of. Since the original construction, in compliance with an order of the Railway Board of Canada, the obstruction has been removed to the extent of a fair way of 29½ feet, the order being to leave a clear way of 30 feet. It is not clear how

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it comes about that the opening is six inches short in width, but there is no evidence of any special damage consequent upon this, and if it were a question to consider, might be disposed of by applying the maxim *de minimis non curat lex* (but see *Pindar* v. *Wadsworth* (1802), 2 East 154; 6 R.R. 412; *Harrop* v. *Hirst* (1868), L.R. 4 Ex. 43).

The case which would appear to be conclusive upon this appeal, and upon which, amongst others, the learned trial judge proceeded, is *Chaudiere Machine & Foundry Co.* v. *Canada Atlantic Rway. Co.* (1902), 33 S.C.R. 11, and it being a decision of the Supreme Court of Canada, is binding upon this Court. That was a case of obstruction, the building of an embankment, and the raising of the level of the street. The judgment of the Court was delivered by the then Chief Justice, Sir Henri Elzear Taschereau. At pp. 14 and 15 he said:

"If an action had been taken by the then owner, when the respondents built this embankment, for the damages to this property, a judgment in his favour in that action would be a bar to any subsequent action for subsequent damages either at his instance or at the instance of the subsequent owners of the property. *Goodrich* v. *Yale* [(1864)], 8 Allen 454. The cases of *Backhouse* v. *Bonomi and Wibe* [(1861)], 9 H.L. Cas. 503, and of *Darley Main Colliery Co.* v. *Mitchell* [(1884)], 14 Q.B.D. 125; [1886)], 11 App. Cas. 127, relied upon by the appellants, are clearly distinguishable. In these two cases, the acts which had caused the damage were, when done, lawful, so that clearly no action for damages could be thought of till the damages accrued. Here the appellants' claim rests upon their allegation that the works done by the respondents at the outset constituted a nuisance and a trespass on their lot."

MCPHILLIPS, J.A.

In the case of *McCrimmon* v. *B.C. Electric Ry. Co.* (1915), 22 B.C. 76, a decision of this Court, the head-note reads:

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

It was with some hesitation, though, that I came to the conclusion that even in that case it was one of continuance of damage, but that was a case of the interference with a natural watercourse, and by reason thereof, and its inefficiency, there was recurrent damage (see at pp. 85-6, 22 B.C.; also see *Greenock Corporation* v. *Caledonian Railway Co.* (1917), 33 T.L.R. 531).

The section (306) reads:

"Shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards."

Here the act done was not done upon the lands of the appellant; it was the doing of an act which was in the disturbance of a public right of way or access to the sea, and the allegation of special damage by reason thereof accruing to the appellant, but not in its nature alleged to be continuing, and it can rightly be said that the cause of action arose with the placing of the obstruction and interference of access (see *Offin* v. *Rochford Rural Council* (1906), 1 Ch. 342). It may be said that "the effect of the damage may continue, but this does not extend the time of limitation" (see Lightwood's Time Limit of Actions, 399).

This appeal, therefore, in the way I view it, calls for no opinion as to the right of the appellant to damages or compensation under the Railway Act, and my conclusion is that the limitation of action is effective and is a complete bar, not being brought within one year, and were it open to consider any question of continuation of damage (none having been claimed, proved, or allowed by the jury), it is not, in my opinion, a case of continuation of damage.

MCPHILLIPS, J.A.

I would, therefore, upon the whole, dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Bodwell & Lawson.*
Solicitors for respondent: *Patmore & Fulton.*

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REX v. WIGMAN.

Criminal law—Habeas corpus—Juvenile delinquent—Conviction on plea of "guilty"—Removal from industrial home to prison—The Juvenile Delinquents Act, Can. Stats. 1908, Cap. 40, Secs. 16 and 22—B.C. Stats. 1912, Cap. 11, Sec. 11.

The conviction of a girl charged as a juvenile delinquent under section 16 of The Juvenile Delinquents Act upon a plea of guilty is invalid, and will be quashed.

MOTION for a writ of *habeas corpus* on behalf of Mary Anne Wigman, heard by MORRISON, J. at Chambers in Vancouver on the 31st of May, 1918. The girl, who was 16 years old, was charged in April, 1917, on the information of her brother as a juvenile delinquent. She appeared before the magistrate with her father and mother and pleaded guilty. She was convicted by the magistrate and committed to the Provincial Home for Girls for an indeterminate period of not less than two years. About a year later she was removed to the prison farm at Oakalla by an order in council made under section 11 of the Industrial Home for Girls Act, B.C. Stats. 1912, Cap. 11.

Statement

A. D. Taylor, K.C., for the motion: Section 16 of the Act provides that on its being proved that the accused is a delinquent, etc., she may be convicted. There is no provision in the Act for a plea of guilty, as in sections 721 and 900 of the Criminal Code. This omission is obviously intended so that a child cannot be convicted on its own admission. The conviction is therefore invalid. The removal of the girl to the gaol is in contravention of section 22 of The Juvenile Delinquents Act, and cannot be justified by the order in council under section 11 of the Industrial Home for Girls Act.

Argument

Henderson, K.C., for the Attorney-General: The conviction was made at the request of the father and mother of the girl. Section 5 of The Juvenile Delinquents Act provides that

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"prosecutions and trials under the Act shall be summary and shall *mutatis mutandis* be governed by the provisions of Part XV. of the Criminal Code in so far as they are applicable." A plea of guilty may therefore be taken and a conviction made. She was old enough at the time to know what she was doing. As to her being transferred to the gaol, if there were no power to do this, she should be sent back to the industrial home.

MORRISON, J. quashed the conviction on the first point raised on behalf of the applicant, and ordered the discharge of the girl. Judgment

Conviction quashed.

SHORTING v. SHORTING: PARKS AND BAYLY, CO-RESPONDENTS.

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SHORTING v. SHORTING

Practice — Receiver — Preliminary objections — Mode of procedure — War Relief Act—Waiver—B.C. Stats. 1916, Cap. 74.

On motion for the appointment of a receiver of a co-respondent's business after judgment in a divorce action, and after an adjournment of the motion at the instance of the co-respondent for further material, the co-respondent at a further hearing raised the preliminary objection that he was entitled to relief under the War Relief Act.

Held, that there had been waiver, and the objection must be overruled.

MOTION by petitioner in divorce proceedings for an order appointing a receiver for a half interest in the grocery business of Bayly Bros. On the 27th of March, 1918, a decree absolute was granted against the co-respondent Bayly. On the 15th of May, he was served with notice of motion for the appointment of a receiver. On the return of the motion before CLEMENT, J. on the 16th of May, counsel for co-respondent asked for an adjournment, undertaking that no disposition Statement

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would be made of Bayly's interest in the business. The motion again came on for hearing before CLEMENT, J. on the 21st of May, when counsel for co-respondent took two preliminary objections: First, that the petitioner should have proceeded by way of Chamber summons, and secondly, that his client had enlisted on that day and was entitled to the benefit of the War Relief Act, to which objection was taken that not having been raised on the first hearing, the objections were waived, as in fact Bayly, being a person who fell within class one of the Military Service Act, became a draftee by proclamation on the 13th of October, 1917. The motion was adjourned at the instance of counsel for the co-respondent for further material until the 31st of May, 1918, when it was heard by MORRISON, J. at Chambers in Vancouver, the two preliminary objections being again submitted.

Statement

Dickie, for petitioner.
Eyre, for co-respondent Bayly.

MORRISON, J.: I refuse to entertain the first preliminary objection on the ground that it has been already disposed of by CLEMENT, J. As to the second objection, War Relief Act, I am bound by the case of *John Hing Co.* v. *Sit Way* (1917), 25 B.C. 153, and hold there has been a waiver. Order goes for receiver.

Judgment

Motion granted.

GUARDIAN ASSURANCE COMPANY, LIMITED v. GUNTHER AND MATTHEW.

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GUARDIAN ASSURANCE CO. v. GUNTHER

Company law—Fire insurance—Application for Provincial licence—Similarity of name to existing company—Imitation—Can. Stats. 1910, Cap. 32, Sec. 4; 1917, Cap. 29—R.S.B.C. 1911, Cap. 113.

When the circumstances point to an intention on the part of a company to do business under a name which might easily be mistaken for the name of an existing company doing the same class of business, and thereby deceive the public, the Court will interfere at once if the circumstances are such as to make it reasonably certain that what is sought to be restrained is in furtherance of a plan to carry on such business.

Hendriks v. *Montagu* (1881), 17 Ch. D. 638 followed.

APPEAL from the decision of CLEMENT, J. of the 26th of June, 1917, in an action to restrain the defendant Gunther, superintendent of insurance, from issuing, and to restrain the defendant Matthew from applying for a licence for the Guardian Fire Insurance Company of Salt Lake City, Utah, under the British Columbia Fire Insurance Act. The plaintiff Company was established in England in 1821 under the name of Guardian Fire and Life Assurance Company, Limited, and was incorporated under the Imperial Companies Act in 1893, in pursuance of a private Act. In 1902 the Company changed its name to that of the Guardian Assurance Company, Limited. In 1905 the Company was licensed under the Companies Act of British Columbia as an extra-Provincial company. In November, 1911, it obtained a temporary licence under the British Columbia Fire Insurance Act, and in January, 1912, was licensed to carry on business under said Act. In 1869, the Company was licensed under the Insurance Act of the Dominion of Canada, and is also licensed to carry on business in all the Provinces of Canada, with the exception of Prince Edward Island, under the Provincial Insurance Acts in force in each such Province, respectively. The defendant Matthew, as agent for the Guardian Fire Insurance Company, applied to the

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superintendent of insurance on the 9th of March, 1917, for a licence under the British Columbia Fire Insurance Act to carry on insurance business in British Columbia under the name of the Guardian Fire Insurance Company. This Company was incorporated in the State of Utah in December, 1913, and has since carried on fire insurance business in several of the United States of America. The plaintiff Company claims that the names of the two companies are so similar that the public are likely to be misled and deceived into believing that the Utah Company is the same as the plaintiff Company. The learned trial judge dismissed the action. The plaintiff Company appealed.

The appeal was argued at Vancouver on the 16th and 19th of November, 1917, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Argument

Mayers, for appellant: The plaintiff Company was established in England in 1821, and has been doing business in British Columbia for 25 years. There are two points to be considered: (1), The names are substantially the same, and (2), the word "guardian" as associated with insurance belongs to the plaintiff Company. The learned trial judge followed *Saunders* v. *Sun Life Assurance Company of Canada* (1894), 1 Ch. 537, but my submission is that he erred in not first finding that the names were so similar that they would be confounded in carrying on business. The Company must first have a Dominion licence. [He referred to *Semi-Ready* v. *Semi-Ready* (1910), 15 B.C. 301; *Hendriks* v. *Montagu* (1881), 17 Ch. D. 638; *Guardian Fire and Life Ass. Co.* v. *Guardian and General Ins. Co.* (1880), 50 L.J., Ch. 253; *Accident Insur. Co.* v. *Accident &c. Insur. Corporation* (1884), 54 L.J., Ch. 104; *The Standard Bank of South Africa* v. *The Standard Bank* (1909), 25 T.L.R. 420; *Ouvah Ceylon Estates Lim.* v. *Uva Ceylon Rubber Estates Lim.* (1910), 103 L.T. 416; *Lloyd's and Dawson Brothers* v. *Lloyds, Southampton* (1912), 28 T.L.R. 338; *Lloyds Bank Limited* v. *The Lloyds Investment Trust Company (Limited), ib.* 379; *Ewing* v. *Buttercup Margarine Company* (1917), 33 T.L.R. 241 and 321; *Albion Motor-Car Company* v. *Albion Carriage and Motor Body Works,*

ib. 346]. The question is whether it is calculated to deceive: see *North Cheshire and Manchester Brewery Company* v. *Manchester Brewery Company* (1899), A.C. 83 at p. 86; *Merchant Banking Company of London* v. *Merchants' Joint Stock Bank* (1878), 9 Ch. D. 560. The word "guardian" now has the reputation amongst the public as belonging to fire insurance. It is a household word in fire insurance, and the learned judge erred in saying I had to prove fraud or damages: see *Reddaway* v. *Bentham Hemp-Spinning Company* (1892), 2 Q.B. 639; *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal* (1902), 32 S.C.R. 315. There are cases where a man carrying on business in his own name has had to change it: see *Tussaud* v. *Tussaud* (1890), 44 Ch. D. 678; *Lewis's* v. *Lewis* (1890), 45 Ch. D. 281; *Turton* v. *Turton* (1889), 42 Ch. D. 128.

G. F. Cameron (*C. J. Cameron,* with him), for respondent Matthew: Section 4 of The Insurance Act, 1910, was declared *ultra vires* of the Dominion Parliament: see *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), 1 A.C. 588, 85 L.J., P.C. 124; on appeal from the Supreme Court of Canada (1913), 48 S.C.R. 260. We are not required to take out a Dominion licence. In this case both companies were carrying on business for some time: see *Saunders* v. *Sun Life Assurance Company of Canada* (1894), 1 Ch. 537. The Salt Lake City Company is in the same position as the Sun Life was in the *Saunders* case, and they should be entitled to use their full corporate name: see also *The Travellers Insurance Company* v. *The Travellers Life Assurance Company of Canada* (1910), 20 Que. K.B. 437. They must shew we have infringed on their rights and there is no evidence that we have done so: see *Montreal Lithographing Company* v. *Sabiston* (1899), A.C. 610. It is a question of evidence as to whether there was false representation. They have not shewn this and the trial judge has so held: see *Burgess* v. *Burgess* (1853), 3 De G. M. & G. 896 at pp. 904-5; *J. & J. Cash Limited* v. *Joseph Cash* (1902), 86 L.T. 211 at p. 212; *Singer Manufacturing Company* v. *Loog* (1880), 18 Ch. D. 395 at p. 412. The question of restraining where there is an attempt to pass off one's goods

Argument

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Argument

as the goods of another is dealt with in *Holloway* v. *Holloway* (1850), 13 Beav. 209; *Jamieson and Co.* v. *Jamieson* (1898), 14 T.L.R. 160; *John Brinsmead and Sons* v. *E. G. Stanley Brinsmead and Waddington and Sons* (1913), 29 T.L.R. 706. My contention is, the evidence shews this is not a case where the defendant is endeavouring to pass off his name as that of the plaintiff. As to interfering with the superintendent's discretion see *Ellis* v. *Earl Grey* (1833), 6 Sim. 214 at p. 223. There is no evidence that any person would be deceived: see *British Vacuum Cleaner Company, Limited* v. *New Vacuum Cleaner Company, Limited* (1907), 2 Ch. 312 at p. 330; *Merchant Banking Company of London* v. *Merchants' Joint Stock Bank* (1878), 9 Ch. D. 560 at p. 566; *Aerators, Limited* v. *Tollitt* (1902), 2 Ch. 319 at p. 325. There is no express provision in the Provincial Act as there is in the Imperial Act against licensing companies with similar names. As to the reasonable probability of deception in this case see *Burberry's* v. *J. C. Cording and Co. Limited* (1909), 100 L.T. 985; *Waring and Gillow (Limited)* v. *Gillow and Gillow (Limited)* (1916), 32 T.L.R. 389. On the question of damages there must be *damnum et injuria*: see *Day* v. *Brownrigg* (1878), 39 L.T. 553 at p. 554, and the act must be done with intention of injuring the plaintiff: see *Street* v. *Union Bank of Spain and England* (1885), 53 L.T. 262; *Bendigo and Country District Trustees and Executors Co. Ltd.* v. *Sandhurst and Northern District Trustees, Executors, and Agency Co. Ltd.* (1909), 9 C.L.R. 474. As to the public being deceived by the name see *The London and Provincial Law Assurance Society* v. *The London and Provincial Joint-Stock Life Assurance Company* (1847), 17 L.J., Ch. 37. There are three other companies with the word "guardian" in its corporate name.

Mayers, in reply: As to when prohibition will lie see *Veley* v. *Burder* (1841), 12 A. & E. 265 at p. 312; *Gould* v. *Gapper* (1804), 5 East 345 at p. 371; *Mayor, &c., of London* v. *Cox* (1866), L.R. 2 H.L. 239 at p. 277. An injunction will lie when prohibition will be granted: see *Hedley* v. *Bates* (1880), 13 Ch. D. 498. The cases shew one is more entitled to the use of a "fancy" name than a descriptive one: see *Valentine Meat*

Juice Co. v. *Valentine Extract Co. Lim.* (1900), 83 L.T. 259.

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MACDONALD, C.J.A.: The plaintiff brought this action against the superintendent of insurance appointed under the British Columbia Fire Insurance Act, Cap. 113, R.S.B.C. 1911, and one A. S. Matthew, to restrain the latter from applying for and the former from issuing a licence under said Act, to do business in this Province, to the Guardian Fire Insurance Company, a foreign Company incorporated under the laws of the State of Utah.

The plaintiff's opposition to the granting of the licence was founded on the similarity of the foreign company's name to that of the plaintiff.

The action was tried by CLEMENT, J., and was by him dismissed on the 26th of June, 1917. Since then, but before the hearing of this appeal, namely, on the 20th of September, 1917, The Insurance Act, 1917, was passed by the Parliament of Canada. This Act had its inspiration from the judgment of the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), 1 A.C. 588, in which it was held that section 4 of The Insurance Act, 1910, was *ultra vires* the Dominion Parliament, but in which it was also held that it would be within the power of Parliament, by properly-framed legislation, to require a foreign insurance company to obtain a licence from the Dominion before doing business in Canada, even in a case where the company desired to carry on its business only within a single Province.

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At the time, therefore, of the application for the licence in question there was no valid Dominion legislation affecting the licensing of foreign insurance companies in Canada.

There is no express provision in the British Columbia Fire Insurance Act against licensing a company with a name so similar to that of another company as to be calculated to deceive the public. Such sections are to be found in the English Companies Act, in our own Companies Act, and in the said Dominion Act of 1917, but the absence of such a provision in the British

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Columbia Fire Insurance Act does not, as I read the judgment of the Court of Appeal in *Hendriks* v. *Montagu* (1881), 17 Ch. D. 638, affect the power of the Court to restrain the applicant Matthew from making or persisting in his application. That case, I think, meets the objection of CLEMENT, J. that this action was premature. As I read that case, it seems to me clear that when the circumstances point to an intention on the part of a company to do business under a name which might easily be mistaken for the name of an existing company doing the same class of business, and thereby deceive the public, the Court will at once interfere: it will not wait until the company actually commences to do such business, if its conduct be such as to make it reasonably certain that what is sought to be restrained is in furtherance of a plan to carry on such business.

MACDONALD, C.J.A.

On the merits, I am clearly of opinion that the plaintiff's contention is sound, and that the Court ought to interfere to restrain the defendant Matthew from persisting in his application for a licence for this company, whose name, in my opinion, is so similar to that of the plaintiff as to be calculated to lead persons doing business with it to the belief that they were doing business with the plaintiff Company. In this result I do not find it necessary to consider whether the Court can restrain the superintendent of insurance, or whether some other proceeding, such as prohibition, is the apt one. The superintendent of insurance was not represented by counsel before us. The respondent Matthew will therefore pay the costs.

The appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A. allowed the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: With great respect to the learned trial judge, I am entirely unable to accept the view at which he arrived. In my opinion, the appeal should succeed. That the action is premature or that the relief and remedy claimed should not, upon the facts, be granted, may be said to be concluded by what may be stated to be the leading case on the point —*Hendriks* v. *Montagu* (1881), 50 L.J., Ch. 456. The headnote thereof reads as follows:

"An injunction was granted to restrain a proposed new company from

applying to the registrar of joint-stock companies for registration under a name which, in the opinion of the Court, was calculated to deceive, although the company had not begun to carry on its business. It is not necessary, to entitle the plaintiffs to an injunction, that the defendants should have a fraudulent intent. They are responsible for the reasonable consequences of their action. The statutory right to register must not be exercised in such a way as to violate some other right, or offend against the law."

The appeal has been ably argued, counsel upon both sides having very exhaustively and elaborately canvassed the case law bearing upon the question for determination, but I do not think that it is necessary to in detail discuss or review the cases. It is clearly apparent to me that that which is attempted is such that cannot be permitted. The appellant is a company which has had existence since 1821, has been continuously in business ever since that time, it is a British Company, world widely known under the name of the Guardian Assurance Company, Limited, and has done business in the Province of British Columbia for the last 25 years, and has a licence under The Insurance Act, 1910 (Can. Stats. 1910, Cap. 32), and is authorized to do business in British Columbia under the British Columbia Fire Insurance Act (B.C. Stats. 1911, Cap. 26). The respondent Matthew has applied to the superintendent of insurance, acting under the British Columbia Fire Insurance Act, for the issuance of a licence under the British Columbia Fire Insurance Act for a company which was incorporated in the State of Utah, one of the United States of America, under the corporate name of The Guardian Fire Insurance Company. This latter company is without a licence under The Insurance Act, 1910 (Canada), (see section 4). That a licence to do business under The Insurance Act, 1910, is a pre-requisite to the doing of any insurance business in Canada or any Province thereof by any company incorporated by a foreign State, cannot, in my opinion, be gainsaid (see *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), 1 A.C. 588, and *Farmers Mutual Hail Insurance Association of Iowa* v. *Whittaker* (1917), 3 W.W.R. 750).

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In *Hendriks* v. *Montagu, supra,* we find Cotton, L.J., at pp. 459-61 saying:

"The first point urged by the respondents here was in the form of a preliminary objection, and though we did not so regard it, the Master of

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the Rolls seems to have thought it fatal to the application. That objection was that the application was under the particular section of the Companies Act, 1862, and that it could not therefore be made, the company not being registered. It is an application for an injunction made in an action brought to enforce a well-known equity, namely, to prevent the defendants from doing that which is calculated to mislead the public and lead them to think that the defendant company is the company of the plaintiffs. Well, the question is whether that is made out. But before I deal with that I will deal with another objection which has been considerably pressed, namely, that this action was premature. The company, it is said, does not exist and does not carry on business; and that if it is premature to apply for an injunction against a company which does not exist, it is premature to so apply when you do not know how it will carry on its business. But the whole principles of the Court are opposed to that argument. . . . . Now, what is the result upon the evidence? In my opinion the result is this, that what the defendants will do if they are not restrained will cause confusion and will induce people, or be the means of inducing people, who desire to insure in this long-established society—namely, that of the plaintiffs—to insure in the defendants' office instead. That, in my opinion, is the result of the evidence. . . . . In my opinion it is not necessary that in taking the name they have there should have been any fraudulent intent; but whether there was a fraudulent intent or not, everybody is responsible for the reasonable consequences of what he is doing, upon the facts known to him. . . . . There is only one other point, namely, whether the plaintiffs are entitled to the whole of the injunction they ask. It is said there is a statutory right to register. Yes, there is a statutory right, provided the person who is doing it is not in doing it violating some other right, or offending against the law. If he is, this Court has the most perfect right to stop him from doing so, just as it has a right of stopping him from going to a Court of law; though it has no right to prevent a Court of law from entertaining his suit. Here one of the grounds of applying to this Court is that the registrar, who registers on application the names of limited companies, could not, under the Act, have refused to register this company, and for this reason, that the particular section of the Act only applies to similarity between names of companies already registered. If, therefore, the Court is satisfied, as we are in this case, that what the defendants intended to do would be a wrong to the plaintiffs, the Court is entitled to prevent the very first step in the wrongful act being taken."

MCPHILLIPS, J.A.

That upon the facts of the present case, through the similarity of the name, injury would result from the intended action of the respondent Matthew, I have no doubt, if it were allowed. Unquestionably, it would be calculated to deceive and would deceive the public to the prejudice of the appellant; further, the doing of it would be running counter to the law and should rightly be restrained by the Court.

I have no doubt that if a licence were obtained under the

British Columbia Fire Insurance Act in the name of the Guardian Fire Insurance Company, it would, upon the facts before us upon this appeal, be a proper case for the intervention of the Court and would entitle the appellant to an injunction restraining the use of the word "Guardian." Recent cases which support this view are *Ewing* v. *Buttercup Margarine Company* (1917), 33 T.L.R. 321; and *Albion Motor-Car Company* v. *Albion Carriage and Motor Body Works, ib.* 346.

Reverting again to *Hendriks* v. *Montagu, supra,* and to the question for decision in this appeal, it occurs to me that the best way to indicate the opinion at which I have arrived is to quote and adopt the language of Brett, L.J., as it is peculiarly applicable to the facts which are before us on this appeal. At p. 459 he said:

"The question is simply whether the name they have adopted is so like the name which the plaintiffs had used as their trade name for so long a period, whether the name which is intended to be used in order to cover a business of the same kind carried on in London, would 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. The question is whether we can come to the conclusion that that will be, in fact, the effect of their using the name which they propose to use, and that must depend in the first place not upon whether the names are identical, but upon whether they are so alike that we are of opinion that in truth and in fact it would have that effect. I do not think that judicially we could decide that as a matter of law; it is a question of fact whether the name is so similar to the other that it would lead to that result—that it would lead to it in business. It is not a question of law at all, but of fact upon the evidence. We have evidence before us, and we are here to judge of the effect of that evidence. If the names were identical I do not say whether one might or might not come to a conclusion without any more evidence, but as it is, I think that evidence was admissible and was necessary. . . . . That evidence seems to me to be satisfactory evidence of the fact, and therefore I think we ought to come to the conclusion, as I do as a matter of fact, that the similarity of the names would in truth have that effect. That seems to me all that it is necessary to decide. It is possible, no doubt, as a matter of possibility, that it would not, but that is not the case here upon the evidence; the question is whether we are of opinion, sitting as a tribunal judging of the fact, that it will—not whether it is possible it might not, but whether in truth it will; and that, to my mind, is made out. Then it is said this is an application for an injunction *quia timet*, and that it ought not to have been made under the Act, and that the Master of the Rolls so held. But that does not seem to me to have been the ruling of the Master of the Rolls. He seems

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to have thought the application might have been made *quia timet*, but that the evidence before him was not sufficient. The case before Vice-Chancellor Hall seems to me to be precisely in point. With regard to the other proposition, that we could not restrain these parties from applying to be registered, it seems to me that the application to be registered is part of the intention which would be made out as a part of the injury, and that therefore this Court can prevent the defendants, and enjoin them from making that application. The whole application therefore for an injunction in this case ought to be granted."

MCPHILLIPS, J.A.

Therefore, for the aforesaid reasons, my opinion is that the appeal should be allowed and an injunction granted, the respondents to be restrained in the terms set out in the statement of claim.

Appeal allowed.

Solicitors for appellant: *Bodwell & Lawson.*
Solicitor for respondent Gunther: *A. M. Johnson.*
Solicitors for respondent Matthew: *Cameron & Cameron.*

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REX *EX REL.* ROBINSON v. SIT QUIN.

Appeal — Jurisdiction — Construction of statutes — Summary Convictions Act, B.C. Stats. 1915, Cap. 59, Sec. 78(1)—Court of Appeal Act, R.S.B.C. 1911, Cap. 51, Sec. 6.

Criminal law — Prohibition Act — Liquor found on premises — Private dwelling-house—B.C. Stats. 1916, Cap. 49, Sec. 11.

The Court of Appeal Act being subsequent in date of passage to the Summary Convictions Act (R.S.B.C. 1911, Cap. 218), the Court of Appeal Act, in case of conflict, prevails, and it continues to prevail notwithstanding the subsequent re-enactment of the Summary Convictions Act.

The accused rented the ground floor of an apartment-house. The entrance from the street led into an unused store which was divided in the middle by a partition across the room. Five steps at the back of the storeroom led to a suite of four rooms occupied as a dwelling by accused and his family. He did not use the storeroom for business of any kind, but the portion behind the partition was used for storing lumber and other material owned by him, and his son slept there. In this

room liquor was found, and he was convicted under the Prohibition Act of unlawfully having liquor in a place other than in the private dwelling-house in which he resided.

Held, on appeal, that the room in which the liquor was found must, on the evidence, be taken as part of his apartments, and the conviction should be quashed.

APPEAL from the decision of CAYLEY, Co. J., of the 14th of February, 1918, dismissing an appeal from a conviction by H. C. Shaw, police magistrate at Vancouver under the Prohibition Act, the accused being found guilty of unlawfully having liquor in a place other than a dwelling-house in which he resided. The accused rented the ground floor of a three-storey apartment house on Georgia Street, Vancouver. There was an entrance from Georgia Street to a large room that had previously been used as a store. This room was divided by a partition across it, slightly back of the middle. At the back of the room five steps led to four dwelling rooms, in which accused lived with his family. The accused's son slept in the store back of the partition, which was also used for storing purposes. The liquor was found in this storeroom, close to the stairs. The front part had never been used by the accused as a store. He was engaged in farming at the time the liquor was seized. Statement

The appeal was argued at Vancouver on the 5th of April, 1918, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Harper, for appellant.

R. L. Maitland, for respondent, moved to quash the appeal on the ground of lack of jurisdiction. This is a conviction by a magistrate under the British Columbia Prohibition Act, B.C. Stats. 1916, Cap. 49, Sec. 11. The County Court judgment is final: see Summary Convictions Act, B.C. Stats. 1915, Cap. 59, Sec. 78(1). The position is the same as *Rex* v. *Berenstein* (1917), 24 B.C. 361; see also *Rex* v. *Brown* (1916), 10 W.W.R. 695. *Rex* v. *Evans* (1916), 23 B.C. 128 does not apply, as the Summary Convictions Act has since been re-enacted, and is now legislation passed after the Court of Argument

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Appeal Act. It should therefore have force and effect over the Court of Appeal Act, and there is no appeal.

Harper, contra: This is an appeal from a judge on an appeal from a conviction under the Summary Convictions Act. The point has already been decided by this Court in *Rex* v. *Evans* (1916), 23 B.C. 128. The subsequent re-enactment of the Summary Convictions Act does not affect the principle involved.

Judgment

Judgment on the preliminary objection was reserved.

Argument

Harper, on the merits: I am entitled to judgment on the facts as found. This was a three-storey apartment house. The magistrate finds it was used by accused as a dwelling. He rented the whole lower flat and lived in the four rooms behind, but his son slept in the room adjoining, where the liquor was found. He used the whole flat as a dwelling, and did not carry on any business in the front room. He was farming at the time: see *Rex* v. *Obernesser* (1917), 40 O.L.R. 264.

Maitland: His dwelling was the four rooms behind the two rooms in front. One was a store and the other a storeroom. The liquor was found in the storeroom.

Harper, in reply: Structural alterations make no difference: see *Wilkinson* v. *Rogers* (1864), 139 R.R. 32.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Mr. *Maitland* has, I think, made the very best of what seems to me to be a weak case. It was conceded by the learned County Court judge that only a question of law was involved, and I am of opinion that that is so. Now, on the facts, the case seems to be this: The rooms in question were part of a frame building. Originally, the front room had been used as a store or shop. The rooms were connected together and had an entrance from the main street, and had no entrance from or into other adjoining parts of the building; they were leased to the accused as a dwelling-house and occupied by him solely as a dwelling-house, his sleeping rooms being in the back part of the apartment. What had formerly been used as a store was used by him as a lumber-room, but to reach the rooms in which his family slept he had to pass to and fro through this room, which, in one sense, was in the nature of a hall to his dwelling. Now, it seems to me that it must be held

that this room was used as part of his appartments, and therefore the keeping of liquor in it was not contrary to the provision of the Prohibition Act. I think the appeal should be allowed, and the conviction quashed.

MARTIN, J.A.: In my opinion the premises here in question come within the definition of section 3, subsection (*b*), as being a private dwelling-house. The learned judge below seemed to be of the opinion (he misdirected himself in that respect, I think, with all due respect) that, as he sums it up, simply because the first room of the whole premises which were rented and occupied by the tenant, was in its use a store and that therefore *per se* it could not remain part of an apartment block. In my opinion, with every respect, that is not the case, because, speaking largely, once you have a suite of the nature specified in subsection (*b*) which is rented as a whole by a tenant, or occupied as it is here, actually residing in it, whether it is occupied by one person or 50 persons, it is no person's business at all to inquire how that suite of apartments may be used. The family, so to speak, might consist of one person, and that family may live in one of the rooms and leave the others—one of, we will say, six rooms, and leave the others unoccupied, or he may live in five rooms more or less and leave the other one unoccupied. The idea that once you have a suite of apartments that you can pry into it and find out what particular use the tenant chooses to put that to, whether he dries clothes in it or whether he uses it as a home, or whether he uses it as a dwelling-room, or whether he chooses to keep a parrot or a pig in it, it is nobody's business at all, provided he does not infringe the city regulations; and therefore I have no difficulty in coming to the conclusion that the learned judge has misdirected himself in the premises and that this does come within the definition of a private dwelling-house. The complexion of the particular class of house is not permanently attached to it. In other words, a shop may be converted into a dwelling-house, and *vice versa* a dwelling-house may be converted into a shop.

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The appeal, consequently, should be allowed.

MCPHILLIPS, J.A.: I would allow the appeal. In the first

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place, I do not think it necessary to go outside of section 3. I exclude subsections (*a*) and (*b*). The facts as found completely fill that definition. Now, if I can say so with respect to the Legislature, subsections (*a*) and (*b*) are idle and of no effect. The subsections are enacted with the preliminary statement that they are not restrictive of the general statement. The Court, then, in construing the enactment must so read it, without restriction, and what is attempted is to restrict the general statement. It is an inapt use of language taken from the British North America Act. The intention in that Act was to in no way restrict or modify the powers statutorily granted, and that all authority should be in the Dominion Parliament not specifically conferred on the Provincial Legislatures, but if I should be wrong in disregarding subsections (*a*) and (*b*), I do not consider that the premises in question come within the meaning of either of the subsections. The appeal should be allowed, and the conviction quashed.

MCPHILLIPS, J.A.

MACDONALD, C.J.A.: 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.

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MARTIN, J.A.: I agree.

MARTIN, J.A.

MCPHILLIPS, J.A.: I agree.

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Conviction quashed.

Solicitors for appellant: *McCrossan & Harper.*
Solicitors for respondent: *Maitland & Maitland.*

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Guaranty—Bank—Collateral securities—Statement of shewn guarantor when he entered into guarantees—Effect of—Objection by bank to rider—Indorsed on guarantees—Acceptance.

A surety will not be relieved from liability because the language of the guarantee carries more than the parties have contemplated, even though the Court may be of opinion that had the surety understood this he would not have entered into the guarantee.

APPEAL from the decision of GREGORY, J. of the 20th of June, 1917, in an action upon a guarantee given by the defendant on the 2nd of January, 1914, to secure the indebtedness of T. R. Nickson & Company and T. R. Nickson & Company, Limited. Prior to 1912 T. R. Nickson and Alfred St. John, carrying on business as T. R. Nickson & Company, did their banking with the plaintiff Bank, and the defendant Banfield, being Nickson's father-in-law, indorsed notes for the partnership. In 1912 the partnership incorporated into a limited liability company, the plaintiff continuing as its banker until the end of January, 1914. At the Bank's request, Banfield gave a guarantee for the indebtedness of T. R. Nickson & Company in February, 1913. On this guarantee Banfield indorsed a rider that should the Bank make demand for payment under the guarantee, payments would only be payable in certain instalments covering one year. After this guarantee was given matters proceeded in the usual course of business until November, 1913, when the Bank asked Banfield to give guarantees covering both the partnership and the Company as incorporated, in pursuance of which Banfield gave guarantees covering both on the 2nd of January, 1914, but added the same rider to each as to payment by instalments in case of demand. At the time they were negotiating for the further guarantees the Bank gave Banfield a statement of the Company's indebtedness to the Bank, which included a memorandum of the securities held by the Bank. When the first guarantee was given the Bank objected to the rider added by the defendant, and

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objected to its incorporation in the guarantees given on the 2nd of January, 1914, but it retained the guarantees and continued business in the regular way with T. R. Nickson & Company, Ltd., as though the guarantees were regular. The learned trial judge found in favour of the plaintiff and ordered a reference as to the amount due in respect of the guarantees. The defendant appealed.

Statement

The appeal was argued at Vancouver on the 8th and 9th of January, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

Stuart Livingston (*O'Dell,* with him), for appellant: The first guarantee was for T. R. Nickson & Co. Then, after the Company was formed, the defendant was asked for another. Both had riders indorsed on them as to payments in case of demand by the Bank. Owing to the riders the Bank never accepted either guarantee. The letters from the Bank shew this, and Buchan, the manager of the Bank, told the defendant he would not accept the guarantees until the head office instructed him. Ellis, who was solicitor for the Bank, had no power to accept for the Bank.

Armour, on the same side: On the question of misrepresentation and fraud in regard to assignments made by Nickson & Co. to the Bank, the statement made by Carrall, for the Bank, and delivered to the defendant, shewed assignments up to $70,000, but he knew no such sum was due; in fact, a portion of the moneys shewn on the statement were paid before the statement was made. The surety is released: see *Davies* v. *London and Provincial Marine Insurance Company* (1878), 8 Ch. D. 469.

S. S. Taylor, K.C. (*W. C. Brown,* with him), for respondent: The defendant took a great personal interest in the concern, as Nickson was his son-in-law. The Bank held the guarantees for what they were worth, although it wanted the rider withdrawn from the guarantee. The defendant knew the whole circumstances and never raised any objection. The doctrines of waiver and estoppel apply. The Bank continued to make advances while objecting to the rider on the guarantee, and during that time the overdraft increased. As to misrepresentation complained of, waiver and estoppel apply.

Armour, in reply: It is an inference of law as to whether he was induced to give the guarantee by reason of the misrepresentation: see *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1 at p. 21.

Cur. adv. vult.

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

MARTIN, J.A. dismissed the appeal.

MARTIN, J.A.

MCPHILLIPS, J.A.: This appeal has relation to two guarantees given to a bank and a contemporaneous agreement referring to the guarantees relative to collateral security and guaranteeing all sums then due and accruing due and owing to the Bank from T. R. Nickson, Mary Nickson, wife of T. R. Nickson, and T. R. Nickson and Alfred St. John, carrying on business as T. R. Nickson and Company, and from T. R. Nickson and Company, Limited, the guarantor being the defendant. The form of the guarantees may be said to be the usual form in use by the Banks of Canada, and read, respectively, "for the due payment of the sums which are now or shall at any time hereafter be owing to the Bank from T. R. Nickson and Company of Vancouver, B.C., and T. R. Nickson and Company, Limited, of Vancouver, B.C." (the principal debtor). It would appear that previously to the giving of the guarantee of the 2nd of January, 1914, guarantees prior in date existed, but when executed by the appellant were made subject to a condition which the Bank throughout refused to accept or be bound by, although the singular situation seemed to be present throughout a long time, that advances were made presumably upon the faith of these guarantees. Whilst this would not appear to be good business procedure, yet the only explanation that is forthcoming may be said to be that it was always expected that the condition would in the end be withdrawn. It was a condition which would operate to defer payments if liability accrued under the guarantee. This condition of things was present at the time of the giving of the guarantees sued upon, and a great deal of reliance is placed upon the fact that the Bank nevertheless kept insisting that the appellant was liable upon these pre-

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vious guarantees. In my opinion it cannot be considered that these previous guarantees were operative or effective, the parties never being *ad idem* in relation thereto. However, in the way I view matters, this is wholly immaterial; also it is immaterial as to what was understood with respect to the collateral securities held by way of assignments of money due to the principal debtor by the City of Vancouver, as at the time of the giving of the guarantees sued upon the appellant must be held to have been fully acquainted with all the facts and circumstances and as to the value of these assignments of moneys due by the City of Vancouver, and that they fell far short of the value previously placed thereon, namely, $70,000. The appellant was a director of the T. R. Nickson Company, Limited, and it is a matter of fair inference that the business affairs of the principal debtor were well known to him, or should have been. It cannot be said, upon the facts, that there was any fraudulent concealment and misrepresentation practised upon the appellant (the guarantor) by the Bank, and consideration for the giving of the guarantees is well established—fortified to the further degree that in the giving of the guarantees sued upon, the condition previously insisted upon was removed or not insisted upon, and a further express advance was thereupon made of the very considerable sum of $30,000. The learned trial judge found in favour of the Bank and upheld the guarantees, directing a reference to find the true amount due in respect thereof, and I cannot persuade myself, notwithstanding the very elaborate and able arguments of counsel for the appellant, that the learned trial judge arrived at a wrong conclusion, and he had the benefit of seeing and hearing the witnesses throughout a long trial, and it would appear that the case was gone into with much care and all the available evidence was before the Court, and the trial judge has remarked upon the evidence in such a manner as would disentitle this Court from disturbing the judgment unless it were clearly of the opinion that there has been error in law. The principles upon which appellate Courts are to act in such cases, in my opinion, prevent any contrary opinion being arrived at (see *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Re Wagstaff; Wagstaff* v. *Jalland*

(1907), 98 L.T. 149). In *Lodge Holes Colliery Co., Lim.* v. *Wednesbury Corporation* (1908), 77 L.J., K.B. 847, Lord Loreburn, L.C. at p. 849 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."

It cannot be successfully gainsaid that the appellant freely and voluntarily entered into the guarantees and agreement, and the Bank acted upon them to its detriment in making very considerable advances, and the learned trial judge construed them and gave effect to them in accordance with the true intent, meaning and understanding of the parties as expressed in the writings (see *Bank of Montreal* v. *Munster Bank* (1876), 11 Ir. R.C.L. 47, *per* Fitzgerald, J. at p. 55; *Barber* v. *Mackrell* (1892), 68 L.T. 29; *The York City and County Banking Company* v. *Bainbridge* (1880), 43 L.T. 732). That the appellant did not intend to undertake the liability now shewn to exist and would not have entered into the guarantees and contemporaneous agreement had he known the true state of accounts and the shrinkage of the collateral from about $70,000 to $7,000, or that he never intended to incur the liability that is now shewn to exist, is of no avail. He was in no way imposed upon by the Bank.

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"*Stewart & McDonald* v. *Young* (1894), 38 Sol. Jo. 385, where, however, Wills, J., said, that a surety will not be relieved from liability because the language of the guarantee carries more than the parties have contemplated, even though the Court may be of the opinion that, had the surety understood this, he would not have entered into the guarantee. See *Steele* v. *Hoe* (1849), 14 Q.B. 431; *Broom* v. *Batchelor* (1856), 1 H. & N. 255; *Chalmers* v. *Victors* (1868), 18 L.T. 481; *Hoad* v. *Grace* (1861), 7 H. & N. 494":

see note (*t*), p. 474, Halsbury's Laws of England, Vol. 15; and also see *Taff Vale Railway Co.* v. *Davis & Sons* (1894), 1 Q.B. 43; and *Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13. Then we have Coleridge, J. in *The Corporation of the London Assurance* v. *Bold* (1844), 14 L.J., Q.B. 50, saying at p. 54:

"No doubt, the intention of the parties is to be inquired into, but that is the intention of the parties as expressed in the instrument itself. You may, indeed, look to the situation of the parties; but where the meaning

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is clear on the face of the instrument, it is a rule not to be broken in upon, that that meaning is not to be added to or extended by evidence."

Upon the whole case, therefore, my opinion is that the appellant is liable upon the guarantees and upon the contemporaneous agreement for the balance that may be due and owing by the principal debtors as set forth in the two guarantees and the contemporaneous agreement; that balance, of course, can only be that which constitutes a legal debt due and owing by the principal debtor (see *Swan* v. *The Bank of Scotland* (1836), 10 Bligh (N.S.) 627).

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. dismissed the appeal.

Appeal dismissed.

Solicitors for appellant: *Livingston & O'Dell.*
Solicitors for respondent: *Ellis & Brown.*

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MARSTON v. THE MINNEKAHDA LAND CO.

MARSTON v. THE MINNEKAHDA LAND COMPANY, LIMITED.

Company law — Winding-up — Application for — Previous assignment for benefit of creditors—Application opposed by all other creditors—Judicial discretion—Exercise of—Appeal—Right of—Future rights—R.S.C. 1906, Cap. 144, Sec. 101.

Under section 101 of the Winding-up Act, an appeal lies from the refusal of a winding-up order, as it involves future rights.

Re Union Fire Insurance Co. (1896), 13 A.R. 268 followed.

On an application for the winding-up of a company that had previously made an assignment for the benefit of its creditors, where it appears that the petitioner was a secured creditor, that he had no substantial interest in the winding-up, and was the only creditor who desired the order, the order ought not to be made (MCPHILLIPS, J.A. dissenting).

Statement

APPEAL from an order of MORRISON, J. of the 6th of October, 1917, dismissing a petition for the winding up of the defendant Company. In July, 1912, the plaintiff sold certain

lands to the Minnekahda Land Company under an agreement for sale for $12,000, payable in instalments. The Company paid $7,500 on account of the purchase price and was in default as to the balance. After certain extensions had been granted for payment of the last instalments, the plaintiff eventually brought action for the balance due in July, 1916. On arrangement between the parties the Company paid $1,130 on account of the balance due, and the action was discontinued, but as no further payments were made, the plaintiff again issued a writ for the balance due in July, 1917, and served notice under section 4 of the Winding-up Act. Judgment was entered on the 24th of August, 1917. The defendant Company made an assignment under the Creditors' Trust Deeds Act on the 15th of August, 1915. This petition was filed on the 6th of September, 1917. Upon the dismissal of the petition the plaintiff appealed.

Statement

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

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

A. D. Taylor, K.C., for respondent, raised the preliminary objection as to the right of appeal under section 101 of the Winding-up Act, upon which judgment was reserved.

Tupper, on the merits: It is submitted that as the learned trial judge gave no reasons for judgment he has not exercised his discretion but acted on the view the petition was demurrable. The Court of Appeal can therefore deal with the matter without the question of interfering with the discretion of the Court below being raised. There are many matters in connection with the Company that require investigation. The chattel mortgage to Buck and Jenkins is bad as it is not in compliance with the Bills of Sale Act, and was a fraudulent preference within section 95 of the Winding-up Act. The insolvency of the Company and the assignment for the benefit of creditors both are grounds for a winding-up order *ex debito justitiæ* as against the Company. The claims of the creditors opposing must be looked into: see *In re Uruguay Central and Hygueritas Railway Company of Monte Video* (1879), 11 Ch. D. 372 at

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p. 383; *In re Chapel House Colliery Company* (1883), 24 Ch. D. 259 at pp. 266-7. A company may be wound up although its assets are entirely covered by debentures: see *In re Chic, Limited* (1905), 2 Ch. 345; *In re Alfred Melson & Co., Limited* (1906), 1 Ch. 841; and the fact that secured creditors oppose is immaterial: see *In re Crigglestone Coal Company, Limited* (1906), 2 Ch. 327. The class of creditor particularly affected must be considered, not the majority: see Halsbury's Laws of England, Vol. 5, p. 414. Where the statutory notice under section 14 of the Winding-up Act has been served demanding payment which has matured into a judgment, the judgment creditor is entitled *ex debito justitiæ* to the winding-up order unless some ulterior motive is disclosed: see *In re Amalgamated Properties of Rhodesia (1913), Lim.* (1917), 86 L.J., Ch. 530; Buckley on Companies, 9th Ed., 307. When there is not good faith on going into voluntary liquidation a winding-up order should go: see *In re The A. B. Cycle Co. (Limited)* (1902), 19 T.L.R. 84. The *ex debito* right of a creditor to a winding-up, in case of insolvency or in case of assignment for benefit of creditors, is recognized by Boyd, C. in *Re Maple Leaf Dairy Co.* (1901), 2 O.L.R. 590; *In re Hermann Lichtenstein and Co.* (1907), 23 T.L.R. 424, where there was a voluntary winding-up, and although no prejudice was shewn to the petitioner it was held the order should go: see also *In re Krasnapolsky Restaurant and Winter Garden Company* (1892), 3 Ch. 174 at p. 178. It is not for the petitioner to shew there were not sufficient assets to warrant a winding-up order: see Parker & Clark's Company Law, pp. 365-7; *In re Crigglestone Coal Company, Limited* (1906), 2 Ch. 327 at pp. 332-3; *In re Chic, Limited* (1905), 2 Ch. 345 at pp. 347-8.

Argument

Taylor: The contention in the Court below was that all the creditors except the petitioner were satisfied with the assignment under the Creditors' Trust Deeds Act, and the result was the petition was dismissed. The learned judge therefore exercised his judicial discretion and, I submit, properly. The petitioner stands alone as to this application, and in addition is amply secured, as the property is worth the balance due on the sale. The law as to the petitioner's right *ex debito justitiæ,*

where the Company is insolvent, has been changed. The Court will consider the wishes of the majority. The granting of the petition now would entail a large additional expense, to the detriment of the other creditors. Counsel's criticism of the statements submitted by the assignee to the creditors cannot be considered, as he did not cross-examine as he was entitled to do, and the statement must be accepted: see *Re Okell & Morris Co.* (1902), 9 B.C. 153; *Re The London Health Electrical Institute Limited* (1897), 76 L.T. 98. The refusal of the order is supported in *Re Oro Fino Mines, Limited* (1900), 7 B.C. 388; *Re Maple Leaf Dairy Co.* (1901), 2 O.L.R. 590; *In re The Strathy Wire Fence Co.* (1904), 8 O.L.R. 186; *Re Belding Lumber Co., Limited* (1911), 23 O.L.R. 255. As to the wishes of the majority to continue the voluntary winding-up see *In re Greenwood & Co.* (1900), 2 Q.B. 306; *In re West Hartlepool Ironworks Company* (1875), 10 Chy. App. 618. It must appear that unless the order is made the petitioner will be prejudiced: see *In re Russell, Cordner & Co.* (1891), 3 Ch. 171: *In re National Debenture and Assets Corporation* (1891), 2 Ch. 505 at p. 518; *In re West Surrey Tanning Company* (1866), L.R. 2 Eq. 737.

Argument

Tupper, in reply.

Cur. adv. vult.

2nd April, 1918.

MACDONALD, C.J.A.: This is an appeal from MORRISON, J. refusing an order to wind up defendant Company under Cap. 144, R.S.C. 1906.

The preliminary objection was taken by Mr. *Taylor,* counsel for the respondent, that under section 101 of the Act an appeal does not lie. I think the objection must be overruled.

In *Re Union Fire Insurance Co.* (1896), 13 A.R. 268 at p. 295, it was held that an appeal of this nature involves future rights. *Cushing Sulphite-Fibre Co.* v. *Cushing* (1906), 37 S.C.R. 427 decides only that in a case of this sort it cannot be said that any sum of money is involved. That case does not decide and could not decide, having regard to the statute there under construction, the question of whether or not future rights are involved in a winding-up order.

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Then, on the merits. After a careful consideration of the facts, and of the very able written arguments which have been submitted to us, I am not prepared to say that the learned judge wrongly exercised his discretion in refusing to make the winding-up order. It was argued that since he has given no reasons for judgment, it ought to be assumed that he disposed of the application otherwise than in the exercise of a discretion. I think, on the contrary, it must be assumed that he came to his conclusion judicially, and if the order is one which is discretionary and can be sustained on the assumption that the judge applied his mind to the whole case, then it must be taken that he made the order in the exercise of that discretion.

Appellant's counsel contended that where a statutory notice has been served demanding the payment of a debt which has matured into a judgment, the judgment creditor is entitled *ex debito justitiæ* to the winding-up order unless it be established that the petition is being made use of for some ulterior or improper motive, and he cites several authorities to support that contention. I do not find it necessary to go into a minute discussion of the authorities. The late Full Court in *Re Okell & Morris Co.* (1902), 9 B.C. 153 held that where nothing substantial was to be gained by the winding-up order, the judge of first instance was right in refusing to make it. If I am to understand by the submission of counsel above referred to, that special stress is being laid upon the fact that a demand for payment was made and not met, then I think it right to say that, in my opinion, it makes no difference in considering the *ex debito* right to an order whether the insolvency be proved by that method or by any other sufficient evidence. However, in that respect there is no distinction to be drawn between this case and *Re Okell & Morris Co., supra,* where no such demand appears to have been made. The decision of the Full Court, while not binding on this Court, was the decision of a Court of co-ordinate jurisdiction, which this Court by judicial comity will not overrule except under very exceptional circumstances indeed. *Re Okell & Morris Co., supra,* in a way was a much stronger case for the making of the order than is the one at bar. There there was neither a voluntary winding-up nor an assign-

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ment for the benefit of creditors preceding the petition. Here there was an assignment for the benefit of creditors, and the case in respect of its facts is very similar, except in some matters affecting discretion, to that of *Re Maple Leaf Dairy Co.* (1901), 2 O.L.R. 590, where an order to wind up was refused and the proceedings under the assignment permitted to be carried on.

Now the case made out by the petitioner is a strong one in all respects except one. Were it not for that one, the numerous English cases cited to us would have great weight. The distinguishing circumstance is this, and it is clearly analogous to a similar circumstance in *Re Okell & Morris Co.* Here the petitioner is the only creditor who wants the Company wound up compulsorily, the others want it wound up by the assignee. The petitioner is a secured creditor, though his counsel appeared to ridicule the idea that a vendor of land under an agreement of sale who had received two-thirds of the purchase-money, and who cannot be compelled to convey until the other third is paid, to him, is a secured creditor. Had he conveyed and taken a mortgage back, could it be said that he was not a secured creditor, yet his situation is in effect that of a mortgagee holding a first mortgage to secure $4,000 on land which not very long before the petition, had been sold by him to the Company for $12,000?

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There is not a tittle of evidence that his security is not ample. The lands are farm lands, and while in argument it was suggested that there was a shrinkage in the value of lands between the date of sale and that of the petition, there is no evidence of it; to use the words of WALKEM, J. in *Re Okell & Morris Co., supra,* at p. 157, "I see nothing to be gained by a winding-up order." On the contrary, I see danger of loss to the estate by making the order.

In what I have said I do not wish to convey the impression that a secured creditor cannot be a petitioner for a winding-up order. What I do say is that where it is not made to appear that the petitioner has a substantial interest in the winding-up, and where he is the only creditor desiring an order to wind up, the order ought not to be made.

I would dismiss the appeal.

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MARTIN, J.A. dismissed the appeal.

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

MCPHILLIPS, J.A.: This appeal is from the refusal of Mr. Justice MORRISON to order a winding-up of the respondent under the Winding-up Act (R.S.C. 1906, Cap. 144), the petitioner therefor—the appellant—being a judgment creditor of the respondent. The respondent before the application was made had made an assignment for the benefit of creditors under the Creditors' Trust Deeds Act (R.S.B.C. 1911, Cap. 13). The fact of the assignment alone would entitle a winding-up order being made (see Winding-up Act, R.S.C. 1906, Cap. 144, Secs. 3 (*g*), 11 (*c*). The petition for the winding-up was opposed by the Company and nearly all the creditors. The main ground of objection was that, in view of the assignment, the creditors other than the petitioner were satisfied that the assignee should proceed under the terms of the assignment and the provisions of the Creditors' Trust Deeds Act, the contention being that the assignment for the benefit of creditors was in effect a voluntary liquidation and Ontario cases were cited to that effect, and that no sufficient case had been made out for the making of a compulsory order for winding-up. The onus, however, was upon the respondent to shew that there was no reasonable probability of any benefit accruing to the unsecured creditors for the winding-up (see *In re Crigglestone Coal Company, Limited* (1906), 2 Ch. 327; *In re Krasnapolsky Restaurant and Winter Garden Company* (1892), 3 Ch. 174), and that onus, in my opinion, was not discharged. I cannot bring myself to the conclusion, in the present case, that the winding-up will be unfruitful or that the petition is presented simply for the purpose of making costs (see Emden's Winding-up, 8th Ed., at pp. 36-7). The petitioner in the present case, in my opinion, is entitled *ex debito justitiæ* to the winding-up order (see *In re Amalgamated Properties of Rhodesia (1913), Lim.* (1917), 86 L.J., Ch. 530, Sargant, J. at p. 533). It cannot be said that an assignment for the benefit of creditors is equivalent to a voluntary winding-up, but even if it were, and were it even that the Company was being wound up voluntarily, that would not

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disentitle a compulsory order being made that it be wound up by the Court.

I do not consider it necessary to refer to or discuss in detail all the cases referred to in the written arguments (which by leave upon special grounds were allowed to be presented), but consider it sufficient to say that in my opinion the present case is one in which an order should have gone for the winding-up of the Company under the Winding-up Act (R.S.C. 1906, Cap. 144). I cannot, with great respect to the learned judge, accept the contrary view at which the learned judge arrived.

I would therefore allow the appeal.

MCPHILLIPS, J.A.

EBERTS, J.A. dismissed the appeal.

EBERTS, J.A.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Tupper & Bull.*
Solicitors for respondent: *Taylor & Campbell.*

ALBION MOTOR EXPRESS v. CORPORATION OF THE CITY OF NEW WESTMINSTER.

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ALBION MOTOR EXPRESS v. CITY OF NEW WESTMINSTER

Highway—Repairing street—Municipality—Obligations of—Oiling street—Skidding of automobile—Negligence.

It is the duty, and only duty, of a municipality, in repairing a road under statutory authority, to see that traps are not left for the unwary, such as dangerous places unguarded by a warning of their condition. Where the work is open to the observation of any person using the road, and it is conducted in a lawful manner, the user has no cause of action for injuries sustained (MCPHILLIPS, J.A. dissenting).

APPEAL from the decision of MURPHY, J., in an action for damages to a motor-truck owing to its skidding on an oiled street in New Westminster, tried by him at Vancouver on the 25th and 28th of January, 1918. The facts are sufficiently set out in the reasons for judgment of the learned trial judge.

Statement

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McPhillips, K.C., and *H. M. Smith*, for plaintiff.
McQuarrie, for defendant.

2nd February, 1918.

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MURPHY, J.: I find the defendant had oiled the middle of 8th Street up to the northern boundary of Royal Avenue and was engaged in sanding the oiled space when the accident happened. The east half of the oiled strip had been sanded right up to the end of the oiled section, *viz.*, the northern boundary of Royal Avenue. The west half of the strip was unsanded all across the intersection of 8th Street with Royal Avenue and for some little distance below that intersection. The work had been carried on expeditiously and there had been no unnecessary delay. The oiled strip, as laid on, was 18 feet wide. The oil was of a somewhat heavier grade than that which defendant had used in former years, but there had been no negligent spreading of it, nor had it covered the roadway to within three or four feet of the gutter. There had been some seepage along each side of the 18-foot strip, such as must occur under the weather conditions, but this was through no fault of the defendant. The strip of roadway left unoiled for the passage of traffic was, despite this seepage, sufficiently wide for vehicular traffic, provided care was exercised by drivers. There was, therefore a strip of unsanded oil nine feet wide plus some seepage along the west of the middle line of 8th Street right across its intersection with Royal Avenue. This strip being black in colour and the remainder of the roadway dry was clearly visible to anyone driving a vehicle such as the one concerned in this accident, at a distance of approximately 100 feet. The driver did not, however, observe it until he was within six feet of its western edge. At the rate he was travelling he could have stopped his truck in a distance of at the utmost 30 feet. He would have been unable to turn off Simcoe Street onto the unoiled western portion of 8th Street so as to drive around the head of the oiled strip, if he went straight ahead, but if he had seen the oiled strip at a distance of even 30 feet from it, he could have done so by utilizing the width of Simcoe Street and properly manipulating his machine. Likewise, the turn at the head of the oiled strip could have been made by utilizing the

width of the prolongation of 8th Street. Care would be required in driving up the western side of 8th Street after making the turn, as the oil had spread somewhat by seepage, but not, in my opinion, on the evidence, sufficiently to prevent the safe passage of this truck if carefully driven, particularly when it is remembered that 8th Street widens from the northern boundary of Royal Avenue.

From an inspection of Exhibit 2, which is drawn to scale, I think the truck driver could see the head of the oiled strip at any rate as soon as he arrived at the intersection of Simcoe Street with 8th Street, as looking north there is a 9 per cent. grade, and he would be on the left or north side of Simcoe Street.

To succeed, the plaintiff must shew negligence. The defendant was not bound to repair 8th Street, but it has statutory authority to do so if it saw fit—*Von Mackensen* v. *The Corporation of Surrey* (1915), 21 B.C. 198. The mere act of repairing *per se,* therefore, could not be negligence and it is not so contended.

Two acts of negligence were relied on: (1), the covering with oil of the portion of 8th Street where the accident happened. The facts, in my opinion, as set out above do not support this contention. With care, the plaintiff could have gone around the oiled strip; (2), it is said there should have been danger signals. There were no such signals.

The true principle of liability seems to be that laid down in *Atkin* v. *City of Hamilton* (1897), 24 A.R. 389 at p. 392, where Osler, J.A. says:

"The only thing they [the defendants] were bound to do was not to leave traps for the unwary—dangerous places unguarded by a warning of their condition. Here everything was patent to the observation of all persons using the road; and if they did use it, they had, I think, to take it as it was, if the work was being done thereon in a lawful manner."

This language, I think, fits the facts of this case. The accident occurred in broad daylight about one o'clock in the afternoon in bright sunlight. If it had occurred at night, possibly the place might be held to be a trap. The oiled strip could be seen at a distance of about 100 feet. The suggestions that the driver did not see it because of the sun shining on the brass of the radiator, or because he was engaged in switching

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off his magneto, or changing his gear, cannot, I think, be accepted on the evidence. As to the latter reasons, the driver himself admitted such actions did not necessitate taking his eyes off the road. As to the first, I do not think it would have prevented him seeing the oiled strip in time had he been looking ahead. Even if it did, I much doubt if defendant can be fixed with negligence on the ground that it should have known the place would be a trap to drivers of motors, the radiators of which were trimmed with brass. At any rate, the onus of proving this is on the plaintiff, and I do not think the evidence adduced satisfies such onus.

Counsel for plaintiff cited cases to shew that mere knowledge of the existence of obstructions on a street on the part of a plaintiff is not *per se* a defence to such an action as this, but these cases bear on the question of contributory negligence.

MURPHY, J.

The primary requisite of success in negligence actions is proof of negligence causing the accident. In my view, plaintiff has failed to satisfy the onus on it of furnishing such proof. If I am in error and plaintiff is entitled to succeed, I find the damages to be $1,205.84.

The action is dismissed.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 4th and 5th of April, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

McPhillips, K.C., for appellant: The truck overturned and the goods were entirely destroyed. The driver jumped and was uninjured. The oil was in the nature of a hidden danger, for which we were not bound to look. Unless the danger was obvious they were bound to give us warning by notice: see *Atkin* v. *City of Hamilton* (1897), 24 A.R. 389. The truck was properly handled by the motorman. There was no finding of negligence on his part. As to the care a corporation should take in warning the public of danger see Shearman & Redfield on Negligence, 5th Ed., 906; *Dickson* v. *Township of Haldimand* (1903), 2 O.W.R. 969; *Armstrong* v. *Township of Euphemia* (1906), 7 O.W.R. 552 at p. 555; *Boyle et ux.* v. *Corporation*

of Dundas (1876), 27 U.C.C.P. 129 at pp. 132-3; *Roach* v. *Village of Port Colborne* (1913), 13 D.L.R. 646 at p. 649; *Touhey* v. *City of Medicine Hat* (1913), 10 D.L.R. 691 at pp. 693-4; *Gordon* v. *The City of Belleville* (1887), 15 Ont. 26 at pp. 29-30; *Copeland* v. *Corporation of Blenheim* (1885), 9 Ont. 19 at p. 24; *Keech* v. *Town of Smith's Falls* (1907), 15 O.L.R. 300 at p. 301; *Ridley* v. *Lamb* (1852), 10 U.C.Q.B. 354; Halsbury's Laws of England, Vol. 16, pp. 133-4, notes (*h*) and (*i*); *Bull* v. *The Mayor, &c., of Shoreditch* (1902), 19 T.L.R. 64 at p. 65; *Torrance* v. *Ilford Urban District Council* (1908), 72 J.P. 526; (1909), 73 J.P. 225; *Hill* v. *Tottenham Urban District Council* (1898), 15 T.L.R. 53 at p. 54. They knew of the defect and we did not: see *Thomas* v. *Township of North Norwich* (1905), 6 O.W.R. 13 at p. 14.

Martin, K.C., for respondent: Notice of the accident required by the Act was not given: see *Egan* v. *Township of Saltfleet* (1913), 29 O.L.R. 116; *O'Connor* v. *City of Hamilton* (1905), 10 O.L.R. 529 at p. 536. On the appeal generally, the coat of oil put on was very light, only one-twenty-fifth of an inch thick: see *Macdonald* v. *Township of Yarmouth* (1898), 29 Ont. 259; *Gougeon* v. *La Cite de Montreal* (1908), 34 Que. S.C. 324 at p. 325; Tiedeman on Municipal Corporations, 328; *Fafard* v. *La Cite de Quebec* (1917), 55 S.C.R. 615. Argument

McPhillips, in reply: The evidence shews it was not necessary to give formal notice: see *Lever* v. *McArthur* (1902), 9 B.C. 417; *McInnes* v. *Corporation of Egremont* (1903), 5 O.L.R. 713 at p. 715; *Young* v. *Township of Bruce* (1911), 24 O.L.R. 546; *Egan* v. *Township of Saltfleet* (1913), 13 D.L.R. 884: see Annotations at pp. 887, 890, 892. We did not see the oil until we were too close to turn away.

MACDONALD, C.J.A.: This case was tried by Mr. Justice MURPHY, without a jury. He was, therefore, so far as the facts of the case are concerned, exercising the function of a jury, and his findings of fact, of course, must be treated with great respect by this Court. They are not so binding on the Court as would be the findings of a jury, but they are such that the Court cannot, unless of the opinion that the findings are clearly wrong, set them aside. I have read the judgment MACDONALD, C.J.A.

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of Mr. Justice MURPHY, and I am unable to say that he was clearly wrong in finding that the driver of the truck might have avoided the danger had he exercised ordinary care and driven, as he might have done (so the learned judge found) to the left and above the oiled strip and got to the eastern side of 8th Avenue into a place where he could have descended with safety. Not only can I not say that the finding was clearly wrong, but I think that it was right, and, being of that opinion, I concur in the conclusion and with the reasons given therefor by the learned trial judge.

MARTIN, J.A.: I am of the same opinion.

GALLIHER, J.A.: The case is a difficult one from my point of view, and very largely hinges, in my opinion, as to whether the driver should not or cannot be taken to have known of the existence of this oil on the road, and should have seen it, and should be taken to have seen it before he did. There is a duty imposed on a person using the streets, especially where he has knowledge of steep streets such as we find here, to exercise a certain degree of care in travelling on those streets, particularly with the load that he had. I was, for a time, strongly impressed with the view that it would have been an easy matter for him to have gone up and gone around. I still think he could have done so if he had noticed the oiling and had stopped where he was on the level before he entered upon the grade of 8th Street, even although there is that acute angle where Simcoe Street comes out into 8th. I will not go so far as to say that there is not some doubt in my mind. There is some doubt in my mind as to whether the learned trial judge was right in the findings he made; but that doubt is not sufficient to justify me in saying that he came to a wrong conclusion, and unless practically satisfied that the trial judge below has come to a wrong conclusion upon the evidence, I feel it is my duty to accept that finding. That being my view of the case, I would not interfere with the judgment below.

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would allow the appeal. I consider that the evidence amply proves that the Corporation of the City

of New Westminster were laying this oil in a negligent manner, in that in the doing of it, the street was not closed to traffic, and if it could be said, with which I do not agree, that this would be unnecessary if only the ordinary film of oil was being laid down, when a heavy thickness was being laid, 80 per cent. of it being asphaltum, it was nothing less than a trap, not only to the unwary but to the ordinarily careful user of the street, in the rightful user thereof, and upon the law unquestionably, in my opinion, the Corporation cannot be excused. As to the governing principle of law, I would refer to the case of *Jamieson* v. *City of Edmonton* (1916), 54 S.C.R. 443, *per* Duff, J. at pp. 456-7.

Now the present case was tried by the learned judge without a jury, and we are not embarrassed to the same extent that we would be if we had the finding of a jury to deal with. I quite agree that a great deal of weight must be attached to the findings of the learned trial judge, but we have to hear the case in the way of a rehearing, and we should not, as the cases shew (*Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Montgomerie & Co., Limited* v. *Wallace-James* (1904), A.C. 73, the Earl of Halsbury, L.C. at p. 75; Lord Shand at pp. 78-9; Lord Davey at pp. 82-3; Lord Lindley at p. 92), shrink from our duty when of the view that the learned trial judge has gone wrong. Now, in my opinion, with great respect, the learned trial judge has gone wrong both upon the facts and upon the law. This truck was proceeding down Simcoe Street—a 4-ton truck with a 4-ton load—traffic known to the Corporation, a street with a 9 per cent. grade. The truck passed upon newly laid oil, there being no barrier up or warning by notice or otherwise. Now, there can be no question of a doubt had the Corporation taken reasonable precaution, this accident would not have occurred. Then why, applying the principles of law, should the Corporation be excused from responsibility, unless one is, upon the facts, driven to that conclusion? To lay oil of the consistency the evidence shews it to have been, in the way it was done and without barrier or warning, was a dangerous thing to do, accentuated by the grade. The street was left open for traffic. It was a common highway. I have often observed as a matter of general

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knowledge work going on upon highways, but it is customary to see the highway closed to traffic or a barrier erected, which is only a reasonable precaution. That precaution was not taken in this case. In my opinion, this was a nuisance—the laying of oil of the consistency stated and under the circumstances detailed, upon a street with a 9 per cent. grade, and not giving any warning or erecting any barrier. Now in this particular case, has the Corporation met this evidence? Has any care, any reasonable care, been shewn? None whatever. The workmen, according to the evidence, were at about Cunningham Street, some distance away from the intersection of Simcoe, Royal Avenue and 8th Street, and no barrier was up. To say that a man should have halted his truck and made a sharp turn up grade in a width of 11 feet on a slope to the gutter, the truck and load weighing 8 tons, and in that way proceed up 8th Street and around the end of the oil as laid, would be, with all respect to the learned trial judge, a requirement which could not be said to be one of reason, especially when there was no indication of danger apparent to the driver of the truck. Could it be said to be a reasonable exercise of the power of the Municipality to, at this particular point, be oiling under the circumstances and in the manner in which it was being done? Further, the oil had 80 per cent. asphaltum in it, and there is evidence that the oil as laid was half an inch thick. The City engineer seemed unable to give any positive evidence as to this. He said he did not think the oil was above one-twenty-fifth of an inch in depth, but when we have oil with 80 per cent. asphaltum, which is of road-making material as against crude oil, which would only form a film, the situation created was one of extreme danger, and O'Mally, the Corporation employee who laid it, said it would have the effect of causing motor-cars to slip. Naturally oil with 80 per cent. asphaltum, that is, 80 per cent. of road-forming material, would take some time to set and to work into the road, and in the *interim* produce a highly dangerous condition for traffic. I think that the driver of the truck, coming, as he says, into 8th Street under the circumstances in which he did, with no warning and no barrier up, in saying that he did not notice the oil until he was within six feet of it, is not

unreasonable, and it seems to accord with common sense. Upon the evidence, it is wholly unreasonable to say that there was any negligence in the driver of the truck. It seems to me that the Corporation can well congratulate itself that it did not become answerable for the death of the driver of the truck—he only saved his life by jumping. I think it cannot be too well impressed upon municipalities that they are not entitled to do work so recklessly, so carelessly, to the likely loss of life and limb and the destruction of valuable property, that if they do, then the law is, that there is liability for the damages that occur by reason of the neglect of duty. The present case is not one which, upon the facts, demonstrated to the mind of the truck driver that there was obvious danger. No apparent danger was noticeable, nor can it be said that it was a danger that could have been reasonably seen or should have been seen or could be said to have been an apparent danger, of which knowledge should be imputed to the driver of the truck. I am, therefore, clearly of the opinion that the learned trial judge erred both as to the facts and to the law. No negligence can be imputed to the driver of the truck, and the circumstances were such that there was a breach of duty upon the part of the Corporation, a duty which it owed to the public lawfully using the highway, and the appellant has suffered special damages by reason of that breach of duty. The Corporation has been guilty of misfeasance, for which it must answer in damages. Judgment should be for the appellant in the sum found by the learned trial judge, being the amount found, to admit of judgment going therefor, were it the opinion of this Court that the judgment should be for the appellant.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McPhillips & Smith.*

Solicitors for respondent: *McQuarrie, Martin, Cassady & Macgowan.*

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STEPHEN *ET AL.* v. MILLER *ET AL.*

Trustees — Remuneration — Gross value of estate — Ascertainment of — Agent's charges—Allowance for disbursement—Right to charge for portion of estate not realized—R.S.B.C. 1911, Cap. 232, Sec. 80.

By order of the Court, trustees were allowed as remuneration for their services five per cent. of the gross value of the estate. The registrar, upon taking accounts, allowed five per cent. on an item of $97,221.50, being an amount outstanding and unrealized, consisting of arrears of principal and interest due the estate under agreements for sale of land. The registrar's report was affirmed by the Court.

Held, on appeal, that the value of the estate must be taken as of the time when the accounts are passed, and evidence of the value of the realized assets should be taken, and five per cent. allowed on that amount only.

Held, further, that the trustees cannot charge the estate with commission paid another party for the collection of interest on mortgages belonging to the estate, nor can any charge be made for rent of offices and hire of clerks in connection with the administration of the estate.

APPEALS from the order of MACDONALD, J. of the 21st of May, 1917, dismissing a motion and cross-motion to vary the registrar's report made upon the taking of the final accounts of the defendants as former trustees of the estate of William Stephen, deceased. On the 29th of September, 1909, the defendants were appointed trustees of said estate, which consisted largely of lands in the vicinity of Vancouver, that were subdivided for sale. On the 18th of February, 1910, after the trustees had sold a portion of the lands and collected about $20,000 on the sales, and at which time they estimated the total value of the estate at $370,000, they petitioned the Court to settle an allowance to them for administration and an order was made by MORRISON, J. that they receive 5 per cent. of the gross value of the estate as defined by section 80 of the Trustee Act. On a petition by the beneficiaries upon coming of age, the defendants were discharged from their trusteeship and accounts were ordered to be taken. The registrar by his report allowed two items in the accounts to which the plaintiffs objected: (1) An item of $4,861.07, being 5 per cent. of

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$97,221.50, the total amount of principal and interest due on certain agreements for sale still outstanding and not realized by the defendants while acting as trustees. (2) An item of $2,036.10 paid as commission to the London & British North America Company, Limited, for the collection of interest on certain mortgages belonging to the estate. The collection of this interest having been put in the hands of said Company by the trustees at the request of Mrs. Stephen, who was the wife of deceased and in charge of the infant beneficiaries. The defendants claimed they were entitled to an item of $8,000 for expenses, found by the registrar to have been incurred for office-room and clerical assistance in the way of an accountant required to assist in the management of the estate. This item the registrar refused to allow. The learned judge below affirmed the registrar's report. The plaintiffs and defendants appealed.

Statement

The appeals were argued at Vancouver on the 17th of January, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Cassidy, K.C., for appellants (defendants): There are two appeals. The defendants appeal from the refusal to vary the registrar's report. I complain of the disallowance of the $8,000 item for expenses of premises, cost of clerk and other necessary disbursements. The registrar found these expenses had been incurred. Miller & Co. were real estate agents and as such were engaged in sales of the property: see *Biggar* v. *Dickson* (1868), 15 Gr. 233.

Davis, K.C., for appellants (plaintiffs): It is admitted that these expenses were paid out. Defendants claim that under section 80 of the Trustee Act they are entitled to 5 per cent.; also all moneys paid out. But the submission is that if they hire a man to do the work, they are not entitled to charge that to the estate as they could have done the work themselves, and the 5 per cent. is paid them for that purpose. The registrar found the payments were made and no more. If these payments fall within "other allowances for expenses actually incurred," all the work could be done by hired help and they would get 5 per cent. of the estate for doing nothing. They cannot charge for work they could have done themselves. The

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statute applies to necessary expenses only. The order of Mr. Justice MORRISON that the trustees should receive 5 per cent. of the gross value of the estate as defined by section 80 of the Act, should not have been made before the estate was administered. This is, I contend, a case where rule 878 should be invoked by this Court, notwithstanding the fact that no appeal was taken from that order. On the question of costs see *Easton* v. *Landor* (1892), 67 L.T. 833; *Griffin* v. *Brady* (1869), 39 L.J., Ch. 136; *Smith* v. *Bolden* (1863), 33 Beav. 262.

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Cassidy, in reply: As to the right to charge for office rent and office salaries see *Saskatchewan L. and H. Co.* v. *Leadlay* (1909), 14 O.W.R. 426 at pp. 431-2. On the allowance of 5 per cent. on the uncollected accounts see *Re Sanford Estate* (1909), 18 Man. L.R. 413. In Ontario the law is that they are paid by piece work, but here it is different. The trustees should get their costs out of the estate: see *In re Love. Hill* v. *Spurgeon* (1885), 29 Ch. D. 348 and cases in Holmested's Ontario Judicature Act, 4th Ed., 249.

H. S. Wood, on the same side: Mrs. Stephen was guardian of the children and she insisted on the London & British North America Company, Limited, collecting the interest on the mortgages. This additional expense should be allowed: see *Speight* v. *Gaunt* (1883), 9 App. Cas. 1 at p. 4; *Stinson* v. *Stinson* (1881), 8 Pr. 560.

Cur. adv. vult.

2nd April, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I concur in the judgment of my brother GALLIHER.

MARTIN, J.A.

MARTIN, J.A. allowed the plaintiffs' appeal and dismissed the defendants' appeal.

GALLIHER, J.A.

GALLIHER, J.A.: Motion and cross-motion to vary registrar's report. MACDONALD, J., before whom the motions were heard, dismissed both motions and affirmed the registrar's findings. Both parties appealed. There are three items in dispute: (1) An item of $4,861.07 allowed the defendants under an order of Mr. Justice MORRISON, fixing the remuneration at 5 per

cent. on the gross value of the estate and objected to by plaintiffs. This sum is represented by 5 per cent. on $97,221.50, being the amount still outstanding and unrealized, and being for arrears of principle and interest due under agreements for sale from the estate to purchasers. The registrar allowed this item, treating the 5 per cent. as applicable (under the order of MORRISON, J.) to the total sale value of the property, and the judge below confirmed the registrar. With respect, I think this was an error. In my opinion, the 5 per cent. should be allowed upon the gross value of the estate as of the time when the accounts were being passed, and there should have been full evidence allowed and a valuation then made by the registrar of the unrealized assets and the 5 per cent. based on that valuation. There should be a reference back to the registrar on this item. (2) An item of $2,036.10 allowed by the registrar and confirmed by the learned judge below and objected to by plaintiffs. This was for commission paid the London & British North America Company, Limited, on collection of interest on mortgages in which some of the moneys of the estate were invested. It appears that Mrs. Stephen, one of the plaintiffs (who at the time was also one of the trustees) requested that the investment of the moneys and the collection of interest be given to the above company, and the other trustees concurred. The defendant trustees are claiming to be allowed for this as a disbursement under the order of MORRISON, J. in addition to their 5 per cent. remuneration. It is proper, under the authorities for trustees, to employ agents for such purposes, and to have agents' charges allowed as disbursements, and the only question is, should they be allowed this as a disbursement since they have already been allowed 5 per cent. for managing the estate, of which estate these moneys collected form a part? I find this dealt with in the case of *Cox* v. *Bennett* (*No. 1*) (1891), 39 W.R. 308, in appeal. The head-note is:

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"Trustees who have been appointed by the Court to receive the rents of, and to manage a trust estate, receiving a commission upon the rental, will not be allowed to charge additional payments made by them to a collector of rents."

Lindley, L.J. said:

"The substantial question is, whether the trustees should be allowed the payments made by them as commission to the rent collectors whom

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they employed. What were the trustees directed to do? The order of the 1st February, 1876, contained nothing authorizing them to pay that commission as well as the commission to themselves, it simply ordered that the trustees should be at liberty to deduct out of the income an allowance of £3 per cent. for their management of the testator's real and leasehold estate. Nothing was said as to two commissions, but the trustees appear to have paid the salary to the collectors and to have passed their accounts. In 1882 the second order was made; there is nothing in that order to shew that the Court ever contemplated two commissions. There are not sufficient grounds for allowing these payments, and the appeal must be dismissed, with costs."

Kay, L.J.:

"In 1882 an order was made that the trustees should receive the rents and receive a commission of £3 per cent. as stated in the order of 1876. It is almost impossible that the Court should allow such a commission as the one now in question. The beneficiary now, being separately represented, objects to the two commissions, and the objection must be allowed."

With Kay, L.J., I may say that it seems to me almost impossible that it could have been in contemplation of MORRISON, J., when the order was made, that this double charge should be made against the estate. It is not, as I view it, a proper item to allow as a disbursement under the circumstances. The registrar's report should be varied accordingly.

GALLIHER, J.A.

(3) Eight thousand dollars disallowed the defendants, being a charge for rent of offices and hire of clerk for 80 months, averaged at a lump sum of $100 per month. The work done was in connection with the sale of the property of the estate and the collection of deferred payments by the firm of J. J. Miller & Co., of which the defendant Miller was a partner. By an order of the Court, the sale of the estate was placed in their hands, and they received the usual commission upon such sales, and the defendant Miller shared in such commission. He has also been allowed 5 per cent., trustees' remuneration on the gross value of these sales and collections, and now seeks to claim $8,000 additional by reason of the extra expense incurred by his real estate firm and himself in handling the property. *Cox* v. *Bennett, supra,* applies to this also. Moreover, the defendant Miller, as trustee, contracted with himself, as he was interested in this $8,000 item, being a partner in the J. J. Miller firm, without disclosure to the *cestuis que trust.* In fact, nothing was heard of this item until new trustees had been appointed and the proceedings taken for the passing of accounts, and state-

ments were rendered from time to time without inclusion of any part of this item. This gives one the impression that the whole thing was an afterthought. Trustees cannot so contract with themselves or their firm without full disclosure and acquiescence by the beneficiaries. Moreover, two of these beneficiaries were infants when Miller took charge.

The defendants' appeal is dismissed with costs, and the plaintiffs' appeal allowed with costs.

MCPHILLIPS, J.A.
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McPhillips and Eberts, JJ.A. concured in the judgment of Galliher, J.A.

Plaintiffs' appeal allowed and defendants' appeal dismissed.

Solicitor for plaintiffs: *D. G. Marshall.*
Solicitor for defendants: *Robert Cassidy.*

WESTERN UNION FIRE INSURANCE COMPANY v. ALEXANDER, LOGGIN AND HOLMES.

Company law—Liquidation—Applicants for shares—No allotment by company—Shares issued and registered—Contributories.

Certain persons applied through the plaintiff Company's fiscal agents for shares in the capital stock of the Company. No allotment of shares was ever made by the Company to the applicants, but they eventually received share certificates for shares which had been previously allotted and issued to others. The applicants were duly registered on the books of the Company as the owners of the shares received by them. Prior to liquidation two attempts had been made to reorganize the Company, and to facilitate such reorganization the applicants executed transfers of their shares in trust. The applicants did not know until after liquidation that no allotment of shares had been made to them by the Company. Upon the Company going into liquidation, the registrar placed the applicants' names upon the list of contributories. Upon motion to vary the registrar's report:—

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Held, that as no allotment of shares had been made, there was no contract between the applicants and the Company, and their names should therefore be struck from the list of contributories.

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APPLICATION to vary the registrar's report placing the applicants upon the list of contributories in the winding-up of the Western Union Fire Insurance Company. The facts are set out in the head-note and reasons for judgment. Heard by GREGORY, J. at Chambers in Victoria on the 1st of March, 1918.

Maclean, K.C., for applicants.

Bourne, for the liquidator.

2nd April, 1918.

GREGORY, J.: This is an application on the part of the above-named individuals to vary the registrar's report placing them upon the list of contributories.

The matter has been brought before me in a most unsatisfactory manner, first, on the 30th of June, 1916, being the last day before vacation, and at the very end of an all-day sitting in Chambers. For want of proper material I directed a re-argument, and it is again, on the 1st of March, 1918, brought up, but through some accident the transcript of proceedings before the registrar is still missing. The following facts are, however, admitted: The above-named all stand in the same position. All applications were made direct to the Company through the General Securities Company, its fiscal agents, and were for shares in the capital stock of the Company. No allotment of shares was ever made by the Company; in fact, the Company never dealt with the application, but the applicants eventually received share certificates for shares which had been previously allotted and issued to other persons, presumably the promoters of the Company. The applicants were duly registered on the books of the Company as the owners of the respective shares so received by them. The Company went into liquidation. The applicants did not learn until after the liquidation that they had never been allotted or received the shares they applied for, but had, in fact, received shares transferred from other shareholders. They lost no time in repudiating any liability.

Judgment

Prior to the liquidation there had been two abortive attempts to reorganize the Company, and to facilitate such reorganiza-

tion the applicants had executed assignments or transfers in trust of their respective shares. Mr. *Maclean,* for the applicants, relied on *Re Bankers Trust and Barnsley* (1915), 21 B.C. 130; *In re Bankers Trust and Okell* (1916), 22 B.C. 436; and *Fitzherbert* v. *Dominion Bed Manufacturing Co.* (1915), 21 B.C. 226. Neither of the *Bankers Trust* cases appear to me to have any application to the present case, for in each of them the company had undertaken to issue shares which had no existence, and so, naturally, there could have been no contract. In *Fitzherbert* v. *Dominion Bed Manufacturing Co.* there had been no liquidation and the contest was between the shareholders and the company, while here it is between the applicants and the liquidator, representing the creditors of the Company.

Mr. *Bourne,* for the liquidator, cited *Allan* v. *McLennan* (1916), 23 B.C. 515; *Stone* v. *City and County Bank* (1877), 47 L.J., C.P. 681; and *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325.

He urged that *Allan* v. *McLennan* is indistinguishable from the present case in principle, and therefore the registrar's report must stand, but he, I think, entirely overlooks the ground upon which the Courts failed to grant Allan the relief he claimed against the bank. The trial judge, at p. 519, stated that there was no direct contractual relation between Allan and the bank, and adds, "the Bank here is a total stranger in the transactions in question"; and on appeal, Mr. Justice MCPHILLIPS, who was the only judge who discussed this phase of the question, said at pp. 535-6:

Judgment

> "The rescission, of course, in any case would only have been as between the respondents [Allans] and McLennan—there was no contract between the respondents and the defendant Bank to rescind."

In that case there were circumstances which made the Allans believe they were dealing directly with the bank and buying unissued shares, but the Court held that as a matter of fact they were dealing with McLennan's agent for the purchase of McLennan's shares, and the bank, though McLennan was an officer in it, had never authorized McLennan's agent to represent himself as the bank's, and so, of course, the bank could not be held responsible for the agent's representations, and the

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creditors of the bank would have the same right to hold the shareholder.

There was no contract between the bank and the Allans; and in the case at bar there is no contract between the Company and the defendants. It is true that, as in *International Casualty Co.* v. *Thomson* (1913), 48 S.C.R. 167, an application had been made to the Company for shares and shares had been received, but not the shares applied for. The application in that case, as here, had never been accepted by the company, or shares allotted by it, and, as Mr. Justice Duff says, at p. 199, "there was no contract between the plaintiff and the company."

The case of *Fitzherbert* v. *Dominion Bed Manufacturing Co., supra,* is, as to some of the shares there considered, much like the present case. Shares had been applied for and share certificates received, but they were for promoters shares, not those applied for. The application had never been accepted by the company, and MACDONALD, C.J.A. says at p. 230:

> "The plaintiff's application to the defendant to be allotted 250 shares was not accepted, and no contract between them was made."

And that is the position here.

It is urged that the fact that the Company is in liquidation, and no steps to obtain relief were instituted until after the order for liquidation was made, disentitles the applicants to relief on the ground that the rights of creditors have intervened and it would be inequitable to grant relief now at the expense of the creditors, and no doubt that is the law in cases where there has been a direct contract between the Company and the shareholders, although prior to liquidation the shareholder would have the right to have the contract set aside on the ground that there was misrepresentation or other fraud on the part of the Company or its agents. Such contracts are held to be voidable, but they are voidable contracts, while here there is no contract at all. There is nothing to be either affirmed or avoided.

Judgment

In *Oakes* v. *Turquand and Harding, supra,* there was a real contract. Though voidable, the application for shares had been accepted and shares issued.

And so, also, there had been a direct application for shares, an allotment and issue in *Reese River Silver Mining Co.* v.

Smith (1869), L.R. 4 H.L. 64; *Lawrence's Case* (1867), 2 Chy. App. 412; *In re Scottish Petroleum Company* (1883), 23 Ch. D. 413; *Taite's Case* (1867), L.R. 3 Eq. 795; *Peel's Case* (1867), 2 Chy. App. 674; in fact, in every case that I have looked at where the principle has been applied.

It is also argued that the applicants, having assigned their shares in the abortive efforts to effect a reorganization of the Company, are now estopped from setting up that they are not shareholders, but I see no force in the argument. There is no contract between them and the Company, and as soon as they became aware that the shares they had received were not part of the unissued capital, they promptly acted.

The registrar's report must be varied and the names of Alexander, Loggin and Holmes struck off the list of contributories.

Costs follow the event.

Registrar's report varied.

BAKER v. RICHARDS.

Execution — Seizure under writ of fi. fa. — Assignment for benefit of creditors—Notice to sheriff—Tender of costs less poundage—Refusal of sheriff to withdraw—Poundage—Right to charge—R.S.B.C. 1911, Cap. 13.

A sheriff seized goods under a writ of *fieri facias* and on the same day he was formally notified of the assignment of the execution debtor under the Creditors' Trust Deeds Act and tendered the costs of the execution creditor up to that time. The sheriff refused the amount of costs tendered and remained in possession, claiming he was entitled to charge poundage. In an action for wrongful possession:—

Held, on appeal (affirming the decision of CLEMENT, J.), that he was in wrongful possession of the goods in question, as he had been tendered the full amount of the execution creditor's costs, and was not entitled to charge poundage.

APPEAL from the decision of CLEMENT, J. of the 28th of June, 1917, in an action for a declaration that the defendant, Statement

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having been tendered his costs in full, was wrongfully in possession, under a writ of *fieri facias* in his hands, in the action of *John Deer Plow Company* v. *John Meston*. The writ was issued on the 8th of June, 1917, and the sheriff entered into possession of the premises of John Meston on the same day at 11 o'clock in the forenoon. On the same day Meston assigned for the benefit of his creditors under the Creditors' Trust Deeds Act, the plaintiff, J. H. Baker, being appointed his assignee. Notice of the assignment was given the sheriff in the afternoon, when he agreed to withdraw upon payment of his fees. The sheriff tendered a bill for $270.79, which included an item of $219.34 for poundage. The plaintiff objected to any charge for poundage but tendered the defendant the amount of his bill less the poundage. This the defendant refused to accept, and remained in possession. The plaintiff paid into Court $54.55 as the amount to which the sheriff was entitled. The learned trial judge held that the sheriff, having been tendered his lawful costs, was wrongfully in possession under said writ. The defendant appealed.

The appeal was argued at Vancouver on the 6th of November, 1917, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Stacpoole, K.C., for appellant: The execution creditor must be a party defendant in the action: see *Hilliard* v. *Hanson* (1882), 21 Ch. D. 69. The judgment was for $3.10 more than the amount paid into Court. As to the right of the sheriff to his costs before giving up possession see *Marquis of Hastings* v. *Thorley* (1838), 8 Car. & P. 573; *Bowen* v. *Owen* (1847), 11 Q.B. 130; *Ex parte Lithgow. In re Fenton* (1878), 10 Ch. D. 169. The execution creditor has a lien for his costs that should be paid before the sheriff gives up possession: see *Thordarson* v. *Jones* (1908), 18 Man. L.R. 223; *Gillard* v. *Milligan* (1897), 28 Ont. 645; *Buchanan et al.* v. *Frank* (1865), 15 U.C.C.P. 196; *Clarkson* v. *Ryan* (1890), 17 S.C.R. 251. As to what are "costs of execution" see *In re Beeston* (1899), 1 Q.B. 626 at p. 633.

C. G. White, for respondent: The whole question here is whether the sheriff is entitled to charge poundage. Before he

can charge poundage, he must levy the money: see *Buchanan et al.* v. *Frank* (1865), 15 U.C.C.P. 196. On the question of tender see *Bark-Fong* v. *Cooper* (1913), 49 S.C.R. 14; *Wexelman* v. *Dale* (1917), 10 Sask. L.R. 289. As to the right to detain goods by reason of his lien see Halsbury's Laws of England, Vol. 19, p. 25, par. 40.

Stacpoole, in reply.

Cur. adv. vult.

2nd April, 1918.

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

MACDONALD, C.J.A.

MARTIN, J.A. dismissed the appeal.

MARTIN, J.A.

GALLIHER, J.A.: Under and by virtue of a writ of *fieri facias,* the sheriff of Victoria seized certain goods on the premises of one John Meston at the hour of eleven o'clock in the forenoon on the 8th of June, 1917, and on the same day the said Meston made an assignment for the benefit of his creditors under the Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13, and notice in writing of the said assignment was served upon the said sheriff about 3.30 o'clock of the same day. The sheriff at once agreed to withdraw on payment of his fees and made up his bill, amounting to $270.79, which amount included an item for poundage of $219.34. The plaintiff, who was the assignee, offered to pay the said bill, less the item for poundage, but the sheriff refused to accept same and remained in possession until the 28th of June, when an order was made by CLEMENT, J. holding that the sheriff was unlawfully in possession, having been offered the lawful costs of the execution creditor at the time notice was served upon him. Upon this order being made the sheriff withdrew. The real question is as to whether the sheriff was entitled to poundage.

GALLIHER, J.A.

Other grounds of appeal were (a), that no tender was ever made to the appellant. As to this, it is quite clear it would have been useless to tender the amount less the poundage, and tender was waived: see *Bark-Fong* v. *Cooper* (1913), 49 S.C.R. 14 at p. 31; also *Wexelman* v. *Dale* (1917), 3 W.W.R. 235. (b) The execution creditor was not party to the action. In support of this, Mr. *Stacpoole* cited *Hilliard* v. *Hanson* (1882),

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21 Ch. D. 69, but if the sheriff was in the wrong in retaining possession, this case is really against him: see remarks of Jessel, M.R. at p. 72. In my opinion there was no necessity for joining the execution creditor.

Mr. *Stacpoole* further argued that the sheriff was entitled to possession money up to the date of the order. This is, I think, disposed of by the case of *In re Harrison; Ex parte Sheriff of Essex* (1893), 62 L.J., Q.B. 266 (not cited), where Williams, J. says at p. 268:

"Upon getting a notice, his [the sheriff's] duty is to hand over the goods or the proceeds, and upon doing so he will get the costs of execution down to that time, and nothing more."

And further:

"In my judgment it is perfectly plain that that means the costs of execution up to the time the notice is given."

GALLIHER, J.A.

And the judgment of Bruce, J. is to the same effect.

There remains then for consideration only the question of poundage. I find this dealt with in *In re Thomas* (1899), 68 L.J., Q.B. 245, which I think is conclusive against Mr. *Stacpoole's* contention. Of course, we have no exactly similar provision as in the English Bankruptcy Act, but our Creditors' Trust Deeds Act, before referred to, in section 14 (2), contains this provision:

"Every such assignment shall take precedence of all judgments, of all executions against goods, and of all attachments of debts not completely executed by payment, subject to a lien in favour of such execution creditors for their costs."

I see no reason why the principle enunciated in the English cases should not apply.

The appeal should be dismissed.

MCPHILLIPS, J.A.: I do not decide that the claim as made for poundage was a claim that could have been insisted upon under the Creditors' Trust Deeds Act (Cap. 13, R.S.B.C. 1911), this becoming unnecessary owing to the learned counsel for the appellant, upon the argument having abandoned same, save as to the poundage upon the costs. This poundage, however, would be so small in amount that the maxim *de minimis non curat lex* may be usefully applied. The poundage, if a rightful or legal claim under section 14 (2) of the Creditors' Trust Deeds Act, under the language "subject to a lien in

MCPHILLIPS, J.A.

favour of such execution creditors for their costs," might under the circumstances of the present case extend to poundage upon the whole sum directed to be levied under the writ of execution —the sheriff being in possession before the assignment—of sufficient goods to satisfy the writ. The following cases, not cited upon the argument, bear upon the point: *Smith* v. *Antipitzky* (1890), 10 C.L.T. 368 (a decision of McDougall, Co. J., upon a statute for all practical purposes of construction similar to that of British Columbia, and if it were to be followed would support the claim as made by the appellant), and *Montague* v. *Davies, Benachi & Co.* (1911), 80 L.J., K.B. 1131.

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I agree in dismissing the appeal.

EBERTS, J.A.: I agree.

EBERTS, J.A.

Appeal dismissed.

Solicitors for appellant: *Bradshaw & Stacpoole.*
Solicitor for respondent: *C. G. White.*

COLLINS v. THE GUARDIAN CASUALTY & GUARANTY COMPANY.

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Insurance—Accident policy—Automobile—Damages—"Collision," meaning of.

The plaintiff insured his automobile in the defendant Company against "loss or damage . . . . caused solely by being in collision with any other automobile, vehicle or other object, either moving or stationary (excluding, however, ... (2) all loss or damage caused by striking any portion of the road-bed, or by striking the rails or ties of any street, steam, or electric railway.)" The plaintiff's chauffeur, when driving down a hill, put on the brakes, and the car skidding, struck a sand-bank that had been placed partly on and partly off the road by tourists on the previous evening. The car overturned, resulting in damage. In an action on the policy to recover the damages sustained:—

Held, on appeal (affirming the decision of GRANT, Co. J.), that the policy should be strictly construed against the insurer, and when so construed, the language used is sufficiently wide to make the Company liable for the loss sustained.

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APPEAL by defendant from the decision of GRANT, Co. J., of the 4th of May, 1917, in an action to recover $750 for damages to an automobile on an accident-insurance policy issued by the defendant Company. The plaintiff, who was the owner of a number of taxi-cars, had an insurance policy taken out in the defendant Company on a Winter car in September, 1916, insuring against "loss or damage . . . . caused solely by being in collision with any other automobile, vehicle or other object, moving or stationary (excluding, however, ... (2) all loss or damage caused by striking any portion of the road-bed or by striking the rails or ties of any street, steam, or electric railway.)" In the following month, October, the car was put in charge of a chauffeur who took a party on a trip with the intention of going to Seattle. When nearing Seattle, in the State of Washington, and going down a hill with a double turn, the chauffeur put on the brakes when nearing the bottom of the hill. Just beyond, on the left side of the road, was a pile of sand, partly on the road and partly off, about a foot high, that had been placed there the previous evening by the occupant of a car which had stuck in the sand-bank. The chauffeur was driving on the left side of the road (wrong side in Washington State), and on his applying the brakes the car skidded, struck the sand-bank and overturned, causing the damage for which this action was brought.

The appeal was argued at Vancouver on the 19th of December, 1917, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

A. D. Taylor, K.C., for appellant: The accident that took place was due to skidding and improper driving. There was no collision, so that the loss does not come within the terms of the policy: see *Tillmanns & Co.* v. *SS. Knutsford, Limited* (1908), 2 K.B. 385. As to the application of the *ejusdem generis* rule see Stroud's Judicial Dictionary, Vol. 2, p. 1359.

E. J. Grant, for respondent: Where there is ambiguity the policy must be construed against the insurer: see Cyc., Vol. 9, p. 578, par. 3; Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., 309; Holt on Insurance, p. 353, par. 253; *Morris* v.

Structural Steel Co. (1917), 24 B.C. 59. As to the effect of the words "or otherwise" see *Meagher* v. *Meagher* (1916), 53 S.C.R. 393.

Taylor, in reply.

Cur. adv. vult.

2nd April, 1918.

MACDONALD, C.J.A.: The learned County Court judge accepted the evidence of Lee and two other witnesses for the plaintiff, and rejected, as unworthy of belief, the evidence of the other witnesses in the case. The pile of sand on the roadway, the existence of which was sworn to by Lee and the other two credible witnesses, must be taken to have been established; that the accident was caused by the plaintiff's car encountering said pile of sand is a fair inference from the evidence of the credible witnesses aforesaid, and of the evidence of defendant's witnesses so far as same was in plaintiff's favour. The question, then, is one of interpretation of the policy. It insures plaintiff against

"loss or damage . . . . caused solely by being in collision with any other automobile, vehicle, or other object, either moving or stationary (excluding, however, ... (2) all loss or damage caused by striking any portion of the road-bed, or by striking the rails or ties of any street, steam, or electric railway.)"

If it were not for the said exception, I should have no hesitation in applying the *ejusdem generis* rule to that language. The exception, however, appears to me to alter the case. To have a meaning, "other object" must extend to things not *ejusdem generis* with "automobile and vehicle."

Then, is contact with the pile of sand on the roadway a collision with an object? Whatever may be the strict meaning of "collision," the term is construed by the policy itself when it speaks of collision with either a moving or a stationary object, so that no difficulty here arises from the use of the word "collision." One may doubt whether the insurer meant to protect the insured against such an accident as occurred to the plaintiff, but the language used in the policy is that of the insurer, and should be strictly construed against the insurer. I am unable to say that the learned trial judge came to a wrong conclusion.

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While the legal question is not free from doubt, the best construction I can put upon the policy is that it insures against collision with a pile of sand on the roadway, which would be just as much an "object" as would be, for instance, a large boulder placed on the roadway. At all events, the insurer has used language wide enough, when strictly construed against it, to make it liable to the plaintiff for the loss in question.

I would dismiss the appeal.

GALLIHER, J.A.: In the face of the manner in which the learned trial judge who saw the witnesses has expressed himself, I think it is hopeless to attempt to set aside his finding as to how the accident occurred. It remains, then, to determine whether the damage sustained is such as is insured against under the policy. Mr. *Taylor* contends that what happened was not a collision, and further that what happened is within the exceptions under the head of Collision in the policy:

"(2) All loss or damage caused by striking any portion of the road-bed, or by striking the rails or ties of any street, steam, or electric railway."

We are concerned only with the first part of (2). Accepting the evidence of Lee, Robbins and Watts, the car struck a pile of sand and turned over, causing the damage. Lee says this sand was partly on paved portion of the road and partly off. The sand was thrown there the night before in the course of digging out a motor which was stuck. The sand-pile was a foot to eighteen inches high at a curve in the road. If it had not been for the sand the car would not have turned over.

GALLIHER, J.A.

I see no difference in striking a pile of sand that high and in striking a boulder which might have fallen on the road. The pile of sand was no part of the road-bed.

We then come to the objection as to its not being a collision. The words of the policy are "coming into collision with any other automobile, vehicle, or other object, *either moving or stationary.*" If it had not been for the words emphasized it might be that we could not in strictness say this was a collision, but to my mind these words qualify it and make the striking of a stationary object a collision within the meaning of the policy.

The appeal should be dismissed.

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

EBERTS, J.A.: I agree.

Appeal dismissed.

Solicitor for appellant: *P. J. McIntyre.*
Solicitor for respondent: *E. J. Grant.*

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BROWN *ET AL.* v. CADWELL *ET AL.*

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BROWN v. CADWELL

Company law — Winding-up — Practice — Order for service "ex juris" — Application to set aside service — Appeal — R.S.C. 1906, Cap. 144, Sec. 101.

An order refusing to set aside the service of a summons under an order for service *ex juris* in a misfeasance action brought against former directors of a company in liquidation under the Winding-up Act, does not involve any controversy as to a pecuniary amount, nor does it involve "future rights" within the meaning of section 101 of said Act. There is, therefore, no appeal.

Cushing Sulphite Fibre Co. v. *Cushing* (1906), 37 S.C.R. 427 followed.

APPEALS from the order of MORRISON, J., of the 29th of October, 1917, dismissing an application by the respondents to set aside service upon them of a summons taken out by the applicants on the 28th of June, 1917, under section 123 of the Winding-up Act, to examine into the conduct of the respondents, E. B. Cadwell, C. A. Phelps, W. C. Langley, J. H. Moore and O. B. Taylor, who were formerly directors of the Canadian Puget Sound Lumber Company, Limited. The summons was returnable on the 4th of September, 1917, and an order had been made by CLEMENT, J. on the 28th of June, 1917, directing that the said summons should be served upon the respondents in the United States. Leave to appeal from the order of MORRISON, J. was granted by CLEMENT, J. on the 29th of October, 1917. The applicants raised the preliminary objection that there is no right of appeal, as the question in controversy does not come

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within the class of cases on which appeals are allowed under the subsections of section 101 of the Winding-up Act.

The appeal was argued at Vancouver on the 8th of November, 1917, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Luxton, K.C., for appellants Cadwell and Phelps.

Mayers, for (applicants) respondents.

Cur. adv. vult.

2nd April, 1918.

MACDONALD, C.J.A.: There are three appeals before the Court *sub nom., Brown* v. *Cadwell,* and subject to the same preliminary objection, which, if decided in favour of the respondent, makes an end of the appeals.

The respondent is the holder of paid-up shares in the capital of the Canadian Puget Sound Lumber Co., Ltd., now being wound up under the provisions of Cap. 144, R.S.C. 1906. He took out a summons under section 123 of said Act, charging the appellants with misfeasance and breach of trust in connection with the business of that Company, and obtained an order for service of it on the appellants *ex juris.* They moved to set it aside, and from the refusal to do so this appeal is taken.

Two questions were raised by appellants before the learned judge: (a) that the respondent not being a creditor of the company, nor a shareholder with liability attached to his shares, was not a contributory, and therefore was not a person who could take out such a summons; and (b) that the Court had no power to grant leave to serve the summons *ex juris.* Subsections (*a*) and (*c*) of section 101 of said Act are relied upon by appellants' counsel as giving a right of appeal in this case. He argues that the appeal involves future rights, or an amount exceeding $500. Dealing first with the question whether on the facts stated above the appeal involves an amount exceeding $500, I think the decision of the Supreme Court of Canada, in *Cushing Sulphite-Fibre Co.* v. *Cushing* (1906), 37 S.C.R. 427, is decisive of it, and that it therefore cannot be held that an amount exceeding $500 is involved in this appeal.

MACDONALD, C.J.A.

Then, does it involve future rights in the sense in which

those words are used in said subsection (*a*)? In *Chagnon* v. *Normand* (1889), 16 S.C.R. 661, no difficulty was found in deciding, on the words of the statute there in question, that future rights were not there involved. The expression "future rights" was there coupled with other words, and was read *ejusdem generis* with them, so that that decision is not of much assistance in interpreting the scope of the words used in the section now under review. Like considerations governed the decision of *The St. John Lumber Company* v. *Roy* (1916), 53 S.C.R. 310, where the words were "any substantive right of the parties in controversy in the action." It was there held that an order for the service of a writ *ex juris* was not such a matter of controversy, but was preliminary to any such controversy.

In *Re Union Fire Insurance Co.* (1886), 13 A.R. 268, it was held that an application to set aside a winding-up order was a matter which affected future rights; and again, in *Re J. McCarthy & Sons Co. of Prescott, Limited* (1916), 38 O.L.R. 3, it was held that leave to bring an action after the winding-up order had been made was an order affecting future rights. In the case at bar I am quite satisfied that the order granting leave to serve a summons *ex juris* is not a matter affecting future rights, but is a mere matter of practice and procedure.

MACDONALD, C.J.A.

With respect to the other branch of the case, namely, the application to set aside the summons, I am equally clear that that does not involve future rights. The question is whether or not the respondent is entitled to succeed in the proceedings which he has taken. That is a question which can be raised in the proceedings themselves, that is to say, if it shall be made to appear that the respondent has no right to take the proceedings he has taken, his summons will be dismissed. His position is analogous to that of a plaintiff seeking to establish his right of action. It is the immediate right of the respondent to have the inquiry provided for by said section 123 which is involved in the appeal.

It follows that, in my opinion, the appeal should be quashed.

GALLIHER, J.A.: The preliminary objection is taken that there is no right of appeal to this Court. Unless the matter comes within any of the provisions of section 101, Cap. 144 of

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the Dominion Winding-up Act, this objection must prevail. These provisions are:

"(*a*) If the question to be raised on the appeal involves future rights; or (*b*) If the order or decision is likely to affect other cases of a similar nature in the winding-up proceedings; or (*c*) If the amount involved in the appeal exceeds $500."

The order appealed from was one refusing to set aside an order for service out of the jurisdiction in a misfeasance suit brought against directors of a company in winding-up proceedings under section 123. In my opinion, the question raised in this appeal does not involve future rights. In the order appealed from there is no controversy as to future rights. The matter is one of procedure only, and does not involve future rights in the sense that I understand such, although I may say that I experience no little difficulty in concluding just what the words "future rights" mean. It might be said that the determination of every question involves the future rights of parties in one sense, but if that broad interpretation were placed on the Act there would be an appeal in every case. It seems to me (though I find difficulty in giving reasons), that this is a present right to be litigated, the decision of which may affect the parties in the future, and as the learned judge below has granted the right to litigate the matter in dispute, I would prefer to err, if err I must, on the side of what seems to me substantial justice. It has not been shewn, nor do I remember that it was even argued that subsection (*b*) would apply. We then come to subsection (*c*). I do not think it can be said that any amount is involved in this appeal: see *Re Cushing Sulphite-Fibre Co.* v. *Cushing* (1906), 37 S.C.R. 173, and again at p. 427.

GALLIHER, J.A.

I would quash the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the judgment of the Chief Justice, which is a disposition of the three appeals.

Appeal quashed.

Solicitors for appellants (Cadwell and Phelps): *Barnard, Robertson, Heisterman & Tait.*

Solicitors for (applicants) respondents: *Bodwell, Lawson & Lane.*

THE ROYAL BANK OF CANADA v. GOLD, EVANS AND WOODWORTH.

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ROYAL BANK OF CANADA v. GOLD

Banks and banking—Advance on security of promissory note—Title deeds of land deposited as additional security—Right to recover on note—Can. Stats. 1913, Cap. 9, Sec. 76, Subsec. 2(c)—Notice of dishonour—Receipt of—Evidence.

War Relief Act—Maker of note protected by—Effect on evidence—B.C. Stats. 1916, Cap. 74, Sec. 2; 1917, Cap. 74.

A bank may recover upon a promissory note, although certificates of title were deposited with the Bank as additional security at the time the advance was made, in contravention of section 76, subsection 2(c) of The Bank Act.

A bank may recover against an indorser of a promissory note notwithstanding the fact that the action is stayed as against the principal debtor under the War Relief Act.

APPEAL from the decision of CLEMENT, J. in an action by the Bank on a promissory note, the defendant Evans being an indorser, tried at Vancouver on the 1st and 8th of March, 1917. The defendant Gold, owing certain moneys on a judgment, arranged with the plaintiff Bank for a loan to pay the amount of the judgment. He gave the Bank a promissory note signed by himself and indorsed by his mother, Emma Gold. He also deposited with the Bank certain title deeds as additional security. Subsequently this note was exchanged for another signed by himself and made in his mother's favour, who indorsed it. It was also indorsed by the defendant Evans. Upon action being brought, the defence was raised that the transaction was illegal under section 76 of the Bank Act.

Statement

Sir C. H. Tupper, K.C., for plaintiff.
E. M. N. Woods, for defendant Evans.

21st March, 1917.

CLEMENT, J.: At the trial I resolved in favour of the plaintiff Bank all questions but the one as to the alleged illegality of the transaction, of which the note sued on was, as is alleged, merely one feature; and as to the effect of such ille-

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gality upon the right of the plaintiff Bank to recover upon the note. I must find, on the evidence, that the moneys advanced were advanced upon the security, in part, of lands, in contravention of section 76, subsection 2 (*c*) of The Bank Act. In the absence of any evidence from Mr. Dobson or Mr. Seaman to contradict Mr. Gold's evidence as to the arrangements made for the advance, I must accept Mr. Gold's evidence that as part of the very transaction in question certain certificates of title were lodged with the plaintiff Bank as security for the advance. On this state of facts, I must confess that my first inclination was to apply the principle of the recent well known money-lenders' case in England—*Victorian Daylesford Syndicate* v. *Dott* (1905), 2 Ch. 624; 74 L.J., Ch. 673, approved of in *Bonnard* v. *Dott* (1906), 1 Ch. 740; 75 L.J., Ch. 446, and in *Whiteman* v. *Sadler* (1910), 79 L.J., K.B. 1050; see also *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297. In other words, I inclined to the view that the transaction was so illegal that the plaintiff Bank could get no aid from a Court of Justice as to any part of the transaction; but upon careful consideration of *The National Bank of Australasia* v. *Cherry* (1870), L.R. 3 P.C. 299, I have come to the conclusion that I cannot distinguish it from the case at bar. The statutory prohibition was as distinct in that case as in this, but their Lordships held that it amounted to a declaration as to what was *ultra vires* rather than to a declaration of illegality in the more culpable sense. The collocation of the clauses, first, a declaration of the Bank's powers, followed by a declaration of disabilities, and among these latter the prohibition in question, was relied on by their Lordships, and the same argument in even stronger shape is open upon the collocation of the clauses of section 76 of the Bank Act. I must, therefore, hold that the advance in the case at bar created a valid debt, and that the promissory note sued on, given as one security for payment of that debt, cannot be impugned on the ground taken. There will be judgment for the plaintiff Bank, with costs, including the costs of the trial, except that there will be no costs to the plaintiff Bank of the proceedings at trial on the 1st instant, and the defendant should have his costs of those proceedings, to be set off against the costs to be awarded to the plaintiff Bank.

CLEMENT, J.

From this decision the defendant Evans appealed. The appeal was argued at Vancouver on the 15th of January, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

E. M. N. Woods, for appellant: The security for the loan was the note and certain certificates of title to real estate lodged with the Bank. The trial judge held the money was advanced upon the security, in part, of lands, in contravention of the Act. I say there was an illegal consideration: see *The National Bank of Australasia* v. *Cherry* (1870), L.R. 3 P.C. 299 at p. 308; *Bank of Toronto* v. *Perkins* (1883), 8 S.C.R. 603; *Ontario Bank* v. *McAllister* (1910), 43 S.C.R. 338. It is illegal because of the deposit of the security: see Maxwell on Statutes, 5th Ed., 646-7; *Jennings* v. *Hammond* (1882), 9 Q.B.D. 225; *Kearney* v. *Whitehaven Colliery Co.* (1893), 1 Q.B. 700. The Court will not enforce the carrying out of an illegal contract: see *Sykes* v. *Beadon* (1879), 11 Ch. D. 170; *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration* (1915), 3 K.B. 676; *Rolland* v. *La Caisse d'Economie N.-D. de Quebec* (1895), 24 S.C.R. 405; *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309. The Golds were relieved under the War Relief Act, and my contention is that Evans being an accommodation indorser, any defences open to the principal debtor are open to him. You cannot proceed against the surety when you cannot proceed against the principal: see *Merchants Bank of Canada* v. *Eliot* (1918), 1 W.W.R. 698; *Rouquette* v. *Overmann* (1875), L.R. 10 Q.B. 525; *Bechervaise* v. *Lewis* (1872), L.R. 7 C.P. 372. As to the sureties' rights see *Owen* v. *Homan* (1851), 3 Mac. & G. 378; *Duncan, Fox, & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1; *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180. Evans was an accommodation indorser, and they did not prove presentation and dishonour of the bill. I moved on that ground that the action should be dismissed. He cannot come in after to prove presentation: see *Jacobs* v. *Tarleton* (1848), 17 L.J., Q.B. 194. In any case there is no evidence that Evans received notice of protest, as the notice was sent to the wrong address.

Argument

Sir C. H. Tupper, K.C., for respondent: If the letter enclos-

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ing the notice is properly stamped it will be accepted as evidence of notice of dishonour, and the defence of want of notice was not raised in his pleadings, which amounts to waiver: see Taylor on Evidence, 10th Ed., par. 806; *Wilkins* v. *Jadis* (1831), 2 B. & Ad. 188; *Curlewis* v. *Corfield* (1841), 1 Q.B. 814; *Waterous Engine Company* v. *Christie* (1885), 18 N.S. 109; *Clarke* v. *Sharpe* (1838), 3 M. & W. 166. The Act says "it will be sufficient": see *Berridge* v. *Fitzgerald* (1869), L.R. 4 Q.B. 639. The English cases cited do not apply, as they are cases in which the whole transaction was illegal. *Sykes* v. *Beadon* (1879), 11 Ch. D. 170 was not approved in *Smith* v. *Anderson* (1880), 15 Ch. D. 247. Evans has no right to relief under the War Relief Act.

Woods, in reply.

Cur. adv. vult.

17th May, 1918.

MACDONALD, C.J.A.: On the question as to whether the security was illegal or not I agree with the judgment of CLEMENT, J. The judgment of the Judicial Committee of the Privy Council in *The National Bank of Australasia* v. *Cherry* (1870), L.R. 3 P.C. 299 is, in my opinion, conclusive of this issue.

MACDONALD, C.J.A.

The action was before trial stayed, so far as defendants Edward Gold and Emma Gold are concerned, by operation of the War Relief Act, 1916. The defendant Evans only appeals. His counsel contended that because the respondent cannot proceed with the action as against the Golds, the principal debtors, it cannot proceed against him, the surety. I cannot agree with that contention. The principal debtors are not necessarily parties to an action against the surety. The respondent might have released the principal debtors altogether, saving its rights against the surety, and then proceeded only against the surety. The stay effected by the War Relief Act has not changed the contract nor made it impossible of performance. It has merely postponed the date of its enforcement against the principal debtors. The case is, I think, analogous to those cases of which *Ex parte Jacobs; Re Jacobs* (1875), 44 L.J., Bk. 34, is an example.

While the question was raised that the taking of an illegal security by the respondent would disentitle it to enforce payment of the debt against the surety, there is nothing in evidence to shew that the appellant indorsed the note either on an express contract with it, or on an implied contract or condition that valid securities should be taken by respondent for appellant's protection. If appellant knew about the security which Gold intended to offer, namely, real estate, he is not entitled to complain, as it is presumed that he knew the general law of the land, and hence knew that such a security could not legally be taken by the respondent. The right of the appellant to a transfer of the security in question, should he pay the note, is not in question here, and I therefore dismiss it from consideration.

The question which has given me some anxiety is that which relates to the notice of dishonour. Some months before the making of the promissory note in question, appellant's address was at 125 Hastings Street, W., in the City of Vancouver. The notary addressed the notice to him at that address without ascertaining the fact that long prior to the date of the mailing of the notice it had been changed to 77 Hastings Street, E., in said city. In these circumstances it was incumbent on the respondent to prove the due receipt, by appellant, of the notice. A clerk in the post office at Vancouver was called, who explained the system in vogue there with reference to changes of address. From this evidence it appears that the letter carriers were supplied with books in which they were required to note changes of address. The book of the carrier who delivered at 125 Hastings Street, W., was produced, and shewed entries of a change in appellant's address from there to 412 Dominion Building, and again from that address to 77 Hastings Street, E., which was appellant's address at the date of the mailing of the notice of dishonour. The practice of the post office was, as I infer from this evidence, to deliver letters after such entries at the new address. The evidence is not very satisfactory. The letter carrier whose book was produced, and who delivered letters during the period in question, was overseas, and his evidence was not available. Though the evidence is not very satisfactory, I think there was sufficient to submit to a jury;

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at least, sufficient to make it incumbent on appellant to deny the receipt of the notice, which he has not done. He was examined for discovery, and gave very unsatisfactory answers, not amounting to a denial, and at the trial offered no evidence at all to rebut the inference which might be drawn from that of the postal clerk. In *Wordsworth* v. *Macdougall* (1858), 8 U.C.C.P. 400, the notary was in doubt as to whether he had given the notice of dishonour or not. The jury found for defendants, and on motion for a new trial, Draper, C.J., delivering the judgment of the Court, said at p. 403:

"It certainly would have been more satisfactory if the defendant, having now the opportunity, had denied the receipt of any notice. Still that fact is not asserted against him in the plaintiff's affidavit, in which case it would have been incumbent on him to meet it."

MACDONALD, C.J.A.

The learned judge, exercising the functions of a jury, found the fact of the receipt of the notice of dishonour by appellant in respondent's favour, and I cannot say that he drew an unwarranted inference from the evidence, coupled with the defendant's failure to deny the receipt of the notice. It is true that section 103 of the Bills of Exchange Act makes a notice mailed to the address given in the instrument a sufficient notice. But that section does not affect the law as it stood in respect of proving notice of dishonour, or the receipt of notice of dishonour by any other way. The sender's channels of proof of service otherwise are not impeded by the section.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A. dismissed the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal, although with some hesitation as to the notice of dishonour. Proof of notice is not very satisfactory, and I doubt if I would have accepted it had I been trying the case in the first instance. However, I will not go so far as to say the learned trial judge could not reasonably draw the inference he did from the circumstances, especially as the appellant has never specifically denied receipt, either in examination on discovery or at the trial.

I have carefully considered the defence raised as to the War Relief Act and all the cases cited, and the two subsequently

handed in by Mr. *Woods*, and have come to the conclusion that the Act has no application to the surety here.

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McPHILLIPS, J.A.: The defendant Evans appeals from the judgment of Mr. Justice CLEMENT. The action was upon a promissory note of which the Bank, the respondent, was the holder in due course, the appellant being one of the indorsers thereof to the Bank. The defence was that the circumstances attendant upon the transaction were impeachable, contravening section 76, subsection 2 (*c*) of The Bank Act (Can. Stats. 1913, Cap. 9), the advance or discount of the promissory note being a lending upon the security of lands, and that the transaction was illegal, with the further defences that the appellant was discharged from all liability because of the non-protest of the promissory note, the failure to give notice of dishonour, and that the action was not maintainable, as the maker of the promissory note being entitled to the benefit of the War Relief Act, B.C. Stats. 1916, Cap. 74, the appellant, a surety, could not be sued or judgment go against him. In my opinion, all of these defences fail, notwithstanding, and with deference to the very able argument of counsel for the appellant. In the first place, and with great respect to the learned trial judge, I do not think that it was established that the transaction was one of lending upon the security of lands. However, should I be wrong in this, I entirely agree with the learned trial judge that if it be so looked at, that the transaction was not an illegal one. At most, all that can be said is that it was an *ultra vires* transaction, and the hypothecation of the certificates of title is not an enforceable hypothecation, this, though, does not relieve the appellant from liability. Lord Cairns had to consider legislation of a similar nature to that of section 76 of The Bank Act in *The National Bank of Australasia* v. *Cherry* (1870), L.R. 3 P.C. 299 at pp. 307-8. Also see *McHugh* v. *Union Bank of Canada* (1913), 82 L.J., P.C. 65 at p. 72; and *Merchants Bank of Canada* v. *Bush* (1918), 1 W.W.R. 383. Upon the facts, it is clear that there was a proper protest of the promissory note and due notice of dishonour. Section 11 of the Bills of Exchange Act, R.S.C. 1906, Cap. 119, reads as follows:

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"11. A protest of any bill or note within Canada, and any copy thereof

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as copied by the notary or justice of the peace, shall, in any action, be *prima facie* evidence of presentation and dishonour, and also of service of notice of such presentation and dishonour as stated in such protest or copy."

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The notarial protest was adduced in evidence. It constituted *prima-facie* proof and was in no way rebutted. I have not the slightest doubt that the appellant received notice of the dishonour, and it would be unconscionable, upon the facts of the present case, to give effect to any such defence (see Maclaren on Bills, Notes and Cheques, 5th Ed., at pp. 36, 37, 294, 295, 296, 297, 298, 299; *Cosgrave* v. *Boyle* (1881), 6 S.C.R. 165, Gwynne, J. at pp. 178-80; and *Merchants Bank of Halifax* v. *McNutt* (1883), 11 S.C.R. 126).

Then, with respect to the contention advanced that the appellant being a surety (although as to this and as affecting the Bank the evidence is not satisfactory, in fact, inconclusive), and the maker for whom he is surety not being capable of being proceeded against by the surety in case he, the surety, pays the debt, that therefore the action is not maintainable against him or should be stayed, is, with all deference, idle argument. The situation is not one of the Bank's creation; further, it is in no way a defence. At most, all that can be said is, that the surety is prevented from bringing, or proceeding with, any such action until the end of the war.

MCPHILLIPS, J.A.

After the foregoing reasons for judgment were written, reference has been made by counsel for the appellant to the case of *Merchants Bank of Canda* v. *Eliot,* a decision of McCardie, J. of the King's Bench Division, England, reported in (1918), 1 W.W.R. 698. After consideration of that case, and especially *Rouquette* v. *Overmann* (1875), L.R. 10 Q.B. 525; 44 L.J., Q.B. 221, cited therein, I am still further confirmed in my opinion (see McCardie, J. at p. 701).

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. dismissed the appeal.

Appeal dismissed.

Solicitor for appellant: *E. M. N. Woods.*
Solicitors for respondent: *Tupper & Bull.*

MORSE *ET AL.* v. MAC & MAC CEDAR COMPANY.

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Contract—Supply of lumber for certain period—Breach—Damages—Oral agreement as part of contract—Admissibility of.

The defendant agreed to supply and the plaintiffs agreed to purchase the total output of certain grades of lumber manufactured at the defendant's mill, estimated at from 300,000 to 500,000 board-measure per month, for a period of six months. Lumber was delivered, for which payment was duly made, for slightly over three months, when the mill shut down and deliveries ceased. The defendant Company then sold its plant, and no more lumber was supplied under the contract. In an action for damages for breach of contract:—

Held, that it was an implied term of the contract that the defendant would continue to operate the mill and supply the lumber for a period of six months, and that the plaintiffs were entitled to damages estimated on the difference between the price fixed by the contract and the market price at the time of the failure to deliver the lumber, and from the terms of the contract and the deliveries made, the pliantiffs were entitled to this difference on 750,000 feet.

Held, further, that an alleged oral agreement that the plaintiffs would, as part of the consideration for the defendant's promise to supply the lumber, finance the defendant in connection with the contract, was inadmissible in evidence.

ACTION for damages for breach of contract under seal, dated the 17th of March, 1916, whereby the defendant Company agreed to sell and C. R. Ash and R. L. Morse agreed to purchase "the total output of cedar lumber manufactured by the Company, estimated at from 300,000 to 500,000 board-measure, per month, at its mill at Powell River, B.C., for a period of six months from the date hereof." The lumber was classified and sold subject to certain conditions, it appearing that only No. 1 and No. 2 clear grade of lumber was to be sold, the price fixed being $20 per 1,000 feet board-measure for lumber four inches in width and one inch in thickness and less than ten feet in length; and $25 per 1,000 for lumber six to twelve inches in width of the same thickness but having a length of ten feet and longer. This left the lower grade, or common lumber, such as was part of the output of the mill, for sale by

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the defendant Company. After the contract had been entered into, deliveries were made from time to time and payments were made in due course. In the latter part of June, 1916, the mill shut down, and the deliveries of lumber ceased. On the 15th of July, 1916, defendant Company sold all its assets to P. R. Brooks, of Vancouver, and no further lumber was supplied under the contract. C. R. Ash died on the 4th of March, 1917, and his widow, Marguerite White Ash, as administratrix, together with the said Robert L. Morse, claim that the contract was broken, and that they are entitled to damages. By an amended statement of defence, defendant alleges that the said Ash, on behalf of himself and his partner, the plaintiff Morse, verbally agreed that they would, as part of the consideration for entering into the contract, "finance" the defendant in connection with same, and that the performance of such contract was contingent and conditional upon such partnership supplying funds to the defendant Company for the purpose of purchasing supplies, paying wages and obtaining logs with which to implement the contract. Defendant alleges that such verbal agreement was carried out for a time, but that the partnership failed to perform its agreement in the latter part of June, 1916, and that such failure excused the defendant Company from further responsibility under the contract; in other words, that it operated as a defeasance of the contract. Tried by MACDONALD, J. at Vancouver on the 25th and 26th of March, 1918.

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

20th April, 1918.

MACDONALD, J. [after reciting the facts as set out in the statement]: While the contract imposed mutual obligations and was clearly a sale of the material covered by its terms, without any conditions whatever, is the position assumed by the defendant tenable? Can it, especially after the death of C. R. Ash, thus destroy the effect of the written contract entered into, after deliberation, by its directors and formally executed with its corporate seal? It would be a dangerous principle to establish that, after such a contract had been actually in operation for a time, it could be rendered ineffective by such verbal evi-

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dence. It must be contended, if any weight is to be attached to such verbal agreement, that the contract in writing does not contain the whole agreement between the parties; but such a contention would involve a violation of the rule of evidence and the decisions of the Courts not to allow oral testimony to be given, which is inconsistent with or repugnant to the terms of the written instrument. In *Long* v. *Smith* (1911), 23 O.L.R. 121 at p. 127, Boyd, C. refers to the difficulty of applying this rule, and draws the distinction between a verbal condition postponing the operation of a written instrument, and a verbal condition or agreement alleged, to affect such an instrument, after it has come into operation, as follows:

"No little difficulty and confusion has arisen in the application of this rule to the varying transactions of business life, which is not lessened by the discordant opinions of the judges. But, without trying to reconcile differences, there is a well-marked line of cases establishing this doctrine, that evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend. The oral evidence may be such as to affect the performance of the written agreement by shewing that it is not to be operative till the condition is complied with. The enforcement of the contract may be suspended or arrested till the stipulation orally agreed on has been satisfied."

This decision is further outlined in *Carter* v. *Canadian Northern R.W. Co.* (1910), 23 O.L.R. 140. See Teetzel, J. at pp. 145-6:

"I do not think it follows that evidence to prove such a condition as was found to have been agreed upon in this case can be said to contradict, add to, vary, or subtract from the agreement as signed, but that it simply established that a condition was agreed upon subject to which the agreement was entered into, and upon which the performance of it by the plaintiff should depend. In other words, it does not amend or work a defeasance of the signed agreement, but simply suspends its operation until the terms of the condition are complied with; and, when this is once accomplished, the purpose of the condition is spent, and the agreement in its entirety remains unaffected by it."

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It was contended that I should not admit any evidence tending to support such verbal agreement or understanding, and cases were cited in support of such contention. I thought it well, however, to allow the evidence to be given, reserving to myself the right, under *Jacker* v. *International Cable Company (Limited)* (1888), 5 T.L.R. 13, to discard the evidence, if I considered that it was not properly admissible. Even if I

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could determine the terms of this alleged verbal agreement, I do not think it should prevail as against the written document. The transaction between the parties was not in any stage of negotiation, nor was its operation to be suspended until the happening of any event. It became binding between them, and the contemplated sale was consummated by frequent deliveries of lumber. The defendant's position is, that while this state of affairs existed, and the purchasers might be compelled to receive the lumber, even although the market price had fallen in the meantime, still, that there was an outstanding verbal agreement which, on non-performance, would put an end to the contract. If it were a clear cut and definite arrangement, such as the defendant must necessarily assert, then, the anomalous position would arise that if the market had fallen, and the purchasers were paying such a price as would result in loss, they might attempt to escape liability, by simply breaking the terms of the verbal contract. However, I deem it unnecessary to discuss further the probabilities or uncertainties of a situation thus presented, by any such verbal agreement. It only emphasizes the desirability, if not the necessity, of adhering to the terms of a written contract, and when such a contract is shewn to exist, the parties should be held strictly to its terms. See *Croasdaile* v. *Hall* (1895), 3 B.C. 384 at pp. 393-4:

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> "There has been a growing inclination on the part of the Courts in England to keep people to the strict letter of their agreements, even though hardship should be the result. *Jones* v. *St. John's College* [(1870)], L.R. 6 Q.B. 115 is a notable example of this."

The parties were *ad idem* at the time, and took more than usual care, in the preparation and execution of a contract of this kind. It is not a case where the contract was rendered impossible of performance, through the occurrence of something, which could not have been in contemplation of the parties at the time when it was made. That is where the interruption is of such a character and duration, that it vitally and fundamentally changes the conditions of the contract, and is of such a nature that it could not possibly have been considered at the time of the execution of the contract. See *Metropolitan Water Board* v. *Dick, Kerr and Company* (1918), A.C. 119 as to

the avoidance of the contract in that event. Then again, even if such verbal agreement were to be considered as affecting the rights of the parties, I would be unable, on the evidence, to determine, with any degree of accuracy, the nature and terms of such agreement. J. J. McKay, managing director of defendant Company, endeavoured, at this late date, without any danger of contradiction from C. R. Ash, meantime deceased, to give particulars of such an agreement. It was, moreover, indefinite as to amount, uncertain as to time, and generally unsatisfactory. There were facts proved, outside of his evidence, through accounts and correspondence, to shew that the purchasers advanced money for the purposes indicated, but this course of dealing would not of itself support such a contract. It would not be an extraordinary procedure for a wholesale dealer in lumber, to advance moneys to the owners of a mill to assist in its operation, and then to be repaid the amount, out of lumber when delivered. Such an arrangement might have been made here, but it might only be intended to be of a tentative nature, and purchasers could withdraw from it at any time when it was deemed advisable. Then again, the correspondence does not shew any agreement of a binding character. It was lengthy, and the defence was challenged to shew any portion of it, which would indicate a right on the part of the defendant to insist upon further moneys being supplied to carry on the operations of the mill, but it failed to satisfy such demand. In conclusion, on this branch of the case, there are two documents which contradict the position sought to be assumed by the defendant. There was an authority given, shortly after the contract was entered into, which directed payment to be made by the purchasers, and reserving the right in the defendant, to withdraw such authority at any time it thought desirable. Also when the defendant Company sold out, on the 15th of July, 1916, to P. R. Brooks, all its assets, including the contracts then existing, the contract in question herein, was specifically dealt with, and a covenant obtained from said Brooks that he would carry out all the terms and conditions of such contract between Ash and Morse and the defendant. This instrument was signed by J. J. McKay, on behalf of the defendant Com-

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pany, and while not made directly to Ash and Morse, still it was, in effect, a statement that the contract was still subsisting. It was certainly inconsistent with any statement on his part that the contract had ceased to exist, on account of non-compliance with the alleged verbal agreement. In my opinion, the contract is binding, and not affected by any condition or collateral agreement as alleged.

Assuming that I am correct in this conclusion, the next point to determine is, as to the terms of the contract and the effect thereof. It is clear that, during the period limited by the contract, defendant Company was to sell the purchasers all the output of its mill of certain classified lumber. It voluntarily prevented itself from manufacturing any further lumber, but endeavoured to protect itself as against the liability under the contract, by the covenant of said Brooks, for its continued performance. As a matter of fact, this stipulation was not adhered to, and nothing was done to implement its apparent purpose. There is no right, however, in plaintiffs to claim against Brooks for non-fulfilment. Plaintiffs assert that the defendant should not, under the circumstances, be relieved from carrying out the contract. They contend that the defendant Company impliedly agreed to continue operating the mill, and to supply lumber monthly within the estimated amount. The law on this subject is stated by Cockburn, C.J. in *Stirling* v. *Maitland* (1864), 5 B. & S. 840 at p. 852, as follows:

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> "I look on the law to be that, if a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. I agree that if the Company has come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue. The transfer of business and dissolution of the Company was certainly an act of the Company itself, so that they have by their act put an end to the state of things under which alone this covenant would operate."

Here a similar occurrence took place. If, in other respects, the terms of the contract are enforceable, the defendant would be liable, and is not relieved by the fact that it has voluntarily

ceased to carry on business. Such act of the defendant, still continuing its liability, is somewhat similar to the position of a party not being permitted to take advantage of his own default or wrong, in justification of a breach of contract. See Viscount Reading, C.J. in *In re New Zealand Shipping Company and Societe des Ateliers et Chantiers de France* (1917), 2 K.B. 717 at p. 723:

"Unless the language of the contract constrains the Court to hold otherwise, the law of England never permits a party to take advantage of his own default or wrong."

It is contended that the terms of this particular contract are such, that the implied engagement to continue business should not be held to exist. This matter was fully discussed in the leading case of *Hamlyn & Co.* v. *Wood & Co.* (1891), 2 Q.B. 488. See Lord Esher, M.R. at p. 491, and Kay, L.J. at p. 494.

The case of *Stirling* v. *Maitland, supra,* is referred to therein, as shewing the nature and extent of the contract, which the Court will imply, in certain cases. Each case must then depend upon its own facts. I have discarded the evidence tending to shew a conditional or collateral agreement, which would affect the contract. Leaving such evidence aside, as not to be considered, am I driven to the conclusion that the parties intended that during the six months, the saw-mill should operate, and the purchasers receive lumber as agreed? In the *Hamlyn* case, Kay, J. did not think that the parties intended that the contract should subsist for ten years. He thought that all that either party intended was that (p. 495)—

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"If the defendants should carry on business for ten years, they should sell their grains to the plaintiffs at the current prices to be ascertained as mentioned in the contract. It would have been a different thing if the contract had been to pay so much down for a supply of grains for ten years."

So that the fact, that no definite price was fixed for the sale of the grains seems to have been an inducing, if not a controlling factor in leading this learned judge to conclude, that the parties did not necessarily intend a continuance of the state of circumstances existing at the time of the making of the contract. The price to be paid for the grains was to be ascertained from time to time, so that the plaintiffs would not be affected by a discontinuance of the defendant's business and lack of supply. They could go into the market and purchase upon the same terms as

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they would require to pay the defendant. Here the circumstances are different. The price was fixed, and the purchaser bound in any event to receive and pay such price for all of certain classified lumber that might be produced at the defendant's mill, estimated at from 300,000 to 500,000 feet per month, during the six months. By such a contract, so executed and binding upon the purchasers, it had the same results as if they had paid a substantial amount on account of lumber to be delivered. I think there is a clear distinction between the facts in the *Hamlyn* case and those which I am called upon to consider here. Viewing the fact, that lumber fluctuates in price, and that T. R. Ash, acting for his partner, would, as a business man, require to know in advance where his supply was obtainable for further sale, I think I am driven, of necessity, to conclude that the parties intended that the mill should provide, during six months, the amount of lumber referred to, available for the purchasers at the fixed price. This conclusion is supported by what took place when the defendant determined to sell out its business to P. R. Brooks. The Company did not take the stand that it had a right to shut down the mill, and dispose of its business without further obligation under the contract, but admitted and acted as if the contract were still in force, and endeavoured to protect itself by the covenant for that purpose. The excuse given by McKay for insertion of this provision does not seem reasonable. It can be fairly assumed that P. R. Brooks would not lightly assume responsibility under a contract, which called for sale of lumber at a price below the then market price. He could not guage with certainty the extent of his liability, even if it had been determined not to make any further deliveries under the contract. If this assumption be correct, then, it would most probably involve some compensation by the defendant in return, perchance by way of reduction in price for the assets. It is true that there is no evidence to shew any such compensation, but the fact remains that the contract was not treated as at an end, but expressly provided to the contrary, and by the covenant purported to place some liability upon the purchaser. Then, if the contract impliedly contained a term that the defendant

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would operate its mill, and continue to supply the lumber mentioned, and has failed to do so, what is the extent of the damages that the plaintiffs can recover for such breach? I should apply the principle expressed by Fitzgerald, B.:

"The general intention of the law in giving damages in an action of contract is, to place the party complaining, so far as can be done by money, in the same position as he would have been in if the contract had been performed":

see *Irvine* v. *Midland Gt. Western Railway (Ireland) Company* (1880), 6 L.R. Ir. 55 at p. 63. This is the ruling principle, and is referred to and approved of, in *Wertheim* v. *Chicoutimi Pulp Company* (1911), A.C. 301 at p. 307, where the measure of damages, based on this principle, is governed by the difference between the price fixed by the contract and the market price at the time when the failure to deliver the goods took place. See p. 308:

"The purchaser not having got his goods should receive by way of damages enough to enable him to buy similar goods in the open market."

Here there was satisfactory evidence given, to prove that the market price for lumber was rising in June, and for the balance of the period during which delivery should have taken place, such price was much higher than mentioned in the contract. The difference in price was $3 per thousand feet. While the amount of loss per thousand feet can thus be ascertained, and used as a basis for assessing the amount of damage, the difficulty is, in estimating what would have been the output of the classified lumber for the balance of the six months subsequently to the time when delivery ceased. I think such a difficulty, however, should not stand in the way of an ascertainment of the damages. The position is similar to a case where damages are sought to be arrived at by the Court before the time for performance of a contract has elapsed. See Mayne on Damages, 8th Ed., 206-7:

Judgment

"Where the trial takes place after the contract has thus been rescinded, but before the time for performance has arrived, there may be a good deal of difficulty in exercising that prophetic judgment which will enable the proper measurement of damages to be assessed. This difficulty, however, is not greater than that of estimating the value of a debt payable on a contingency under the bankrupt law, and the Courts have always held that the difficulty of estimating damages is no reason for refusing to fix them."

It was contended that the figures given of 300,000 to 500,000 feet should be a guide in determining the amount. They may

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April 20.

MORSE v. MAC & MAC CEDAR CO.

be of some assistance, though it might be argued that they are words of "estimate" only. The figures were doubtless given for a purpose, and intended to fix the maximum and minimum monthly output. It may be doubtful as to whether these words apply to the whole output of mill or only the classified lumber, subject of sale, but I think a reasonable deduction is that the parties would intend them to refer, alone, to the goods intended to be covered by the contract. In fact, it proved fairly accurate, as approximately one million feet of lumber was delivered during three months. Then again, if it were incumbent upon the defendant to continue to operate the mill, it is a fair presumption, that if it had not ceased operations, it would have produced monthly the same amount of lumber, of the same grade, as it did up to the time when it shut down. In thus dealing with the question of damages, I am following the principle expressed by Lord Selborne in *Wilson* v. *Northampton and Banbury Junction Railway Co.* (1874), 43 L.J., Ch. 503 at p. 505:

> "In the case of damages, as it appears to me, the plaintiff will be entitled to the benefit of such presumptions as according to the rules of law are made in Courts both of law and equity against persons who are wrongdoers, in the sense of refusing to perform and not performing their contracts. It is an established maxim that in assessing damages every reasonable presumption may be made as to the benefit which the other party might have obtained by the *bona fide* performance of the agreement."

Judgment

So, considering the deliveries actually made by the defendant under the contract, coupled with the statement of McKay, and the terms of the contract, I think a fair amount to estimate, as the deliveries that should have been made for the balance of the six months, would be 750,000 feet board-measure. There would, in that event, be a loss to the plaintiffs of $3 per thousand on 750,000 feet of lumber, amounting to $2,250. This is an amount lower than would be obtained based on the minimum stated in the estimate, but in determining the quantity of lumber, and consequently the monetary loss, I have made some allowance for contingencies and expenses bound to arise. I then allow $2,250 as damages. There should be judgment accordingly, with costs.

Judgment for plaintiffs.

WOODS v. FORSYTH.

COURT OF APPEAL

1918

April 16.

WOODS v. FORSYTH

Pleading—Leave to amend—Action on covenant—Illegal consideration—R.S.C. 1906, Cap. 115, Sec. 20.

On an application to amend the defence, where it appears that an arguable question has been raised by the proposed amendment, the application should be granted.

APPEAL from the order of HUNTER, C.J.B.C., of the 11th of February, 1918, on an application by the defendant for leave to amend his statement of defence. The action was for rent of certain lands on False Creek, leased by the plaintiff from the defendant. The ground was filled in by the plaintiff who owned the adjoining ground over former navigable waters on False Creek. The proposed amendment was that the consideration for the covenant sued on and the making of the lease and the occupation of the ground is illegal and contrary to public policy and to the provisions of the Navigable Waters' Protection Act, R.S.C. 1906, Cap. 115, and to The Vancouver Harbour Commissioners Act, Can. Stats. 1913, Cap. 54. The land in question and so demised is wholly below the high-water mark of False Creek, which is navigable tidal waters within the Navigable Waters' Protection Act. The Chief Justice refused to allow the amendment. The defendant appealed.

Statement

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

S. S. Taylor, K.C. (*Tiffin*, with him), for appellant: Woods is suing for rent. He got his lease from the Canadian Pacific Railway. Under section 18*a* of an Act respecting the Canadian Pacific Railway, Can. Stats. 1881, Cap. 1, plans were required to be filed with the minister of railways of beach and land below high-water mark required for their works. Plans were filed, including the ground in question, before leave was given to build the railway west of Port Moody. Later, on a recom-

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mendation of Collingwood Schreiber, blocks were granted to the Canadian Pacific Railway, including the land in question, but the land covered by the maps filed was not all within Schreiber's recommendation. What they now have were navigable waters and have been unlawfully filled in: see Navigable Waters' Protection Act, R.S.C. 1906, Cap. 115, Sec. 20. Authority must be obtained under section 7 of the same Act. The leases were given in 1914. In support of the plea that the consideration for the covenant sued on was illegal see *The Gas Light and Coke Company* v. *Turner* (1840), 6 Bing. (N.C.) 324; *Stevens* v. *Gourley* (1859), 7 C.B.N.S. 99; *Holman* v. *Johnson* (1775), 1 Cowp. 341; *Attorney-General* v. *Parmeter* (1822), 10 Price 378; *Flight* v. *Clarke* (1844), 13 L.J., Ex. 309. As to the right of amendment of pleadings see *Tildesley* v. *Harper* (1878), 10 Ch. D. 393 at pp. 396-7; *Budding* v. *Murdoch* (1875), 1 Ch. D. 42; Annual Practice, 1918, p. 452.

Argument

A. H. MacNeill, K.C., for respondent: The application is to amend in order that they can shew the Canadian Pacific Railway had no title. This is an attempt to evade the rule that the tenant cannot dispute the landlord's title. My submission is that this rule applies in this case.

Taylor, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: It is not without hesitation that I agree that the amendment should be made. I agree, not because I have formed any opinion that such an amendment will avail the party seeking it, that is to say, that the proposition of law involved in the amendment will prevail—I think it is debateable—but I do not desire now, as this matter may come before us again, to express a final opinion upon it simply for the purpose of deciding this motion. There seems to be an arguable question raised by the proposed amendment, and that being so and the other members of the Court being of this opinion, the amendment must be allowed. After all, it strikes me that the point sought to be raised is the question of a tenant disputing his landlord's title.

MARTIN, J.A.

MARTIN, J.A.: If this matter had come before me originally as judge in Chambers, I would have no hesitation in saying that

there is an issue raised, as my brother MCPHILLIPS has said, clearly debateable on the record, on the authority cited by Mr. *Taylor,* and I think the amendment should be allowed. The appeal should be allowed.

MCPHILLIPS, J.A.: I am of opinion the appeal should be allowed, and the amendment made as counsel may advise. I do not say one way or the other as to the merit or demerit of the proposed defence. I think that the exercise of the powers given to a judge in Chambers in passing upon pleadings ought only to be used in the way of preventing amendments to the pleadings when it is clear no arguable question is capable of being agitated.

MCPHILLIPS, J.A.

EBERTS, J.A.: I have a great deal of hesitation in agreeing to this particular amendment. I express no opinion as to its merits.

EBERTS, J.A.

Appeal allowed.

Solicitors for appellant: *Scrimgeour, Hogg & Gilling.*
Solicitor for respondent: *F. W. Tiffin.*

MORRISON, J. (At Chambers)

1918

May 31.

MCLEOD v. MCLEOD: LONGHURST, CO-RESPONDENT; DAVID SPENCER, LIMITED, GARNISHEE.

Practice—Garnishee—Divorce—Judgment—Damages assessed against co-respondent—Procedure—R.S.B.C. 1911, Caps. 14, and 67, Sec. 36—1 & 2 Vict., Cap. 110, Sec. 18 (Imperial).

MCLEOD v. MCLEOD

A judgment in an action under the Divorce and Matrimonial Causes Act is, by section 18 of the Judgments Act, 1838 (Imperial), enforceable by an attaching order issued under the Attachment of Debts Act.

MOTION by the co-respondent to set aside an attaching order under the Attachment of Debts Act on the ground that a judgment in a divorce action is, under the Divorce and Matrimonial Causes Act, enforceable only in a manner similar to judgments and decrees of the High Court of Chancery when the Divorce and Matrimonial Causes Act was passed (20 & 21 Vict., Cap. 85, Sec. 52).

Statement

The petitioner obtained a decree absolute on the 14th of March, 1918, before MACDONALD, J. and a special jury, and damages were assessed against co-respondent for $250. The decree contained a provision that the co-respondent should pay into Court within three days of the service of decree the sum of $250. This money was not paid in. About the 8th of May, 1918, and after the taxation of costs, the solicitor for the petitioner applied to the registrar of the Supreme Court alleging by affidavit in support that the money was not paid in, and obtained an order garnishing money owing by David Spencer, Limited, to the co-respondent. Heard by MORRISON, J. at Chambers in Vancouver on the 31st of May, 1918.

Argument

Hume B. Robinson, for co-respondent: Under section 36 of the Divorce and Matrimonial Causes Act of British Columbia the only way to enforce decrees of the Divorce Court is according to the method used to enforce orders made by the Court of Chancery at the time of the introduction of the English law into the Province of British Columbia: see Halsbury's Laws

of England, Vol. 16, p. 589; *Clarke* v. *Clarke* (1873), L.R. 3 P. & D. 57. A decree of divorce is not a final order: see judgment of Kay, J. in *In re Binstead. Ex parte Dale* (1893), 1 Q.B. 199. The judgment in the case at bar is not a final judgment, as it directs the moneys to be paid into Court, and these moneys are subject to the direction of the Court: see section 18 of the Divorce and Matrimonial Causes Act; *Graham* v. *Harrison* (1889), 6 Man. L.R. 210 at p. 215. Section 3 of the Attachment of Debts Act refers to final judgments or order for payment of moneys. A district registrar as defined by the Attachment of Debts Act is *persona designata*: see *Richards* v. *Wood* (1906), 12 B.C. 182 at p. 183, and is limited to the district registrar of the Supreme Court and does not include registrar of the Divorce Court.

Argument

Steers, for the petitioner: Under section 36 of the Divorce and Matrimonial Causes Act all decrees and orders made by the Supreme Court in divorce actions shall be enforced and put into execution in the same manner as judgments, orders and decrees of the High Court of Chancery in the year 1857; see also the Judgments Act, 1838 (1 & 2 Vict., Cap. 110, Sec. 18), where it was provided that all decrees and orders of Courts of Equity for payments of money should have the effect of judgments at law and that all remedies given to judgment creditors were thereby made available for enforcing such decrees and orders.

MORRISON, J.: The judgment in this case directed the payment into Court of $250 in damages and of $599 costs to the petitioner. The procedure adopted comes within section 18 of the Judgments Act, 1838 (1 & 2 Vict., Cap. 110). The motion is dismissed with costs.

Judgment

Motion dismissed.

MORRISON, J. (At Chambers)

1918

June 12.

PILKINGTON v. KENT.

Practice — Registrar's order — Application to set aside — Jurisdiction — War Relief Act, B.C. Stats. 1917, Cap. 74, Sec. 8—B.C. Stats. 1918, Cap. 97, Sec. 5.

PILKINGTON v. KENT

Any application dealing with a registrar's order under subsection (4) of section 5 of the War Relief Act Amendment Act, 1918, must be made to the Court.

APPLICATION by the defendant to set aside an order made by the registrar under the War Relief Act Amendment Act, 1918, granting leave to proceed with the action, heard by MORRISON, J. at Chambers in Vancouver on the 12th of June, 1918. Under section 8 of the War Relief Act Amendment Act, 1917, a person desiring to proceed had to apply for leave to a Court. By the amendment to this section in 1918, by section 5, subsection (*b*) of Cap. 97, the power is extended to "a judge or the registrar thereof," and by subsection (4) all applications for leave to proceed must be made in the first instance to the registrar.

Statement

N. R. Fisher, for the application.

Housser, contra, took the preliminary objection that there is no jurisdiction in the Court to set aside—that the application should be made to the registrar and not to the Court or a judge thereof.

Argument

MORRISON, J.: The "registrar" is introduced for the first time by the amendment of 1918, and on an application for leave to proceed, evidence satisfactory to him must be adduced if the application comes to him. After he disposed of such application he is *functus.* Any further step must be by way of application to the Court, pursuant to the last clause of section 8, Cap. 74, B.C. Stats. 1917. To accede to Mr. *Housser's* submission, the words "or a judge, or the registrar thereof" must be read into that part of the section. I hold, therefore, that any application dealing with the registrar's order under the War Relief Act must be made to the Court.

Judgment

Preliminary objection overruled.

IN RE HARRISON. (No. 1).

HUNTER, C.J.B.C.

1918

April 8.

IN RE HARRISON

Criminal law—Fugitive offender—Grounds for laying information—Arrest on warrant before being set at liberty—Informant police officer executing warrant issued upon information laid by him—Information disclosing offence.

An information for the purpose of obtaining the issue of a provisional warrant to apprehend a fugitive under the provisions of the Fugitive Offenders Act, R.S.C. 1906, Cap. 154, may be laid upon information and belief, and witnesses need not be examined in support unless the magistrate considers it desirable or necessary, as provided by section 655 of the Criminal Code, the provisions of which are made applicable to section 9 of the Fugitive Offenders Act.

Additional care ought to be taken in the case of extraditing persons to foreign countries than in facilitating criminal proceedings in various parts of the Empire, to which alone the Fugitive Offenders Act applies.

A person in custody, lawful or otherwise, may be arrested on lawful process without the necessity of his being set at liberty before being arrested on another charge. The validity of the original caption is not material.

It is no valid objection to the arrest of a person by a constable on a warrant, that the constable is the person who laid the information upon which the warrant to apprehend was based.

It is sufficient to follow the statutory language when laying the information. The information charged the accused as getting money by false pretences from "Smith and Woodman," not indicating whether they were a firm, or a company, or two separate individuals.

Held, that this, while objectionable, did not invalidate the proceedings.

APPLICATION for a writ of *habeas corpus*, heard by HUNTER, C.J.B.C., at Victoria, on the 8th of April, 1918. Previous applications had been made to MORRISON, J. on the 26th of March, 1918, and to GREGORY, J. on the 4th of April, 1918.

Statement

The prisoner was confined in the Victoria City lock-up under an order of the immigration officer of the port of Victoria for his detention pending the holding of an inquiry by a board under the provisions of the Immigration Act to determine whether he would be permitted to remain in Canada. While so detained, an information was laid before the stipendiary magistrate at Victoria by the superintendent of provincial

HUNTER, C.J.B.C.

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police, who had received cable instructions from the commissioner of police at Wellington, New Zealand, charging the prisoner with having obtained money by false pretences from Smith and Woodman, at Whangarei, in the Dominion of New Zealand, with intent to defraud, and a warrant under the provisions of the Fugitive Offenders Act was issued for the arrest of the prisoner. Thereupon, and while the prisoner was detained under the immigration officer's order, the prisoner was arrested by the superintendent of provincial police, in the office of the chief of the Victoria City police, which is situated in the same building as are the cells in one of which the prisoner was confined. The grounds upon which the application was made were: (1) The information laid was insufficient because founded on information and belief, and the sources of information were not disclosed in the written information. (2) The prisoner was illegally detained under the immigration officer's order, and could not be arrested until he had been set at liberty. (3) The officer who executed the warrant was the person who laid the information. (4) The information does not disclose any offence, as it does not allege that the accused knew the representations were false.

Statement

Moresby (*Lowe*, with him), for the application: On the first point there must be a positive statement supported by some other competent evidence: see *Re Walter A. Dickey* (*No. 2*) (1914), 8 Can. Cr. Cas. 321; *Rex* v. *Kehr* (1906), 11 Can. Cr. Cas. 53. The Justice should examine the complainant and his witnesses: see *Ex parte Coffon* (1905), 11 Can. Cr. Cas. 48, *citing Ex parte Boyce* (1885), 24 N.B. 347. On the second point, *Ex parte Cohen* (1902), 8 Can. Cr. Cas. 312. On the third point, *Re Walter A. Dickey* (*No. 2*), *supra*.

Argument

Bullock-Webster, for the Government of New Zealand: The information laid may be on information and belief: *Rex* v. *Harsha* (*No. 2*) (1906), 11 Can. Cr. Cas. 62 at p. 69; *Re Webber et al.* (1912), 19 Can. Cr. Cas. 515. *In re O'Neill* (1912), 17 B.C. 123. Witnesses in support of the information need not be examined under section 655 of the Code. That is only done when the justice considers it desirable or necessary: *White* v. *Dunning* (1915), 21 D.L.R. 528; *Ex parte Arch-*

ambault (1910), 16 Can. Cr. Cas. 433; *Rex* v. *Johnston* (1909), 17 Can. Cr. Cas. 369; *Rex* v. *Mercier* (1910), 18 Can. Cr. Cas. 363; *Rex* v. *Mitchell* (1911), 19 Can. Cr. Cas. 113. Arrest may be made on a warrant based upon telegraphic information: *Rex* v. *Rudland; Ex parte Kalke* (1908), 14 Can. Cr. Cas. 22. The validity of the caption is not material: *Rex* v. *Whitesides* (1904), 8 O.L.R. 622; 8 Can. Cr. Cas. 478 at p. 485; *Rex* v. *Lee Chu* (1909), 14 Can. Cr. Cas. 322 at p. 327; *Rex* v. *Gage* (1916), 30 D.L.R. 525 at p. 528, approving *Rex* v. *Whiteside, supra.* *Rex* v. *Mitchell, supra*; *Re Webber et al., supra*; *Rex* v. *Walton* (1905), 10 Can. Cr. Cas 269; *Stone* v. *Vallee* (1911), 18 Can. Cr. Cas. 222; and *Reg.* v. *Weil* (1882), 15 Cox, C.C. 189 is conclusive on this point. It is absurd to suggest that a police officer informant cannot legally execute a warrant based on the information that he has laid. If such were held to be the law, it would be impossible to provide for the execution of warrants and the arrest of criminals. *Stone* v. *Vallee, supra,* in my favour does not follow *Re Walter A. Dickey (No. 2)* (1904), 8 Can. Cr. Cas. 321. In some instances such an arrest would be improper. As to the information not disclosing an offence because it does not allege that the prisoner knew that the representations were false, such an allegation is not required, the information is laid in the words of the enactment describing the offence: section 852 of the Criminal Code.

Argument

[HUNTER, C.J.B.C.: Are Smith and Woodman a company? How can money be obtained by false pretences from a company?]

Smith and Woodman are the names of two individuals alleged to have been defrauded. Their Christian names would be given if they were known to the informant, but the cable from the commissioner of police did not furnish any other names. Particulars can be asked for by the accused if he is prejudiced, and the information sought will be obtained by cable and supplied to him.

HUNTER, C.J.B.C.: A number of points have been taken by Mr. *Moresby* in support of this application; but I do not think there is anything in any of these points which afford any

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relief to the applicant. The first point raised was that the information was bad as based upon information and belief without giving the surrounding facts and circumstances—without, at all events, annexing to the information the sworn testimony of some person who had first knowledge of the matters in hand. When we look into the language of the Act itself, which, after all, is what must govern, we find it is enacted by section 9, that,—

"A magistrate in Canada may issue a provisional warrant for the apprehension of a fugitive who is or is suspected of being in or on his way to Canada, on such information and under such circumstances as would, in his opinion, justify the issue of a warrant, if the offence of which the fugitive is accused had been committed within his jurisdiction; and such warrant may be backed and executed accordingly."

When we turn to section 655 of the Criminal Code, it provides,—

"Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant, and if the justice considers it desirable or necessary, the evidence of any witness or witnesses; and if the justice is of opinion that a case for so doing is made out, he shall issue a summons or warrant, as the case may be, in manner hereinafter provided."

So that by section 9 of the Fugitive Offenders Act, it is provided that where the justice, using the same machinery as he would use in connection with an offence alleged to have been committed within the jurisdiction, comes to the conclusion that the warrant ought to issue, then it is his duty to issue it. And he comes to such conclusion after hearing and considering the allegations of the complainant, and if he considers it desirable or necessary, the evidence of any witness or witnesses. So that, I think, by virtue of the express language of the enactments, taken together, it is not incumbent on the justice, although he may, if he sees fit to do so, and ought, unless the information is laid by an apparently credible person, ought, I say, to make some investigation outside of the mere allegation of the complainant himself, but it is within his jurisdiction and discretion if he sees fit, to accept only the allegation of the complainant as the foundation for the issuing of the warrant. Section 10 of the Extradition Act (R.S.C. 1906, Cap. 155) was relied on by Mr. *Moresby*. The language of that section is somewhat different, because it there provides that "whenever this Part

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applies, a judge may issue his warrant for the apprehension of a fugitive on a foreign warrant of arrest, or on information or complaint laid before him, and on such evidence or after such proceedings as in his opinion would, subject to the provisions of this Part, justify the issue of his warrant," and so on. So that there is a material distinction between the two enactments, the Extradition Act requiring that the justice shall satisfy himself in addition to perusing the information and complaint, by such evidence as he may see fit to call for, that the case is a proper one in which he should issue his warrant. It is quite obvious that some additional care ought to be taken in the case of extraditing persons to foreign countries than in facilitating criminal proceedings in the various parts of the Empire, to which alone the Fugitive Offenders Act applies.

There were some cases cited by Mr. *Moresby* in support of his contention, and some cases cited by Mr. *Bullock-Webster* against that contention. It is sufficient for me to say that I prefer the cases cited by Mr. *Bullock-Webster*; it is not necessary to go to the length of expressing dissatisfaction with those cases cited by Mr. *Moresby,* but I am quite satisfied with the reasons given by Chancellor Boyd in *Rex* v. *Harsha (No. 2)* (1906), 11 Can. Cr. Cas. 62. But, apart altogether from these decisions, if there were no decisions cited to me either way, I would be quite satisfied, on the language of the two sections, that it is not incumbent on the justice to do anything more than to act on the complaint of some credible person—in this case, the chief of police.

Judgment

The next point raised was that when the accused was arrested he was already in an apparently unlawful custody, and that he ought to have been previously discharged from that unlawful custody before he could be again validly arrested. To my mind that is an absolutely untenable suggestion, to suggest that the hands of the police are powerless in respect to an individual who happens by some misfortune or ill chance to be irregularly in the custody of the police by reason of some unlawful or irregular proceeding. All I will say about that is, the law affords a remedy for unlawful custody, by way of damages or *habeas corpus,* as the case may be. But it is, to my mind,

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perfectly idle to suggest that the police must wait, forsooth, until the accused or some of his friends should take proceedings by which he could be freed from the unlawful custody.

Another point raised was that the officer who laid the information made the arrest, and a case is cited apparently in support of that contention. It is sufficient for me to say I do not agree with that contention at all. I think it is quite open to the same officer who lays the information to make the arrest; only, as pointed out by Mr. *Bullock-Webster,* there are cases in which it would be highly undesirable that such should be the case, especially, for instance, in the case that he suggested, where the officer who makes the arrest may have some monetary interest in the result or where the officer has any personal feeling against the accused.

Another point raised was that there was no offence disclosed by the information. As far as that goes, the language is the statutory language of a charge of false pretences; the only doubt about the matter is that the allegation is that he obtained from "Smith and Woodman" the sum of £43. Now, I think any charge ought to be made with sufficient certainty so as to enable the person against whom the charge is made to know what it is he is being charged with. Smith and Woodman, so far as I know, or anyone else can know, looking only at the information, may be the name of a firm, it may be the names of two separate individuals having no partnership connection, or it might be a company. I have some doubt on that, but not sufficient doubt to enable me to say the information is bad. The tendency of modern criminal law is to dispense with and to discountenance the raising of technicalities in connection with the statements made in informations and indictments. I may say generally, on an application of this kind, we are not so much concerned with irregularities in connection with the actual arrest or detention, for which the law provides remedies, but we are concerned more particularly with the validity of the warrant of commitment itself. And if the judge finds that the warrant of commitment, on the face of it, is valid, I do not think it is at all incumbent upon him to go behind it endeavouring to support the discharge of the accused on the ground of some

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irregularity or technicality in connection with the proceedings. I am one of the many judges who believe in abolishing technicalities in connection with criminal law, as well as civil law. So long as substantial observance of the requirements of the law is shewn, I think it is sufficient. It is notorious that in those jurisdictions where technicalities are allowed to prevail, the law falls into disrepute. I therefore, for these reasons, must decline to give effect to the application. I will say, however, that owing to the small doubt that I have as to the point that I have already mentioned, as to the way in which the information is laid, with respect to Smith and Woodman, that it ought not to be impossible for the Crown to consent to this individual being let out on bail. But that is a matter which I have nothing to do with on the present occasion.

Judgment

Application dismissed.

ROGERS v. ROGERS.

MORRISON, J. (At Chambers)

1918

June 4.

ROGERS v. ROGERS

Practice—Divorce—Application for security for costs—Affidavit in support—Application to cross-examine on.

On a petition for dissolution of marriage where there is a charge of adultery, neither the respondent, co-respondent nor the petitioner, even where there is a counter charge, is bound to answer any questions tending to prove him or her guilty of adultery.

APPLICATION by the respondent for security for costs on a petition for dissolution of marriage on the ground of his wife's adultery. The record was complete and the petition had been set down for hearing. In the affidavit in support of the application the respondent deposed that she had consulted counsel, who advised her that she had a good defence upon the merits, which she verily believed. Upon the hearing of the motion, counsel for the petitioner asked leave to cross-examine the

Statement

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respondent on her affidavit, which was opposed by the respondent's counsel, on the ground that it would be allowing discovery on the question of adultery, which is the only issue to be tried. Heard by MORRISON, J. at Chambers in Vancouver on the 4th of June, 1918.

Gibson, for the application.
Killam, contra.

MORRISON, J.: Where there is a charge of adultery neither the respondent, co-respondent, nor the petitioner, even if there be a counter charge, is, before decree, liable to be asked, or bound to answer any questions tending to prove him or her guilty of adultery: *King* v. *King* (1850), 2 Rob. E. 153; *Swift* v. *Swift* (1832), 4 Hag. Ec. 139; *Redfern* v. *Redfern* (1891), P. 139 at p. 147; *Bass* v. *Bass* (1915), P. 17; Ross on Discovery, 280. Order LXVIII., r. 1, Supreme Court Rules, differs from the English Order LXVIII., r. 1. The latter specifically excludes divorce from the scope of the rules. Our rules relating to discovery have not been made to apply specifically to proceedings for divorce or other matrimonial causes. Our divorce rules are silent on the question of discovery, therefore it seems to me that the practice in divorce, which generally is founded partly on the old ecclesiastical law practice and partly in the rules which prevailed at common law and in equity before the Judicature Act, and which, as one learned judge has put it, has become "inveterate," should still be followed.

Judgment

"It is one of the inveterate principles of English law that a party cannot be compelled to discover that which if answered would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure—Based upon the traditions of a law belonging to an earlier age and a fear of ecclesiastical monitions that is now technical and obsolete, the privilege in such a case has never been abrogated":

Bowen, L.J. in *Redfern* v. *Redfern, supra.*

BUSCOMBE SECURITIES COMPANY, LIMITED v. HORI WINDEBANK AND QUATSINO TRADING COMPANY, LIMITED.

MORRISON, J. (At Chambers)

1918

June 5.

BUSCOMBE SECURITIES CO. v. HORI WINDEBANK AND QUATSINO TRADING CO.

Practice—Writ—Application to set aside—Conditional appearance filed without leave—Preliminary objection to.

An application to set aside a writ on the ground that it did not include the plaintiff's address will be refused upon it appearing that the defendant had entered a conditional appearance without having first obtained the leave of the Court to do so.

APPLICATION by the defendant to set aside a writ on the ground that the address of the plaintiff was not set out in the writ. Heard by MORRISON, J. at Chambers in Vancouver on the 5th of June, 1918. Statement

Darling, for the application.

C. B. Macneill, K.C., contra, raised the preliminary objection that the defendant having entered a conditional appearance without first obtaining leave of the Court, the conditional appearance therefore has the same effect as an ordinary appearance, and cited Annual Practice, 1918, p. 127; Supreme Court Rules, Order XII., r. 30. Argument

MORRISON, J.: The preliminary objection should be sustained and the defendant's application dismissed with costs. Judgment

Application dismissed.

MORRISON, J.
(At Chambers)

1918

June 6.

REX v. LEWIS.

Criminal law—Prohibition Act—Sale of liquor—Conviction—Certiorari—Venue—B.C. Stats. 1916, Cap. 49.

REX
v.
LEWIS

Before imposing the consequences of an infraction of the Prohibition Act there should be reasonable particularity of proof as to when and where the offence alleged was committed.

APPLICATION for a writ of *habeas corpus* and for *certiorari*. The accused was convicted on the 1st of December, 1917, for unlawfully selling intoxicating liquor, to wit, a bottle of John Dewar & Son's Special Scotch Whiskey. The summons, conviction, and warrant of commitment were signed by Samuel Gibbs, who is described as stipendiary magistrate in and for the County of Cariboo. The accused appealed from the conviction to the County Court of Cariboo holden at Ashcroft. Upon the hearing the Crown objected that it was the wrong sittings, and the appeal was dismissed on the ground that no appeal had been taken, no notice having been given for the proper sittings of the Court. Heard by MORRISON, J. at Chambers in Vancouver on the 6th of June, 1918.

Statement

R. L. Maitland, for accused: As to the *habeas corpus,* the accused should be discharged, because his sentence expired by effluxion of time on the 31st of May. He was out on bail, and this makes an exception, under section 69 of the Summary Convictions Act, to the date from which the sentence should run. The Crown, having taken the position that we did not appeal, cannot successfully maintain that we were legally out on bail. The conviction should be quashed on *certiorari.* There was no proof that the accused sold intoxicating liquor, no witness having described the contents of the bottle alleged to have been sold, and no analysis having been made: see *Rex* v. *Schooley* (1917), 27 Can. Cr. Cas. 444. There is no evidence to shew that the offence was committed in the County of Cariboo. The only witness who mentions venue is Hurley, who says that he

Argument

was in Lillooet, but he does not shew that Lillooet is in the County of Cariboo: see *Rex* v. *Oberlander* (1910), 15 B.C. 134; *Rex* v. *Picard* (1913), 21 Can. Cr. Cas. 250; *Rex* v. *Aikens* (1915), 23 Can. Cr. Cas. 467. The conviction does not set out the date of the offence. As the magistrate's jurisdiction it limited to a prosecution within six months, this is fatal. The summons has the same effect, and the accused was therefore improperly before the Court, having appeared under protest. During argument on the trial the magistrate made reference to the actions of the accused in his private residence, of which no evidence was given. He, therefore, acted improperly and misdirected himself: see *Re Sing Kee* (1901), 5 Can. Cr. Cas. 86. No copy of the conviction was served on the accused, and it is submitted that under section 46 of the Summary Convictions Act such service is necessary before a warrant of commitment can issue. As to the Crown's objection of failure to set out the grounds in the notice of application and the writ of *certiorari,* this is unnecessary: see *Rex* v. *McGregor* (1905), 10 Can. Cr. Cas. 313. As to the objection that we have appealed to the County Court, it is clear, on the Crown's objection taken there, that we have not appealed, and *certiorari* will lie: see *Reg.* v. *Caswell* (1873), 33 U.C.Q.B. 303. As to the objection that we do not shew the Court the original affidavit of merit, it is submitted that a certified copy from the County Court registry is sufficient secondary evidence, the original being filed in a Court of record. As to the objection that no writ of *certiorari* will lie because of section 54 of the B.C. Prohibition Act, I submit that the power of the Supreme Court to review the proceedings in an inferior Court cannot be taken away by statute: see Seager's Magistrate's Manual, 37; *Reg.* v. *Caswell, supra; Ex parte Hill* (1891), 31 N.B. 84; *Reg.* v. *Coulson* (1893), 24 Ont. 246; *Reg.* v. *Dunning* (1887), 14 Ont. 52; *Reg.* v. *Becker* (1891), 20 Ont. 676; *Re Sing Kee* (1901), 5 Can. Cr. Cas. 86; *Rex* v. *Oberlander* (1910), 15 B.C. 134; *Re Ruggles* (1902), 5 Can. Cr. Cas. 163; *Rex v. Wells* (1909), 15 Can. Cr. Cas. 218; *Rex* v. *St. Pierre* (1902), 5 Can. Cr. Cas. 365; *Rex* v. *Horning* (1904), 8 Can. Cr. Cas. 268, and *Johnson* v.

Argument

MORRISON, J. (At Chambers)

1918

June 6.

REX v. LEWIS

O'Reilly (1906), 12 Can. Cr. Cas. 218. Failure to prove the venue goes to the jurisdiction of the magistrate.

H. S. Wood, for the Crown: The magistrate having returned an amended conviction which shews that the gaoler is rightfully holding the accused, the applicant cannot succeed unless he can invoke the aid of a writ of *certiorari*: see section 69, subsection 2 of the Summary Convictions Act. The accused was out on bail on his appeal, and he cannot now invoke the irregularity of his own proceedings, but must serve the full time. In any event, the six months had not expired when the application was launched, because no time can be allowed for good conduct when the prisoner was not in custody. As above stated, on application for *habeas corpus* merely the proceedings themselves cannot be attacked. By section 55 of the British Columbia Prohibition Act *certiorari* was taken away. If the effect of the statute is not to take away *certiorari* altogether, it can be invoked only on the question of jurisdiction, or where the conviction has been obtained by fraud: see *Rex* v. *Richmond* (1917), 2 W.W.R. 1200 at p. 1204. In any event, the applicant has no ground except to shew that the magistrate acted without jurisdiction, and this ground is not open to him. Section 53 of the British Columbia Prohibition Act requires that the party applying must produce to the judge an affidavit of merits. No such affidavit is produced here, but only a copy, the original having been filed in the appeal proceedings. This ground is not set out in the notice given to the magistrate. Under rule 33 of the Crown Office Rules, five grounds are given, but question of jurisdiction is not mentioned. It is submitted that this notice must state the ground. The implication is that the notice must give the grounds, so that the justice may know to what he must shew cause. This argument has particular application where the grounds are given, and the applicant should not be allowed to depart from the grounds so given.

Argument

MORRISON, J.: The Court may look into the record produced and decide that there was no jurisdiction to make the conviction. There was no evidence as to venue. There is a "Lillooet" in the County of Cariboo and another "Lillooet" in the County of Westminster. Particularity as to the *locus in quo* must be

Judgment

observed. Before imposing the consequences of an infraction of the British Columbia Prohibition Act there should be reasonable particularity of proof as to when and where the offence alleged was committed. In the present case that particularity is absent.

Production of a certified copy of the original affidavit, which is on file, is sufficient compliance. Conviction quashed.

Conviction quashed.

BOUCH v. RATH.

War Relief Act—Divorce—Judgment—Damages—"Liabilities"—B.C. Stats. 1917, Cap. 74, Sec. 2.

The term "liabilities" in section 2 of the War Relief Act Amendment Act, 1917, does not include damages recovered in an action arising in tort.

APPLICATION by the plaintiff to sell an interest in a property owned by the defendant to satisfy a judgment obtained in an action against the defendant for seduction in which damages were awarded the plaintiff. The defendant claimed relief under the War Relief Act Amendment Act, 1917, in that the word "liabilities" in section 2 thereof included damages arising in tort, in answer to which reference was made to *Stokes* v. *Leavens* (1918), 2 W.W.R. 188 at p. 190; *Nelson* v. *Balderson & Valley Dairy* (1917), 3 W.W.R. 488. Heard by MORRISON, J. at Chambers in Vancouver on the 7th of June, 1918.

Statement

J. Ross, for the application.
J. A. Russell, contra.

MORRISON, J.: The order is allowed to go, but the cases cited differ from the present one inasmuch as there is in this case a judgment.

"The expression 'for the enforcement of payment by any such person of his liabilities' seems to me to exclude from the term 'liabilities' claimed for damages arising in tort which cannot be fixed and determined until they have been reduced to judgment":

Per Cameron, J.A. in *Stokes* v. *Leavens* (1918), 2 W.W.R. 188 at pp. 189-90.

Judgment

Application granted.

MORRISON, J. (At Chambers)

1918

June 10.

MATHER & NOBLE, LTD. v. DIAMOND VALE SUPPLY CO.

MATHER & NOBLE, LIMITED v. DIAMOND VALE SUPPLY COMPANY, LIMITED.

Practice — Security for costs — Application for — Must be made within reasonable time—Companies Act, R.S.B.C. 1911, Cap. 39, Sec. 114.

The defendant applied for security for costs, under section 114 of the Companies Act, on the day before trial. The writ had been issued in March, 1916, and the action set down for trial in March, 1918. The plaintiff's insolvency was disclosed on examination for discovery four days previously to the application.

Held, that by reasonable care the defendant might have discovered the plaintiff's status at a much earlier date, and the application was refused.

APPLICATION by defendant for security for costs under section 114 of the Companies Act. The writ was issued on the 8th of March, 1916, the statement of claim was filed on the 22nd of March, 1916, and the defence was filed on the 31st of March, 1916. Plaintiff filed a demand for particulars on the 8th of September, 1917, and the particulars were filed on the 12th of September, 1917. On the 29th of March, 1918, the action was set down for trial on the 11th of June, 1918, and upon the plaintiff being examined for discovery on the 6th of June, 1918, insolvency was disclosed. The application was made on the day before the trial. Heard by MORRISON, J. at Chambers in Vancouver on the 10th of June, 1918.

Statement

Mayers, for the application: Although applying at the eleventh hour, I am nevertheless entitled to the order: see Palmer's Company Procedure, Part II., 11th Ed., 450; *Northampton Coal, Iron, and Waggon Company* v. *Midland Waggon Company* (1878), 7 Ch. D. 500.

Argument

A. M. Whiteside, contra: In the case of *Northampton Coal, Iron, and Waggon Company* v. *Midland Waggon Company*, the order for security would not have been granted but for an amendment to the pleadings that was allowed and an entirely new issue arose, which differentiates it from this case. Discovery could have been held at a much earlier date, when

defendant would have learned the financial condition of the plaintiff and then applied.

MORRISON, J. (At Chambers)

1918

June 10.

MATHER & NOBLE, LTD. v. DIAMOND VALE SUPPLY CO.

MORRISON, J.: The position of the plaintiff was disclosed on discovery by the defendant, who now applies on the eve of the trial for security. It might well be that the defendant might have ascertained the status of the plaintiff at a much earlier date. On this ground I would differentiate the cases cited by Mr. *Mayers*. The duty of every party applying for security is to apply promptly: see *Star* v. *White* (1906), 12 B.C. 355; *Ellis* v. *Stewart* (1887), 35 Ch. D. 459. Application dismissed.

Judgment

Application dismissed.

RE LAND REGISTRY ACT AND GRANBY CONSOLIDATED MINING AND SMELTING COMPANY, LIMITED.

MACDONALD, J. (At Chambers)

1918

June 17.

RE LAND REGISTRY ACT AND GRANBY CONSOLIDATED

Land Registry Act—Registration of conveyance—Lis pendens—Effect of section 71 of Act—Cloud—Refusal of registration—R.S.B.C. 1911, Cap. 127, Sec. 71.

It is a proper exercise of the discretion given the registrar-general by the Land Registry Act to refuse registration of conveyances vesting an indefeasible title in the applicant, on the ground that certificates of *lis pendens* had been registered prior to the application, in actions in which the Crown grant of the land was questioned.

APPLICATION by way of petition by the Granby Consolidated Mining and Smelting Company, Limited, for an order directing the registrar-general to register certain conveyances with relation to section 2 and the east 60 acres of section 3, range 7, Cranbrook District. Heard by MACDONALD, J. at Chambers in Victoria on the 17th of June, 1918.

Statement

MACDONALD, J. (At Chambers)

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Mayers, for the Company.
The Registrar-General, in person.
Harold B. Robertson, for the Esquimalt & Nanaimo Ry. Co. and Bing Kee.

RE LAND REGISTRY ACT AND GRANBY CONSOLIDATED

17th June, 1918.

MACDONALD, J.: The Granby Consolidated Mining and Smelting Company, Limited, being dissatisfied with the refusal of the registrar-general to register certain conveyances affecting section 2 and E. 60 acres section 3, range 7, Cranbrook District, B.C., applies by way of petition for an order directing such registration. The refusal is based upon the fact that certificates of *lis pendens* have been registered on behalf of the Esquimalt & Nanaimo Railway Company and Bing Kee, in actions, in which the Crown grant of such land is attacked. The root of title under which the Granby Consolidated Company seeks to become a registered owner is questioned, and the registrar claims that such a cloud has been thus created upon the title, that he is justified in his refusal to register conveyances, which would vest an indefeasible title in the applicant.

Judgment

If I were to comply with the petition, I would, under section 116A of the Land Registry Act, as amended by B.C. Stats. 1914, Cap. 43, Sec. 66, be required to declare, that it has been proved to my satisfaction, "upon investigation that the title of the person to whom the certificate of title is directed to issue is a good, safe-holding and marketable title," *i.e.,* "a title which at all times and under all circumstances may be forced on an unwilling purchaser": Dart on Vendors and Purchasers, 7th Ed., Vol. 1, p. 92. The like necessity existed on the part of the registrar. He contends that he properly exercised his discretion under section 14 of the Act, which declares that if he is not satisfied that such a title exists, he may, "in his discretion," refuse the registration. It is submitted that such discretion was improperly exercised, and that notwithstanding such *lis pendens,* registration should be effected. There is no doubt that if the certificates of *lis pendens* had been registered "since the date of the application for registration" of the conveyances, then the certificates of indefeasible title would, under sub-clause (*g*) of section 22 (1) of the Act, be subject to such *lis pendens.*

They were, however, registered prior to the application for registration, and so the position thus created has to be considered.

It was argued on behalf of the applicant that the certificates of indefeasible title, if issued, would be subject to the *lis pendens,* and that the word "interests" in such a certificate included a *lis pendens.* I do not think this ground is tenable. While section 71 of the Land Registry Act, as re-enacted by B.C. Stats. 1917, Cap. 43, Sec. 32, provides that "any person who shall have commenced an action, or, being a party thereto, is making a claim in respect of any land, may register a *lis pendens* against the same as a charge," still, I do not consider this provision as to registration of a *lis pendens* means that it is to have the same effect, and constitute a "charge," as interpreted by section 72 of the Act. It merely provides a mode of registration. The certificate of *lis pendens* does not create an estate or interest, but is simply a notice that some estate or interest is claimed by the party bringing the action: see *Robinson* v. *Holmes* (1914), 5 W.W.R. 1143 at p. 1146; also Armour on Titles, 3rd Ed., 193:

"The certificate of *lis pendens* is a mere allegation of fact, *i.e.,* that an action is pending, and the registration is designed to give notice to persons dealing with the land that some interest therein is called in question."

The case of *Pearson* v. *O'Brien* (1912), 4 D.L.R. 413, was cited in support of the contention that the word "interests," mentioned in a certificate of title under the Manitoba Real Property Act, included interests that are merely claimed as well as those established or admitted. Perdue, J. (now Chief Justice) certainly so held, but such conclusion, in this respect, was not essential for the determination of the point at issue. Further, the Manitoba Act provides for the filing of a *lis pendens* "in lieu of or after filing a *caveat,*" either before or after the issuance of a certificate of title. There is no section in our Act indicating this similarity between a *caveat* and a certificate of *lis pendens.* The procedure (as to *caveats*) is the same between the Provinces, in prohibiting the transfer or other dealing with land, unless the instrument sought to be registered is "expressed to be subject to the claim of the caveator." There is no corresponding provision as to a *lis pendens.* If the registrar were only "registering" instruments, then there would be no diffi-

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culty, but he is examining and passing titles, and it would seem an anomaly to grant a certificate of indefeasible title where the Crown grant, forming the very basis of title was attacked. It was proposed that even if the word "interests" did not include a certificate of *lis pendens,* an order might be made retaining such certificate of indefeasible title in the registry office, "to be held on behalf of all persons interested in the land," but unless such certificate be considered a "charge," there is no provision in the Act supporting such procedure. This conclusion is supported by the fact that it was deemed necessary in 1917 to pass legislation authorizing the issuance of an "interim certificate of title" in certain events. The applicant, in my opinion, is thus forced to rely upon the contention that the certificates of *lis pendens* should have been ignored by the registrar in passing the title, on the ground that they do not create a cloud upon the title. This means that, the registrar having failed to do so, I should now determine that the actions in which such certificates of *lis pendens* were issued are so ill-founded, that they cannot succeed, and thus that I may, with safety and confidence, pay no attention to the *lis pendens.* In view of the fact that the interests involved are very important, this course should not be pursued if any doubt existed on the point. If it were eventually decided that the plaintiffs in the actions were entitled to succeed, a very anomalous position would be created. In the first place, it would be contrary to authorities in Canada not to consider a *lis pendens* as a cloud upon the title: see MARTIN, J. in *Townend* v. *Graham* (1899), 6 B.C. 539 at p. 541:

Judgment

> "It is now settled that such a *lis pendens* is a cloud on the title which a purchaser is entitled to have removed."

The question considered in that case was, whether the purchaser was justified, in refusing to make payments under an agreement for sale before the cloud, created by a *lis pendens,* had been removed, and the judgment clearly decides that the title thus affected could not be "forced" upon the purchaser. *Re Bobier and Ontario Investment Association* (1888), 16 Ont. 259, to the same effect, is referred to with approval.

Even if, generally speaking, a certificate of *lis pendens* creates a cloud upon the title and gives notice of the plaintiff's claim, it is still contended, that it would not excuse a purchaser from

completing his contract. During the argument, I referred to *Bull* v. *Hutchens* (1863), 32 Beav. 615, as giving support to this proposition, but in Armour on Titles, 3rd Ed., 195, after mentioning this case, *Re Bobier and Ontario Investment Association, supra,* is referred to as follows:

"In a recent case it was held that the vendor was bound to remove certificates of *lis pendens* in order to make a clear registered title."

In *Bull* v. *Hutchens, supra,* the head-note on this point is as follows:

"A registered *lis pendens* does not create a charge or lien on the property nor does it excuse a purchaser from completing his contract, but merely puts him upon an inquiry on the validity of the plaintiff's claim."

In this contradictory state of the law of conveyancing, a number of authorities have been cited upon the question of what is a safe-holding and marketable title, and also as to the necessity of considering and deciding the validity of the plaintiff's claim, in the actions in which such certificates of *lis pendens* were registered. In my view of the matter, I do not consider it necessary to discuss this position at length. The registrar, in passing a title, is, I think, in an analogous, if not stronger, position than a solicitor acting for a purchaser. While he is required to facilitate the transaction of business and the registration of documents towards that end, still, when an indefeasible title is sought to be obtained, he should not ignore the rights and claims of parties brought to his notice. He should not be called upon, where an action has been brought, apparently in good faith, to determine, in advance, the result, nor do I think I should take a similar course. If the certificate of indefeasible title were issued, it would, under section 22 of the Act, be good against the whole world, subject only to the exceptions referred to in said section, and these would not include any rights sought to be preserved by a plaintiff under a *lis pendens*, registered prior to the application, under which such a certificate of indefeasible title was issued.

Judgment

In my opinion, the registrar properly exercised the judicial discretion, which is referred to, in *In re Land Registry Act and Shaw* (1915), 22 B.C. 116. His duties in the investigation of titles of various kinds are there outlined, and I do not think he has violated any of the principles referred to in that case.

MACDONALD, J. (At Chambers)

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RE LAND REGISTRY ACT AND GRANBY CONSOLIDATED

I might add that, without any application being made for the cancellation of the *lis pendens,* the plaintiffs in the actions should speed the trial, on the same basis as they would be required to do where an injunction had been granted in their favour. See Blake, V.C. in *Finnegan* v. *Keenan* (1878), 7 Pr. 385 at pp. 386-7:

> "I have always understood that, where a party to a suit obtains an injunction, he must proceed with the greatest possible expedition, and, a *lis pendens* being in effect an injunction, the same rule applies to the present case."

See, further, *Preston* v. *Tubbin* (1684), 1 Vern. 286:

> "Where a man is to be affected with a *lis pendens,* there ought to be a close and continued prosecution."

Judgment

In the view I have taken of the matter, I have not deemed it necessary to deal with the application of the Esquimalt & Nanaimo Railway Company for an order prohibiting any registration in connection with the land, or the issuance of a *caveat.*

The application of the Granby Consolidated Mining and Smelting Company, Limited, is refused, and in the meantime, pending the trial and final determination of the actions, the registrar should, by necessary extensions, provide, that the applicant is not prejudiced by the delay, in obtaining registration of the conveyances.

Application refused.

OLDS v. PARIS.

Malicious prosecution—Reasonable and probable cause—Defence of acting on counsel's advice—Malice—Use of criminal process to collect debt.

Although the taking of counsel's advice is evidence in the defendant's favour in an action for malicious prosecution, it is not conclusive unless he can shew he had taken proper care to inform himself of all the facts.

Harris v. *Hickey & Co.* (1912), 17 B.C. 21 followed.

Malice is sufficiently established in an action for malicious prosecution by proving that the defendant endeavoured to use the criminal Courts as a means for collecting a debt.

ACTION for malicious prosecution. The defendant had laid an information against the plaintiff for obtaining credit under false pretences. The defendant had purchased certain goods from the plaintiff, which were paid for by cheque. Payment of the cheque on presentation at the bank was refused, it being marked "not sufficient funds." Tried by GREGORY, J. at Vancouver on the 5th and 6th of June, 1918. Statement

Housser, for plaintiff.

D. W. F. McDonald, for defendant.

18th June. 1918.

GREGORY, J.: Action for malicious prosecution. I quite agree with defendant's counsel that the plaintiff to succeed must prove (a) that he was innocent of the charge for which he was prosecuted; (b) that there was want of reasonable and probable cause for the prosecution; and (c) that the defendant was actuated by malice. But I think the plaintiff has sustained the burden cast upon him. Judgment

As to what took place between the plaintiff and defendant when the plaintiff gave his order for boots, I unhesitatingly accept the plaintiff's story. He gave his evidence in a clear, straightforward manner, and in every way impressed me with his accuracy and truthfulness; while the defendant's manner and demeanour in the witness-box was not convincing of the

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accuracy of his statements. After hearing the evidence of the plaintiff and of the bank manager, I do not see how any one could hesitate for a moment in believing that the plaintiff honestly thought that his cheque would be paid by the bank. He, therefore, could not have been guilty of the charge of obtaining credit by false pretences.

As to the lack of reasonable and probable cause, Mr. *McDonald* has urged that the defendant having acted on the advice of counsel, he is fully protected, and he refers to a number of cases where expressions have been used which would at first seem to sustain his contention; but I do not see any reason for changing the opinion expressed by me in *Harris* v. *Hickey* (1912), 17 B.C. 21, *viz.*: that it is evidence but not necessarily a complete answer. I do not propose to review the cases on the subject—it is unnecessary in this action—but it is worthy of note that in the case of *Abrath* v. *North Eastern Railway Co.* (1883), 11 Q.B.D. 79, and on appeal to the House of Lords (1886), 11 App. Cas. 247, not one of the judges at the trial, in the Court of Appeal, or House of Lords, suggests that such a circumstance is a complete answer, although the case is one in which such an expression is one which would almost certainly have been used had the state of the law justified it.

Judgment

That a person seeking to shelter himself behind his counsel, must take proper care to inform himself of all the facts, cannot, I think, be questioned: see *St. Denis* v. *Shoultz* (1898), 25 A.R. 131; *Momsen* v. *Rudolph* (1913), 18 B.C. 631; *Abrath* v. *North Eastern Railway Co., supra.*

Long before the prosecution was instituted the defendant knew that the plaintiff thought he had arranged for an overdraft at the bank, and in fact himself stated that when he told plaintiff the cheque had not been paid, plaintiff seemed surprised. In these circumstances, it seems clear to me that any reasonably prudent man would have gone to the bank manager and ascertained the facts. Defendant's counsel urges that the bank manager would not have told him. There is no evidence of that, and the circumstances are such that I think he would have told him, and not only that, but that the cheque would have been paid. Defendant says he presented the cheque

mostly every day for two weeks. I cannot believe him. The bank account was produced, and shewed that a number of cheques had been paid within that period, and the manager further says that there was no reason why defendant's cheque should not have been also paid if presented at the same time.

Defendant's statement that he told his counsel everything—the same as he told it in Court—is not, to my mind, convincing. It is too general a statement. He should have told the Court in detail just what he did tell him and what his counsel advised him, and, personally, I think it would have been much more satisfactory if his counsel, instead of acting as such for him on the trial, had been a witness and testified as to what he had been told and the advice he gave. That was the practice followed in *Martin* v. *Hutchinson* (1891), 21 Ont. 388.

If, as defendant says, he told his counsel just what he testified to in Court, then I think he did not fairly represent the facts, for I cannot, as I have already stated, accept all his statements, *e.g.*, as to what took place at the original transaction and as to the number of times he presented the cheque, etc.

As to the question of malice, I think it has been abundantly proved that the defendant acted from an indirect and improper motive and not in the furtherance of justice. It is true that he says he did not, but I attach slight importance to that statement. It seems to me clear that he endeavoured to use the criminal Courts as a means for the collection of his debt. When the warrant or summons was issued, he told plaintiff that he would have the proceedings stopped if the cheque were paid. He endeavoured by threats of prosecution to collect his debt, his counsel even covertly did the same thing at the creditors' meeting. This, I think, establishes such malice as the law requires, and which takes away the protection which the law gives to any one acting honestly, upon reasonable and probable cause, in the prosecution of another for a criminal offence.

Judgment

There will be judgment for the plaintiff for $300 damages.

MORRISON, J. (At Chambers)

1918

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SKENE v. ROYAL BANK OF CANADA

SKENE AND CHRISTIE v. ROYAL BANK OF CANADA.

Practice—Pleading—Statement of claim—Motion to strike out—Frivolous and vexatious—Consent judgment—Action to set aside—Res judicata—Fraud—Alleged in writ but not in statement of claim.

An action may be brought to set aside a consent judgment on the grounds of mistake or misrepresentation.

The indorsement of fraud on a writ will, on application, be struck out where there is no allegation of fraud in the statement of claim.

APPLICATION to strike out the statement of claim on the ground that the action is frivolous and vexatious and, in the alternative, to strike out the indorsement of fraud on the writ on the ground that there was no allegation of fraud in the statement of claim. The action is brought against the defendant Bank to set aside a consent judgment on the ground of mistake, misrepresentation and fraud. The action in which the consent judgment was obtained, was brought in the Supreme Court for extras on the Hotel Vancouver, in which the Royal Bank was plaintiff (as assignee of the contractor) and Skene and Christie were defendants. The defendants claimed that the contractor had failed to perform certain portions of the contract. The trial judge found in favour of the plaintiff on some items and in favour of the defendants on other items, and directed a reference to the registrar to ascertain the quantities. The solicitor for the Royal Bank submitted a draft judgment to the solicitors for the defendants in the said action, embodying a provision for the ascertainment of the measurements of the various items by a reference to the registrar under the judgment of the trial judge. Subsequently the parties arranged to have the measurements made by a representative of each side, in the hope that they would agree, which they did. The solicitors for the Bank then redrafted the judgment, and sent it to the solicitor for the defendants with a letter stating:

Statement

"We have struck out paragraph 6 of the draft which dealt with the reference to the registrar and have substituted a paragraph dealing with the figures arrived at by Messrs. Thomson and Garrow."

Part of the new provision inserted in the place of paragraph 6 was the following:

"And the parties hereto having settled the entire accounts between them on the basis of this judgment and after making all proper deductions and allowances on both sides and it appearing from such accounts that the defendants are indebted to the plaintiff in the sum of $2,039.32."

Messrs. Skene and Christie appealed to the Court of Appeal from the judgment of the trial judge, and on the appeal the solicitors for the Bank contended that the above-quoted clause amounted to a declaration that a settlement of all matters in dispute between the parties had been made, and that the judgment in effect was a consent judgment, and that there was no appeal. A majority of the Court of Appeal so construed the clause. Heard by MORRISON, J. at Chambers in Vancouver on the 18th of June, 1918.

Statement

Alfred Bull, for the application: The plaintiff has adopted the wrong procedure, and should have appealed from the Court of Appeal judgment and not issued a writ in the present action. Further, the plaintiff alleged fraud in the indorsement on his writ, but did not mention same in his statement of claim, consequently the allegation of fraud should be struck out: see *Huntly (Marchioness of)* v. *Gaskell* (1905), 2 Ch. 656.

McMullen, contra: An action, and not an appeal, is the proper procedure, and the statement of claim discloses a good cause of action: see *Huddersfield Banking Company, Limited* v. *Henry Lister & Son, Limited* (1895), 2 Ch. 273; *Wilding* v. *Sanderson* (1897), 2 Ch. 534; *Ainsworth* v. *Wilding* (1896), 1 Ch. 673; Halsbury's Laws of England, Vol. 18, p. 547; *Faraday* v. *Tamworth Union* (1916), 86 L.J., Ch. 436. A judgment can be set aside on any grounds upon which an agreement can be set aside, and an agreement can be set aside upon the grounds of mistake, misrepresentation or fraud. In not charging fraud in the statement of claim the plaintiff has simply limited or modified the grounds upon which it seeks to have the judgment set aside; this is clearly authorized by marginal rule 228: see Annual Practice, 1916, pp. 368-9. There is no provision in the rules for striking out part of an indorsement on the writ. Rule 284 covers pleadings. The only effect is that the ground mentioned in the writ but not laid

Argument

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in the statement of claim, is deemed abandoned: Annual Practice, 1916, p. 369.

MORRISON, J.: As to the allegation of fraud in the indorsement, I shall strike that out. The facts in this case differ from that in *Huntly (Marchioness of)* v. *Gaskell* (1905), 2 Ch. 656, for in the latter case the plaintiff obviously inserted the "vicious" allegations for the purpose of interefering with an impending sale of valuable property, and were not made in good faith.

Judgment

As to the whole application, I think in order to determine whether or not there was a mistake or misrepresentation as to the consent clause in question, Mr. *McMullen* has taken the proper course by issuing his writ herein.

The application is therefore dismissed except as to that part of the indorsement alleging fraud.

Order accordingly.

MURPHY, J. (At Chambers)
1918
June 21.

IN RE BENSON, DECEASED.

Practice — Probate — Executor on war service — Authority delegated by power of attorney—Affidavits required made by attorney—B.C. Stats. 1916, Cap. 68.

IN RE BENSON

An appointee by power of attorney under the Execution of Trusts (War Facilities) Act, B.C. Stats. 1916, Cap. 68, has power to make the usual affidavits required from the executor on an application for probate.

Statement

APPLICATION under the Execution of Trusts (War Facilities) Act to have probate granted to the attorney of the executor, who was engaged in war service. The usual affidavits required to be made by the executor were sworn to by the said attorney. Heard by MURPHY, J. at Chambers in Vancouver on the 21st of June, 1918.

Symes, for the application.

Judgment

MURPHY, J.: Under the Act the affidavit sworn by the attorney should be accepted and probate issued accordingly.

Application granted.

McLENNAN, McFEELY & COMPANY, LIMITED v. COLPITTS.

MORRISON, J. (At Chambers)

1918

June 20.

McLENNAN, McFEELY & Co. v. COLPITTS

War Relief Act—Application under section 13—Made after order for substitutional service—May be invoked at any stage—B.C. Stats. 1917, Cap. 74, Sec. 9.

Section 13 of the War Relief Act, B.C. Stats. 1916, Cap. 74, as enacted by B.C. Stats. 1917, Cap. 74, Sec. 9, may be invoked in an action at any stage of the proceedings.

APPLICATION under section 13 of the War Relief Act, as enacted by B.C. Stats. 1917, Cap. 74, Sec. 9, to dispense with the restrictions of said Act. The plaintiff issued a summons in the County Court and before launching this application, obtained an order for substitutional service. It was submitted by the defence that plaintiff should have applied before obtaining the order for substitutional service to dispense with the Act, that parties applying under section 13 must apply before taking any further proceedings after issue of the writ. Section 13 recites that,— Statement

"notwithstanding anything contained in this or any other Act, or in the Rules of Court, a judge of the Supreme Court may dispense with the restrictions, prohibitions, and conditions herein contained or any of them, and permit any act to be done, or proceedings to be taken, or any action or proceeding to be carried on at such times and upon such terms and conditions as he may think fit as if this Act had not been passed,"

and counsel for the plaintiff submitted that the words "or any action or proceeding to be carried on" mean a plaintiff may apply at any stage of the proceedings to a judge of the Supreme Court, but if he applies at a late date he does so at his own risk. Heard by MORRISON, J. at Chambers in Vancouver on the 20th of June, 1918.

Griffin, for the application.
W. H. McFarlane, contra.

MORRISON, J.: Section 13 may be invoked at any stage of the proceedings. Judgment

Application granted.

GREGORY, J.

1918

June 26.

BELL v. QUAGLIOTTI *ET AL.*

Contract—Rents—Possession—Part performance—Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2(33).

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Section 2(33) of the Laws Declaratory Act provides that "Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation."

Held, that the statute does not change the general law that a promise, unless under seal, requires a consideration to support it; that the word "agreement" in the statute applies only to a "binding agreement," and that the words "rendered in pursuance of an agreement for that purpose" refers to a part performance other than the payment of money.

Statement

ACTION for the recovery of possession of building and premises, being lot 441, Victoria City, and known as the Variety Theatre. The facts are set out fully in the reasons for judgment. Tried by GREGORY, J. at Victoria on the 24th and 25th of June, 1918.

Alexis Martin, for plaintiff.
Maclean, K.C., for defendant Quagliotti.

26th June, 1918.

Judgment

GREGORY, J.: This is a case which, I think, should have been settled between the parties by mutual concessions. To accept the view of either the plaintiff or defendant will apparently work a great hardship on the other party. There is this to be said, however, on behalf of the plaintiff, that the bargain between defendant Quagliotti and defendant, the Island Amusement Company, out of which Quagliotti's losses arise, was entered into by them without reference to the plaintiff, except to ask for her consent.

The plaintiff has voluntarily reduced the rent to such an extent that she has received in the aggregate some $17,000 less rent than she was entitled to, and latterly has not received sufficient to pay the taxes on the demised premises, while

Quagliotti has received annually from his sub-lease in the neighbourhood of $2,000 more than he paid to the plaintiff.

During the argument defendant Quagliotti's counsel applied to amend his defence. This application cannot be allowed. He is not in any way taken by surprise; he seeks to contradict paragraph 4 of his defence, wherein he set up that "the business" referred to in the letter of Messrs. Elliott & Courtney of the 28th of June, 1917, refers to the business of the Variety Theatre. He had full knowledge of all the letters, only three or four, out of which this action arose, and must have known that they would be offered in evidence; in fact, had the plaintiff not put them in, he would have had to do so himself in order to make a semblance of proving his defence.

Quagliotti is the only defendant who defends. He has no lease of the premises, but sets up that he has an agreement for a lease from the plaintiff. He had such an agreement, but such lease was only to be granted when certain payments had been made and the Island Amusement Company had surrendered its lease. The Amusement Company has not surrendered its lease. It is not the plaintiff's, but Quagliotti's, duty to secure that surrender. He was reminded of this by Mr. Langley in writing on two occasions, but he took no steps to secure it, and has not gone into the witness-box to explain why, and I strongly suspect that he did not secure such surrender because he knew the Amusement Company would not surrender until he arranged with it to pay the moneys overdue on his agreement with it, and because the moment he did he would be compelled to accept the lease referred to in his agreement with the plaintiff, the terms of which, as it now turns out, would have been more onerous than those of the Amusement Company, which has been assigned to him by that Company. Quagliotti also sets up that he holds under that assigned lease, and that the rent reserved therein was by agreement between him and the plaintiff reduced to $100 per month. That agreement, it is alleged, is contained in the letters of the 27th of June, 1917, Swinerton & Musgrave to Courtney & Elliott; of the 28th of June, 1917, Courtney & Elliott to Swinerton & Musgrave; of the 9th of July, 1917, Swinerton & Musgrave to Courtney & Elliott.

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No question is raised about Swinerton & Musgrave or Courtney & Elliott being fully authorized to act for their respective principals, or the variation of an instrument under seal by parole or letter.

Plaintiff says the agreement was only temporary—was only good from month to month, was without consideration, and in any case was put an end to by notice in writing of the 31st of January, 1918, by plaintiff's solicitor. Quagliotti on the other hand says that by the terms of the letter of the 9th of July, 1917, it could only be put an end to by the plaintiff personally, as by it she was appointed the judge of whether "times improved or otherwise," and that she personally exercised no personal discretion in the matter at all. The text of that letter is as follows:

"We have your letter of June 28th. The understanding as regards the Variety Theatre is as set out in your letter. The sum of $100 is paid for the ground rent of the Variety Theatre for the month of June and Mrs. Bell is willing to accept this sum of $100 in full of the ground rent each month until such time as the business improves, Mrs. Bell, of course, being the judge of whether times have improved or otherwise."

To me it seems questionable whether these three letters make an agreement. Taken independently, in one sense they appear to be an attempt to form an agreement, but each one differs a little from the other, and may be called a series of offers and counter offers, and the last one containing a reference to the plaintiff being the judge, etc., has never been accepted. According to Courtney & Elliott's letter of the 28th of June, it would appear that there was no attempt to enter into an agreement, but merely a statement of the terms of an agreement already come to with Mr. *Martin,* who had been the plaintiff's agent, and in that letter no reference is made to plaintiff being the judge, etc.

Judgment

It is urged on behalf of Quagliotti that the plaintiff is given a personal discretion to exercise which she cannot delegate to another, and Bowstead on Agency, 5th Ed., p. 12, is referred to. The law as there stated cannot, I think, be questioned, but it seems to me that this is not a case for its application. In order to interpret the letters the circumstances under which they were written should be inquired into and the Court placed in the same situation as the writer: Phipson on Evidence, 4th Ed., 566.

The plaintiff to defendant's knowledge resided in London, England, and never personally took any part in the business, which was always transacted by her agents; the whole correspondence shews beyond question that plaintiff's agent intended merely to bind plaintiff to accept the $100 only from month to month and not until the $100 was actually paid. Swinerton & Musgrave's letter of the 27th of June shews that it was accepted for the month of June, without prejudice to plaintiff's rights under the existing lease. Courtney & Elliott's letter of the following day was written as it states "so at some future date Mrs. Bell cannot claim that Mr. Quagliotti owes her any money in respect of ground rent . . . . over and above the amount actually paid by him," and at the end they say "and the same would apply to each month in which she receives a payment less than the actual rent reserved by the lease, she accepting the rent paid in full satisfaction of the rent due for the particular month in which it is paid." And the expression of her "being the judge," etc., is not the conferring of a power upon her or the appointment of her as sole arbitrator, but a right reserved by her, which she could exercise through her solicitor or agent, of putting an end to the understanding at any time she saw fit. It was nothing more than a declaration by her after the rent was actually paid, of an intention to accept future payments in the same way so long as she saw fit. The money was not paid as consideration for any promise by her. It was paid before she expressed any intention. Counsel relied strongly upon subsection (33) of section 2 of the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133. But that would only apply if suit had been brought to recover the difference between the $100 paid and the rent reserved in the lease. By that subsection part performance of an obligation only extinguishes the obligation without a new consideration, "when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose." So far as this action is concerned there is no question of any money having been so accepted; in fact no money was paid, though it has since been brought into Court. Nor does that statute change the general law that a promise requires a consideration to support it. Quagliotti

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cannot say that he had an agreement and the money he brings into Court "has been rendered in pursuance of that agreement." It seems to me not unlikely that that portion of the statute refers to a part performance other than the payment of money; and I think the word "agreement" in the statute must, as Lord Ellenborough, C.J. says in *Wain* v. *Walters* (1804), 5 East 10, at pp. 16-7, be a binding agreement:

> "In all cases where by long habitual construction the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. . . . . And the question is, whether that word [agreement] is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to *promise* or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties. The latter appears to me to be the legal construction of the word . . . ."

Judgment

I regret that the case has not been more fully argued, for there are a number of most interesting points raised.

It is admitted that there is no privity between the plaintiff and the defendant Quagliotti entitling plaintiff to judgment for the rent due against Quagliotti, she is, however, entitled to judgment for possession.

MOORE v. CONFEDERATION LIFE ASSOCIATION.

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Insurance, life—Policy—Surrender of—Wife's consent—Independent advice—Onus of proof—Insanity of one party—Knowledge of by other—R.S.B.C. 1911, Cap. 115.

Under the provisions of the Life-insurance Policies Act it is not necessary that a wife should have independent advice before joining with her husband in the surrender of a policy of insurance taken out by him in her favour, and this particularly applies where there is substantially a refund of the premiums paid.

There is no rule of law casting upon the Insurance Company the burden of shewing that the instruments were sufficiently explained to the wife or that she had had sufficient protection.

ACTION to recover the amount payable on an insurance policy made payable to the plaintiff upon the death of her husband. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Victoria on the 20th, 22nd and 31st of May, 1918. Statement

Mayers, for plaintiff.
Housser, for defendant.

16th July, 1918.

MACDONALD, J.: George E. Moore, on the 17th of November, 1915, effected an insurance on his life in the defendant Company for $1,000, payable, upon his death, to the plaintiff. Moore died on the 5th of August, 1917, and the amount of such insurance is now claimed by the plaintiff. It is admitted that the premiums already paid would have carried the insurance, and that it would have been in full force on that date, unless it had, in the meantime, been put an end to, by the surrender and delivery up of the policy of insurance. Defendant contends that this event happened, and that long prior to the death of Moore, the insurance had ceased to exist. This contention is supported, not only by the policy of insurance being in the possession of the defendant, but also by the production of a formal surrender of the policy, purporting to be signed by Judgment

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Moore, and also by the plaintiff, as beneficiary thereunder. She states, however, that she did not sign such surrender, and that her name, appearing thereon, is not in her handwriting. If it be found that this statement be incorrect, and that the surrender was properly signed by Moore and the plaintiff, it will afford a defence to the action.

It appears that Moore was anxious to abandon the policy of insurance in defendant Company, and obtain insurance on the life of the plaintiff in his own favour. He approached Gurney, defendant's local district agent, for that purpose. He was, at first, opposed to the scheme, but eventually agreed to further it, so an application for such an insurance was prepared, and purported to be signed by the plaintiff. This document is witnessed by Gurney, but the signature is clearly in the handwriting of the plaintiff. It sufficed to warrant the physician, on behalf of the defendant, conducting her medical examination, and she admits signing his report. Then, upon the application and report being forwarded to Toronto, in due course, a new policy of insurance was forwarded to Victoria, and delivered to the plaintiff. A cheque for the refund on the old policy was also received, payable to the plaintiff and her husband, and apparently indorsed by both of them. The proceeds of this cheque were applied towards payment of the premium on the new policy, on the life of the plaintiff, in favour of Moore. The indorsement on the cheque is also disputed by the plaintiff. Defendant Company, at its head office, had no reason to doubt that the surrender was properly executed, as their agent, Gurney, appeared to have witnessed the signatures of both the plaintiff and Moore, but the agent quite frankly admitted that this was not a fact, and that he did not see the surrender signed, nor the cheque, which he subsequently cashed, indorsed. They both came from the possession of Moore, and he assumed that they were all right. He was guilty of negligence, in thus pretending that he had witnessed the signatures. If he had not done so, the controversy that has arisen might have been avoided. Was he correct, however, in the assumption that the signatures attached to the surrender, and appearing on the cheque, were genuine? This involves the comparison of handwriting. There

were documents and signatures produced, which were admittedly in the handwriting of the plaintiff, and a comparison of these with the disputed signatures, was made by experts in handwriting. They had no hesitation in coming to the conclusion that the disputed signatures were in the handwriting of the plaintiff. The reasons given appealed to me, as being sound, and that such signatures were not forgeries. I was impressed with their statements, as to the characteristics prevalent between the admitted and disputed handwritings. I attach great weight to the similarity, in this respect, in the name "Moore." Plaintiff's handwriting is, apparently, easy and flowing, and this was exemplified in the disputed signatures. I do not think it necessary to deal further upon this aspect of the case, as I am satisfied the signatures are genuine, and that the plaintiff is mistaken, as to not having signed the surrender, as well as the cheque. I do not think, though the matter is arguable, that the provisions of the British Columbia Insurance Act prevent a wife, except upon independent advice, from joining with her husband, in the surrender of a policy of insurance, especially where a refund is made of a portion of the premiums previously paid. The result is, that the surrender, as far as the plaintiff is concerned, operates as a bar to her action, unless she can succeed upon some other grounds of her defence. The burden of proof rests upon the plaintiff, to successfully impugn the document she has thus executed.

Judgment

It was urged that proof should be given by the defendant, of independent advice being afforded the plaintiff at the time of the execution of the document, though it was admitted by counsel for the plaintiff, during the course of the argument, that this was not necessary in all cases. I do not think that the relationship of husband and wife is such, as to necessarily involve an application of the equitable doctrine, that the onus of such proof rests on a person supporting a document in which a wife is joining with her husband to divest themselves of rights. This situation is fully discussed in *Howes* v. *Bishop* (1909), 2 K.B. 390. In that case the general statement of Lord Penzance in this connection in *Parfitt* v. *Lawless* (1872), L.R. 2 P. & M. 462 at p. 468, is disapproved of, and the decision

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of Cozens-Hardy, J. in *Barron* v. *Willis* (1899), 2 Ch. 578 at p. 585, which reads as follows, is considered far weightier:

"'It is also settled by authority which binds us, although text-writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Baseley* [(1807)], 14 Ves. 273 applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid. The *onus probandi* lies on the party who impugns the instrument, and not on the party who supports it. This was clearly decided by Sir James Parker in 1852 in *Nedby* v. *Nedby*, 5 De G. & Sm. 377, and it accords with what Lord Hardwicke said in *Grigby* v. *Cox* [(1750)], 1 Ves. Sen. 517.'"

Whether this be right or wrong, it is an authoritative expression of opinion by a learned judge of great experience in that branch of the law, and is of greater weight than the general statement of Lord Penzance. That view derives support from other authorities. So, unless I were to decide, that the circumstances in connection with this document, were such as to bring it within one of the exceptions, referred to by Lord Alverstone in *Howes* v. *Bishop, supra,* at p. 395, I do not think that there is any onus cast upon the defendant to shew that it was necessary for the plaintiff, as a married woman, to have had the documents "adequately explained to her or had independent advice or sufficient protection."

Judgment

Then, it was contended, although not pleaded, that upon the evidence, there should be a finding that plaintiff's action, in signing the document, was so irrational and unreasonable, as to indicate undue influence on the part of her husband. There might be a suspicion that, when she signed such a document, she was influenced by her husband in taking a course, that was contrary to her interest, but that is not sufficient. There is no evidence to support such a conclusion. I think the onus rests upon the plaintiff to shew, as a fact, that there was undue influence. Her difficulty is, that she has denied signing the document, and thus shut the door, that might otherwise be open, allowing her to explain the circumstances under which she executed. Fletcher Moulton, L.J. in *Howes* v. *Bishop, supra,* at p. 399, thus shortly indicates the position of a wife seeking to avoid a transaction, on the ground that she has been unduly influenced by her husband, as follows:

"I have no hesitation in saying that, if the defendant desires to get out of such a transaction as is found in these answers [of the jury], she must prove that her acts were controlled by the undue influence of her husband."

The further important ground of the defence is taken, that Moore was insane at the time of the execution of the surrender. It is not contended that he was afflicted to such an extent, that his condition and inability to transact business were apparent to the agent of the defendant Company. I find that such agent had no knowledge that Moore was insane, and consequently that the defendant was in the same position. It was not, and could not be, contended that the defendant Company did not act in good faith, and consummated the transaction in the ordinary course of business. This finding, as to want of knowledge of insanity, would, prior to the decisions to which I will presently refer, have debarred the plaintiff from avoiding the surrender, even though her husband was, as a matter of fact, insane at the time of its execution. In dealing with the capacity to contract, of a lunatic, the law is thus stated in Halsbury's Laws of England, Vol. 19, p. 397:

"It is now settled law that it is a good defence to an action upon a contract if it can be shewn that the defendant was not of capacity to contract [on account of insanity] and that the plaintiff knew it."

The leading case, there referred to, is that of *Imperial Loan Co.* v. *Stone* (1892), 1 Q.B. 599, and Lord Esher, M.R. thus deals with the matter at p. 601:

"When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."

Judgment

Fry, L.J., in the same case, at p. 602, after approving of the decision in *Molton* v. *Camroux* (1848), 2 Ex. 487 and (1849), 4 Ex. 17, refers to the proof of knowledge being necessary, as follows:

"It thus appears that there has been grafted on the old rule the exception that the contracts of a person who is *non compos mentis* may be avoided when his condition can be shewn to have been known to the plaintiff."

There are numerous other authorities to which reference might be made, in this connection, but it is contended, that

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although such cases have not been expressly overruled, that in effect they no longer constitute the law on the subject, and that the later decisions of *Daily Telegraph Newspaper Company* v. *McLaughlin* (1904), A.C. 776, and *Molyneux* v. *Natal Land and Colonization Company* (1905), A.C. 555 govern the situation. It is contended that even without knowledge, on the part of the defendant, as to Moore being insane, that if his mind is found to be in that condition, then that his signature was a "mere mechanical act," and did not operate so as to give any validity to the document. It was not submitted that the plaintiff might, in any event, be bound by the surrender, even though her husband was of unsound mind. As the point was not taken by the defendant, I am simply referring to it in passing. The question then is, whether Moore was insane at the time. During this period he was considered to be sufficiently intelligent to enlist for military purposes. Then the agent of the defendant Company was very positive, and I accept his statements, that Moore seemed to thoroughly understand what he was doing, and the effect of his actions. The transaction took some time to complete, and considerable discussion occurred between the parties. There is no doubt that Moore was eccentric in March, 1916, and Dr. Bryant, who had a fairly good opportunity of observing his actions, in answer to a leading question, on the part of the plaintiff, said that, in his opinion, Moore was not in a fit state to conduct business in March. Even assuming, that a most liberal construction was placed upon this statement, in favour of the plaintiff, I do not think it goes far enough. While the business transacted in connection with the life insurance may not, as events transpired, appear to be a reasonable one, and certainly proved prejudicial to the plaintiff, still, I think it occurred during lucid intervals, when the reasoning powers of Moore were being exercised, though unfairly, towards his wife. If I am correct in my previous conclusion, she joined with him in executing the surrender and indorsing the cheque, and approved of the transaction to that extent at any rate.

Judgment

The plaintiff relies upon the case of *Daily Telegraph Newspaper Company* v. *McLaughlin, supra.* In that action, the

plaintiff sought to recover from a limited company, certain shares that had formerly stood in his name, but had been transferred under the authority of a deed purporting to have been executed by his attorney (p. 779):

"His case was that the power of attorney, though it bore his genuine signature, was void because, at the time when his signature was obtained, he was of unsound mind and incapable of understanding what he was doing."

The High Court of Australia, differing from the trial judge, held that when the plaintiff executed the power of attorney in question "'he had no knowledge of what he was doing, except that he knew that he was signing his name, which under the circumstances was, as described by Dr. Lamrock,' who was his medical attendant, a 'mere mechanical act.'"

The Privy Council upheld the decision, holding that the power of attorney was, under these circumstances, void, though knowledge of such insanity was not brought home to the company. The case of *Elliot* v. *Ince* (1857), 7 De G. M. & G. 475 is referred to with approval, as follows (p. 780):

"But Lord Cranworth, L.C., on appeal, held that unless a lucid interval were proved she must be treated as tenant in tail. His Lordship's view was that everything depended on the validity of the power of attorney, and that, if she was of unsound mind when she executed the power of attorney, the 'substratum,' to use his Lordship's expression, was 'removed.'"

Here, as I have already stated, the facts are different. Then, support is also sought for the plaintiff's contention by the case of *Molyneux* v. *Natal Land and Colonization Company, supra.* It was held that, under the Roman-Dutch law, which prevailed in Natal, a mortgage bond passed, by virtue of a power of attorney executed by an insane person, is not legally enforceable, where it appears that the mortgagor derived no benefit, and that the mortgagee had no knowledge of the insanity. In other words, "that a contract made by an insane person is void and not voidable." This case is also distinguishable from the facts here presented. These later decisions may have affected the law as it stood, as to the necessity for the party, attacking a document, on the ground of insanity, proving knowledge of such insanity on the part of the person endeavouring to support it, but naturally the question of insanity, or degree of insanity, at the time of execution, still remains to be determined. I

Judgment

MACDONALD, J.

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MOORE v. CONFEDERATION LIFE

think, therefore, that the decision in this case turns upon the weight to be attached to the evidence concerning insanity. The onus rests upon the plaintiff to avoid the document by proving that her husband was insane at the time when he executed the surrender. I think she has failed to do so, and that her position, in this respect, is different from that of Cowey in the *Molyneux* case, *supra,* at p. 569, as follows:

"No evidence was given as to whether Henry Cowey understood the terms of that power, and, in fact, no witness was called to prove its due execution. If signed by Henry Cowey, it was so signed at a time when he was suffering from senile dementia, and, in the absence of proof that he understood the document and knew what he was doing, the presumption is that the total absence of a reasoning mind which then existed would have prevented him from grasping its contents."

Judgment

Here Moore signed the surrender, after discussion, and with full understanding, as to the nature of the transaction, which he had instigated, in order to change the insurance on his own life to that of his wife. He was "lucid" at the time. His mind went with the act. The plaintiff has thus failed to destroy the effect of the surrender, and, in my opinion, cannot succeed upon the policy of insurance.

The action is dismissed with costs.

Action dismissed.

CANADIAN FINANCIERS TRUST COMPANY v. ASHWELL *ET AL.*

MACDONALD, C.J.A. (At Chambers)

1918

July 19.

CANADIAN FINANCIERS TRUST COMPANY v. ASHWELL

Costs—Appeal books—Additional cost of typewriting—Extra copy of appeal book at counsel's request—Extra copy of transcript for draft appeal book—Tariff of costs, item 130.

On appeal to the Court of Appeal an appellant may either print or type the appeal book, but if he adopt the more expensive method he will, on a party and party taxation, be allowed only for the least expensive mode of preparing the books. The taxing officer may, however, take into consideration difficulties in special cases of having the appeal book printed.

The cost of an extra copy of the appeal book, supplied at the request of the unsuccessful party, will not be allowed on a party and party taxation.

A copy of the transcript of evidence supplied by the reporter, made for incorporation in the draft appeal book will not be allowed on a party and party taxation where the transcript itself could have been used for that purpose.

APPEAL by plaintiff Company from the allowance by the taxing officer of three certain items on a party and party taxation of the costs of the appeal, particulars of which are sufficiently set out in the head-note and reasons for judgment. Argued before MACDONALD, C.J.A. at Chambers in Victoria on the 17th of July, 1918. Statement

Dorrell, for plaintiff.

C. W. Craig, for defendants, *contra.*

19th July, 1918.

MACDONALD, C.J.A.: This is an appeal from the allowance on taxation of three items in a bill of costs.

The first is the cost of typewritten appeal books. The book contains 650 pages, and it is not in dispute that to print it would cost at current rates $510 less than it cost at tariff rates to type it. This, of course, includes the number of copies required on appeal. I think the allowance should be reduced by the said sum of $510. I may add that that is the sum which would be saved by printing the appeal books over typing Judgment

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them, after allowing the solicitor's tariff fee per folio for perusing or proof-reading.

No doubt it is optional with an appellant to either print or type the appeal books. If, however, he adopt the more expensive course, he should, on party and party taxation, and perhaps also on solicitor and client taxation (though I am not called upon to decide the latter), be allowed only for the least expensive mode of preparing the books. This seems to me to be in accordance with reason and justice, and also with the true inference to be drawn from item 130 of the tariff, which reads:

"Where, pursuant to Rules of Court, or when a saving of expense may be thereby effected, any pleading, special case, petition of right, appeal book, or evidence is required to be printed, the solicitor for the party printing shall be allowed for copy for printer, except when made by an officer of the Court, and no further copy necessary for the printer, at per folio ten cents."

That seems to me to contemplate that when a saving of expense may be effected by printing instead of typewriting, the printing press should be resorted to. But even apart from that item of the tariff, I should hold that when there are two alternative courses open to the solicitor preparing documents such as appeal books, he must, when a substantial saving can be effected, select the least expensive one. If he take the other, he does it at the peril of having his bill reduced by disallowance of the excess. There may, of course, be special cases in which circumstances beyond the solicitor's control prevent him from having the appeal book printed. These circumstances should be considered by the taxing officer. Speaking generally, however, the appellant adopts the expensive method of preparing the appeal books at his peril, and cannot complain if he be allowed, on taxation, only what the preparation of the books ought to have cost had he pursued the least expensive course. It was pressed upon me that there were such special circumstances in this case; that the appeal book could not have been printed in time, owing to the inability of the reporter to furnish the transcript of evidence promptly. But the admitted fact is, that he was not applied to until six weeks after the delivery of the judgment appealed from, and there is nothing before me to shew that had due diligence been exercised, the appeal books could not have been printed in time.

Judgment

The second item in appeal was an allowance of $190 for an extra copy of the appeal book, supplied at his request to the respondent's solicitor. It seems to me that this transaction was altogether outside the power of a taxing officer to allow. The furnishing of this extra copy is outside the tariff. It is a matter between solicitors, not between the parties. It was stated by counsel that a copy could have been made in respondent solicitor's office for ten or fifteen dollars, yet the respondent is made liable to pay $190 for a copy, which for aught I know might not be taxable against him, even on solicitor and client taxation.

The third item involved in the appeal arises in this way: a copy of the transcript of the evidence supplied by the reporter was made for incorporation in the draft appeal book, and for this a charge of $130.80 is made. It is contended that the reporter's transcript should have been used for this purpose. It is in effect contended, *contra,* that if the book is to be printed —and I must now deal with the item on that basis—the solicitor must retain the reporter's transcript in his possession, to enable him to correct the printer's proofs. I cannot give effect to this contention. Even if the draft book be taken apart in the type-setting, I see no difficulty in connection with the proof-reading in the circumstances. I have never known a practice which permitted the allowance on taxation of a copy of the transcript where the transcript itself could have been used. When it can be used, a copy is not to be allowed: see item 130 of tariff, *supra.*

Judgment

Appeal allowed.

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May 3.

QUESNEL FORKS GOLD MINING CO. v. WARD

QUESNEL FORKS GOLD MINING COMPANY, LIMITED v. WARD AND CARIBOO GOLD MINING COMPANY.

Mines and minerals—Placer mining—Lease—Declared valid in special Act —Free miner's certificate—Necessity of lessee holding—Assessment work required under lease—B.C. Stats. 1894, Cap. 3; 1895, Cap. 5; 1907, Cap. 50;; R.S.B.C. 1911, Cap. 165.

Under the powers contained in a special Act of the Legislature, in 1894 a lease was granted the defendants' predecessors in title for placer mining for a period of 25 years. Owing to the lease not including certain provisoes in the Act a second Act was passed in the following year declaring the lease valid, and including the lease verbatim in a schedule to the Act. The lease contained a proviso that "if the said lessee or its assigns shall cease for the space of two years to carry on mining operations upon the premises or to do any work which can conduce to the facility of carrying on such mining operations as aforesaid, or shall completely abandon such premises for the space of one year, then this demise shall become absolutely forfeited and these presents and the term hereby created, and all rights, privileges and authorities hereby granted and conferred or intended so to be, shall *ipso facto*, at the expiration of the times aforesaid cease and be void as if these presents had not been made." Mining operations were carried on until the fall of 1907, when the works were shut down and all material on the ground used in the mining operations were sold. In the following year a former manager of the owners worked the property on his own account, but after operating for one year he ceased work at the instance of the defendant Company, which had in the meantime purchased the property. A caretaker was left in charge until the fall of 1913, when the property was sold under an agreement for sale to the defendant Ward, who proceeded to work the property and continued his operations up to the time of action. The property still remains on the records in the name of the defendant Company, which held a free miner's certificate continuously until the 31st of May, 1912, when it was allowed to expire. The predecessors in title to the plaintiff Company acquired seven leases under the Placer Mining Act in January, 1916, which included the ground covered by the defendants' lease. In an action for a declaration that the plaintiff Company is entitled to the ground comprised within its leases, it was held by the trial judge that there was not a complete abandonment of the property by the defendants, but after 1908 they had ceased to carry on mining operations for over four years, whereby the lease was voided *ipso facto*, he also found that under the Placer Mining Act the property became vacant on the expira-

tion of the defendant Company's free miner's certificate on the 31st of May, 1912, and reverted to the Crown.

Held, on appeal, reversing the decision of MACDONALD, J. (MACDONALD, C.J.A. dissenting), that notwithstanding the wording of the forfeiture clause in the lease, the breach of the conditions in the non-performance of the required work by the lessees under the lease render the lease voidable only at the option of the lessors, and that the Crown has by its action in this case waived forfeiture.

Held, further, that the defendants' lease having been confirmed and declared binding by special statute, the obligation under the Placer Mining Act of the owner to always have a free miner's certificate was not obligatory upon the defendant Company, and avoidance of the statutory lease could not be effected on this ground.

There cannot be complete abandonment while the owner retains a caretaker in charge of the property.

Quære, whether the Government has power, by arrangement with the lessee, to apply the excess expenditure in any one year to cover a period in which no work is done, thereby waiving the enactment in the lease requiring a certain expenditure per annum.

APPEAL by the defendants from the decision of MACDONALD, J., of the 12th of September, 1917, in an action for a declaration that the plaintiff Company has a good title for placer mining to all ground comprised within seven mining leases in the Quesnel Mining Division held by said Company. On the 13th of January, 1916, the gold commissioner for Quesnel Mining Division, with the sanction of the Lieutenant-Governor in Council, granted the seven leases in question to John Hopp and others, they being subsequently transferred to the plaintiff Company. The defendant Ward, who was in possession of the property in dispute, claimed title from the year 1894. Prior to that year the Cariboo Hydraulic Mining Company had acquired certain leases, which included the ground in question. In 1894 that Company applied for special legislation confirming its incorporation and powers as to its property rights, privileges and easements already acquired. An Act was passed (B.C. Stats. 1894, Cap. 3) reciting that the Company desired to consolidate its properties and obtain a more lasting and secure title thereto, and authority was given the Lieutenant-Governor in Council to demise to the Company for a term of 25 years the several properties set forth in a schedule to the Act, being the properties held at the time by the Company. The Act required that the lease should contain certain covenants and provided for

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the securing of water rights. A lease was granted to the Company under the Act on the 16th of May, 1894, for 25 years. It subsequently appeared that the lease did not comply in its terms with certain covenants provided for in the Act, and on the 21st of February, 1895, an Act was passed by the Legislature declaring the lease valid and binding and included the lease in a schedule to the Act. The Company continued to work the property actively until 1907, when it came into the hands of a company known as the Guggenheims. A closing down of operations then took place, and a large amount of the goods and chattels of the Company used in the mining operations were sold. Some of these were acquired by a Mr. Hobson, who had formerly been the manager of the first-mentioned company, and in 1908 he worked the property on his own account, but in the following year he was prevented from continuing by the defendant Company, which had, in the meantime, acquired the rights and property of the Cariboo Hydraulic Mining Company. After this, no work appears to have been done by the defendant Company. The only interest shewn until the property was disposed of to the defendant Ward in October, 1913, being that a man was left in charge as a caretaker. The work done by Hobson, in 1908, was largely in excess of the assessment work required under the lease and an application was made by the defendant Company to the Government to apply the excess work done by Hobson on the necessary assessment work for future years, and this was acceded to by the Government. Upon Ward taking over the property he proceeded to work it sufficiently to cover the assessment work required. The defendant Company continued to hold a free miner's certificate until the 31st of May, 1912, when it ceased to hold a free miner's certificate, and the first point raised by the plaintiff was that not having a certificate after the 31st of May, 1912, all its rights under the lease then lapsed and the property again became vacant Dominion land. The lease under which the defendant claims title, as set out in the Schedule to the Act of 1895, provided that if the lessee should cease to carry on mining operations for two years or should completely abandon the property for one year, then the demise should become absolutely forfeited and the rights thereby

granted should *ipso facto* cease and be void as if these presents had never been made. The plaintiff claimed that there had been an absolute abandonment of the property when the assets were sold in 1907, but that if they were not right in this, the required assessment work was not done for more than four years after Hobson had completed his work in the summer of 1908. It was held by the learned trial judge that upon the expiration of the defendant Company's free miner's certificate on the 31st of May, 1912, the property became vacant under the Mineral Act and the Placer Mining Act, and reverted to the Crown. He held, further, that a complete abandonment of the property had not taken place, but that the defendant had ceased to carry on mining operations as required by the lease for more than four years. That it is not necessary for the Government to take action to avoid the lease, but if such action were necessary, it took place when the new leases were granted over the same ground to the predecessors in title of the plaintiff Company. The defendants appealed.

Statement

The appeal was argued at Vancouver on the 14th of January, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

S. S. Taylor, K.C., for appellants: Our rights date from 1894. The plaintiff got its claims in 1916. It is by virtue of the statute of 1894 that we received our lease for 25 years. This is substantially a jumping of our property by Hopp: see *Granger* v. *Fotheringham* (1894), 3 B.C. 590 at p. 599. There are two main points: (1), the effect of our allowing our free miner's certificate to expire; and (2), the claim that we abandoned our property. As to the free miner's certificate, this was allowed to expire in 1912. The lease is on the books of the Crown, and the Crown has never declared a forfeiture. There is no dispute between the lessor and lessee. A third man attacks. Our lease recites a special Act and not the Placer Mining Act. We have a special lease by a special Act of the Legislature. The licence ran out in June, 1912, and Ward purchased in October, 1913. On the question of general statutes affecting particular statutes: see Halsbury's Laws of England, Vol. 27, p. 187, par. 365; *Esquimalt Waterworks*

Argument

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Company v. *City of Victoria Corporation* (1907), A.C. 499 at p. 509; *City and South London Railway Co.* v. *London County Council* (1891), 2 Q.B. 513 at pp. 517-8 and 524-5; *Surrey Commercial Dock Company* v. *Bermondsey Corporation* (1904), 1 K.B. 474 at pp. 477 and 483; *Moran & Son, Limited* v. *Marsland* (1909), 1 K.B. 744 at pp. 757-9; *Fitzgerald* v. *Champneys* (1861), 30 L.J., Ch. 777 at p. 784. These cases point out that when there is any inconsistency the general Act has no application. The Crown must first declare a forfeiture: see *Davenport* v. *The Queen* (1877), 3 App. Cas. 115 at pp. 128-31; *Paulson* v. *The King* (1915), 52 S.C.R. 317 at pp. 334-8; *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 S.C.R. 281; *Attorney-General of Victoria* v. *Ettershank* (1875), L.R. 6 P.C. 354 at pp. 368-72. As to the performance of a condition subsequent the contract is not void but voidable: see *Bonanza Creek Hydraulic Concession* v. *The King, supra*; *The Hardy Lumber Company* v. *The Pickerel River Improvement Company* (1898), 29 S.C.R. 211 at pp. 213-4; *Smith* v. *The Queen* (1878), 3 App. Cas. 614 at pp. 623-6; *Osborne* v. *Morgan* (1888), 13 App. Cas. 227 at pp. 235-7; *Klondyke Government Concession* v. *The King* (1908), 40 S.C.R. 294 at pp. 309-11; *Canadian Company* v. *Grouse Creek Flume Co.* (1867), 1 M.M.C. 3 at pp. 6-7.

Argument

Maclean, K.C., for respondent: We obtained our leases and entered on the land intending to work. Our entry on the land gave us full rights: see Halsbury's Laws of England, Vol. 27, p. 853, par. 1500. Ward is a trespasser and we are entitled to a writ of possession. *Osborne* v. *Morgan* (1888), 13 App. Cas. 227 is decided on different facts, in that case the plaintiff had no *locus standi*. In this case, first, they had no certificate after the 31st of May, 1912, and secondly, under proviso at the end of the lease in case of abandonment for a year or doing no work for two years, they are automatically deprived of all their rights under the lease. The contention that the Crown waived the necessity of their complying with this clause is not tenable. We say the Crown cannot waive, and in any case they did not waive the necessity of complying with the conditions in the leases. As to the application of the general Act, it is admitted it does not

apply when there is conflict but otherwise it applies. *Uckfield Rural Council* v. *Crowborough District Water Company* (1899), 2 Q.B. 664. The old company was continually exercising privileges under the general Act. The words "*ipso facto* voids the lease" are not in the *Ettershank case* (1875), L.R. 6 P.C. 354, but they are included in the lease in question. My contention is, the evidence shews they decided to abandon and did abandon the property. When they stopped work they sold out all their equipment except some pipe and three monitors. After 1908 no work was done until 1914, when Ward did a little work. The Crown decided they had abandoned when they gave us leases. The last payment of rent they made was in 1911, which was for the year ending in May, 1912. Ward did nothing and had no interest until October, 1913. The Crown could only give a new lease under a legal location. As to waiver of forfeiture see *Doe dem. Ambler* v. *Woodbridge* (1829), 9 B. & C. 376; *Croft* v. *Lumley* (1857), 6 H.L. Cas. 672 at p. 705. The burden is on them to shew waiver has taken place. There is no waiver on account of acceptance of rent. As to the effect of the lapse of the free miner's licence: see *Woodbury Mines* v. *Poyntz* (1903), 10 B.C. 181; *McNaught* v. *Van Norman* (1902), 9 B.C. 131; *Barinds* v. *Green* (1911), 16 B.C. 433 at p. 439.

Argument

Taylor, in reply.

Cur. adv. vult.

3rd May, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A. dismissed the appeal.

MARTIN, J.A.

MARTIN, J.A. allowed the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: The principle running through all the decided cases is that where the provisions of a general Act cannot be read consistently with and cannot be made to harmonize with the provisions of a later special Act, the special Act governs. Lord Alverstone, C.J. in delivering the judgment of the Court in *Surrey Commercial Dock Company* v. *Bermondsey Corporation* (1904), 1 K.B. 474 at pp. 482-3; 73 L.J., K.B. 293 at p. 298, says:

"It seems to us that dealing with a statutory undertaking, as to which

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both the rights and the obligations are imposed by a statute upon a particular body, express enactment or a clear implication is necessary in order to transfer the responsibility to a body acting under a general statute."

Those words, of course, fit the particular case then under consideration, but I think I can shew by analogy that the principle therein involved is applicable to the case at bar. The question here is as to the effect of the lapse of the Company's free miner's certificate on the 31st of May, 1912. The general Act is that no person or joint-stock company shall be recognized as having any interest in any mining property unless they have a free miner's certificate unexpired, and the decisions under the general Act are that on expiry of the certificate the rights and interests of the parties cease and the land reverts to the Crown and is open for re-location.

The appellants claim under the special Act, Cap. 3, B.C. Stats. 1894, and the lease granted in pursuance thereof and the special Act, Cap. 5 of 1895, which sets out the said lease in the schedule thereto, and ratifies and declares it valid and binding. The effect of this latter Act is to give the appellants a lease, the provisions of which are confirmed and declared binding by statute. Now, nowhere in these special Acts, nor in the lease itself do we find any reference to a free miner's certificate or licence. The general Act, however, calls for such, as I have before noted. The lease provides terms and conditions upon which the lessees may maintain their title and interest in the mining properties leased for a given period, and also provides for renewal for a further period, and also what is quite important from my point of view for the manner in which the lease may become forfeited. If the non-payment of the tax for the free miner's certificate, or the failure to keep it alive, had no other effect than, say, the imposing of a money penalty, it might be that it could be said to be not inconsistent with the provisions of the special Act, in which I include the lease, but when we find that its effect is to create a forfeiture of all rights in the mining property, we come in direct conflict with the provisions of the lease of the appellants dealing with that precise question, which provisions have received statutory sanction, and enacting the method by which forfeiture is created. I do not think we need refer to other sections of the Act for further

inconsistencies: this to my mind is absolutely inconsistent and antagonistic. The lease in part reads:

"Now this indenture witnesseth that in consideration of the rents, covenants, conditions and stipulations hereinafter contained and by the lessee and its assigns to be respectively paid, observed and performed the lessor doth hereby demise and lease unto the lessees . . . . to hold the said premises hereby demised and subject as aforesaid unto and to the use of the lessees and their assigns for the term of twenty-five years from the date," etc.,

and then follows the "hereinafter contained" considerations as to rents, covenants, conditions and stipulations. It was suggested that while the lease would become forfeited for non-observance of the covenants it might also without inconsistency be forfeited for lack of the free miner's certificate, but the lease sets out the conditions upon which it is granted and declares that the lessee shall hold, subject to those conditions, for a period certain, with option of renewal and any other conditions or circumstance which would disturb that holding would be inconsistent with the terms of the lease.

The next question is as to whether the leases have lapsed, either from non-payment of rent, absolute abandonment or failure to carry on mining operations for a specified time, all as provided for in the lease itself. I hold, upon the evidence, that there was no forfeiture for non-payment of rent, no notice was given pursuant to the lease, rent was tendered from time to time, sometimes refused at once, other times retained for a period and then returned; no complaint at any time as to non-payment; no declaration of forfeiture for non-payment, but the sole notation against these leases in the books of the gold commissioner being "forfeiture by reason of lapse of free miner's certificate." I also hold there was no complete abandonment.

The only remaining point for consideration is, did the lessees cease for the space of two years to carry on mining operations upon the premises or to do any work which would conduce to the facility of carrying on such mining operations? There is before us evidence that from the time Ward took over the property on the 29th of October, 1913, until the 1st of May, 1914, some $17,000 was expended by him and further sums later, and in fact it was admitted by Mr. *Maclean* when Ward

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was being examined at the trial that his clients were not relying on any default as to work after Ward took over the property. There was a period between 1907 and May 31st, 1912, when it is proven that no work, other than that done by Hobson in 1908, was done upon the premises. The defendants' answer is that in 1908 an expenditure in excess of $5,000 per annum was established and estimated by the Government of British Columbia, and on the 5th of January, 1912, the Crown, represented by said Government, admitted that the said expenditure would lapse on the 1st of June, 1912, and would operate quite apart from all other expenditures on the said premises as a full fulfilment of the terms of the said lease to the 1st of June, 1912, and that the Crown thereby waived the carrying on of mining operations and the doing of work conducing to the facility of carrying on mining operations up to that date. This arrangement is evidenced by letter of the 14th of September, 1911, and the 5th of January, 1912, and the evidence of Mr. Tolmie, deputy minister of mines, at the trial. Can the Government of British Columbia, by any such arrangement, by applying the excess expenditures in any one year to cover a period when no further work was done, waive the strict enactment in that lease? The evidence would seem to be that they intended so to do. What is their power? In connection with this, we have first to consider, does the proviso of forfeiture make the term, *ipso facto*, void or voidable only upon breach of the conditions?

GALLIHER, J.A.

In *Davenport* v. *The Queen* (1877), 3 App. Cas. 115, Sir Montague E. Smith, who delivered the judgment of their Lordships of the Privy Council, says at p. 128:

"In a long series of decisions the Courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors."

It was contended here that as the lease in question was issued in pursuance of a statute and incorporated in and confirmed by a subsequent statute, that this rule of construction did not apply and that the Crown had no power to waive forfeiture. The same objection was taken in the *Davenport* case, but it was there stated: "But in many cases the language of statutes even

when public interests are affected has been similarly modified."

And Sir E. Montague E. Smith, at p. 129, further says:

"There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail, but the intention to exclude it should be clearly established."

There is nothing in the statute ratifying the lease or in the lease itself sufficiently clear to exclude the application of this rule. If we treat the lease as not void but voidable only at the option of the lessors, I am of opinion that the Crown, acting through its responsible ministers, have so treated it and by their acts have waived forfeiture. See also the case of *Attorney-General of Victoria* v. *Ettershank* (1875), L.R. 6 P.C. 354.

GALLIHER, J.A.

I would allow the appeal.

McPHILLIPS, J.A.: It must be conceded that the respondent has no position as against the appellants in respect of the placer mining ground covered by the lease validated by statute, of date the 16th of May, 1894 (see Cariboo Hydraulic Mining Company Amendment Act, 1895, Sec. 5 reading, "and the same [referring to the lease] is hereby declared to be valid and binding"; and see as to the effect of validation, Sir Arthur Channell in *Canadian Northern Pacific Railway* v. *New Westminster Corporation* (1917), A.C. 602 at p. 604—"it operates as if it were a clause in an Act of the Provincial Legislature"), unless it can be held that the lease having statutory confirmation is no longer a good and subsisting demise. The learned trial judge has held that the lease is non-existent upon two grounds: (a), the failure upon the part of the respondent Company to take out annual mining certificates from the year 1912; (b), that by reason of non-payment of rent, the non-doing of work, and abandonment, the lease became forfeited and void. With great respect to the learned judge, I am entirely unable to accept the view at which he arrived. The appellants are in possession of the placer mining ground claimed by the respondent under leases from the Crown prior in time to those held by the respondent, and with respect to the lease validated by statute, it is, in my opinion, a statutory demise and it is not stated to be subject to the provisions of the Placer Mining Act. The respondent, apart from all other considerations affecting title to the placer

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mining ground called in question in the action, was not entitled to stake any of the ground, in that at the time of the staking the ground was not "unoccupied ground." I do not think it necessary to enter into any detail upon this point, but will refer to the judgment of my brother MARTIN in *Deisler* v. *Spruce Creek Power Co.* (1915), 21 B.C. 441 at pp. 458-62, where the point was fully considered. I would also refer to my reasons for judgment at pp. 460-70 in the same case, wherein I was in agreement with my brother MARTIN upon the question of what is to be deemed "land lawfully occupied for placer mining purposes," and upon the facts of the present case, the view there expressed would, in my opinion, be applicable. Without dealing *seriatim* with all that took place, with respect to the payments of rents, the postponement thereof, and the doing of work and the postponement thereof, it can be fairly and justly said that nothing occurred which can be said to have entitled re-entry or forfeiture; nor was there, upon the facts, abandonment within the terms of the lease. Further the 20 days' notice of default was not given, nor was there any inquiry had which would admit of the Crown declaring cancellation of the lease. Any hearing that was had could not be said to have been with relation to the terms of the statutory lease. At most, all that can be said is that the leases granted to the respondent were granted upon the ground that the appellant Company had failed to take out a free miner's certificate, something not called for under the terms of the lease. There can be no question that in the present case there was no inquiry which would satisfy the requirements of the law, and I will content myself upon this point by referring to *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 S.C.R. 281. In that case Duff, J. elaborates the point and refers to the leading and controlling cases.

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I am, therefore, clearly of the opinion that there was no hearing of such a judicial nature as would admit of the statutory lease being declared forfeited or void, and that it must be deemed to be a good and subsisting lease. The statutory lease bears date the 16th of May, 1894, and the terms of the demise were for 25 years from the date thereof, therefore there has been no expiry of the term by effluxion of time, and it was impossible

for the respondent to obtain any valid demise from the Crown during the term of this legislative demise, unless, of course, it could be said that the lease was at an end, *i.e.*, had automatically ended, which is contended, but with deference to all contrary opinion, that cannot be viewed as other than idle argument.

To recapitulate: the statutory demise must be a good and subsisting demise, unless it is that the absence of the free miner's certificate can be said to be fatal, or upon the facts under the terms of the lease the same became void and of no effect consequent upon the non-payment of rent, failure to do the required work and abandonment of the premises, and that it was not a pre-requisite to the avoidance of the lease that there should be any inquiry judicial in its nature. With regard to the free miner's certificate, there is nothing in the lease requiring this, and it cannot be that the lease is void because of something not called for under the terms thereof, unless we find some express provision imposing this requirement in apt language in the private Act or the general legislation (Placer Mining Act, Sec. 26, B.C. 1891; Cap. 136, R.S.B.C. 1897) is made applicable, which is not the case, the situation in the present case is that of the lessee holding placer mining ground under special statutory demise, no mention being made of the general legislation, and by way of analogy, I would refer to the case of *Esquimalt Waterworks Co.* v. *City of Victoria Corporation* (1907), 76 L.J., P.C. 75, and the present case is one of special obligations imposed upon the lessee, and as already stated the general legislation is not in terms or by any necessary implication made applicable to the statutory demise. The lease is not the ordinary or customary lease under the Placer Mining Act, it is different in terms and with more extensive obligations. The lease was made following the authority conferred by an Act respecting the Cariboo Hydraulic Mining Company (Limited Liability) assented to on the 11th of April, 1894, which in its preamble in part reads: "Consolidating the several placer mining claims and other properties not held by them into one, with a more lasting and secure title thereto," obviously removing the demise from the jeopardy that leases in general are subject to, and in particular it was enacted by sections 3

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and 4 of the Cariboo Hydraulic Mining Company Amendment Act, 1895, as follows:

"3. The Lieutenant-Governor in Council may also, on such terms and conditions, and with such rents, reservations, and restrictions as may be deemed expedient, authorize and empower the Company to construct a dam or dams across the outlets of Morehead and Bootjack Lakes, and to execute all other necessary works for utilizing said lakes, or either of them, as reservoirs for the storage of water for use upon the mining property of the Company in working the same by the hydraulic process.

"4. The grants mentioned in the two preceding sections shall make due provision for the protection of the interests of all persons from being prejudicially affected by the operations of the Company under said grants, or either of them, and shall make provision whereby water not necessary for the purposes of the Company may be supplied to others upon fair and equitable terms."

And the works authorized and constructed meant the expenditure of hundreds of thousands of dollars, and as provided in the latter part of section 4, "shall make provision whereby water not necessary for the purposes of the Company may be supplied to others upon fair and equitable terms," a provision in the nature of creating by private expenditure a public utility capable of being enjoyed by others, demonstrating the particular obligation imposed upon the Company, and with all this in view, the judgment in the *Esquimalt Waterworks Co.* case is peculiarly apposite. The head-note of that case, in part, reads as follows:

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"Private Acts conferring special rights and imposing special obligations for special purposes are not overruled by general legislation, the application of which might interfere with the rights granted and the obligations imposed by the private Acts."

(Also see *Surrey Commercial Dock Company* v. *Bermondsey Corporation* (1904), 1 K.B. 474 at pp. 477, 483; *City and South London Railway Co.* v. *London County Council* (1891), 2 Q.B. 513; *The London & Blackwall Railway Co.* v. *The Limehouse District Board of Works* (1856), 3 K. & J. 123; *Thorpe* v. *Adams* (1871), L.R. 6 C.P. 125; *Ashton-under-Lyne Corporation* v. *Pugh* (1898), 1 Q.B. 45; *Fitzgerald* v. *Champneys* (1861), 30 L.J., Ch. 777 at p. 782). My opinion is therefore that the obligation under the Placer Mining Act of always having a free miner's certificate, arising by reason of the general legislation, was not obligatory upon the Company, and avoidance of the statutory lease could not be effected upon this ground.

It is a matter for remark and is cogent evidence of the departure from the ordinary lease under the Placer Mining Act and indicating the special nature of the statutory demise as being outside the scope of the Act, that the statutory lease is not a lease granted in stated pursuance of the Placer Mining Act for placer mining only, as all the leases under which the respondent claims read, but is a lease "with full liberty to take from the premises hereby demised and retain for their own use all mines and minerals therein contained including the precious metals," and with respect to other than the precious metals there certainly is no requirement by general legislation to take out a free miner's licence, and no argument is sustainable that as to the other minerals a free miner's licence could be required, but as hereinbefore stated, under the circumstances of the present case, the free miner's certificate cannot be deemed to have been a matter of obligation to maintain the life of the statutory lease.

Then we come to the other questions upon which, it is said, the statutory lease became void, *i.e.*, under the terms thereof it "shall *ipso facto* at the expiration of the times aforesaid cease and be void as if these presents had not been made." It must be conceded that save as to the contended default in not taking out the annual free miner's certificate from and after 1912, no inquiry, judicial or otherwise, took place, then the contention is that without judicial inquiry, under the terms of the statutory lease alone, upon the facts, by operation of law, the statutory lease became void and of no effect, entitling the granting of the leases under which the respondent claims. In *The Hardy Lumber Company* v. *The Pickerel River Improvement Company* (1898), 29 S.C.R. 211, see the judgment of Sir Henry Strong, C.J. at pp. 214, 215 and 216.

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In the present case there is considerable evidence of waiver on the part of the Crown, and in my opinion, waiver is amply established and no judicial inquiry nor proceeding by the Attorney-General on behalf of the Crown to have a forfeiture judicially declared, has taken place; further, the Crown is not a party to the action. In *Klondyke Government Concession* v. *The King* (1908), 40 S.C.R. 294, DUFF, J., at p. 311, said:

"This appeal is governed by the decision in *The Bonanza Creek Hydraulic Concession* v. *The King* [(1908)], 40 S.C.R. 281. The material provisions

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of the appellants' lease are identical with those considered on that appeal; and, although, in this case, there is evidence of communications and discussions between the minister and the solicitor of the company before the formal declaration of forfeiture, the minister's decision that the lessees had failed in making the expenditure required by the terms of the lease was not, I think, preceded by anything which, within the principle of that case, could be described as a hearing upon that question."

In *Davenport* v. *The Queen* (1877), 37 L.T. 727 it was held that,—

"A clause in a lease declaring that it shall be void upon a breach of conditions by the lessee must be held to mean that it is voidable only at the opinion of the lessor, even if the condition was imposed by statute."

In the judgment, as reported at p. 731, we find this language:

"Besides being made subject to the terms, conditions, penalties, and forfeitures contained in the Acts, this lease includes covenants by the lessee for the payment of the rent and observance of the clauses, conditions and provisoes in the Acts, with a distinct covenant to cultivate one-sixth of the land within a year. There seems to their Lordships to be nothing in the form of this lease inconsistent with the Acts. The covenants afford the means of conveniently enforcing the obligations of the lessee. Does then the proviso of forfeiture in section 8 of the Reserves Act, when read into such a lease as the present, make the term *ipso facto* void, or voidable only upon a breach of the conditions? In a long series of decisions the Courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors."

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It was also held that upon the facts in the *Davenport* case, there was waiver of the forfeiture. In my opinion, in the present case, as already stated, there has been waiver, and even apart from waiver, there has been no exercise of the option to avoid the lease based upon breach of conditions. A pre-requisite thereto, of course, would be an inquiry, judicial in its nature. All that the Crown did through the department of mines by its gold commissioner is of record in these words, under date the 22nd of December, 1913: "Forfeited as a certificate of lapse of the free miner's certificate filed Barkerville, December 4th, 1913." Therefore, even if without judicial inquiry, forfeiture could be declared of the statutory lease for breach of conditions thereof, it is plain that no forfeiture has been declared having relation to any breach of conditions in the lease. The taking out of a free miner's certificate is not one of the conditions in the lease, how then could the respondent achieve any position as against the appellants holding under the prior statutory lease

still existent? Unless it could, of course, be said that there was an effective forfeiture by reason of the lapse of the free miner's certificate, that point I have already dealt with and my opinion as already expressed is, that there was no right of forfeiture for any such cause.

Therefore, in my opinion, the claimed forfeiture or lapse of the statutory lease for failure to take out a free miner's certificate was ineffective in that there was no requirement that a free miner's certificate should be held by the lessees. Then, if it can be said that the lease was voidable by the lessor, the Crown, upon a breach of conditions by the lessee, that could only be at the option of the Crown and that option was never exercised. Further, the required 20 days' notice was never given, which was a condition precedent to re-entry for non-payment of the rent or other default under the provisions of the statutory lease, nor was there any inquiry of a judicial nature, all of which incontrovertibly demonstrates the fallaciousness of any legal right in the respondent to the possession of the lands in question in this action, the same being held by the appellants under a good and subsisting lease legalized by statute. In the result, in my opinion, the leases under which the respondent claims possession of the lands cannot prevail over the rights granted and the obligations imposed by the private Act validating the lease of the 16th of May, 1894 (Cap. 5, Sec. 5, Cariboo Hydraulic Mining Company Amendment Act, 1895), that is, the respondent, in my opinion, fails in establishing title to the possession of the lands as against the priority of right of possession thereto existent in the appellants. Upon the whole case, therefore, I am of the opinion that the appeal should succeed and the judgment of the learned trial judge be reversed and set aside, the appeal allowed and the action dismissed.

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Appeal allowed, Macdonald, C.J.A. dissenting.

Solicitors for appellants: *Carter & Fillmore.*
Solicitor for respondent: *James Murphy.*

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REX v. EDWARDS.

Criminal law—Sale of intoxicating liquor—Conviction by magistrate—Appeal—British Columbia Prohibition Act—Regulations under War Measures Act supplementary to Provincial Act—B.C. Stats. 1916, Cap. 49, Secs. 10 and 18—Can. Stats. 1915, Cap. 2.

Section 10 of the British Columbia Prohibition Act prohibits the sale of intoxicating liquor, and section 28 provides for a penalty of imprisonment with hard labour for a term of not less than six months and not more than twelve months for violation of any of the provisions thereof. An order in council under The War Measures Act, 1914, made and approved March 11th, 1918, provided *inter alia* that no person shall either directly or indirectly sell or contract or agree to sell any intoxicating liquor which is in or which is to be delivered within any Province wherein the sale of intoxicating liquor is by Provincial law prohibited. It provided a penalty for the first offence of not less than $200 or more than $1,000, and in default of immediate payment, to imprisonment for not less than three or more than six months for violation of any of the provisions of the regulations, and it further provided that the regulations be construed as supplementary to other prohibitory laws then in force or that may be thereafter in force in any Province. The accused was convicted by a magistrate and sentenced to six months in prison under the Provincial Act.

Held, on appeal, that from the difference in the penalty clauses in the two pieces of legislation a conflict is apparent, and notwithstanding the provision that the regulations be construed as supplementary to the prohibitory laws in force in the Province, the order in council must be construed as superseding section 10 of the Provincial Act, and the conviction is quashed.

Rex v. *Thorburn* (1917), 41 O.L.R. 39 followed.

Statement

APPEAL from a conviction by the police magistrate at Vancouver, who convicted the appellant, under section 10 of the British Columbia Prohibition Act, for selling liquor on the 16th of March, 1918, the prisoner being sentenced to six months in prison under the Provincial Act. Said section 10 prohibits the sale of intoxicating liquor within the Province. Section 28 of said Act provides, *inter alia*, that any person contravening or violating the provisions of section 10 shall, upon summary conviction, be liable to imprisonment with hard labour for a term of not less than six months and not more than

twelve months for the first offence. Regulations made and approved on the 11th of March, 1918, under The War Measures Act, 1914 (Can. Stats. 1915, Cap. 2), provided, *inter alia*, that no person after the 1st of April, 1918, shall either directly or indirectly sell, or contract, or agree to sell any intoxicating liquor which is in, or which is to be delivered within any Province wherein the sale of intoxicating liquor is by Provincial law prohibited, and paragraph 11 of said regulations provides that any person who violates any of the provisions of the regulations shall, on summary conviction, be liable to a penalty for the first offence of not less than $200 and not more than $1,000, and in default of immediate payment to imprisonment for not less than three nor more than six months, and for the second offence to not less than three months nor more than twelve months. Paragraph 13 of the regulations recited that the said regulations shall be construed as supplementary to other prohibitory laws then in force or that may be thereafter in force in any Province or Territory, and shall continue in force during the continuance of the present war and for twelve months thereafter. Argued before CAYLEY, Co. J. at Vancouver on the 12th of June, 1918.

Statement

R. L. Maitland (*F. Lyons,* with him), for appellant: The Dominion order in council, passed the 10th of March, 1918, superseded section 10 of the Provincial statute: see *Rex* v. *Thorburn* (1917), 41 O.L.R. 39. The Dominion Parliament has entered the field as to the sale of intoxicating liquor, and that being so, the Dominion statute prevails. The conviction should be quashed, as the sentence is under the Provincial Act.

Argument

W. C. Brown, for the Crown: The order in council, by paragraph 13 thereof, expressly provides that it shall be construed as supplementary to the Provincial statutes and should be read in connection with it.

CAYLEY, Co. J.: It is to be observed that section 10 of the Provincial Act and the order in council referred to, deal with the sale of liquor, but the Provincial statute makes imprisonment without the option of a fine the penalty, while the order in council makes the penalty a fine. The broad question seems

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to be whether both laws can be in force in the same Province at the same time. No doubt this is a constitutional question, and it would be a matter of satisfaction if it could be referred to the Court of Appeal, but in the meantime it must be determined in this Court so far as the present appellant is concerned. The order in council was passed under the authority of the War Measures Act, 1914, Can. Stats, 1915, Cap. 2. Section 5 of the order reads as follows:

"No person after the 1st day of April, 1918, shall either directly or indirectly sell or contract or agree to sell any intoxicating liquor which is in, or which is to be delivered within any prohibited area."

Section 10 of the British Columbia Prohibition Act, B.C. Stats. 1916, Cap. 49, reads as follows:

"Except as provided by this Act, no person shall, within the Province, by himself, his clerk, servant, or agent, expose or keep for sale, or directly or indirectly or upon any pretence, or upon any device, sell or barter, or offer to sell or barter, or in consideration of the purchase or transfer of any property or thing, or for any other consideration, or at the time of the transfer of any property or thing, give to any other person any liquor."

Manifestly, as far as the sale of liquor is concerned, these two enactments cover the same field if British Columbia is a "prohibited area." "Prohibited area" is defined in the order in council as follows:

"(c.) 'Prohibited area' means any Province, Territory, municipality, district, county, or other area wherein the sale of intoxicating liquor is under or by any law, Federal or Provincial, prohibited."

Judgment

A strange question arises, whether if the section prohibiting the sale in a Provincial statute is superseded by the order in council dealing with the same subject, there is any "prohibited area." But the fact that this question arises cannot determine the question whether the order in council does or does not supersede the Provincial enactment. It may be presumed that there would be no doubt but that the order in council (since it has the effect of law) supersedes the Provincial enactment, under the various decisions that have been made by the Privy Council and which are cited in the case of *Rex* v. *Thorburn* (1917), 41 O.L.R. 39—if it were not for section 13 of the order in council, which reads as follows:

"These regulations shall be construed as supplementary to the prohibitory laws now in force or that may be hereafter in force in any Province or Territory, and shall continue in force during the continuance of the present war and for twelve months thereafter."

It is contended that this section 13 of the order in council, coupled with the following paragraph from the preamble of the order in council: "Whereas laws have been passed in every Province of Canada prohibiting the sale of intoxicating liquor, and such laws are now in force save in the Province of Quebec, where the prohibitory law is to go into force on May 1, 1919, and in order to make such legislation more effective it is desirable to enact regulations supplementing these Provincial laws," shews that it was the intention of Parliament not to supersede the Provincial Act, but to supplement it.

But a similar saving clause is to be found in The Ontario Temperance Act (Ont. Stats. 1916, Cap. 50), reading as follows:

"140. Nothing contained in this Act shall be construed to interfere with the operation of The Canada Temperance Act or any other Act of the Parliament of Canada applicable to the Province of Ontario or any part thereof."

Notwithstanding this, it was decided in *Rex* v. *Thorburn, supra,* that because the two Acts (the Ontario Temperance Act and The Canada Temperance Act) cover the same field, therefore the Dominion Act supersedes the Provincial Act. I think it cannot be considered that the order in council does not cover the same field, so far as selling is concerned, as the Provincial Act, and I would conclude from *Rex* v. *Thorburn* that no saving clause, such as section 13 of the order in council, can prevent the order in council from superseding section 10 of the Provincial Act any more than section 140 of The Ontario Temperance Act was able to save that legislation.

Judgment

In the present case and all similar cases the conflict between the order in council and the Provincial Act is important to the appellant on account of the difference in the penalties imposed. Section 28 of the Provincial Act reads as follows:

"(1.) Every person contravening or committing any breach of any of the provisions of section 10 shall, upon summary conviction thereof, be liable to imprisonment, with hard labour, for a term of not less than six months and not more than twelve months for the first offence; and for a second or subsequent offence, to imprisonment, with hard labour, for not less than twelve and not more than twenty-one months; and if the offender convicted under this subsection be a corporation, it shall be liable to a penalty of $1,000."

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Section 11 of the order in council, on the other hand, provides as follows:

"Every person who violates any of the provisions of these regulations shall be guilty of an offence, and shall be liable on summary conviction to a penalty for the first offence of not less than $200, and not more than $1,000, and in default of immediate payment to imprisonment for not less than three, nor more than six months, and for a second offence to imprisonment for not less than six months nor more than twelve months."

Therefore for the same offence of selling the accused must suffer imprisonment for six months without the option of a fine under the Provincial Act, while under the order in council he would be subject to a penalty of not less than $200 and not more than $1,000. It cannot be said that the two pieces of legislation do not conflict when a difference in penalty is as above and, when it becomes a matter, for the Court to decide to which penalty the accused is liable, I should hold that it is the order in council that governs and not the Provincial Act.

Judgment

Conviction will be quashed. The usual order will go protecting the magistrate.

Conviction quashed.

TERAINSHI v. CANADIAN PACIFIC RAILWAY COMPANY.

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TERAINSHI v. CANADIAN PACIFIC RY. CO.

Negligence—Damages—Injury to employee of lessee of premises—Dangerous condition of elevator—Elevator repairs looked after by lessor's engineer—Liability of lessor.

The defendant Company rented an apartment-house, the lessee agreeing to pay as rent 25 per cent. of the gross income from the premises. The plaintiff, who was employed by the lessee as an elevator boy, sustained injuries that resulted from the defective state of the elevator. During the tenancy the Company sent its own engineer from time to time to examine and make any necessary repairs to the elevator. In an action for damages:—

Held, on appeal (affirming the decision of MURPHY, J.), that no liability can be attached to the lessor.

APPEAL by plaintiff from the decision of MURPHY, J. at the trial, dismissing, on the ground of contributory negligence, an action for damages for injuries to the operator of an hydraulic elevator occasioned by defects in the apparatus. The building in question, known as the Vancouver Hotel Annex, was the property of defendant, and had been used as a part of the Hotel Vancouver, with which it was connected by passage-ways. Before the date of the accident it had been leased by the defendant, fully furnished and equipped, to a Mrs. McKenzie, the instrument providing that she should pay to defendant, as rent, 25 per cent. of the gross receipts. Defendant had a mechanical engineer and staff who, before the transfer, had attended to the condition of the mechanical apparatus used in the hotel and annex, and continued to attend to the condition of the elevator in the annex thereafter. On two occasions the defendant had employed and paid men from an elevator works, and the apparatus had been by them taken down and put up during the tenancy. For some time prior to the accident, owing, as it appeared, to a defective packing in a valve which controlled the flow of water operating the elevator, it would creep slowly upwards when left at a standstill, at the rate of about a foot every three minutes. The plaintiff was employed by Mrs.

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McKenzie, who paid his wages. On the occasion in question he had taken a parcel up in the elevator, and, in the course of his duties, left it standing at the third floor while he went to a room to deliver the parcel. When he returned some five minutes later, he found that the elevator had crept up so that its floor was about two feet above the floor of the passage. He was very short, and proceeded to scramble into the elevator to resume control, when suddenly, owing, as the evidence shewed, to the valve packing giving way altogether, the elevator shot up suddenly and jammed his body between the floor of the elevator and the top of the elevator gate or opening. MURPHY, J. held that the plaintiff was negligent in getting into the elevator when he did.

Statement

The appeal was argued at Vancouver on the 3rd of December, 1917, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Cassidy, K.C., for appellant: It was appellant's duty to re-enter the elevator and there was no apparent risk in his doing so; therefore he was not negligent. Even if he was, his action did not contribute to the injury. If, notwithstanding the negligence of plaintiff, the injury would not have happened but for the original breach of duty of the defendant, here in having a defective valve, the defendant is liable: *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719. We do not contend that a landlord is liable for injuries caused by defects in the leased premises. Defendant is here liable because of its relation to the elevator to the business being carried on with the assistance of the elevator, and because of its relation to the plaintiff, and in spite of the fact that by the instrument between the defendant and Mrs. McKenzie, with which plaintiff was not concerned, the relationship of landlord and tenant was created. Defendant and Mrs. McKenzie were joint adventurers using the elevator in the business. A person supplying an instrumentality for use in a business in which he has an interest, has a duty to see that it is fit for the purpose and is liable if it injures persons whom he would know would have to use it in the ordinary course of the business. This is

Argument

a far stronger case for plaintiff than any reported following the doctrine of *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; *Marney* v. *Scott* (1899), 1 Q.B. 986 at p. 992; *Mowbray* v. *Merryweather* (1895), 2 Q.B. 640; *Elliott* v. *Hall* (1885), 15 Q.B.D. 315; *Malone* v. *Laskey* (1907), 2 K.B. 141; *Winterbottom* v. *Wright* (1842), 10 M. & W. 109; Pollock on Torts, 10th Ed., 530.

McMullen, for respondent: Even if there had been a covenant on the part of the Company to repair the elevator, there would be no liability on the part of the Company. But there was no covenant for repairs in the lease, and the lessor cannot be held responsible for lack of repairs. We were not a party to the contract with the boy: see *Cavalier* v. *Pope* (1905), 2 K.B. 757; (1906), A.C. 428; *Lane* v. *Cox* (1897), 1 Q.B. 415. *Heaven* v. *Pender* (1883), 11 Q.B.D. 503 does not apply to a situation of this kind.

Argument

Cassidy, in reply: There was a substantial undertaking by the Company to keep the elevator in repair: see Halsbury's Laws of England, Vol. 21, p. 384, par. 652; *Victoria Corporation* v. *Patterson* (1899), A.C. 615; *Mowbray* v. *Merryweather* (1895), 2 Q.B. 640; *Elliott* v. *Hall* (1885), 15 Q.B.D. 315; *Malone* v. *Laskey* (1907), 2 K.B. 141. On the argument of *res ipsa loquitur* see *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596. As to Mrs. McKenzie's defence to an action owing to defects in the elevator see *Rajotte* v. *The Canadian Pacific Railway Co.* (1889), 5 Man. L.R. 365.

Cur. adv. vult.

2nd April, 1918.

MACDONALD, C.J.A.: I would dismiss the appeal. If the plaintiff has a cause of action at all, it is not against the defendant. The case is, in my opinion, too clear for argument. The defendant is the landlord and is not in occupation of the premises in any true sense of the term. The fact that from time to time it sent its engineer to make repairs to the elevator, does not, in my opinion, make it liable, on the facts of this case, to a third person.

MACDONALD, C.J.A.

MARTIN, J.A. dismissed the appeal.

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GALLIHER, J.A.: Assuming (which I do not decide) that there was a right of action against the defendant, and that it was negligent, the learned trial judge has found contributory negligence, and I am unable to say there is not evidence upon which he could so find.

The appeal should be dismissed.

MCPHILLIPS, J.A.: In my opinion this appeal should be dismissed. With great respect though to the learned trial judge, I am entirely unable to accept the view that the action is to be determined upon the ground of the contributory negligence of the appellant. That would import that the respondent, upon the evidence, was guilty of negligence. This cannot be held to be the legal position. The respondent is the owner of the premises, but the same was under demise at the time of the accident. The tenant was in possession, and the appellant was a servant of the tenant, and there was no covenant or contractual relationship of any nature or kind whereby the landlord, the respondent, was called upon to execute repairs. The accident occurred through the defective condition of an elevator upon the premises, and even were it the fact, which was not established, that at the time of the demise, the elevator was out of repair or in a dangerous condition, still no action at law would be maintainable.

MCPHILLIPS, J.A.

The counsel for the appellant, in a very able argument, endeavoured to fix liability upon the respondent upon the following, amongst other, grounds, that at the time of the demise the elevator was in a dangerous condition (as to this, as I have said, it was not established; further, it in itself would be ineffective in any case to impose liability); that the letting was one of joint adventure, *i.e.*, the tenant paid rent in the following way: "yielding and paying therefor as rent to the Company (the respondent) at the end of each and every month during the said term 25 per cent. of the lessee's gross income for each month."

I am unaware of any authority which, upon this latter ground, would put the respondent in any different position to that of any landlord under the usual and customary provision

of paying a rent certain in money. The gross income is capable of ascertainment, and may be said to be a rent certain. It cannot be said that the respondent was carrying on the business (a) by itself; (b) in contractual relationship with the tenant; or (c) in any manner whatever. It was solely the business of the tenant which was being carried on upon the premises held under demise from the respondent.

The authorities that may be usefully referred to in arriving at the decision upon this appeal may be said to be the following: *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C.P.D. 311; 46 L.J., C.P. 675; *Cavalier* v. *Pope* (1905), 74 L.J., K.B. 857, affirmed on appeal (1906), 75 L.J., K.B. 609; and *Cameron* v. *Young* (1908), 77 L.J., P.C. 68. In *Nelson* v. *Liverpool Brewery Co., supra,* Lopes, J. (as he then was) said at p. 676:

"We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger, by the defective repair of premises let to a tenant, the occupier, and the occupier alone, being *prima facie* liable—first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition. In either of these cases we think an action would lie against the owner: see *Payne* v. *Rogers* [(1794)], 2 H. Bl. 349; *Todd* v. *Flight* [(1860)], 9 C.B.N.S. 377; s.c. 30 L.J., C.P. 21; *Russell* v. *Shenton* [(1842)], 3 Q.B. 449; s.c. 11 L.J., Q.B. 289; and *Pretty* v. *Bickmore* [(1873)], L.R. 8 C.P. 401. In the present case, however, there is no contract by the defendants, the landlords, to do repairs, and it is admitted that the premises were not out of repair when Farragher became the tenant. We think, therefore, the rule should be made absolute to enter a nonsuit."

MCPHILLIPS, J.A.

In *Cavalier* v. *Pope* (1905), 74 L.J., K.B. 857, Collins, M.R. (as he then was), at pp. 861-2, considered *Nelson* v. *Liverpool Brewery Co.* In (1906), 75 L.J., K.B. 609, Lord Macnaghten, at pp. 610-11, said:

"Notwithstanding the opinion of Lord Justice Mathew and the able argument of the learned counsel for the appellant, I am of opinion that the judgment of the Master of the Rolls and Lord Justice Romer must be upheld. The facts are not in dispute. The law laid down by the Court of Common Pleas in the passage quoted by the Master of the Rolls from the judgment of Chief Justice Erle in *Robbins* v. *Jones* (1863), 33 L.J., C.P. 1; 15 C.B.N.S. 221, is beyond question: 'A landlord who lets a house in a dangerous state, is not liable to the tenants customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any.' In this case the husband was the tenant. The wife,

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who was not the tenant, cannot be in a better position to recover damages than a customer or guest. Her position is perhaps less favourable. She had the advantage or disadvantage of knowing more about the state of the house than any guest or customer could have known."

And see *per* Lord Atkinson at p. 612, where he deals with a situation not present in the case before us, *i.e.*, one of "agreement to repair." See also *Cameron* v. *Young*, *supra*, *per* Lord Robertson at pp. 69-70.

I am of opinion that the appeal ought to be dismissed.

EBERTS, J.A.

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

Appeal dismissed.

Solicitor for appellant: *J. A. Russell.*
Solicitor for respondent: *J. E. McMullen.*

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Oct. 1.

ESQUIMALT & NANAIMO RY. CO. v. DUNLOP

ESQUIMALT & NANAIMO RAILWAY COMPANY v. DUNLOP *ET AL.*

Practice—Interlocutory order—Appeal—Application to stay action pending —"Incidental" to appeal—R.S.B.C. 1911, Cap. 51, Sec. 10—Marginal rules 880, 881a.

If, while an action is pending, a question arises which may affect the course of the action and is the subject of an appeal, the action should be stayed until the question has been dealt with by the Court of Appeal.

Statement

APPEAL by plaintiff from the order of MARTIN, J.A. of the 16th of August, 1918, granting a stay of the proceedings in the action until after the determination of the appeal from an interlocutory order of MACDONALD, J. of the 17th of June, 1918, adding the Attorney-General as a party-defendant in the action.

The appeal was argued at Victoria on the 1st of October, 1918, before MACDONALD, C.J.A., MCPHILLIPS and EBERTS, JJ.A.

Argument

Harold B. Robertson, for appellant: The order was made without jurisdiction. Section 10 of the Court of Appeal Act is in question (rule 881*a* is the same), and the whole action

cannot be considered as "incidental" to an appeal from an interlocutory order. The statement of claim is the same, except for the necessary changes owing to the Attorney-General being made a party, so that there is no prejudice of any kind resulting from the order.

Mayers, for respondents: The Attorney-General has, I submit, been made a party-defendant contrary to the established practice, and they have the protection of the Crown under the Vancouver Island Settlers Rights Act. This is a question of special importance as to parties, and should be first disposed of. The case of *Dyson* v. *Attorney-General* (1911), 1 K.B. 410 was followed, but I submit it has no application to this case.

Argument

Robertson, in reply.

MACDONALD, C.J.A.: Though I am unable, with respect, to accept in its entirety his construction of section 10 of the Court of Appeal Act, I think the order made by my learned brother MARTIN should be affirmed. It appears that the Attorney-General—apparently without his consent—was made a party-defendant to the action. The other defendant objects to that and, I take it, asks this Court to infer—as I think the Court can very properly infer—that that very fact is in itself evidence of prejudice. I think that the Court may infer that a defendant is prejudiced when he has another improperly foisted upon him, as a co-defendant. I think, when an action is pending, and some question arises which may affect the course of the trial, and which is the subject of appeal to this Court, that the trial ought, in general—unless there are very special reasons otherwise—to be stayed until the Court of Appeal has dealt with the question which may have some considerable influence upon the course of the trial. Now, in this case, I cannot see that there is any prejudice, or will be any prejudice at all to the plaintiff by this stay which has been granted. Time is of no great importance; it is not suggested that it is. There is no reason why the plaintiff should get down to trial immediately, and there is no suggestion that if it should fail to do so, that it would be in some way greatly inconvenienced.

MACDONALD, C.J.A.

MCPHILLIPS, J.A.: It is well understood that when an order

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has been made by a judge in the exercise of a jurisdiction committed to him, that unless it should be shewn that he had no evidence upon which that discretion could be legally exercised, that the order should be maintained. In this particular case I think that my brother MARTIN had evidence before him which entitled him to come to the conclusion that there was prejudice in that which had been done—adding the Attorney-General of the Province, apparently without consent on his part; or, as far as I can see, without any notification at all to him of the intention to make any such application, and his not being personally present or represented by counsel. I can quite understand that when a party has a title which comes from the Crown, that the only idea of joining the Attorney-General must be an attempt to introduce the Crown, for the purpose of having it shewn in some way or other, that the Crown should not have proceeded in the way in which it did. As at present advised, with great respect to the learned judge who made the order under appeal, the Crown in the right of the Province of British Columbia cannot, save with its consent, be made a party to an action. There is, however, the right to present a petition of right (Cap. 63, R.S.B.C. 1911).

MCPHILLIPS, J.A.

Upon the face of the proceedings, I think the appeal is of such moment that there should be a stay of the action pending its determination, and I am in complete agreement with the judgment of my brother MARTIN ((1918), 3 W.W.R. 25 at pp. 26-7), and I also agree with what has been said by the Chief Justice, that, apart from all other reasons, the special facts of this case would not indicate that there would be any prejudice to either of the parties by having the appeal disposed of before further proceedings be had. It would be undesirable to have an appeal rendered abortive by reason of that which has occurred in the meantime. I do not think, therefore, that it is a proper case in which to disturb an order which I consider was rightly made.

EBERTS, J.A.

EBERTS, J.A.: I agree.

Appeal dismissed.

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

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

IN RE KITSILANO INDIAN RESERVE. VANCOUVER HARBOUR COMMISSIONERS v. THE KING.

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April 30.

IN RE KITSILANO INDIAN RESERVE

Arbitration—Expropriation—Railway Act—"Superior Court," meaning of—Interpretation Act—Court of Appeal—Jurisdiction—R.S.C. 1906, Cap. 37, Sec. 209; Cap. 1, Sec. 34, Subsec. (26)(c)—Can. Stats. 1913, Cap. 54.

Under section 209 of the Dominion Railway Act an appeal lies by either party to the Supreme Court from an award of compensation exceeding $600, but there is no further appeal to the Court of Appeal.

APPEAL by the Vancouver Harbour Commissioners from the decision of HUNTER, C.J.B.C., of the 27th of June, 1917, setting aside the award of arbitrators appointed to determine the compensation to be paid by the appellants for the expropriation of the Kitsilano Indian Reserve in the City of Vancouver. In March, 1915, the appellants applied to the Royal Commission on Indian Affairs to be allowed to expropriate the Kitsilano Reserve for railway terminal, wharfage and warehouse purposes. In the following August the Royal Commission on Indian Affairs reported to the Governor-General in Council and to the Lieutenant-Governor of British Columbia in Council recommending that permission be granted the appellants to expropriate the reserve for the purposes aforesaid. In March, 1916, authority was given by the Privy Council of Canada for sale of the reserve to the appellants, subject to the consent of the Lieutenant-Governor of British Columbia, and such consent was given on the 19th of July, 1916. The price offered by the appellants for the reserve was refused. The necessary powers of expropriation were reserved to the appellants by section 25 of The Vancouver Harbour Commissioners Act, and on the 26th of September, 1916, three arbitrators were appointed by MCINNES, Co. J. to assess the compensation that should be paid. The award was given on the 27th of January, 1917, fixing the compensation at $666,200. The Crown, in the

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right of the Dominion Government, appealed from the award, which was set aside by HUNTER, C.J.B.C. On the appeal from the judgment of HUNTER, C.J.B.C. the preliminary objection was taken by the respondent that the judgment appealed from was final and there was no jurisdiction to hear this appeal.

The appeal was argued at Vancouver on the 18th of January, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

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

Stuart Livingston, for respondent, raised the preliminary objection that there was no jurisdiction to hear the appeal. We appealed from the arbirtator's award and the Chief Justice set it aside. The Court to which an appeal may be taken from an award is, under section 209 of the Railway Act, a "Superior Court," and the Court so fixed by the Act is *persona designata.* "Superior Court" is defined by section 34, subsection (26)(*c*) of the Interpretation Act, and means "Superior Court" in this Province. There is therefore no appeal: see *Birely* v. *Toronto, Hamilton and Buffalo Railway Company* (1898), 25 A.R. 88; *The Ottawa Electric Company* v. *Brennan* (1901), 31 S.C.R. 311; *James Bay Ry. Co.* v. *Armstrong* (1907), 38 S.C.R. 511; *James Bay Railway* v. *Armstrong* (1909), A.C. 624; *Vallieres* v. *Ontario & Quebec R.W. Co.* (1909), 11 Can. Ry. Cas. 18; *St. John & Quebec Ry. Co.* v. *Bull* (1913), 16 Can. Ry. Cas. 284; *Rex* v. *Tanghe* (1904), 10 B.C. 297.

Argument

MacNeill: Subsection (4) of section 209 is the important one and, I submit, applies: *In re Ward* (1874), 1 B.C. (Pt. I.) 114; *In re Joseph Bros. and J. Miller* (1884), *ib.* (Pt. II.) 38. My contention is this is not an appeal, but an application to set aside the award on certain grounds. It has been decided that the principles of the Arbitration Act apply to the Railway Act.

Livingston, in reply.

Cur. adv. vult.

30th April, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The preliminary objection was taken that this Court had no jurisdiction to hear the appeal.

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The order appealed from is one setting aside an award made by arbitrators in what purports to be an arbitration between the Vancouver Harbour Board and the Crown in right of the Dominion respecting the acquisition by the Harbour Board of what is known as the Kitsilano Indian Reserve. The Province claims a reversionary interest in the land. The consent of the Dominion to the Harbour Board's proposal to purchase the reserve and to ascertain its value by arbitration under the Railway Act was given conditional upon like assent on the part of the Crown in right of the Province. Orders in Council were accordingly passed, and the Harbour Board served the Dominion Government with notice to treat. No notice appears to have been served upon the Provincial Government.

When the proceedings opened, Mr. *McPhillips* appeared on behalf of the Provincial Government, and took part, for some time, in the proceedings. But then came a time when counsel for the Dominion Government objected to Mr. *McPhillips* taking part in the examination of witnesses to the extent which he desired, and this led to Mr. *McPhillips's* withdrawal.

The arbitrators finally made an award fixing the price of the land in question, and the Dominion Government appealed to the Supreme Court of British Columbia. HUNTER, C.J.B.C., made an order setting the award aside, basing his opinion, as I understand it, on the neglect of appellant to join the Province as a party.

MACDONALD, C.J.A.

It is now sought to appeal from that order to this Court. I am of opinion that there is no right of appeal. The right of appeal from an award given by section 209 of the Railway Act, R.S.C. 1906, Cap. 37, is to a "Superior Court," which, by the Interpretation Act, Cap. 1 of the same statutes, means in British Columbia the Supreme Court of British Columbia. There is no statutory provision giving a further appeal.

The question now under consideration has been dealt with in a number of cases, one of the most recent being *St. John & Quebec Ry. Co.* v. *Bull* (1913), 16 Can. Ry. Cas. 284, in which the older cases are referred to.

Counsel for the Harbour Board further argued that even if there was no right of appeal to this Court, yet by subsection (4)

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of said section 209 it was provided that the right of appeal given by the section should not affect the existing laws or practice in the Province as to setting aside awards, and it was submitted by them that the proceedings below might be regarded not only as an appeal pursuant to the section, but alternatively a motion to set aside the award under the laws and practice of this Province, which sanctions such motions on limited grounds. Where an arbitration or an award has been improperly procured the Court may set it aside, but by the Supreme Court Rules such a motion must be made within two months after the parties have received notice of the award, and the appeal taken to the Supreme Court was not within two months, and if it is to be regarded as a motion to set aside the award, it was too late.

Now the notice of motion to the Supreme Court states that His Majesty the King, in right of the Dominion of Canada, intends to and hereby appeals to the Supreme Court of British Columbia, and further, that the said Court will be moved by way of appeal for an order setting aside the award and for an order declaring that the compensation fixed is insufficient and ought to be increased. At the opening of the case, counsel for the Dominion Government moved to set aside the award on the ground already stated. The learned judge said: "I do not see why this point was not taken by way of motion to set the award aside." Mr. *MacNeill,* counsel for the Harbour Board, then said:

MACDONALD, C.J.A.

> "Our rule requires it to be made within two months.
> "The Court: A point of jurisdiction may be taken at any time."

As I understand this observation, it means that the learned judge was of the opinion that he could deal with the point in the appeal, and in that I think he was right. In other words, the order made was one made in the appeal, and not as upon a motion to set the award aside on grounds upon which it could have been attacked under Provincial law. I do not think we can treat what took place below as anything but an appeal under section 209, and therefore this Court has no jurisdiction to hear an appeal from the order there made.

The appeal should be quashed.

MARTIN, J.A.

MARTIN, J.A. quashed the appeal.

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

MCPHILLIPS, J.A.: In my opinion the appeal to this Court should be quashed. I am in agreement with my brother MARTIN, but merely wish to add that the Court of Appeal is not the "Superior Court referred to in section 209, of the Railway Act, R.S.C. 1906, (also see the Interpretation Act, R.S.C. 1906, Cap. 1, Sec. 34 (26)(*c*). Even if it were, and there was concurrent jurisdiction with the Supreme Court of British Columbia, the appeal having been brought to that Court—*i.e.*, heard by the Chief Justice of that Court (HUNTER, C.J.B.C.) —the attempt in coming to this Court would be "to appeal from the judgment in the Court of concurrent jurisdiction" (see Riddell, J. in *Re Royston Park Subdivision and Town of Steelton* (1913), 13 D.L.R. 454 at pp. 455-6). In the Province of Ontario it is a matter of election as to which Court shall be gone to. In this Province an appeal brought under the provisions of the Railway Act is incompetent to this Court. It is to be remarked that very recently an award made under the provisions of the Railway Act relative to compulsory expropriation was carried by way of appeal from the Appellate Division of the Supreme Court of Ontario to the Supreme Court of Canada and then to the Privy Council (*Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95), but in the Province of Ontario there is the right of appeal to the Appellate Division of the Supreme Court of Ontario, and that being "the highest Court of last resort" in the Province, an appeal laid to the Supreme Court of Canada, which is not possible, as the Railway Act now stands, with regard to the Province of British Columbia. Therefore, in that no such appeal as is here claimed is given by the Railway Act, this Court is without jurisdiction to entertain it.

EBERTS, J.A.: An arbitration was held to ascertain the value of the Kitsilano Indian Reserve. An appeal against the award was taken by His Majesty the King against said award, under section 209, Cap. 37, R.S.C. 1906 (Railway Act), to the Supreme Court of British Columbia, and was heard by

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HUNTER, C.J.B.C., which appeal was allowed and the award set aside.

This judgment was appealed from and at the outset a preliminary objection was raised on motion by Mr. *Livingston* of counsel for His Majesty the King, that "as the judgment appealed from is a judgment of a Superior Court under the provisions of the Railway Act, being the Supreme Court of British Columbia, and given on appeal from the award of arbitrators appointed under the said Act, and no appeal is given by the said Act or by any other Act from the judgment of the said Superior Court." Under the Interpretation Act, R.S.C. 1906, Cap. 1, Sec. 34, Subsec. (26), " 'Superior Court' means (*c*) in the Provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, the Supreme Court for each of the said Provinces respectively." I, therefore, am of opinion that the parties having invoked the practice and procedure under section 209 and appealed to the Superior Court (which in British Columbia is the Supreme Court), have no further appeal to this Court, and the objection to the jurisdiction of this Court is sustained.

EBERTS, J.A.

The appeal should be disallowed.

Appeal quashed.

Solicitor for appellants: *R. R. Maitland.*
Solicitor for respondent: *Stuart Livingston.*

WALKER v. W. B. LEES: MAY E. LEES, THIRD PARTY. CLEMENT, J.

1918

June 1.

WALKER v. LEES

Husband and wife—Separation deed—Wife's liabilities—Wife to keep husband indemnified—Transfer by husband of mortgaged property to wife —Wife's covenants to pay on extension of time for repayment—Action on husband's covenant—Right to be indemnified by wife.

Husband and wife entered into a separation agreement, the wife agreeing to keep her husband indemnified from all debts and liabilities thereafter contracted by her. On the same day he conveyed to her a property upon which the plaintiff held a mortgage. Subsequently, in order to obtain an extension of time for repayment, she covenanted to pay the mortgage. On action being brought against the husband on his covenant in the mortgage to pay the mortgage debt, he claimed the right to be indemnified by his wife, and made her a third party to the action.

Held, that the wife's covenant to indemnify did not cover the mortgage debt, notwithstanding her covenant with the mortgagee, as the indemnity clause only applied to debts, her incurring which would render her husband liable.

ACTION on a covenant in mortgage for payment of the mortgage debt and claim by the defendant of right to be indemnified by a third party, tried by CLEMENT, J. at Vancouver on the 25th of April, and the 31st of May, 1918. In September, 1910, the defendant mortgaged the southerly half of lot 14, block 59, district lot 185, group 1, Vancouver District, to the plaintiff to secure the sum of $5,500. In August, 1913, a separation deed was executed between the defendant and his wife, the third party, which provided, *inter alia*, that "in further consideration of the premises the said May E. Lees hereby covenants and agrees with the said Wilfred B. Lees that she will at all times hereafter during the continuance of the said separation, keep indemnified the said Wilfred B. Lees from and against all debts and liabilities hereafter contracted or incurred by the said May E. Lees and from and against all actions, claims and demands on account thereof and against all such costs, charges, losses, damages and expenses as may be incurred by the said Wilfred B. Lees on account thereof, and if the said Wilfred B. Lees shall at any time hereafter be called

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upon to pay any, and shall actually pay debts and debts which the said May E. Lees shall at any time contract, then such payment shall be an indebtedness payable forthwith by the said May E. Lees to Wilfred B. Lees." On the same day the defendant conveyed the above mentioned land to the third party, subject to the mortgage. In March, 1914, the third party, under agreement with the plaintiff, covenanted to pay the said mortgage with interest, and the plaintiff agreed to extend the time of repayment therefor. The whole question on the trial was whether the defendant was entitled to be indemnified by the third party.

Statement

A. D. Taylor, K.C., for defendant: The covenant in the extension agreement was given by the third party presumably because of her having taken over the property in question with the mortgage, and in conformity with her obligation to assume it.

Gurd, for third party: No such inference can be drawn, it being obvious that the covenant was given to procure the extension for payment of the mortgage. Although a "liability thereafter contracted," this was not an act which made the defendant liable, nor which came within the meaning of the covenant in the separation agreement. To come within that agreement, the third party's act must be one which by the very act itself created a liability upon the defendant, such as the purchase of necessaries.

Argument

1st June, 1918.

CLEMENT, J.: Upon consideration, I think Mr. *Gurd* is right that the covenant in the separation deed, by which the wife covenants to indemnify her husband from her debts thereafter contracted, does not cover the mortgage debt in question, notwithstanding the fact that the wife, at a date subsequent to the separation deed, covenants with the mortgagee to pay the amount of the mortgage. In other words, her covenant to indemnify refers only to debts, her incurring of which would render her husband liable. Her husband's liability is not by reason of anything the wife did, but is upon his own earlier covenant to the mortgage.

Judgment

Third party proceedings dismissed, with costs to be paid to the third party by the defendant.

JENSEN v. JENSEN.

MURPHY, J. (At Chambers)

1918

Sept. 17.

JENSEN v. JENSEN

Divorce—Practice—Adultery—Evidence on trial by affidavit—Discretion.

On an application for an order for directions in a divorce action, counsel for petitioner asked for an order allowing proof of the facts by affidavit at the trial, owing to the remoteness of witnesses and the financial disability of the petitioner.

Held, that the trial must be held on oral evidence, but a saving clause giving the trial judge power to allow proof by affidavit of such facts as he may deem proper may be inserted in the order.

APPLICATION by petitioner in a divorce action for an order for directions. The summons included an application that evidence submitted by affidavit be accepted on the trial. Petitioner and witnesses were a great distance away, and petitioner was financially unable to attend trial and bring witnesses. Heard by MURPHY, J. at Chambers in Vancouver on the 17th of September, 1918.

Statement

A. D. Macintyre, for the application.

MURPHY, J.: On all applications for an order for directions in divorce actions where counsel ask for an order to be allowed to prove facts by affidavit at trial, they must come armed with material, and when the fact to be so proved is adultery, such material must make out a strong case: see *Gayer* v. *Gayer* (1917), P. 64; 86 L.J., P. 73. The usual order for directions for trial may, if desired, contain a saving clause giving the trial judge power to allow proof by affidavit of such facts as he may deem proper. In this case counsel has submitted no material in support. The trial must be heard on oral evidence, but the saving clause will be inserted if desired by counsel.

Judgment

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CANADIAN NORTHERN PACIFIC RY. CO. v. CITY OF KELOWNA

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY v. CORPORATION OF THE CITY OF KELOWNA.

Railways—Lands within municipality—Taxation—Exemption—Failure to file plans—B.C. Stats. 1910, Cap. 3; 1913, Cap. 58, Sec. 7—R.S.B.C. 1911, Cap. 194, Sec. 17.

The lands of the Canadian Northern Pacific Railway within a municipality of which no plan has been filed or submitted for the approval of the minister under section 17 of the British Columbia Railway Act, are not exempt from taxation under paragraph 13(*e*) of the agreement of the 17th of January, 1910, between the railway and the Province (B.C. Stats. 1910, Cap. 3, Sch.), MCPHILLIPS, J.A. dissenting.

Canadian Northern Pacific Railway v. *New Westminster Corporation* (1917), A.C. 602 applied.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 30th of June, 1916. The plaintiff Company, holding certain lands within the defendant Municipality, claimed they had been acquired solely for railway purposes and that they were to be used in connection with the operation of the railway. The Municipality assessed the lands for purposes other than local improvements and in October, 1915, held a tax sale and sold the lands for delinquent taxes. The Company brought action that the sale be set aside; for a declaration that the lands so sold were exempt from taxation; and for an injunction restraining the defendant from taking any proceedings for the collection of the taxes. The action was based on the provisions of paragraph 13(*e*) of the agreement between the Province and the defendant Company in the Schedule to the Act (B.C. Stats. 1910, Cap. 3) as amended by B.C. Stats. 1913, Cap. 58, Sec. 7, the lands of the Company being subject to taxation for local improvements only. The whole of the plaintiff Company's lands in the Municipality consisted of about 90 acres. The Company had filed with the minister of railways a plan and book of reference which shewed a little over six acres intended as right of way. No work of any kind in the way of construc-

tion of the railway had been done. The clause in question reads as follows: "The Pacific Company and its capital stock, franchises, income, tolls and all properties and assets which form part of or are used in connection with the operation of its railway shall, until the first day of July, 1924, be exempt from all taxation whatsoever . . . . ." The learned trial judge set aside the tax sale and granted the injunction.

The appeal was argued at Vancouver on the 15th of January, 1917, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

R. M. Macdonald, for appellant: Mackenzie and Mann acquired the property and held it in trust for the railway. This land has never been used for railway purposes. Until the railway is actually constructed the land cannot be said to "form part of or be used in connection with the operation of the railway." The railway may never be built. The plan required under section 17 of the Railway Act has never been approved by the minister. The plan which was filed and approved is defective in that areas and widths are not shewn. Exemption is claimed on 90 acres and no such amount of land is dealt with, either in the plan or the book of reference. The statute must be construed strictly: see Maxwell on Statutes, 5th Ed., 439. As to what is considered as land used as a railway see *The South Wales Railway Company* v. *The Local Board of Health of the Borough of Swansea* (1854), 24 L.J., M.C. 30; *Lancashire and Yorkshire Railway* v. *Liverpool Corporation* (1915), A.C. 152; *In re Canadian Northern Pacific Ry. Co. and City of New Westminster* (1915), 22 B.C. 247. Under section 157 of the Railway Act the consent of the Municipality to cross roads must be obtained. No such consent was ever granted. To exempt 90 acres of land from taxation in a town of this size creates a serious situation for the landholders. Argument

Armour, for respondent: The plan was deposited as required by the Act. As to the right of way not being shewn on the plan, the book of reference gives the dimensions and the minister has both before him. The acreage is required for a terminal scheme. We are bound to build under the 1910 agree-

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ment. As to obtaining leave to cross roads, when we start to construct we will then deal with the Municipality.

Macdonald, in reply.

Cur. adv. vult.

20th December, 1917.

CANADIAN NORTHERN PACIFIC RY. CO. v. CITY OF KELOWNA

MACDONALD, C.J.A. concurred in the judgment of GALLIHER, J.A.

GALLIHER, J.A.: I would allow this appeal except as to the portion of land comprising the right of way as shewn on the plan filed and approved by the minister of railways, and also filed with the land registrar, being the lands referred to in the book of reference also filed and approved, in all, 6.325 acres.

Mr. *Macdonald* took objection to the sufficiency of the plan as filed and approved, but I think that plan is a substantial compliance with the Act, and in any event is approved by the minister. In reference to the balance of the lands, they are not, in my opinion, exempt. I would refer to the judgment of this Court in *In re Canadian Northern Pacific Ry. Co. and City of New Westminster* (1915), 22 B.C. 247, affirmed on appeal to the Judicial Committee of the Privy Council (1917), A.C. 602; 86 L.J., P.C. 178. No plan of these lands having been filed or submitted for approval, they cannot be said to form part of the railway, nor can they be classed as lands used in connection with the operation of the railway. In the *New Westminster* case their Lordships of the Privy Council, in dealing with the interpretation of paragraph 13(*e*) of the agreement between the Province of British Columbia and the Canadian Northern Pacific Railway, expressed themselves thus:

GALLIHER, J.A.

"It is essential to the argument of the appellants that the Board should read the words 'which form part of and are used' as including lands 'acquired for the purpose of forming part of and being used'; but the words of the clause are in the present tense, 'form part and are used,' and clause 9 of the agreement, quoted in the judgment of Mr. Justice MCPHILLIPS, gives the Government security over the property of the company 'acquired for the purpose of and used in connection with' the lines and ferry, thus shewing that the framers of the agreement, and the Legislature which adopted the words of it, had in their minds the distinction between lands acquired for the purpose of being hereafter used and lands actually now used. To read the clause in the way desired would be to

add to it words which are not to be found in it; and it appears to the Board that there is nothing in the context, or in the object of enactment, or in the incorporated enactments, which make it necessary or justifiable to read in the necessary words. The company are no doubt justified in buying land which they expect to want for the railway before getting their compulsory powers, and they are probably in most cases acting providently in doing so, as they may have to pay more for the lands when they come to exercise their powers; but there seems no reason for giving the exemption to such lands as soon as they become the property of the company. They may remain for some time in use for the purpose for which they have previously been used. In this case the lands are said to include some mills and such like buildings still being used as before. Why should they be exempt from taxation to cheapen the ultimate cost to the company of the lands required for their undertaking, when the public are neither getting the actual railway, nor having it already in process of construction for their ultimate benefit? The benefit expected to the public from the railway is, of course, the consideration for the remission of taxation. From the time when the lands are definitely appropriated as part of the railway and taken from other uses there appears reason for the exemption, and, at any rate, it is then clearly given."

GALLIHER, J.A.

The appellant should have its costs of appeal.

McPHILLIPS, J.A. (oral): I am of the opinion that under the judgment of the Privy Council no lands are exempt unless it is shewn that they are not used for other purposes—that is, *per se,* the filing of the plan does not constitute exemption, and I must say that the evidence to me is insufficient upon which to determine what portion should be exempt; and I am of the opinion that there ought to be a new trial, or a reference, and report back to this Court upon the evidence as to what lands would come within the purview and meaning of the judgment of their Lordships of the Privy Council, because it appears to me that they have unquestionably determined this point—that the mere filing of the plan is not in itself an exemption as to the area defined therein; and that being so, it is incumbent upon this Court to determine what is and what is not exempt.

MCPHILLIPS, J.A.

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

Solicitors for appellant: *Burne & Temple.*
Solicitors for respondent: *Heggie & De Beck.*

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WOOLSTON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Damages—Negligence—Jury—Answers to questions—Meaning of uncertain—New trial—County Court—New trial ordered at close of hearing—Jurisdiction—Costs.

WOOLSTON v. B.C. ELECTRIC RY. CO.

In an action in the County Court for damages for injuries sustained from a fall when alighting from a street-car, the plaintiff claimed that after the car had stopped at its usual stopping place at a road-crossing, it started again before she had got down from the step and threw her to the ground. The evidence of the conductor on the car was that she stepped off the car as it was slowing down and before it had reached the crossing. The jury found the defendant guilty of negligence and the plaintiff not guilty of contributory negligence, but in answering a question as to what the defendant's negligence was, stated "in allowing plaintiff to alight while car in motion as claimed to be by conductor." The trial judge ordered a new trial.

Held, on appeal, GALLIHER, J.A. dissenting, that in view of the uncertainty of the meaning of the jury's answer as to what the defendant's negligence was, coupled with the finding that the plaintiff was not guilty of contributory negligence, there should be a new trial.

Held, further, that the trial judge in ordering a new trial at the close of the case, was acting without jurisdiction.

Held, further (MCPHILLIPS, J.A. dissenting), that the appellant, although obtaining an order for a new trial, having failed in all its grounds of appeal and the respondent having an order he did not ask for, there is good cause for disposing of the costs otherwise than following the event, and the order should be costs in the cause.

Statement

APPEAL from the decision of LAMPMAN, Co. J., of the 25th of May, 1917, on a trial with a jury of an action for damages for injuries sustained by the plaintiff in falling off an interurban car of the defendant Company. Plaintiff boarded a car at Wilkinson Road and was to get off at Queen's Avenue. As it approached Queen's Avenue she says she got up from her seat and after it had stopped she went out and just as she was alighting the car started and she was thrown down, sustaining injuries. The conductor says she came out before the car stopped, and after he had called "Queen's Avenue," he turned around and saw her on the lower step when she stepped off before the car stopped. The jury found negligence on the part

of the conductor in allowing her to alight while the car was in motion "as claimed by the conductor"; that there was no contributory negligence on the part of the plaintiff, and assessed damages at $250. The trial judge then ordered a new trial. The defendant appealed.

The appeal was argued at Victoria on the 31st of January, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Harold B. Robertson, for appellant: The negligence found was that we allowed plaintiff to alight when car was moving. The doors are always open within the city limits, and there is no pleading that we permitted her to get off the car. What we did does not constitute negligence. We were some distance from the stopping-place when she got off. The answer to question two shews the jury found our story was true, that is, she got off before the car stopped. The learned judge has not the jurisdiction to order a new trial. The action should have been dismissed on the finding.

Moresby, for respondent: If this Court orders a new trial the proceedings here will be abortive. I submit the Court can give judgment on the verdict for the plaintiff: see *Sewell* v. *British Columbia Towing and Transportation Co.* (1884), 9 S.C.R. 527; *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43; *Paquin, Limited* v. *Beauclerk* (1906), A.C. 148 at p. 161. The Court can enter judgment even although the verdict is inconsistent with the findings. The jury have found negligence, but not contributory negligence. They may believe part of a witness's evidence and reject the balance: see *Steves* v. *South Vancouver* (1897), 6 B.C. 17. The answers given amount to a general verdict: see *McArthur* v. *Dominion Cartridge Company* (1905), A.C. 72 at p. 75; *Vandry et al.* v. *Quebec Ry., Light, Heat and Power Co.* (1915), 53 S.C.R. 72; *Toronto Power Co.* v. *Raynor* (1915), 51 S.C.R. 490; *Tecla et al.* v. *Burns et al.* (1917), 1 W.W.R. 639; *St. Denis* v. *Eastern Ontario Live Stock and Poultry Assn.* (1916), 36 O.L.R. 640. The verdict should be construed reasonably, having regard to the course of the trial: see *Scott* v. *B.C. Milling Co.* (1894), 3 B.C. 221; *Marshall* v. *Cates* (1903), 10 B.C.

Argument

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153; *Waterland* v. *Greenwood* (1901), 8 B.C. 396. On the question of contributory negligence see *Scott* v. *Fernie* (1904), 11 B.C. 91; *Jaroshinsky* v. *Grand Trunk R.W. Co.* (1916), 37 O.L.R. 111; *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838 at p. 845.

Robertson, in reply.

Cur. adv. vult.

2nd April, 1918.

MACDONALD, C.J.A.: The action was tried before LAMPMAN, Co. J. with a jury. Questions were submitted and answered, and the Court was moved by both parties for judgment. After reserving the matter for further consideration, the learned judge ordered a new trial on the ground that the answers were to his mind unsatisfactory. No application for a new trial had been made by either party and no opportunity had been given counsel to be heard on the question. The defendant appeals not against the judgment ordering the new trial, but against the refusal or failure of the judge to pronounce judgment for the defendant.

There were other grounds of appeal, such as that the findings of negligence and of the absence of contributory negligence were not supported by the evidence; that the judge had erred in his charge, and that the judgment was wrong in law; but the defendant's substantial complaint was that whereas they were entitled, as they contended, to judgment on the answers of the jury, they had not got it.

MACDONALD, C.J.A.

At the hearing of the appeal the majority of the Court came to the conclusion that the learned County Court judge had no power, in the circumstances above outlined, to order a new trial, but that as this Court had the power to make the order, we should do so, and a new trial was accordingly directed, but we reserved the question of costs for further consideration.

Before taking up the question of costs, I desire to give my reasons for thinking that the learned County Court judge erred in making the order, and this brings me to a consideration of section 110 of the County Courts Act as consolidated in the Acts of 1905. This section reads as follows:

"Every order and judgment of any Court, except as herein provided,

shall be final and conclusive between the parties, but the judge shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or defendant to the judgment of the Court, and shall also in every case whatever have the power, if he shall think fit, to set aside the judgment and to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings."

Prior to that time the section was substantially the same as section 93 of the English County Courts Act, 1888, and did not contain the words "to set aside the judgment and" not found in it. These words were put there by way of amendment, indicating, to my mind, that the County Court judge must first come to a decision and then, if either party, on an application to him, should convince him that a new trial ought to be granted, set aside the judgment and order a new trial. In *Cole* v. *De Trafford* (1917), 1 K.B. 911, the County Court judge did what His Honour did in this case, except that the parties were present, that is to say, the County Court judge ordered a new trial apparently without pronouncing any other judgment. That would indicate that under the section as it is in England and without the words above quoted, a new trial could be ordered even where no judgment in the action had been recorded. No power is given, as is the case in the Ontario statute, to set aside the verdict *simpliciter* and order a new trial. That result, it seems to me, can only be attained here by setting aside the judgment entered on the verdict. That the section applies to trials with a jury as well as to those by the judge alone is, I think, apparent from its wide language. This view of it is supported by *Clarke* v. *West Ham Corporation* (1914), 2 K.B. 448; that was a jury case and a new trial was refused, but not on that ground. There was no suggestion there that the section does not enable new trials to be ordered in jury cases. The principles which ought to guide in the granting or refusal of new trials under this section as it is in England are summarized by Sankey, J. in *Sanatorium, Limited* v. *Marshall* (1916), 2 K.B. 57 at p. 60.

MACDONALD, C.J.A.

It may seem anomalous that in a case of this sort where the judge finds a verdict unsatisfactory and difficult on which to found his judgment, he should instead of ordering a new trial *simpliciter* be obliged to make up his mind in favour of one

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party or the other, and having given judgment, then set it aside in order to grant a new trial. But a reason may be assigned for requiring this course to be pursued. The judge must complete the trial, leaving it to the parties either to acquiesce in the decision or to appeal to this Court, or to apply to himself under said section.

The learned County Court judge took the short cut, which, in my opinion, was not authorized, and moreover he made the order though no application therefor was before him, and without the consent of parties. But could what took place below furnish ground for making an order affecting the costs which, by statute, are to follow the event unless the Court for good cause shall otherwise order? I have difficulty in identifying the event. The appellant has failed on every one of its grounds of appeal. They have, incidentally, however, got a valid order for a new trial, which they do not want. The respondent has a valid order which he did not ask for. The mistake was that of the Court appealed from, and I think there is good cause for disposing of the costs otherwise than as following the event. I would make them costs in the cause.

MACDONALD, C.J.A.

MARTIN, J.A. (oral): Without in the least intending to do so, no doubt, but, if I may say so with great respect, misapprehending the extent of his jurisdiction, and thereby usurping ours, the learned County judge purported under Order XVII., of the County Court Rules, to grant a new trial, under circumstances which did not allow him to do so. While it is true that the judges of the County Court have powers in regard to rehearing and new trial, which are not possessed by the judges of the Supreme Court, yet it is conceded that the circumstances before him were not such as vested him with jurisdiction. Therefore it is clear that, as I say, without the least intention to do so, he has usurped the functions of this Court.

MARTIN, J.A.

But we are at liberty, I have no doubt, to make the order now which he should have made then. But the only question is, what is the proper order to make? I feel, after careful consideration of the questions answered by the jury, and with every disposition to give to those answers the construction set

out in the case of *Marshall* v. *Cates* (1903), 10 B.C. 153 before the Full Court, that I am unable to say that either party on them is entitled to judgment. The difficulty I experience about the matter is this, that it is almost impossible, in fact I find it quite impossible, to find out just precisely what the jury meant when, in answering the question in regard to the plaintiff's negligence, they added the words, "as claimed to be by conductor." I have found it impossible to know, to state to my satisfaction, what part of the conductor's evidence they wish those remarks to be allocated.

Starting then, with that unfortunate uncertainty, one has to consider the effect of the finding of contributory negligence. That was put before them by the learned judge very succinctly and very plainly, in a way in which it is impossible for them to misunderstand it; and this is what he says, speaking of the circumstances before him:

MARTIN, J.A.

"The contributory negligence means, did she contribute herself to the accident in any way at all by her carelessness? If so, what was it? They say that she jumped off the car while it was in motion."

Now, in answer to that question, the jury say that she was not guilty of contributory negligence; therefore she is exculpated from the only ground at all upon which that charge could be brought against her; and yet that is the very and only charge that the conductor brings against her, which is involved in question two. The result of all that is that there is absolutely a self-contradictory verdict, and therefore it cannot stand. It is quite clear that it must be the case that either the jury did not intend the full story of the conductor to be accepted, when they added those words in question two, or else they intended to give wholly a verdict for the plaintiff. I find it impossible myself, to say what they did intend. And therefore I find that the answers constituting the verdict being self-contradictory, it is impossible to found a judgment upon it. And proceeding then to give the judgment which the learned judge could not have given below, in my opinion, it must be that there should be a new trial.

GALLIHER, J.A.

GALLIHER, J.A. (oral): I agree with what has been said by my learned brothers in regard to the action of the learned trial

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GALLIHER, J.A.

judge below in directing a new trial; and I need not enlarge upon what has been said with respect to that. I differ, however, in the conclusions on the verdict. In my opinion the appeal should succeed and judgment should be entered for the defendant. I can understand why there may be some difficulty in coming to a conclusion as to what the jury really meant in answer to question No. 2; but in my own mind, and of course one must give their judgment in accordance with their own views, I experience no difficulty. It is quite clear, as I view it, and viewed in the light of all the evidence, and of the judge's charge, that the jury had for some reason or other come to the conclusion that because the conductor was not there to detain this woman from stepping off when the car was in motion, that therefore the Company is guilty of negligence. In reality their verdict imports contributory negligence rather than negligence, and to my mind, it is not a finding of negligence against the Company at all. And without negligence against the Company, the plaintiff cannot succeed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): In my opinion the appeal should succeed. I am in agreement with what has been said by the Chief Justice and my brother MARTIN in their judgments just pronounced. But I would like to further add that, I think the case of *Bank of Toronto* v. *Harrell* is helpful in arriving at this decision. That was a case which came before this Court of Appeal, and the report may be found in (1916), 23 B.C. 202; (1917), 1 W.W.R. 213, that is, the report of the judgments in the Court of Appeal. I was in the minority, dissenting; but the majority opinion of this Court was that the jury's general verdict could be approved; and judgment was entered for the defendant. The case was one tried before Mr. Justice MURPHY, with a jury, and judgment was given for the plaintiff, and it had these peculiar features; the jury found a general verdict for the defendant, and then they went on and answered certain questions. The view that I took was (page 224), "there is variance between the general verdict and the answers of the jury to the questions submitted." And the majority of this Court did not think there was variance. There

was an appeal to the Supreme Court of Canada: see (1917), 55 S.C.R. 512; (1917), 2 W.W.R. 1149. There the majority of the Supreme Court of Canada determined that this Court of Appeal was in error, and that the judgment of Mr. Justice MURPHY should be restored. Mr. Justice Davies, at page 517, said:

"I am not able to agree with the learned judges who held that the specific answers of the jury to questions put to them by the trial judge are consistent or reconcilable with their general verdict or that the specific answers should be disregarded and the general verdict alone accepted."

Now the submission, of course, in the present case is that in effect the verdict of the jury amounts to a general verdict. But the difficulty is, as indicated by Davies, J., that the answers that they have given are inconsistent and irreconcilable with that contention—in accepting the conductor's testimony and then saying that there was no contributory negligence.

Mr. Justice Davies in *Bank of Toronto* v. *Harrell, supra,* further says, at pages 517-8:

"The law of British Columbia on this question is the same as that of England. The jury have the right to find a general verdict and ignore specific questions put to them. If they do so and render a general verdict only or if no questions are asked them, then any reasons which of their own motion they may give for their general verdict may be treated as surplusage and the general verdict alone considered. There seems to be some conflict between the authorities as to whether the same result would follow answers given to questions of the trial judge as to their reasons for their general verdict, after it has been rendered in cases where they had not been asked previously to giving their verdict to give their reasons. 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."

MCPHILLIPS, J.A.

Following this decision of the Supreme Court of Canada, this Court would be required, in fact constrained, to enter judgment for whichever party the specific questions and answers entitled judgment to be entered for; but the difficulty here is that these questions and answers do not admit, in my opinion, of judgment being entered either for the plaintiff or for the defendant. Consequently, it must result in this, that judgment cannot

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be entered for either party, and there must be a new trial. The learned trial judge ordered a new trial, the same conclusion as that arrived at by this Court, but it was without jurisdiction.

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

New trial ordered, Galliher, J.A. dissenting.

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

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

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May 7.

GRANGER v. BRYDON-JACK

GRANGER v. BRYDON-JACK.

Contempt of Court—Publication—Influencing litigation—Person charged must be named—Criminal Code, Sec. 322.

Contempt of Court being a criminal offence, the person charged must be specifically named in the application to commit, and an application to amend by adding the name of such person will be refused.

Statement

MOTION to the Court of Appeal to commit the printers, publishers and proprietors of The Vancouver Daily Province for contempt of Court in writing, printing and publishing in the issue of said newspaper on the 6th of May, 1918, certain comments and statements alleged to be calculated to prejudice or interfere with the fair trial of the appeal from the judgment delivered in this case. The affidavit in support of the motion referred to the printers, publishers and proprietors of The Vancouver Daily Province, but did not name any individuals. Heard by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A. at Vancouver on the 7th of May, 1918.

Argument

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

Armour, contra, raised the preliminary objection that the motion should be dismissed as there was nothing in the material

shewing who the individuals were against whom the proceedings were taken.

Woods, produced an affidavit made by R. W. Brown, managing director of the "Province," which was in substance an apology for the publication complained of. I should be allowed to amend by adding Mr. Brown's name as the person against whom proceedings were to be taken.

Armour, in reply: He is not entitled to amend. He can commence *de novo.*

MACDONALD, C.J.A.: I think we must dismiss the application. This is not a case for amendment. It is not a civil proceeding. There is no provision in the criminal law for substituting a party not charged for a party who is charged, or some entity that is charged. So far as the application to amend is concerned, it is an application to substitute some one not before the Court, some one who is not a party to the proceedings, for those who are described here as the "printers, publishers and proprietors" of the newspaper. I do not think that can be done. It is clear the only thing we can do is to dismiss the motion.

MACDONALD, C.J.A.

MARTIN, J.A.: This case, in principle, is exactly covered by the proceedings in *In re Scaife* (1896), 5 B.C. 153, where an application was made to commit an individual named specifically, which was also in connection with the paper about which we are now asked to entertain this motion. It was there decided, on objection taken by myself, that "contempt of Court is a criminal offence, *In re Pollard* [(1868)], L.R. 2 P.C. 106; therefore the same particularity in the proof of the offence is necessary as in any other criminal trial" (and this was a criminal proceeding entirely distinct from the civil proceedings out of which it arose). The learned judge there sustained that objection, and the gist of the judgment is this: "I cannot commit a man unless he is charged with something. It is a delicate matter and involves the liberty of the subject. You must prove step by step that the party charged is guilty, and then the responsibility is cast on me to determine the punishment to be imposed. There is not the slightest thing to be shewn that Mr. Scaife is responsible for this."

MARTIN, J.A.

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This case is still more defective than that case, because here the foundations are not properly constituted. This is the first time I have ever heard a criminal charge being made in which no person at all is named. Only one course can follow. It is impossible to amend, to substitute a person charged for somebody who does not exist. It sounds almost a legal bull to put it that way, but that is the only way to put it. As I have already stated, you cannot substitute something for nothing. The motion should be dismissed.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with my learned brothers who have preceded me in giving their reasons for denying the motion, but whilst I do so, I think I am entitled, by reason of this affidavit having been filed by Mr. Brown, to observe upon the facts to some very limited extent. I consider that this affidavit of Mr. Brown's is in the nature of an apology. In this affidavit he says that he accepts the general responsibility for the matter. I wish to say that the publishers of newspapers ought to understand the law generally, if not specifically. It would be well for them, I think, that they should have legal advisers. Newspapers have a powerful influence in a community. They discuss public questions as well as private matters, arising out of proceedings in the Courts.

A frequent breach of the law exists here from time to time, as I observe on picking up the newspapers of the city, by the publication of a statement of claim or a statement of defence in an action pending, and that under the law is not permissible. Anyone may be the subject of a vexatious action in which some really scandalous statements may be made, and before the Court can strike them off the file, or before the action can come to trial, these statements may be published and great damage may be done. It should be well understood that newspapers are not above the law.

EBERTS, J.A.

EBERTS, J.A.: In my opinion the motion should be dismissed.

Motion dismissed.

SOLTON v. NORTHERN LOAN AND MORTGAGE GUARANTEE CORPORATION, LIMITED.

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May 7.

SOLTON v. NORTHERN LOAN AND MORTGAGE GUARANTEE CORPORATION

Vendor and purchaser—Agreement for sale—Subsequent sale subject to agreement—Defect in title—Admissions—Application for judgment.

The fact that a vendor, after having sold land to S. under an agreement for sale, subsequently, and before final payment was due, sold the land to H., subject to the agreement with S., is not a sufficient ground to support an application by S. for judgment on admissions in an action for rescission.

APPEAL from the order of GRANT, Co. J., of the 20th of December, 1917. The action was for rescission of an agreement for sale of land and a refund of money paid on the ground that the defendant could not give title to the lands sold. It appeared that after three of the four payments were made on the agreement for sale and before the final payment became due, defendant Company gave a deed of the property in question to one Mrs. Haring, subject to the agreement to sell to the plaintiff. The sale to Mrs. Haring was for a large amount of property, of which that sold to the plaintiff was a small part. The secretary of the defendant Company, one Hancock, was examined for discovery and stated that the arrangement was made with Mrs. Haring that she would give back a deed for any portion of the property upon which payments in full were made, and she was to give a deed to the plaintiff when he made his final payment. The plaintiff moved for judgment on admissions made by Hancock on said examination, and an order was made that if within a certain period a valid title be not produced, that the agreement for sale be rescinded and the payments made refunded. The defendant appealed.

Statement

The appeal was argued at Vancouver on the 6th and 7th of May, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Warner, for appellant: Judgment should not be given on admissions unless a clear case is made out: see *Landergan* v.

Argument

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SOLTON v. NORTHERN LOAN AND MORTGAGE GUARANTEE CORPORATION

Feast (1886), 34 W.R. 691. Where a serious question of law arises no such judgment should be given: see *Gilbert* v. *Smith* (1876), 2 Ch. D. 686 at p. 689. On the question of tender see *Thomas* v. *Evans* (1808), 10 East 101; *Dunlop* v. *Haney* (1898), 6 B.C. 185; Harris on Tender, p. 72. It is sufficient if the vendor can get the title: see *Goodchild* v. *Bethel et al.* (1914), 30 W.L.R. 280; *Re Hucklesby and Atkinson's Contract* (1910), 102 L.T. 214; *Rogerson & Moss* v. *Cosh* (1917), 24 B.C. 367; 37 D.L.R. 694. As to cases where the purchaser is not entitled to rescission on the ground of want of title see *Beech* v. *Mullins* (1916), 9 W.W.R. 1168; *Foot et al.* v. *Mason et al.* (1894), 3 B.C. 377; *Guthrie* v. *Clark* (1886), 3 Man. L.R. 318; *Newberry* v. *Langan* (1912), 47 S.C.R. 114.

Argument

J. A. Campbell, for respondent: The judgment was given in the exercise of the learned judge's discretion: see County Court Rules, Order VIII., r. 12, and *In re Wright. Kirke* v. *North* (1895), 2 Ch. 747 at p. 750. We did not need to tender until they shewed title: see *Newberry* v. *Langan* (1912), 47 S.C.R. 114. By their admissions they have waived the right to tender: see Wigmore on Evidence, p. 384, par. 292.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think this is a case in which the parties, and perhaps the learned judge below, were under a misapprehension as to the law. The only admission is that the property was conveyed to Mrs. Haring, but the deed contains a declaration that it is subject to the agreement upon which the plaintiff bases this action. The secretary of the Company has sworn that they could make title. No doubt there has been delay. If the action had been framed for that, and had gone to trial, and the learned judge had found there was a breach in carrying it out at an earlier period, it might be very difficult to interfere, but the learned judge has not tried the case, he has simply given judgment on what are said to be admissions by the defendant, but there are no admissions by the defendant which will support the judgment.

The appeal should be allowed. The final judgment will fall with this interlocutory one. The action will go to trial in the usual way, and costs of the trial will follow the event.

MARTIN, J.A.: I agree.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.: I think that the admissions were not such as to entitle judgment being given. Judgment on admissions should only be given in a clear case, and I might say, in the event of this case going to trial, it will be useful for counsel to refer to the case of *Rogerson & Moss* v. *Cosh* (1917), 24 B.C. 367, a judgment of this Court.

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

EBERTS, J.A.

Appeal allowed.

Solicitor for appellant: *William Warner.*
Solicitors for respondent: *J. A. Campbell & Co.*

GRANGER v. BRYDON-JACK. (No. 2).

County Court—Equitable jurisdiction—Partition—Injunction—Receiver—Yacht—Costs.

The County Court has no equitable jurisdiction except what is given by statute.

In an action in the County Court to recover the purchase price of an undivided four-fifths' interest in a yacht in which the plaintiff already held a one-fifth interest, the plaint included an application for a receiver, for the granting of an injunction, that there be a partition of the yacht, and that it be sold and the proceeds divided according to the interest of the parties. An order was made appointing a receiver and granting an injunction.

Held, on appeal, reversing the decision of GRANT, Co. J., that as the Court below had no jurisdiction to make the order, it should be set aside.

APPEAL from an order of GRANT, Co. J. of the 22nd of March, 1918, granting an injunction and appointing a receiver in an action for the recovery of $1,000 purchase price for a four-fifths' interest in a yacht known as "Ailsa No. 2." The

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facts are that originally the yacht in question was owned by the plaintiff. In June, 1913, under an agreement for sale the plaintiff sold the defendant an undivided four-fifths' interest in the yacht for $2,000, and on the 19th of January, 1914, the plaintiff by bill of sale transferred the four-fifths' interest to the defendant, who did not pay the $2,000 but agreed to pay 7 per cent. interest on the amount until paid, and gave the plaintiff a mortgage, subject to two previous mortgages, on certain property in Vancouver owned by him to secure the payment of the purchase price. In January, 1916, the defendant was in default in interest on the mortgage, and the plaintiff sued and obtained judgment. The parties who used the yacht together at first, later became estranged over the question of expenses in connection with the yacht. In 1917, the defendant used the yacht as a place of abode for himself, his wife and child, and the plaintiff was deprived of its use. On the 1st of October, 1917, plaintiff wrote defendant demanding payment of the $2,000, and on the 21st of January, 1918, defendant paid $137.47 on account of interest, but refused to pay the principal. On motion, an order granting an injunction was made by GRANT, Co. J., and the plaintiff was appointed receiver of the yacht. Defendant appealed from the order.

The appeal was argued at Vancouver on the 10th of May, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

E. M. N. Woods, for appellant: An order was made appointing Granger receiver until the trial and granting an injunction. There is no ground for making such an order. On the question of the right to deal with property when there is co-ownership see Abbott on Shipping, 14th Ed., p. 117; *Mayhew* v. *Herrick* (1849), 18 L.J., C.P. 179; Clerk & Lindsell on Torts, Can. Ed., 247; *Job* v. *Potton* (1875), L.R. 20 Eq. 84; *Jacobs* v. *Seward* (1872), L.R. 5 H.L. 464. A serious case of misconduct must arise before injunction will be granted: Halsbury's Laws of England, Vol. 17, p. 250, par. 533; *McIntosh* v. *Port Huron Petrified Brick Co.* (1900), 27 A.R. 262; *Scott* v. *Mercantile Accident Insurance Company* (1892), 8 T.L.R. 320.

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Reid, K.C., for respondent: We are in the position of partners after the partnership is dissolved: see Lindley on Partnership, 8th Ed., pp. 38-40. You can have partition of personal property: see *Morris* v. *Morris* (1917), 12 O.W.N. 80; *McEachern* v. *Cox* (1910), 8 E.L.R. 590; Cyc., Vol. 30, p. 170; *Pasley* v. *Freeman* (1789), 3 Term Rep. 51. As to the County Court having equitable jurisdiction see *Aldous* v. *Hall Mines* (1897), 6 B.C. 394; *White* v. *Sandon* (1904), 10 B.C. 361. In modern practice it is necessary to plead ouster of jurisdiction: see *Fitzgerald* v. *Williamson* (1913), 18 B.C. 322; *Joseph Crosfield & Sons, Limited* v. *Manchester Ship Canal Company* (1904), 2 Ch. 123 at p. 142; *Norwich Corporation* v. *Norwich Electric Tramways Co.* (1906), 75 L.J., K.B. 636.

Argument

Woods, in reply: As to partition see *Wethered* v. *Calcutt* (1842), 4 Man. & G. 566 at p. 573(*n*).

MACDONALD, C.J.A.: In my opinion this appeal must be allowed. It is sufficient to dispose of it, to decide the question of jurisdiction of the County Court to make the order appealed from. It is well settled that the County Court has no equitable jurisdiction, except what is given to it by statute. Now, in this case, while the action is well founded, so far as it is an action for debt, and that is a matter to be tried by the Court, the trial not having yet taken place, the learned judge was applied to and made an order which cannot be sustained unless the County Court had equitable jurisdiction to order partition of personalty owned jointly by two persons, or to do what was equivalent, order a sale of the chattel and a division of the money. By the plaint the plaintiff claimed a partition of a yacht between the plaintiff and the defendant, though the subject-matter is not capable of partition in the ordinary sense. Then there is a claim that the said yacht be sold and the proceeds thereof divided. That, Mr. *Reid* contends is equivalent to a claim for equitable partition, and unless the County Court had equitable jurisdiction, such as was inherent in the Court of Chancery, to do justice between the parties and order the yacht to be sold and the proceeds divided, this order cannot stand.

MACDONALD, C.J.A.

It is almost conceded by Mr. *Reid* that he is not able to sustain the jurisdiction of the County Court in that behalf.

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In this view of the case it is unnecessary to consider the other questions involved. Therefore the appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: It was decided in *Parsons Produce Co.* v. *Given* (1896), 5 B.C. 58 that the County Court had no equitable jurisdiction, except such as it acquired by statute. It was submitted by appellant's counsel and conceded by respondent's counsel that this jurisdiction was necessary in order to sustain the order appealed from. Counsel for the respondent was unable to shew us any section of the County Courts Act which would ground the making of the order, on the equitable side of the Court. It inevitably follows from that, that the Court below had not jurisdiction, and therefore the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I also am of the view that the appeal should be allowed, but I do not wish to be thought to be assenting in any way to the proposition of law as advanced, and ably presented by Mr. *Reid,* that in the case of a chattel, there is the right of partition or sale. The question of jurisdiction is one that, in my opinion, may be taken at any time: *Norwich Corporation* v. *Norwich Electrical Tramways Co.* (1906), 75 L.J., K.B. 636. In the judgment of the Court of Appeal in England, Vaughan Williams, L.J., at p. 639, said:

> "It has always been my view that an objection to the jurisdiction of the High Court to entertain a case is one which (in the High Court) may be taken at any time. In my judgment it is well established law that the Court may itself take the initiative if it is satisfied that it has no jurisdiction to try the case,"

and Stirling, L.J. and Fletcher Moulton, L.J. (now Lord Moulton) agree.

In this case there was no special term introduced into the judgment on the question of costs. On the question of costs, I think that costs should follow the event. I think that this case is one in which certainly the Court should not exercise any indulgence.

EBERTS, J.A.

EBERTS, J.A.: I am of opinion that the County Court had

not jurisdiction and the appeal should be allowed. As to costs, my view is that there should be no costs of the appeal.

MACDONALD, C.J.A.: I am of opinion (dealing with the question of costs, which I did not deal with, in disposing of the appeal, on the merits) that if this point had been raised before the learned County Court judge, he would have decided that there was no jurisdiction to make the order appealed from, and therefore there would be no order made, from which to appeal, and the expense of this appeal would not have been incurred. I think that failure to take the point below is good cause for depriving the successful appellant of costs, and therefore there should be no costs of the appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: I am of the same opinion. We have frequently held in this Court (and in the old Full Court) that an objection to jurisdiction should be taken promptly, that when a case is in process of being argued at length, an objection to the jurisdiction must be taken promptly, so that the time of the Court may not be wasted, and if that is not done, then the question of costs will have to be considered. It is true here that counsel did not raise the objection promptly, as in the *Parsons* case, *supra,* and for that reason I think the order should be made as mentioned by the Chief Justice.

MARTIN, J.A.

GALLIHER, J.A.: That is my view.

GALLIHER, J.A.

Appeal allowed.

Solicitor for appellant: *E. M. N. Woods.*
Solicitor for respondent: *D. S. Wallbridge.*

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May 19.

TERAINSHI v. CANADIAN PACIFIC RAILWAY CO.

TERAINSHI v. CANADIAN PACIFIC RAILWAY COMPANY. (No. 2).

Practice—Court of Appeal—Leave to appeal to Privy Council—Application for—Action for damages—Personal injuries—Privy Council Rules, 1911, r. 2(b).

An application for leave to appeal to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal dismissing an appeal from the dismissal of an action for $1,700 damages for personal injuries will be refused.

APPLICATION to the Court of Appeal for leave to appeal to the Judicial Committee of the Privy Council from the decision of the Court of Appeal reported *ante* p. 497 dismissing an appeal by the plaintiff from the decision of MURPHY, J. dismissing an action for $1,700 damages for injuries sustained through an accident occurring through the defective condition of an elevator on a premises of which the defendant Company was landlord and used by a lessee as a rooming-house. The plaintiff submitted that the case came within rule 2(*b*) of the Privy Council Rules which provides that an appeal shall lie "at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision." Heard by MACDONALD, C.J.A., MCPHILLIPS and EBERTS, JJ.A. at Vancouver on the 19th of May, 1918.

Statement

Cassidy, K.C., for the application.
McMullen, contra.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I do not think this is a case in which we ought to give leave, exercising the discretion which we are bound to exercise in the interest of justice. In a case of damages for personal injuries of this sort, the amount involved being only $1,700, there is no question of public importance

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and no constitutional question at stake. The questions involved are negligence and contributory negligence, and this further question that the majority of this Court thought that the wrong party had been sued, if there was a cause of action at all.

MCPHILLIPS, J.A.: I am of like opinion. If an appeal is desirable in this case, the ultimate Court of Appeal for Canada, the Supreme Court of Canada, is open to the parties. The important point is, does this case come within rule 2(*b*) of the Privy Council Rules? This is a matter we no doubt will have to consider from time to time upon the special facts of each case, and I cannot see by any stretch of imagination how this case can be said to come within it.

MCPHILLIPS, J.A.

EBERTS, J.A.: I would refuse the application.

Application refused.

MURPHY, J.

1918

May 23.

IN RE DOMINION TRUST CO.

IN RE DOMINION TRUST COMPANY.

Liquidation—Proceedings in—Liquidator's remuneration—Settling.

An application to reduce the monthly remuneration of a liquidator, on the ground that the liquidation is at a stage where his entire services are no longer required, will be refused upon opposition by creditors whose claims form a substantial portion of the aggregate.

On an application without notice or filing of material, the following resolution, passed at a meeting of the creditors, was submitted to the Court: "That in the opinion of this meeting the expenses for legal and accountancy work of this liquidation are excessive and this meeting asks Mr. Justice MURPHY to appoint a solicitor for the liquidation on a monthly salary basis and to bring all possible pressure to bear to secure an early termination of the liquidation and to this end the creditors ask that the liquidator continue to give his whole time to the work of the liquidation."

Held, that the resolution as submitted cannot be dealt with by the Court, but that if any party interested desires to bring any of the matters therein referred to before the Court, he may do so by application in

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IN RE DOMINION TRUST CO.

proper form, accompanied by proper evidence, in accordance with the established practice of the Court.

APPLICATION to settle the remuneration of the liquidator of the Dominion Trust Company, in liquidation, for services rendered and to settle the manner and amount of his remuneration for future services until further order. Heard by MURPHY, J. at Chambers in Vancouver on the 21st of May, 1918.

Wilson, K.C., and *Cowan, K.C.,* for the liquidator.
Sir C. H. Tupper, K.C., for the Prudential Trust.
Walkem, for the creditors.
Armour, for G. Miller, a creditor.

23rd May, 1918.

MURPHY, J.: I have already decided the first branch of this application. The second is a request that the present basis of remuneration be altered on the ground that hitherto the liquidator has been devoting his whole time to the work but that it is now no longer necessary for him to do so and that, therefore, a change as to remuneration should be made, the monthly allowance to be reduced and the liquidator to be left at liberty to devote such part of his time not required by the liquidation to other employment. The ground, therefore, is the reducing of the expense of the liquidation. The proposal is strenuously opposed by creditors whose claims in the aggregate amount to a very large sum. With a view to obtaining an expression of opinion from the creditors as a body, I directed a meeting to be called. This was done and a resolution was passed opposing any alteration in the present arrangements. In reply to this counsel for the liquidator contends that the proceedings at this meeting were of such a character as to deprive the resolution of any weight. I have read the transcript of what occurred, and agree that this resolution ought not to be considered a factor in determining the question, and I, therefore, exclude it.

Judgment

I am, however, of opinion that I am bound to take cognizance of the opposition put forward formally on the hearing by counsel representing, as stated, creditors whose claims in the aggregate amount to a very large sum. These creditors contend that there is no precedent for fixing beforehand the total remuneration to

be received by the liquidator, as is now proposed for the future, and further contend that the liquidation has not reached a stage where any change in present arrangements should be made. I have already held, in disposing of the first branch of the application, that in the absence of precedent I would not deal with the matter of total remuneration at this time. While this absence of precedent is not a conclusive reason for refusing to make a change, it is, I think, one that is of weight in considering whether I should do for the future what I have declined to do for the past.

On the question of the present state of the liquidation, I made enquiry of Mr. Smellie, one of the inspectors, as to the possibility of obtaining a report. His reply was that to do so would take a good deal of time and entail considerable expense. In view of this, I did not feel justified in requesting such a report.

The only ground put forward is a saving of expense. On behalf of the opposing creditors it is pointed out that the liquidator has in his employ accountants, one of whom, at any rate, is an expert, and as the liquidator is himself an expert accountant a saving approximating the proposed saving, if the change asked for is made, might be effected by a re-organization of the staff by securing less highly skilled assistance at a lower rate of pay without detriment to the liquidation as the liquidator is himself competent to properly supervise such a staff.

On the whole, I have come to the conclusion that in view of the absence of precedent and of the strong opposition of a body of creditors representing such large claims, I would not be justified, on the material before me, in making any change for the present at any rate. As to costs, I think I must allow same to such parties as were notified, at my request, to attend the hearings. Judgment

At one of the hearings, Mr. *Lawson* presented a resolution passed at the meeting of creditors above mentioned. This resolution is as follows:

"That in the opinion of this meeting the expenses for legal and accountancy work of this liquidation are excessive and this meeting asks Mr. Justice Murphy to appoint a solicitor for the liquidation on a monthly salary basis and to bring all possible pressure to bear to secure an early termination of the liquidation and to this end the creditors ask that the liquidator continue to give his whole time to the work of the liquidation."

MURPHY, J.

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IN RE DOMINION TRUST CO.

I stated that I would write a considered judgment in relation to this resolution. On further consideration, however, I am of opinion that to do so is impossible on the material before me, and even if possible is uncalled for and would be unfair. Such a judgment cannot be written as there is not a tittle of evidence before the Court on which to found it. It is uncalled for, since all the accountancy bills, as all others, have to be passed upon by the Court. These that have so far been presented have been carefully examined and have been approved for payment only after what was considered the best expert advice obtainable had advised the Court that the charges were reasonable. Likewise as to the legal costs. These have all been taxed, the Court taking the precaution to have all taxations attended upon by a solicitor representing *ad hoc* the general body of creditors. The law provides for appeals if the rulings of the registrar are thought to be open to attack. In one instance this right was exercised and I carefully reviewed the taxation. As no other appeals were taken, the Court must take it that the solicitor whom it had appointed for the express purpose of seeing that all bills were properly taxed, saw nothing in the rulings of the registrar that could be successfully attacked. Finally, a decision would be unfair, as it would be merely *obiter* and so not open to review by a higher Court.

Judgment

If any party interested desires to bring either of the matters referred to in the resolution before the Court, he will be granted every facility to have same expeditiously heard, but the application must be made in proper form, accompanied by proper evidence and according to the established practice of the Court, so that its determination may be subject to review if desired by higher tribunals.

Application refused.

IN RE HARRISON. (No. 2).

MACDONALD, J. (At Chambers)

1918

May 28.

IN RE HARRISON

Criminal law—Fugitive Offender—Essentials of offence of obtaining by false pretence—Parting with property in consequence of false pretence—Full offence charged—Attempt proved.

It is an essential ingredient of the crime of obtaining by false pretence that not only should the representation be false, but that it should be shewn to have operated on the mind of the party who paid over the money on the strength of such representation.

A person charged, under a warrant issued under the provisions of the Fugitive Offenders Act, with the offence of obtaining by false pretences, cannot be committed for the offence of attempting to obtain by false pretences when the evidence does not justify a committal for the full offence.

APPLICATION for a writ of *habeas corpus,* heard by MACDONALD, J. at Chambers in Victoria on the 28th of May, 1918, following the refusal of HUNTER, C.J.B.C. in *In re Harrison, ante,* p. 433, to grant the prisoner's application for discharge. The prisoner was committed by the stipendiary magistrate at Victoria to await his return to New Zealand. The grounds upon which the application was made were: (1) There is no evidence to support the charge of false pretence, inasmuch as one of the essentials to support that offence is lacking, namely, that there has not been shewn to be a false statement which represented as existing something which did not exist. (2) There is no evidence produced before the magistrate to shew that the money referred to had been parted with by Smith and Woodman in consequence of or through a false representation.

Aikman (*Moresby,* with him), for the application.

Bullock-Webster, for the Government of New Zealand, *contra.*

MACDONALD, J.: This is an application for a writ of *habeas corpus* on the part of John C. Harrison. He seeks to invoke the provisions of section 17 of the Fugitive Offenders Act, Judgment

MACDONALD, J. (At Chambers)

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IN RE HARRISON

R.S.C. 1906, Cap. 154. He has been committed to gaol by the magistrate, under section 12 of that Act, for that he "on the 30th of January, 1918, with intent to defraud, obtained from Messrs. Smith and Woodman, the sum of £43:4:0, by a certain false pretence, to wit: by representing that a certain preparation sold by him the said John C. Harrison to the said Smith and Woodman for the sum of £43:4:0, called Anconia Sheep and Cattle Dip was an effectual sheep and cattle dip, whereas in fact such preparation was useless for such purpose."

On the matter being investigated by the police magistrate of this city, he apparently came to the conclusion that the evidence produced raised "a strong or probable presumption" that Harrison committed the offence mentioned in the warrant, which had been duly indorsed pursuant to the Act. There are a number of grounds taken in support of the application for the release of Harrison. I think it only necessary to deal with two of these, which are as follows: First, the ground is taken that there is no evidence to support the charge of false pretence, inasmuch as one of the essentials to support that offence is lacking, namely, that there has not been shewn to be a false statement, which represented as existing, something which did not exist.

A consideration of this ground involves the question as to whether I have the right to determine, as to the magistrate, having correctly decided that the evidence raised a strong or probable presumption, as to the commission of the crime. In this connection I am not assisted by any authority, except that the matter was reviewed in the case of *Rex* v. *Vyner* (1903), 68 J.P. 142. There, Lord Alverstone, L.C.J. says, that for the purpose of considering that case, he was going to assume that the Court can consider whether there was in the evidence before the magistrate such a strong or probable presumption. He added, "the question may arise on some future occasion as to whether the Court has such a power to review the exercise of this magistrate's discretion." He then concludes as follows:

Judgment

"Speaking for myself, I think the Court has such a power, though it is not now necessary to decide the point, as assuming that the Court has such a power, after the most careful consideration of all the facts in this case, I am of opinion that there is a grave case to be answered by Lieutenant Vyner."

Then Kennedy, J., in the same case, says as follows:

"I also agree that no sufficient ground has been shewn for interfering

with the order. I also think the question as to the power of the Court to try whether there was or was not a strong or probable presumption of the prisoner having committed the offence, should be left open, as speaking for myself, I should be very slow to interfere with the discretion of a magistrate who has come to a decision with the facts before him."

Having in view this decision, and bearing in mind the conclusion that I have arrived at, with respect to the second and important point raised on behalf of the applicant, I do not deem it advisable to come to a determination, on the first ground thus raised.

Then as to the second ground, it is alleged that there was no evidence produced before the magistrate, to shew that the money referred to had been parted with by Smith and Woodman in consequence of or through a false representation. Mr. *Bullock-Webster,* counsel for the Dominion of New Zealand, was frank enough, as I understood his argument, to admit that there was no evidence, or rather, no direct evidence, bearing upon this point. I consider he was correct in his admission. He contended that it was open to me, and also to the magistrate, to conclude or infer from the evidence, that the money was paid on the strength of the representation. I do not think, in a criminal trial, or even upon preliminary investigation, this goes far enough. There should not be conjecture, but direct evidence. I think that it is an essential ingredient of the crime of false pretence that not only should the representation be false, but that it should be shewn to have operated on the mind of the party, who paid over the money on the strength of such representation. It differs in that respect from an attempt to commit a false pretence, because in that case, the party paying the money over may have acted on his own judgment, and still the party making the false representation would be guilty of an attempt to commit the crime. Taking the view then, that I do, in this connection, and applying the cases to which I have referred, I think the magistrate was wrong in coming to the conclusion that the crime of false pretence had been proved before him, even to the extent indicated by the Fugitive Offenders Act. It is true that it only refers to there being a strong or probable presumption of guilt; but in my opinion there should be evidence upon which the magistrate can base a conclusion of that kind.

Judgment

MACDONALD, J. (At Chambers)

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IN RE HARRISON

Counsel for the Dominion of New Zealand then, on being met with this difficulty, seeks to evoke the provisions of section 17 of the Fugitive Offenders Act. It is not necessary for me to read the section at length, but the latter portion of it reads as follows: (referring to the power of the Court) ". . . may order that the party shall not be returned until after the expiration of the period named in the order, or may make such order in the premises as to the Court seems just." It is contended that it would be a "just" order for me to make, to refer the matter back to the committing magistrate, with an intimation that while the offence charged had not been fully proved by evidence, still that there was sufficient evidence to support a charge of attempt to commit the crime, and that a committal might be made for that offence. The only case cited to me, in support of such a course being pursued, is that of *Reg.* v. *Spilsbury* (1898), 62 J.P. 600. There was also the case of *Reg.* v. *Hole, ib.* 616, on this point. Neither of these cases assist me; they do not go the necessary length. I find further that the real point required to be decided in those cases was on the question of bail—the right to grant bail.

Judgment

I think that I should not, without authority at any rate favouring such a course being pursued, make an order such as is suggested. I further draw attention to the fact that section 12 of the Fugitive Offenders Act seems to create the jurisdiction for the magistrate to act, and it refers to his committing the fugitive in connection with the "offence mentioned in the warrant." Now, the offence as charged by the proper authorities in New Zealand was not, an attempt to commit a false pretence, but was the full completed offence.

Under the circumstances, I think the order for release should go.

Application granted.

IN RE HARRISON. (No. 3.)

MACDONALD, J. (At Chambers)

1918

June 13.

IN RE HARRISON

Criminal law — Fugitive offender — False pretences — Strong or probable presumption — Prima facie case of guilt to satisfaction of superior Court—Uniformity of decisions in criminal cases throughout Canada.

Extradition from Canada to another British possession will not be confirmed on *habeas corpus* unless a *prima facie* case of guilt is made out to the satisfaction of the superior Court to which the accused has made application for discharge.

It is not necessary that all the statements made should be proved to be false, nor is it necessary that all the statements subject of discussion, and which are alleged to have been false, should have operated upon the mind of the party who paid out his money on the strength of such representations.

In determining whether a *prima facie* case of obtaining by false pretences has been made out, the Court will be guided by the same principles that govern a jury, acting not on admissions nor direct evidence, but drawing proper inferences from proved facts.

It is incumbent upon a judge, if possible, to follow decisions in criminal cases as rendered in other Provinces, in order to create and perpetuate a uniformity of decisions in criminal cases throughout Canada.

APPLICATION for a writ of *habeas corpus* heard by MACDONALD, J. at Chambers in Victoria on the 13th of June, 1918, following the order of MACDONALD, J. on the 28th of May, 1918, for the discharge of the prisoner in *In re Harrison (No. 2)*, *ante* p. 541. The prisoner, who was held under a warrant of remand charging him with having obtained money by false pretences from Ernest James Taylor, at Te Awamuta, in the Dominion of New Zealand, was committed by the stipendiary magistrate at Victoria to await his return to New Zealand. The ground upon which the application was made was that there was no evidence of a false representation. The prisoner's representations were at most, nothing more than puffing.

Statement

Aikman (*Moresby,* with him), for the application, cited *Reg.* v. *Bryan* (1857), 7 Cox, C.C. 312.

Bullock-Webster, for the Government of New Zealand: In *Reg.* v. *Bryan* (1857), 7 Cox, C.C. 312, the prosecutor obtained

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some value for his money. It is different where the prosecutor obtained something of no value at all: *per* Crompton, J. in *Reg.* v. *Bryan, supra,* at p. 321. It is not necessary to prove any particular words. It is enough if on the whole case the false pretence is substantially made out. Coleridge, J. in *Reg.* v. *Hazzlewood* (1883), 48 J.P. 151 at p. 152; *Rex* v. *Holderman* (1914), 23 Can. Cr. Cas. 369; 19 D.L.R. 748; *Reg.* v. *Cooper* (1877), 13 Cox, C.C. 617; 46 L.J., M.C. 219. The question is, what was intended to be conveyed to the mind of the prosecutor by the acts, conduct or silence of the prisoner: *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459; Fry, L.J. at p. 485. It is sufficient if the prosecutor was partly and materially influenced: *Reg.* v. *English* (1872), 12 Cox, C.C. 171. It is not necessary that the falsity of the pretence should be shewn by direct evidence: Crankshaw's Criminal Code, 4th Ed., 462, citing *Reg.* v. *Howarth* (1870), 11 Cox, C.C. 588. The prisoner represented that he was carrying on a *bona fide* business, or a *bona fide* extensive business, and as the evidence negatives this, there was a false representation: *Reg.* v. *J. A. Crab* (1868), 11 Cox, C.C. 85; *Reg.* v. *Rhodes* (1899), 1 Q.B. 77. It is doubtful if *Reg.* v. *Bryan, supra,* is now of any authority: Russell on Crimes, 6th Ed., Vol. 2, p. 498; *Reg.* v. *Lewis* (1869), 11 Cox, C.C. 404. It is not necessary that all the pretences should be false: *Reg.* v. *Lince* (1873), 12 Cox, C.C. 451; *Rex* v. *Ady* (1835), 7 Car. & P. 140; *Rex* v. *Perrott* (1814), 2 M. & S. 379; *Hill's Case* (1811), R. & R. 190. Where any valuable thing is obtained by false pretences, *prima facie* there is an intent to defraud, although the prosecutor got something which was of real value for his money: *Sidney Hammerson* (1914), 10 Cr. App. R. 121. The question of the falsity of the pretence is for the jury: *Reg.* v. *Foster* (1877), 41 J.P. 295; *Reg.* v. *Cooper* (1877), 2 Q.B.D. 510; *Reg.* v. *King* (1897), 1 Q.B. 214; *Reg.* v. *Randell* (1887), 16 Cox, C.C. 335.

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MACDONALD, J.: John C. Harrison applies for a writ of *habeas corpus* under the provisions of section 17 of the Fugitive Offenders Act, R.S.C. 1906, Cap. 154. He is held under a warrant of commitment issued by the police magistrate of the

City of Victoria, under section 12 of that Act. The charge upon which he is so committed is that he, on the 15th of January, 1918, at Te Awamuta in New Zealand, with intent to defraud, obtained from one Ernest James Taylor, the sum of £21 12s. by a certain false pretence, to wit, by representing that a certain preparation, sold by the said Harrison to the said Taylor, for the said sum of £21 12s., called "Anconia" sheep and cattle dip, was an effectual sheep and cattle dip, whereas in fact such preparation was useless for such purpose. The magistrate, upon investigating the matter, apparently came to the conclusion that the evidence submitted raised a "strong or probable presumption" that Harrison committed the offence mentioned in the warrant, under which he had been arrested.

Upon a previous application made for release of Harrison, the matter was discussed as to whether or no, I should treat the matter upon the same basis as if it were, in a sense, an appeal from a decision already rendered by an inferior Court, upon the evidence. I have been assisted on this application by the case of *Reg.* v. *John Delisle* (1896), 5 Can. Cr. Cas. 210. In that case it was held by Taschereau, J., in the Province of Quebec, that extradition from Canada to another British possession will not be confirmed on *habeas corpus,* unless a *prima facie* case of guilt is made out to the satisfaction of the superior Court, to which the accused has made application for discharge; and that this confirmation should be made irrespective of the decision of the committing magistrate. Without entering into further discussion of the case thus cited, I propose to follow such judgment, as far as it applies, not only out of respect for the decision, but because I think it is incumbent upon a judge, if possible, to follow decisions in criminal cases as rendered in other Provinces, in order to create and perpetuate a uniformity of decisions in criminal law throughout Canada. I have, then, to consider whether the evidence before me, raises the strong or probable presumption, referred to in section 12 of the Fugitive Offenders Act. This involves consideration of the essentials that constitute the crime of false pretence. In the first place, there must be a false statement, which represents as existing something which does not exist. Here it is stated

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that the preparation sold to Taylor was useless for the purpose intended. This contention is supported by the evidence of Parker, the analyst in New Zealand, and corroborated to some extent by Willes, a wholesale chemist, who also appears to have a technical education in chemistry, but whose evidence is not so direct, as to the goods sold, as that of Parker. Now, standing by itself, and irrespective of the after events, this would be sufficient to create a *prima facie* case, as to the preparation being useless. I accept the statement of Parker, that the preparation is valueless. I take it that he means, by using the word valueless, not that the preparation had no particular commercial value in its ingredients, but that it is worthless. This interpretation of the meaning attached to the word is emphasized by the subsequent portion of his evidence. Because, he adds, it is of no value "for that purpose or any other purpose mentioned on the label." He then emphasizes his opinion of the preparation by saying that it is a swindle, even if it were given away. This evidence, however, is met by that of J. H. Keown, a local veterinary surgeon, and to a certain extent such evidence is contradictory to that given by Parker. I do not think, however, that the matter should be weighed as between the evidence thus in controversy; I think the proper course to pursue is to assume a position of whether or no a *prima facie* case has been made out, as to this essential ingredient of the offence of false pretence. And I find the evidence sufficient in this connection.

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Then, we require to consider the important feature of the crime, that not only must there be a false statement, but that such statement should be operative in its effect, and that the complaining party should have parted with his money or goods on the strength of such false statement. It is argued that the evidence of Taylor, taken orally before the magistrate, is subject to criticism, because he did not dwell upon this branch of the offence, when he had previously given his evidence in New Zealand; further, that when he gave his evidence in Victoria, a decision had already been rendered by the Court releasing the accused on the Smith and Woodman charge, on the ground that this essential ingredient of the crime had not been proven.

That is doubtless the fact, but I am not to assume that because such event had occurred, the witness, a merchant doing business in New Zealand, would come to this Province, and give his evidence falsely, simply in order to fill up, what might be termed, the gap that was wanting in the previous charge. It is not necessary that all the statements made should be proved to be false; nor is it necessary that all the statements subject of discussion, and which are alleged to have been false, should have operated upon the mind of the party who paid out his money on the strength of such representations.

In view of the conclusion which I have arrived at upon the application, I must say, at this stage, that I feel some hesitation in expressing myself at great length as to the evidence. I fear that, if I were to do so, it might be used, perhaps, unfairly against the accused at some future time, when he is upon trial. However, I find it necessary to discuss the evidence, to some extent, in order to shew the reasons for my conclusion.

Then I come to the next essential, forming one of the ingredients of the crime, and that is as to whether, there was an intent to defraud, on the part of Harrison. Standing by itself, if Harrison simply had received from some manufacturer a quantity of goods that were alleged to be sufficient for the purpose of getting rid of parasites or insects on sheep, and had sold such goods, either at wholesale or retail, to other parties, it would require strong evidence to shew that he knew that such preparation was in fact insufficient for the purpose, or that it was so worthless as to be an intentional fraudulent imposition upon parties purchasing it. I have in mind a case, where a party was charged with passing a Confederate bill, and was discharged, as there was no evidence produced to the Court shewing any knowledge as to the Confederate States having ceased years before to have any existence, or that the party had any knowledge even of the existence of the Confederate States, or any other matter that would have pointed to a guilty knowledge on his part in dealing with the money; nor did he act in any manner that was inconsistent with innocence. It is a difficult matter to determine, where a party sells that which, upon the evidence at present adduced, I consider an article

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worthless for the purpose intended, whether he does so with a knowledge of the want of value or worth in such article, and the fraud he is committing. It is a matter to be passed upon usually by a jury, acting not on admissions nor direct evidence, but drawing proper inferences from proved facts. I presume that I should take the same position, in determining whether, on this branch of the case, a *prima facie* case has been made out.

Assuming for the moment, then, that the article is worthless, what were the surrounding circumstances that should influence me in coming to a conclusion in this connection as to the fraudulent intent? I find that Harrison interviewed Taylor, with a view of selling Anconia sheep dip; on the 15th of January, 1918, a contract or agreement was entered into by Harrison, purporting to act on behalf of John Harrison & Sons, whereby, in consideration of Taylor purchasing twelve dozen of their goods, which are shewn to have been the Anconia preparation, they made Taylor their agent, giving him the wholesale and retail rights for territory, which is not named. Then this important statement is made, that this agency is to last for twelve calendar months from its date. There is a further provision that, if Taylor is desirous of relinquishing the agency at the end of twelve months, they agree to repurchase from him, for the same amount per dozen, any of the goods which Taylor may not have disposed of. If John Harrison & Sons

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are a responsible firm, and this is a genuine contract, it was one that Taylor could not with any degree of danger have entered into. I can assume, as I have a right to assume, that he was honest in his idea of doing business with his customers, and that he would not be purchasing a worthless article. He had the protection that should the article not prove up to all the recommendations made by Harrison, but prove ineffectual for sale, he could then turn to Harrison, under his contract, and ask him to repurchase the goods on hand, or which might have been returned. This feature of the matter was not developed apparently, so far as the evidence goes. It is not shewn to have had any weight on Taylor's mind in making the purchase and parting with his money, but I think it worthy of consideration on the point under discussion. This, then, was the condition of affairs on the 15th of January, 1918.

Meantime, according to the evidence, Harrison was busy developing the business, particularly in advertising it. He obtained literature for the purpose of bringing the article before the public; engaging printers, supplying copy, which resulted, at the end of February, or, at any rate, in the beginning of March, in his having a quantity of printed material on hand, and some of the preparation ready for delivery. What then happened? On the 18th of February, 1918, he went to Wellington, the capital of New Zealand, and obtained a permit to leave on the Niagara for Canada, the date of sailing being the 5th of March, 1918. He certified to this permit being correct in its statements by his signature on the margin; he described himself as a grazier, giving as his nationality and birthplace, London, England. Now, in order to obtain this permit, it would be necessary for Harrison, as I am informed, to take a trip of four or five hundred miles from Auckland, where, according to his card, he was then carrying on his business. It is worthy of comment, I cannot refrain from referring to it, that during this period he was still purchasing goods, or rather engaging in contracts for printing, as late as the 27th of February—at least, I take it, from the account of Park, verified by Mattheson, that the dates on the exhibit filed at Auckland are correct. So much so, that on this 27th of February he had, according to this exhibit, delivered to him 19,173 cartons, for which he was incurring the liability of £79 1s. 9d., making a total unpaid at the time of his departure, £149 18s. 9d. He left other outstanding accounts. Of itself, that would not be, of course, any ground to support the allegation of false pretence on the 15th of January, 1918; but, exercising, properly I think, the right to look at surrounding circumstances, it has some weight with me, in coming to the conclusion as to the intent—sufficient, at any rate (and I wish it particularly noted that I am not deciding upon the guilt of the accused), to warrant me in saying that a *prima facie* case has been made out, on this branch as well as the others, shewing the ingredients necessary to satisfy the crime alleged. In thus deciding, I have considered many circumstances, outlined in the evidence of a number of witnesses.

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It has been pressed upon me that some remarks in *Reg.* v. *John Delisle* (1896), 5 Can. Cr. Cas. 210 should have weight, as to a person coming to Canada, not being sent back for trial to another portion of the Empire, except under certain conditions. The freedom of the subject is involved, but I do not feel that, while it is true New Zealand has as its greatest industry the production of wool, and that the care of such industry is of great importance to the citizens of that Dominion, still, that Harrison, if placed upon his trial, will not receive full and ample justice.

There may be other matters which come into my mind in dealing with the case, and which may have affected me in coming to this decision, which I may not have mentioned, but which can be thoroughly and completely explained by Harrison to the satisfaction of a Court and jury. It is contended that I should not be, to any extent, controlled by the fact that this party, engaging in business and entering into contracts for at least a year, instead of remaining at his place of business, is now in the City of Victoria. He came to this Province, without having made any arrangements of a business nature, or otherwise, prior to his departure. The excuse is given that he came to Canada for the purpose of medical treatment. If that be the fact, it is capable of proof. But I cannot shut my eyes to the fact that he left New Zealand without having given any explanation to the parties, who are complaining, before his sudden departure. His business ceased; but I do not deem it advisable to add any further remarks in this connection.

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Order refused.

Order refused.

IN RE ESTATE OF W. H. GARDNER, DECEASED.

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Will—Construction—Gift of remainder to wife—Gift over in event of her dying before receiving gift—Wife dies before receipt of gift—Not vested in her.

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; that after such portion had been set aside one-fourth of the balance should be paid to each of his daughters. He then directed the trustees to pay to his wife the balance remaining after all the foregoing bequests had been set aside and in the event of his wife dying before his decease or dying before receiving such bequest, then said balance was to be paid to his said daughters. The wife died after his decease but before receiving the bequest and before the trustees had set aside a portion of the trust premises to produce the annual income for the parents.

Held, that the wife was not, prior to her death, entitled to receive the portion of the trust premises referred to, and the bequest did not become vested in her.

APPLICATION for the opinion of the Court on the construction of the will of W. H. Gardner, deceased. Heard by MACDONALD, J. at Chambers in Victoria on the 25th of June, 1918. The facts are set out fully in the reasons for judgment. Statement

H. G. Lawson, for the trustees.
Maclean, K.C., for Mrs. Tripp.
Higgins, for Mrs. Hart.
A. D. Macfarlane, for the Royal Trust Co.

31st August, 1918.

MACDONALD, J.: By his will, dated the 21st of October, 1911, W. H. Gardner appointed his wife (Linnie L. Gardner), Thomas L. Hamilton and Percy W. Abbott to be his executrix and executors, as well as the trustees, of and under such will. He directed the trustees, immediately after his death, to take possession of all his real and personal estate, and gave them, or a majority of them, discretionary powers to retain his estate Judgment

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or sell the same and invest the proceeds in such securities and investments as they should, in their absolute and uncontrolled discretion, think fit. He provided that his trustees should first pay his debts, funeral and testamentary expenses, and then set aside a sufficient portion of the trust premises to produce an income of not less than $500 per annum, and pay such income to his mother and father, after his death, in equal proportions, share and share alike, with right of survivorship. Upon the death of the survivor, such portion of the trust premises was to be divided between his daughters and his wife. He next directed that, after such bequest had been set aside, one-fourth of the balance of the trust premises should be paid by the trustees to each of his daughters, but in the event of their death, without having left issue, their shares were to be retained by the trustees, and the income arising therefrom, to be paid to his mother and father during their lifetime, and after the decease of both of them, then one-half of such shares of his daughters was to go and be paid to his wife, and one-half to his brothers and sisters. He then made the following provision, as to his wife, directing the trustees to "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 opinion of the Court is sought, as to the construction to be placed upon this last-mentioned clause in the will. The question is, whether the trust premises mentioned in such bequest, vested in Linnie L. Gardner, the wife, prior to her death, and thus became part of her estate, or did such trust premises, upon her death, vest in the daughters of the said William H. Gardner? Considering the will in its entirety, it is apparent that the testator sought, first to provide an income for his father and mother and then, during their lifetime, to divide the balance of his estate, by giving one-half thereof, after this matter had been securely arranged, to his daughters and the remaining portion to his wife. The major portion of his

property consisted of real estate, which was doubtless considered by him of greater value than it proved to be, after his decease. It might not be out of place, in passing, to mention, that in 1911, what is commonly and properly termed a "boom," was at its height in Western Canada, and the testator might have been influenced in making his will and disposing of his property, by the then market price of real estate, and the apparent facility of selling same, especially in the City of Edmonton, where his holdings were extensive. If this be a fact, then he might not, at that time, appreciate the difficulty which afterwards ensued, when the trustees were required to create the fund, from which the income of $500 would be paid annually to his father and mother. While this condition of mind may have existed, still, it would only have a bearing upon the matter, if the situation were such, that the intention of the testator at the time of making his will governed and controlled its meaning. It loses its weight, however, when you consider that the alteration in the price of real estate was gradual, and was doubtless quite appreciable by the testator, before his death in 1915. In any event, "Every will shall be construed . . . . to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will": R.S.B.C. 1911, Cap. 241, Sec. 21. Then again, as an alteration in circumstances, does not create a ground upon which a presumption of intention can be assumed, sufficient to revoke a will, so it could not operate to destroy the effect of a clearly-expressed term of a will, stipulating that a bequest should not vest in a beneficiary, except upon the happening of certain contingencies. The two events referred to in the clause of the will, under consideration, and the non-occurrence of either of which, it is contended, would not vest the bequest in the wife, are: (1) The fund, for the benefit of the mother and father, not being set aside by the trustees; and (2) the wife dying before receiving such bequest. The husband predeceased his wife, who died on the 22nd of December, 1916. In the meantime, she had received from the estate a small sum of money. It was only by way of assistance, and could not be presumed to be intended as even a partial fulfilment of the terms of the will, so that she died "before receiving this bequest." If the literal meaning be

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given to the wording of the will, then the portion that she should have "received" would revert and be payable by the trustees to the daughters. Notwithstanding this apparent result, it is submitted that such portion of the estate really vested in the wife and became her property.

The testator did not, by his will, in terms, bequeath or devise his property to the trustees in trust, but simply gave them power to deal with the same. Unless, however, it were contended that the language of the will was not sufficient to vest the property in the trustees, I do not see any force in the argument. The whole question rests upon the construction to be placed upon the wording of the particular clause, coupled with such assistance as may be gained from the other portions of the will. A somewhat similar position, and the manner in which the Court should approach and deal with such a will, is outlined by the Lord Chancellor in *Gaskell* v. *Harman* (1805), 11 Ves. 489 at p. 497, as follows:

"I admit the soundness of the proposition, appearing by the Report to have been stated by the Master of the Rolls; that, if a testator thinks proper, whether prudently or not, to say distinctly, shewing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies, or the residue, unless they live to receive them in hard money, there is no rule against such intention, if clearly expressed. But that would open to so much inconvenience and fraud, that the Court is not in the habit of making conjectures in favour of such an intention. In the case of *Hutcheon* v. *Mannington* [(1791), 1 Ves. 366] I admit, I thought the meaning of those words was, what they shall have received; and I thought so even after the decision. The use I have since made of that case is as an authority, that, if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him."

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Then at p. 498:

"The Court therefore has said, the best construction is generally to consider the interest vested and in hand, though, strictly, not collected for the purpose of enjoyment, as between the particular interests and the capital: and, if that is wise, the Court will not conjecture in favour of an intention against the general rule. It must however be distinctly understood, that, if the intention, contended for in this case, is clearly expressed, it must be carried into execution."

The presumption is in favour of the early vesting of a bequest, either upon the death of the testator, or at the earliest moment after that date, which is possible. It is presumed that a testator intends a gift to be vested, rather than to remain in suspense. Prior to division, the trustees simply held the trust

premises in trust, for the benefit of the parties really interested. Their duty was, in their discretion, to sell the property, then create the necessary fund, for the payment of the income to the father and mother, and distribute the balance; but until this took place and the payment over of her share of the balance, it is contended that the wife never actually had any interest in the bequest. There was no suggestion that the delay, which had occurred in the disposing of the property, was not caused by a proper exercise of the discretion possessed by the trustees. Still, it must be borne in mind that such postponement was intended to benefit the estate, and all those interested in obtaining the best possible result from the sale of the property. While the property was extensive and of considerable value, according to the valuation given at the time the will was probated, still there is no evidence to prove that the necessary fund could have been created, even by a sacrifice of the real estate. By the course of action thus pursued, a division of the property could not be made. The widow was a party to this procedure, and even, if desirous of selling, she could not compel her co-trustees to take that course, as the majority controlled, in exercising discretion under the will. The result has been, according to the contention of counsel for the daughters, that the bequest did not vest in her. They contend that the proper construction to be placed upon the clause in question is, that the portion of the estate bequeathed to the wife was not payable until the prior bequests had been set aside. In other words, that even if the enjoyment of such bequest may have been postponed for the convenience and the benefit of the estate, still that no interest therein passed to the wife until "payment" was actually and properly made.

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It was suggested, that from the fact that the daughters were the issue of a previous marriage, the testator might have intended that a very strict construction should be placed upon the wording of the clause, making provision for his wife, so that in the event of her dying before actually receiving any portion of his estate, such share or interest would not have vested in the meantime, and be capable of disposition by her by will or otherwise. The force of this contention is, however, destroyed by reference to the previous provision of the will, shewing that

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upon the death of the father and mother, the wife is to share in the trust premises, set aside to create the income for the father and mother. Then there is also a resulting trust in favour of the wife, in certain events, as to the shares to be given to each of the daughters. While these circumstances are worthy of consideration, I repeat that, to my mind, the whole question turns upon, whether the meaning to be attached to the words in the clause, constitute a vesting of an interest or share, in the wife, or not? Before she has any right to participate in or be paid any portion of her husband's estate, the trustees must have set aside the previously mentioned bequests. The words "set aside" are not apt, as applied to the provisions made for the daughters' share in the estate, as this would have occurred, at the same time that the wife received her portion of the balance remaining, after the fund had been set aside to create the income for the father and mother. Applying these words, however, to the latter direction to the trustees, they did not, as already mentioned, set aside such a fund, and consequently the time had not arrived for dividing the balance of the estate. The bequest did not become payable to the wife. While this may have been due to the condition of the estate, still, there was a gift over, in the event of the bequest not being received. So it did not lapse. As to the effect of clause, providing for reversion, in the event of death before a beneficiary has received a bequest see *In re Couturier* (1907), 76 L.J., Ch. 296 at p. 298:

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"A further consideration is the fact that here there is no gift over or other express disposition of the principal in the event of the legatee dying before the period fixed for payment."

In *West* v. *Miller* (1868), 37 L.J., Ch. 423, Malins, V.C., at p. 426, discusses the law as follows:

"I take it therefore to be now settled that where there is a gift of property to vest in a person at twenty-one or marriage, with a gift over in the event of such person dying before the same becomes 'payable,' or the legatee is 'entitled in possession,' these and all similar expressions mean no more than dying before the property becomes 'vested.' Here the word is 'received,' that is, 'receivable.' But if one person has to pay, there must be another to receive, and 'receivable' must mean the same as 'payable,' so far as it refers to any period of time. The word 'payable' will necessarily be used where the trustee has been directed to pay, and 'receivable' where the legatee is to receive. I myself should have held that the words 'receivable' and 'payable' were the same thing, and that both were equivalent to 'vested.' . . . . . 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 *In re Dodgson's Trust* [(1853), 1 Drew. 440], which decision has my full concurrence."

There is this difference, to be noted, between the portion of the judgment just cited and the facts here presented: that the payment of the bequest is not dependent upon the attainment of a particular age, or any other event personal to the wife, but is contingent upon the trustees having previously carried out the directions indicated. In this judgment, the case of *Hayward* v. *James* (1860), 28 Beav. 523; 29 L.J., Ch. 822, is referred to with approval. Sir John Romilly there refers to the will, then under discussion, as follows, at pp. 528-9:

"The testator then directs that, in case the last-named daughters or either of them shall happen to die without issue, or having issue if all of them shall die without becoming entitled to the receipt of the trust money, it shall go to the daughters' next of kin. How can the words 'entitled to the receipt' differ from the word 'payable?' Whenever there is money payable, there is somebody entitled to the receipt of the money to be paid, and I am unable to distinguish between the expression, that there is money payable to a person, and that there is a person entitled to the receipt of that money which is to be paid. In neither case does it mean the actual receipt of the money, because if it did it would be unmeaning, for if so, until the money has been received, no right could accrue; nor could it mean that any formal or accidental delay in payment after the right to the receipt had accrued would give the next of kin a right to the money. But it means 'before the money becomes payable,' that is to say, before there are persons in existence who are entitled to receive the money, provided it could be paid at that period."

Judgment

Here, while the person was in existence to receive the bequest, still it could not be paid. There is difficulty in placing a construction upon the clause in the will, but, in my opinion, the ordinary meaning, attachable to the words contained in the bequest, in favour of the wife, should govern. I have thus come to the conclusion, that as the wife was not, prior to her death, entitled to receive the portion of the trust premises referred to, the bequest did not become vested in her. The portion of the estate, that she might have been entitled to receive under this bequest, would thus go to and be paid to the daughters of the testator. There should be costs to all parties out of the estate.

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THE MICHIGAN TRUST COMPANY v. THE CANADIAN PUGET SOUND LUMBER COMPANY, LIMITED.

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TEMPLE v. THE CANADIAN PUGET SOUND LUMBER COMPANY, LIMITED.

Mortgage — Trust deed — Mortgagor a company — In liquidation — Foreclosure action—Lease—Dicta—R.S.C. 1906, Cap. 144, Sec. 133.

MICHIGAN TRUST CO. *v.* CANADIAN PUGET SOUND LUMBER CO.

TEMPLE *v.* THE SAME

In an action for foreclosure of a mortgage given by the defendant Company by way of a trust deed to secure a debenture issue, said Company having previously to the action gone into liquidation under the Winding-up Act:—

Held, that the plaintiff was entitled to a final order for foreclosure.

Per MACDONALD, C.J.A.: The submission that when a company is in progress of winding up under the Winding-up Act an action for foreclosure of a mortgage given by the company does not lie, but that the mortgagee is restricted to the remedy given by section 133 of the Act, can only prevail, if at all, when the case falls strictly within the class of cases mentioned in the section, but this case does not fall within it for the reason that the mortgaged premises was never "in the hands, possession or custody of the liquidator."

Per MCPHILLIPS, J.A.: *Dicta* are not of binding authority, and to be accepted against one's own individual opinion, unless they can be shewn to express a legal proposition which is a necessary step to the judgment pronounced: see *per* Lord Dunedin in *Charles R. Davidson and Company* v. *M'Robb or Officer* (1918), A.C. 304 at p. 322; 87 L.J., P.C. 58 at p. 68; 34 T.L.R. 213 at p. 217.

Statement

APPEAL from a final order for foreclosure made by GREGORY, J. on the 19th of January, 1918, in an action for foreclosure of a property mortgaged by the defendant Company by way of a trust deed of the 8th of June, 1911, to secure a debenture issue. The Canadian Puget Sound Lumber Company went into compulsory liquidation on the 19th of May, 1914, and the writ in this action was issued upon leave, on the 23rd of December, 1915. Upon the order *nisi* being obtained, accounts were taken and at the expiration of the time for redemption the application for final order was made. Upon the hearing the learned judge overruled the defendant's contention that there was no right of action for foreclosure, but ordered that a new account

be taken and that one month from the date of the registrar's certificate be allowed for redemption. The appellant contends (1) that the trust deed was made and entered into as security for a debenture issue of the defendant, and as such security constitutes a trust for sale only and contains no provision authorizing foreclosure, the order for foreclosure should not have been made; (2) there was no request by a majority of the bondholders to bring foreclosure proceedings; (3) there was no jurisdiction to entertain the application; (4) in view of the pendency of misfeasance proceedings the learned judge should have exercised his discretion and refused or postponed the granting of the order; and (5) having found there was a right of foreclosure, the learned judge should have granted a longer period in which to redeem.

Luxton, K.C., for plaintiff.

Ernest Miller, for defendant.

19th January, 1918.

GREGORY, J.: This is a motion for final order for foreclosure. I regret very much that I am unable to find time to prepare a judgment dealing fully with the very careful argument of counsel and the cases referred to by them.

The defendant asked for further time in which to redeem, and also contends that the mortgage in question confers no right to foreclose, and in any case that there must be a further accounting and new date fixed for redemption. I can see no ground for granting a general extension of the time fixed to redeem. The evidence offered as to the value of the equity of redemption is most unsatisfactory, in fact I would call it illusory. The mortgagor is hopelessly in arrears with its interest, thousands of dollars due for taxes, and both of these items are increasing by leaps and bounds, and there is danger of the property being lost to the mortgagees if the interest payable to a prior mortgage is not paid. There is not the slightest suggestion that the mortgagor can provide the moneys to protect the property in the meantime, nor has any scheme of re-organization been submitted. To grant further time in such circumstances would, I think, be a great injustice to the mortgagees, for it would of necessity require them to pay out many thousands

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of dollars in addition to their present outlay, with no reasonable certainty of getting it back.

As to the objection that there is no right to foreclose, I have, with some hesitation, come to the conclusion that it cannot be sustained; there is nothing in the instrument differing materially from the usual form of mortgage, and it cannot be denied that in such case there is a right of foreclosure.

The second objection must, however, prevail. The mortgagee is in possession of the mortgaged premises, and has received large sums of money which have never been brought into account. The mortgagor has and has had no means of ascertaining how these moneys have been expended, he has never really been in a position to know how much money he would have to pay in order to redeem, and he is entitled to. Mr. Temple's affidavit in no way accounts for the moneys received; it is not sufficient for him to swear generally that the moneys received by him "are not sufficient to cover the insurance, wages and other expenses accrued, accruing and to accrue in connection with the properties," etc.

GREGORY, J.

There must be a further account, and one month allowed after the registrar's certificate for payment and redemption.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 2nd and 3rd of April, 1918, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: There is no jurisdiction to entertain these actions after the winding-up of the Company, even with leave. Their relief must be under section 133 of the Winding-up Act. This objection can be taken at any time: see *Stewart* v. *LePage* (1916), 53 S.C.R. 337 at pp. 343 and 348; *Smurthwaite* v. *Hannay* (1894), A.C. 494 at p. 501. The second point is that the deed created a floating charge on the Company. The effect of a floating charge is discussed in *De Beers Consolidated Mines, Limited* v. *British South Africa Company* (1912), A.C. 52 at p. 70, and Palmer's Company Precedents, 11th Ed., Pt. III., 79. This is a mortgage by way of trust for sale and does not include the right of foreclosure: see *Sampson* v. *Pattison* (1842), 1 Hare 533; *Jenkin* v. *Row*

Argument

(1851), 5 De G. & Sm. 107; *Scweitzer* v. *Mayhew* (1862), 31 Beav. 37; *Locking* v. *Parker* (1872), 8 Chy. App. 30 at p. 39. He cannot foreclose but is limited to his remedy by sale: *In re Alison. Johnson* v. *Mounsey* (1879), 11 Ch. D. 284 at p. 297; Halsbury's Laws of England, Vol. 5, p. 383; *Tennant* v. *Trenchard* (1869), 4 Chy. App. 537. The trustee for the debenture holders cannot sue without joining the debenture holders: see *Thomas* v. *Dunning* (1852), 5 De G. & Sm. 618; *Calverley* v. *Phelp* (1822), 6 Madd. 229; *Douglas* v. *Horsfall* (1825), 2 Sim. & S. 185; *Goldsmid* v. *Stonehewer* (1852), 9 Hare, App. xxxviii.; *Francis* v. *Harrison* (1889), 43 Ch. D. 183; Lewin on Trusts, 12th Ed., 536. No request or demand was made for payment: see *Hay* v. *The Swedish and Norwegian Railway Company (Limited)* (1889), 5 T.L.R. 460; *Sneath* v. *Valley Gold, Limited* (1893), 1 Ch. 477; *Mercantile Investment and General Trust Company* v. *International Company of Mexico, ib.* 484(*n.*); *Northern Assurance Company, Limited* v. *Farnham United Breweries, Limited* (1912), 2 Ch. 125. The Court should not have made any order *nisi* at this time as there were circumstances which justified an indefinite extension of the case before such an order should have been made. The liquidator should be allowed to continue his work, in which case he might bring about the payment of the debts in full.

Argument

Luxton, K.C., for respondent: The deed is substantially the same as an ordinary mortgage. It contains the usual recitals and there is a proviso for redemption. Dealing with the subject of floating security see Coote on Mortgages, 8th Ed., 1035, in which case the holder can issue a writ at any time. A remedy by foreclosure is applicable to chattels and any other species of stocks or shares in a company: see Fisher of Mortgages, 6th Ed., p. 505, par. 985; Seton on Decrees, 7th Ed., 1923. The only point is that when there is a mere trust for sale and not a conveyance, is it necessary to apply that the trusts be administered? See *Sampson* v. *Pattison* (1842), 1 Hare 533; Halsbury's Laws of England, Vol. 21, p. 71, par. 126; *Balfe* v. *Lord* (1842), 2 Dr. & War. 480. As to what may be considered a condition which may be broken see *Williams* v. *Morgan*

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(1906), 1 Ch. 804. We have the right to enforce our security: see *In re Lenora* (1902), 9 B.C. 471; *In re B.C. Tie and Timber Co.* (1908), 14 B.C. 81; *In re Giant Mining Co.* (1904), 10 B.C. 327; Palmer's Company Precedents, 11th Ed., Pt. II., 467-8. The remedy of the mortgagee is not interfered with by the winding-up. As to the binding effect of the order *nisi* of the 9th of March, 1916, see *Mayor, &c., of London* v. *Cox* (1866), L.R. 2 H.L. 239 at p. 262; *Charles Bright & Co., Limited* v. *Sellar* (1904), 1 K.B. 6; Halsbury's Laws of England, Vol. 9, p. 15, par. 14; Everest & Strode on Estoppel, 2nd Ed., 19. As to sections 133 and 22 of the Winding-up Act see *Re Raven Lake Portland Cement Co. National Trust Co.* v. *Trusts and Guarantee Co.* (1911), 24 O.L.R. 286. As to foreclosure where there is a floating charge see *Sadler* v. *Worley* (1894), 2 Ch. 170.

Mayers, in reply.

10th September, 1918.

MACDONALD, C.J.A.: At the threshold of this appeal lies the submission of appellant's counsel that when a company is in process of winding up under the Winding-up Act, R.S.C. 1906, Cap. 144, an action for foreclosure of a mortgage given by the company does not lie, but that the mortgagee is restricted to the remedy given by section 133 of the Act. That contention can only prevail, if at all, when the case falls strictly within the class of cases mentioned in the section. In my opinion this case does not fall within it, for the reason that the mortgaged premises were never "in the hands, possession or custody of the liquidator."

MACDONALD, C.J.A.

This action is one for foreclosure of a mortgage given to secure debentures, and leave was obtained from the judge in control of the winding-up proceedings to bring the action. It appears that the requisite number of debenture holders mentioned in the mortgage as entitled to call upon the trustee to enforce it by foreclosure have demanded that these proceedings should be taken. It was argued by appellant's counsel that the clauses in the mortgage authorizing foreclosure proceedings were drawn up by an attorney not familiar with the practice of our Courts, and ought to be read as authorizing only fore-

closure by way of sale, if I may use that expression. I cannot adopt this theory.

It was also argued by him that the mortgage was a floating charge on the Company's property, and that foreclosure was not the apt and proper remedy for enforcing it. Assuming that the mortgage was originally a floating charge as to part of the property at least, it became crystallized when the winding-up order was made. It is to be observed also in this mortgage that there is no trust for sale. It is called a trust deed, but it is in fact a mortgage. There is a power of sale and there is a trust to take foreclosure proceedings. The cases, therefore, to which we were referred, *viz.*: *Locking* v. *Parker* (1872), 8 Chy. App. 30; and *In re Alison. Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, are not in point.

Mr. *Mayers's* contention that the action could be brought only by all debenture holders, or by one or more who had obtained a representative order, would, I think, be well-founded if this action had been one for foreclosure of debentures in the absence of a legal mortgage, but in this case power to enforce the security is by agreement vested in the trustee, subject to conditions which had been performed. He further urged that even if the Court had jurisdiction to entertain this form of relief, yet on the facts it ought to have denied it. I see no reason for interfering with the discretion exercised by the learned judge.

The appeal should be dismissed.

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

MCPHILLIPS, J.A.: The action is one for foreclosure of properties in respect of moneys borrowed by way of mortgage and trust deed securing a debenture issue. The first point raised in the appeal is that although the action is brought with leave, being after the commencement of winding up, it is not maintainable. The learned counsel for the appellant, in a very careful argument, elaborated this and the further points of appeal, but I cannot persuade myself that that is the effect of section 133 of the Winding-up Act (R.S.C. 1906, Cap. 144, Secs. 22 and 133). In short, what is contended is, that after the winding-up order is made, an action such as the present

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one is in effect prohibited, and if there is no right to maintain it, the leave granted would be futile, in fact that the Court was without jurisdiction to grant leave. To consider this point it is necessary to carefully study the general provisions of the Winding-up Act, its scope and object, and to in particular scan and weigh the meaning and intent of sections 22 and 133, which read as follow:

"22. After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes."

"133. All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the Court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever."

It is true that in *Stewart* v. *LePage* (1916), 53 S.C.R. 337, Anglin, J. said, at p. 348:

"I incline to think, however, that section 133 is prohibitive of any action or suit, such as that brought by the complainants in so far as they seek a declaration of trust and an allocation to the trust of certain 'effects of property in the hands, possession or custody of a liquidator,' and prescribes an application by summary petition as the exclusive means of obtaining this part of the relief sought. Once the trust has been established the appointment of a new trustee would seem almost a matter of course."

This language is precise enough, and can be said to be applicable to the special facts of that case, but I venture, with the greatest respect to the learned judge, to not interpret the language as meaning the enunciation of a legal proposition that even where leave has been granted in an action such as the present one, the statute is prohibitive. Further, to so hold was not a "necessary step to the judgment" of the Supreme Court of Canada in that case: see *per* Sir Louis Davies, J. at pp. 340-42; Idington, J. at pp. 346-7; and Brodeur, J. at pp. 350-52.

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It cannot be successfully said, in my opinion, that *Stewart* v. *LePage* is conclusive upon this point or binding upon this Court, and where leave was obtained, as it was in the present case, the action is rightly maintainable. Upon the point of the effect of *dicta* occurring in judgments, it is instructive to read what Lord Dunedin had to say in *Charles R. Davidson and Company* v. *M'Robb or Officer* (1918), A.C. 304 at p. 322; 87 L.J., P.C. 58 at p. 68; 34 T.L.R. 213 at p. 217:

"I now turn to the question whether I am bound to take the view which I personally do not hold in respect of decisions of this House. I apprehend that the *dicta* of noble Lords in this House, while always of great weight, are not of binding authority and to be accepted against one's own individual opinion, unless they can be shewn to express a legal proposition which is a necessary step to the judgment which the House pronounces in the case."

The next point pressed was that the mortgage or trust deed is in its nature and effect a floating charge and that foreclosure is not a remedy which can be decreed, but that which should be decreed would be sale only. A careful perusal of the trust deed makes it manifest that it is essentially a mortgage in the fullest sense. There is the grant of specific properties and usual and customary covenants to be found in mortgages where the estate is effectually vested in the mortgagee, the mortgagor being divested of all estate with the equitable right only of redemption, and it follows that in such case there is clearly in the mortgagee the remedy of foreclosure, and in the course of the proceedings the equitable rights of the mortgagor will, of course, receive consideration. *Balfe* v. *Lord* (1842), 2 Dr. & War. 480; 59 R.R. 786, may be said to be a leading authority upon the question. The effect of the instrument there under consideration received the attention of the Lord Chancellor (Sir Edward Sugden), and certainly the mortgage in question in the present case is of equal portent. The head-note in part reads:

"A Court of equity will presume an instrument of this nature, intended as a security for money advanced, to be an ordinary mortgage, accompanied by the usual remedies, unless the terms of the instrument exclude such a construction."

The Lord Chancellor, at p. 488, said:

"The party, failing to pay according to his covenant, would not be entitled to a reconveyance; but still he would have an equity of redemption, and the plaintiffs are consequently entitled to sustain their bill for a foreclosure and sale."

In *Williams* v. *Morgan* (1906), 75 L.J., Ch. 480, Swinfen Eady, J. (now the Master of the Rolls) said at p. 482:

"The first point, therefore, is to see if any condition has been broken, because until this is the case and the mortgagee's estate becomes absolute at law, proceedings for foreclosure cannot be taken in equity."

That conditions have been broken and that the mortgage is in arrears and that all things have happened that entitled fore-

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closure proceedings being taken, cannot be gainsaid, in fact all such questions are concluded, all the necessary allegations being made in the statement of claim by the default of defence upon the part of the appellant: see *Page* v. *Page* (1915), 22 B.C. 185; and *Merchants' Bank of Canada* v. *Bush* (1917), 24 B.C. 521; (1918), 1 W.W.R. 383. Also see Order XIX., r. 14.

That trustees may sue without joining any of the persons beneficially interested is clear when Order XVI., r. 8 (Yearly Practice, 1918, pp. 163-168) is considered. Therefore there is no force in the contention that the action is not correct as to parties. It is, of course, open to the Court or a judge to add parties or substitute parties according to discretion, and that jurisdiction apparently in this case has been exercised, and I cannot say wrongly—it is a discretion which cannot lightly be interfered with. Upon the whole case, I am not satisfied that the appellant has succeeded in shewing that the order appealed from is wrong; on the contrary, in my opinion, it is absolutely right, therefore I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Mackay & Miller.*
Solicitors for respondent: *Pooley, Luxton & Pooley.*

WILSON AND LANGAN v. KEYSTONE LOGGING & MERCANTILE COMPANY LIMITED.

HUNTER, C.J.B.C.

1917

Dec. 11.

COURT OF APPEAL

1918

Oct. 1.

Trespass—Damages—Cutting of timber—Plea of leave and licence—Not proven—Exemplary damages not necessarily justified.

In an action for damages for trespass on lands, for the taking of timber and injury to the soil, where the defendants are unable to substantiate a plea of leave and licence, they may not necessarily be assessed in exemplary damages.

WILSON v. KEYSTONE LOGGING & MERCANTILE CO.

APPEAL by plaintiffs from the decision of HUNTER, C.J.B.C., in an action for damages for trespass tried by him at Vancouver on the 25th of October, and the 3rd to the 11th of December, 1917. The plaintiffs, who owned two quarter sections in the New Westminster district, entered into an agreement with the defendant in September, 1913, whereby the defendant could cut and take away from one of the quarter sections all merchantable timber over 15 inches in diameter. The plaintiffs had subdivided the sections into four-acre lots and sold a number of them. The plaintiffs claimed that the defendant had removed all the timber from the sections, destroyed the survey posts and caused damage by hauling the logs across the property and strewing the property with debris resulting from the logging operations. Subsequently to the operations the defendant sent its surveyor to replace the survey posts. The defendant paid into Court $600 as sufficient to cover any damages arising in the action.

Statement

McCrossan, and *Harper,* for plaintiffs.
Bird, for defendant.

HUNTER, C.J.B.C.: As I have already said, the exercise of a little common sense in this matter would have avoided a lot of expense which has been wasted in litigation. The defendant, I think, had the right to assume, by reason of Wolf's relations with Mr. Wilson, that Mr. Wilson would have no objection to his taking this timber, and that it would be a mere matter of compensation. I do not think there is the smallest evidence of *mala fides* or that it has been proven that the Company attempted

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to take any advantage of Wilson in his absence. It must be remembered that there were two written agreements come to between Wilson and the Keystone Logging Company in the year 1913, through the intervention of this same man Wolf. One of these logging agreements provided for the taking of all the timber of the south 40 acres of the northeast quarter of section 2, not less than 18 inches in diameter at the butt, for the sum of $160. There was another agreement, dated the 15th of September of that year, between the same parties. There was an arrangement made in respect of the northeast quarter of section 2 that there should be a logging road built for the purposes of the Company. These two agreements, as I said before, were made through the medium of Mr. Wolf, and were subsequently ratified by Mr. Wilson. There were two agreements also entered into in 1916. One provided for the sale of timber on the northeast quarter of section 1. In that case the timber was to be not less than 15 inches in diameter at the butt. The consideration there was $1,200. There is also an agreement entered into contemporaneously for the building of a right of way for the purposes of the defendant Company, and it is obvious on the face of that agreement that advantages would accrue to both sides. The road was to be left after the completion of the undertaking by the Logging Company for the benefit of the settlers, who were to be placed on these tracts by the plaintiffs. There is no question about it, that that was a substantial advantage to those tracts. Mr. Wilson would have the advantage, after the Logging Company had got through its work, of having a graded road built through his tract, which he himself could never have undertaken, because over a hilly and rough country of that kind it would take a large sum of money to build graded roads. There is also this advantage apparent on the face of the agreement, that it was only the heavy timber which was being sold off these tracts, leaving the timber over the 15 inches, or the 18 inches, as the case may be, for the settlers, which would be quite sufficient for their purposes. The heavy timber could only be successfully handled by logging companies such as the defendant Company which were equipped with modern machinery and plants. And there was also the advantage, which is clear to

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any one who reads these agreements, that the plaintiff who was parting with his timber under those circumstances, was securing himself against possible loss of the timber in the future by fire. There was no advantageous sale possible to any person or corporation other than the defendant Company, at any kind of reasonable price, for the little patch that was taken. Not only that, but I think it is clear from the evidence that this particular patch of timber could not profitably have been taken off by any other buyer except in the way it has been taken off by this particular Company, and with the plant that they had at their disposal. Where the evidence of Wolf and James comes in conflict, I think credit ought to be given to James rather than Wolf. Wolf's evidence was coloured by strong animus against James, for what particular reason it is not necessary for me to inquire. There is no question whatever, to my mind, that Wolf knew all along of this so-called timber trespass, and if he had been loyal to his employer's interests he would have informed him of what was going on at the earliest stage, because I must assume that he was in communication with Mr. Wilson all the time, as he was getting money from him for selling these tracts. I think also that James's story is to be credited when he says, on Mr. Wilson's return in September, 1916, he asked him to come over and look the place over, and Mr. Wilson's reply at that was, he did not care to. I see no reason for doubting James's testimony when he says he endeavoured to see him on other occasions, and he found him not at home; and it must be obvious to any person that it would be absolutely futile for James or any other person belonging to this Company to attempt to conceal the so-called trespass. Any one who has had anything to do with this kind of thing knows perfectly well it is simply a matter of computation by a competent cruiser to estimate the amount of timber taken from any particular piece of land, and the only question that can be left in doubt is as to the deduction or allowance which should be made on account of timber which was conky or wind-shaken, or otherwise unsuitable for mill use. I think, on the whole, the onus, which, of course, otherwise would be very strong in the case of a trespass, has been met in this case, because I think James was entitled to go on the land on the

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assumption that it was only a mere matter of compensation, owing to the former dealings which were carried on by these same parties through this man Wolf; and if there is now any onus at all it has been transferred to the plaintiff to shew what the value of this timber was at the time it was taken. But, leaving apart all question of onus, I think the sum of $600, which was tendered the plaintiffs before the suit, was a reasonable compensation to offer for this timber. I understand it was tendered; at all events, it was paid into Court.

With regard to the question of the destruction of the stakes, what little destruction of stakes took place through the operations of the Company has been made good since the action was brought. With regard to the question of the debris, about which much complaint has been made, and of the destructive character of the operations with regard to the land, we all know that the presence of debris resulting from logging operations gives the land a very unsightly appearance; but we all know, just as well, that in order to turn the land to agricultural or building use a much greater amount of debris has to be caused by the use of powder in clearing it, so that, I think, as far as that is concerned, the plaintiffs are really making a mountain out of a mole-hill. In conclusion, I am not at all satisfied that this $600 does not represent a reasonable sum to be accepted by the plaintiffs for all the so-called damage and all the so-called trespass; and, under those circumstances, I think that subsequently to the time of the payment into Court the defendant Company is entitled to no costs; and up to that time there will be no costs.

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From this decision the plaintiffs appealed. The appeal was argued at Vancouver on the 25th and 26th of April, 1918. before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Harper, for appellants: It was held below that the amount paid into Court was sufficient to cover the damages sustained. We say, first, that in an action for trespass they cannot go on the property and make a second trespass in order to remedy the damage. In the next place, they contradict the admission

Argument

in their pleadings; they say they took 240,000 feet, whereas in their pleadings they admit having taken over 400,000. They paid the money into Court without denial of liability, and having done so they cannot then deny trespass: *Hubback* v. *British North Borneo Company* (1904), 2 K.B. 473 at p. 477; *J. R. Mundy, Limited* v. *London County Council* (1916), 1 K.B. 159 at p. 164; (1916), 2 K.B. 331; *Dumbleton* v. *Williams, Torrey, and Field Limited* (1897), 76 L.T. 81; *Coote* v. *Ford* (1899), 2 Ch. 93 at p. 103. As to the effect of the trespass being committed openly see *Whitwham* v. *Westminster Brymbo Coal and Coke Company* (1896), 1 Ch. 894; (1896), 2 Ch. 538. On the assessment of damages for cutting young trees see *Dominion Lumber Co.* v. *Halifax Power Co.* (1915), 23 D.L.R. 187. We are entitled to costs in any case, as there was a denial of liability.

Sir C. H. Tupper, K.C., for respondent: The pleadings, when read together, are to the effect that there are no admissions whatever: see *Scott* v. *Fernie* (1904), 11 B.C. 91; *Blue* v. *Red Mountain Ry. Co.* (1907), 12 B.C. 460 at p. 467. The $600 paid in was a generous amount and held by the trial judge as sufficient. There was an understanding we were not to pay for the ties.

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Harper, in reply.

Cur. adv. vult.

1st October, 1918.

MACDONALD, C.J.A.: The action is for damages for trespass to lands and the taking of timber and other trees, injury to the soil and the destruction of boundary posts. The defendant pleads leave and licence and does not dispute liability to make due compensation for the trees taken and the other damage done by them. Leave and licence have not, in my opinion, been proved, but that question is of little importance since I have come to the conclusion that the trespass was not of a character to justify the assessment of exemplary damages. The question, therefore, is, what sum will compensate the plaintiffs for the damage suffered by them? Defendant admits the taking of 416,980 feet of merchantable or saw timber; the market value of this class of timber on the stump was, I find, $1 per

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thousand feet, purchaser to pay the Provincial royalty of 50 cents per thousand feet. As the timber in question here was on Crown granted land, it was free from the payment of royalty, and hence was worth to the seller $1.50 per thousand feet, making for this item $625. Defendant also admits taking tie timber to the amount of 89,940 feet, or 5,000 ties. There is evidence of two witnesses that ties were worth on the stump 8 cents each, and while there is contradictory evidence, there is, to my mind, no satisfactory evidence to rebut the sworn price of 8 cents. The ties taken were, therefore, worth the sum of $400.

The evidence as to the amount of damages because of disturbance of soil, and by the accumulation of rubbish, is that it would amount to at least $100 per acre, which is the total value of the land disturbed, namely, five acres. The damages, therefore, suffered by the plaintiffs on this head amount to $500. The land was worth in its natural state $100 per acre, and from the evidence I think it is quite clear that it could not be put back into its natural condition for less than $100 per acre. I think it is also a fair inference that the land is valueless in the condition in which it was left by the defendant. The plaintiffs claim for the destruction or disturbance of survey posts the sum of $335. That posts were disturbed is virtually admitted by the defendant, who sent its surveyor up with instructions to replace them. The surveyor did not complete his task, and, in my opinion, what he did was of no value to the plaintiffs. I think the plaintiffs are entitled to have a re-survey made by their own surveyor, and cannot be asked to be satisfied with a survey made by another, but has a right to know that their boundaries have been re-established. The evidence of King, plaintiffs' surveyor, is that a re-survey would cost the sum above mentioned and there is no satisfactory evidence to rebut this. I think that sum must be allowed for. The plaintiffs also claim for the destruction of young trees. This has reference to the trees taken for the ties already mentioned. The suggestion is that the trees had a potential value beyond their value for railway ties at the present time. This claim is too vague, I think, to be given effect to. Such a claim may be well founded in law,

but the facts in this case do not satisfy me that any damage was suffered by the plaintiffs in this respect. In the same manner I would dispose of the plaintiffs' claim for use of their land by defendant for getting out timber over it from defendant's timber berth No. 96. I do not think that damage has been satisfactorily proven. I would, therefore, allow the appeal, and direct judgment to be entered for the plaintiffs for the several amounts mentioned, amounting in all to $1,860.

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MARTIN, J.A. allowed the appeal, and directed that judgment be entered for the plaintiffs for $1,860.

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GALLIHER, J.A.: At the outset I am in agreement with the learned trial judge in holding that, under the circumstances of this case, we would not be justified in finding deliberate trespass. The defendant Company says it is willing to pay for the timber taken and any damage done, so it resolves itself into a question of what that damage should be. I disagree as to the amount of damages awarded. The defendant, in its pleadings, and Mr. *Bird* during the trial, admitted a trespass as to merchantable timber of 417,000. Taking into consideration the location of the timber and that it was only in conjunction with other and larger operations that this timber could be profitably removed unless the price per thousand was reasonable. I would, upon the evidence, fix that price at $1.50 per thousand. This would give $625. Then there is the damage to the property by tearing off the surface soil and piling up of debris on five acres. This was a sub-divided property in blocks of approximately five acres, some of which had been sold at $100 per acre. If there had been a contract between the plaintiffs and defendant as to this timber, it might be said that it would be in the contemplation of the parties that certain damage would ensue in the course of logging operations, and unless provision for such had been specifically made in the contract, there could be no recovery for such unless, of course, negligent or wilful damage had been done, but here, where at most it was a tentative understanding that they could go upon the premises and remove the timber, subject to a settlement with the plaintiffs afterwards, and that understanding not with the

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plaintiffs themselves, the defendant, in going upon the property and operating, took the risk of having to make good any damage done to the surface. The evidence is that this five-acre tract is ploughed through by logs and heaps of debris piled up, and the weight of evidence is that it cannot be restored to its original condition. I would hold, that what has occurred here has deprived the plaintiffs of the opportunity of selling this tract, and rendered it practically worthless to them, and the damages should be the sale value before the trespass, which I would fix at the amounts the other tracts sold for, *viz.*: $500. As to the five thousand ties taken, the onus is upon the defendant to establish that it had an agreement by which it had authority to take these for use on the logging railway it was building through a portion of the property. Mr. James, a member of the defendant Company, claims he had such verbal agreement, but this is specifically denied by the plaintiffs. The learned trial judge has not passed upon this, other than to say generally that he considers the amount—$600—paid in covers all damages. I think these ties must be allowed for. We have the evidence of two timber men, Radnor and Foley, as to the value of this, and they each find the amount the owner of the timber would be entitled to at 1 cent per lineal foot, or 8 cents per tie at the time their evidence was given. This strikes me as a high figure, but we have no satisfactory evidence to contradict it. Fuller, for the defence, says, "I have bought ties at 1½, 2 and 3 cents per tie for the timber," but does not state when. James says the Government charges 1 cent per tie, but even if he means royalty he is wrong, for taking the lowest estimate of lineal feet in a tie as given in the evidence at 30 feet, Government royalty charge is 50 cents per thousand lineal feet, or for 1 tie 1½ cents. Then again, it is not what you could purchase ties from the Government for, but what is the charge by timber owners that governs in the matter of damages; in other words, the market value. A number of these ties were below standard size, and would have been classed as culls had they been required for a standard railway, but at the same time no man has a right to cut down the young timber in the premises of another and deprive him of the appreciation in

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value that would accrue by further growth, and as there is another head of damages, *viz.*: destruction of young trees for ties, upon which the evidence is not definite enough to fix an exact amount, I think the justice of the case will be met by treating these as ties of the standard size and allowing for them on that basis. Upon the evidence, I think we must allow for them at 8 cents per tie, or $400. On the ground of use and occupation, I find no damages.

The only other item is for the disturbing of stakes. The plaintiffs are not bound to accept the survey or replacing of stakes by a surveyor for their opponent sent there during the trial, but is entitled to have their own surveyor re-locate, check up and set the stakes. The plaintiffs' evidence, and it cannot be said to be contradicted, is that this will cost $335. In the result, the appeal will be allowed, with costs here and below, and judgment entered for the plaintiffs for $1,860 and costs, credit being given for the amount paid into Court.

MCPHILLIPS, J.A.: This appeal, in my opinion, should be allowed. The facts establish trespass, in fact trespass may be said to be admitted; the admission is in the pleadings, and if it could be listened to notwithstanding this, that the question was open, as I have said, the evidence as adduced at the trial established trespass. It is clear that there was no authority to go upon the lands and commit the acts complained of. This, apparently, the respondent well knew, and as I look at its conduct, nothing would have been said if no discovery had been made of the acts of trespass, and that if discovered, it was considered that it would only be a matter of compensation. Had it not been for the manner in which the appellants proceeded, that is, the entry upon a negotiation or discussion as to what compensation should be paid, I would have been of the opinion that the damages should be exemplary in nature (*Davis* v. *Bromley Urban District Council* (1903), 67 J.P. 275; *Pratt* v. *Pratt* (1848), 2 Ex. 413; *Reeves* v. *Penrose* (1890), 26 L.R. Ir. 141). However, the learned trial judge, the Chief Justice of British Columbia, would appear to have viewed the case as one for compensation —that, though, is not the form of the action as brought by the

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appellants. The action is one for trespass, and it is questionable if the action may be so viewed; yet, after all, what the appellants are entitled to at the very least is compensation for the loss suffered. The principle of law is referred to by Bowen, L.J. in *Phillips* v. *Homfray* (1883), 24 Ch. D. 439 at pp. 461, 462.

In the present case, the respondent has made use of the land of the appellants; largely destroyed its value as agricultural land; has cut timber from off it, outside the authority given; interfered with and obliterated the survey by the destruction and scattering of the planted survey posts. To have cut the young timber, *i.e.*, of less diameter than fifteen inches, was a most serious act, and palpably against any colour of right. The lowest scale upon which damages should be assessed would be full compensation for the loss sustained, for the use made of the lands, the depreciation in value of the lands, the value of the timber taken therefrom and, generally, damages that are the natural and probable result of the wrongful acts: *The Argentino* (1888), 13 P.D. 191, *per* Lord Esher, M.R. at p. 199; *Jones* v. *Gooday* (1841), 8 M. & W. 146; *Hosking* v. *Phillips* (1848), 3 Ex. 168; *Dodd* v. *Holme* (1834), 1 A. & E. 493; *Hide* v. *Thornborough* (1846), 2 Car. & K. 250; *Whitwham* v. *Westminster Brymbo Coal and Coke Company* (1896), 2 Ch. 538; *McArthur & Co.* v. *Cornwall* (1892), A.C. 75; *Livingstone* v. *Rawyards Coal Company* (1880), 5 App. Cas. 25; *Jegon* v. *Vivian* (1871), 6 Chy. App. 742; *Phillips* v. *Homfray*. *Fothergill* v. *Phillips*, *ib.* 770; *Attersoll* v. *Stevens* (1808), 1 Taunt. 183.

Apparently the learned Chief Justice of British Columbia was of the view, upon all the facts, that the case was not one for exemplary damages, and that there were facts amounting to justification or excuse: see *Skull* v. *Glenister* (1864), 16 C.B. (N.S.) 81, 103. With great respect to the learned Chief Justice, I am entirely unable to accept that view but, as before stated, the subsequent conduct of the appellants leads me to think that possibly the correct course to adopt is to allow the appellants such damages as will reasonably compensate them for their loss. Unquestionably the amount paid into Court

and thought to be sufficient damages, *viz.*, $600, is, with all due deference to the learned Chief Justice, quite inadequate. I would be disposed to assess the damages upon the different heads of loss at a much greater sum, and would arrive at even a greater amount than that thought to be just and right by my learned brothers, who have also arrived at the conclusion that the damages have been inadequately assessed. I have, however, and with deference to the view of my learned brothers, finally concluded that rather than that a new trial should be directed for the assessment of damages, with the consequent further risk and expense of litigation, the ends of justice may be satisfied by the assessment arrived at by my learned brothers, to which assessment I therefore agree.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellants: *McCrossan & Harper.*
Solicitors for respondent: *Bird, Macdonald & Ross.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

CORPORATION OF THE CITY OF VICTORIA, THE v. MACKAY (p. 23).—Reversed by Supreme Court of Canada, 14th May, 1918. See 56 S.C.R. 524; (1918), 2 W.W.R. 610.

GUARDIAN ASSURANCE COMPANY, LIMITED v. GUNTHER AND MATTHEW (p. 353).—Reversed by Supreme Court of Canada, 9th December, 1918. See (1919), 1 W.W.R. 67; 45 D.L.R. 32.

MCCOY v. THE NATIONAL BENEFIT LIFE AND PROPERTY ASSURANCE COMPANY, LIMITED (p. 162).—Affirmed by Supreme Court of Canada, 10th June, 1918. See 57 S.C.R 29; (1918), 2 W.W.R. 591; 42 D.L.R. 21.

MEADOW CREEK LUMBER COMPANY v. ADOLPH LUMBER COMPANY (p. 298).—Reversed by Supreme Court of Canada, 3rd March, 1919. See 58 S.C.R. 306; (1919), 1 W.W.R. 823; 45 D.L.R. 579.

VICTORIA-VANCOUVER STEVEDORING COMPANY, LIMITED v. GRAND TRUNK PACIFIC COAST STEAMSHIP COMPANY, LIMITED (p. 6).—Affirmed by Supreme Court of Canada, 25th June, 1918. See 57 S.C.R. 124; (1918), 3 W.W.R. 450; 43 D.L.R. 231.

WILLIAMS MACHINERY COMPANY OF VANCOUVER, LIMITED, THE A. R. v. GRAHAM (p. 284).—Affirmed by Supreme Court of Canada, 21st October, 1918. See 57 S.C.R. 229; (1918), 3 W.W.R. 597; 43 D.L.R. 437.

Case reported in 23 B.C., and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

DOMINION TRUST COMPANY v. NEW YORK LIFE INSURANCE COMPANY *et al.* (p. 343).—Affirmed by the Judicial Committee of the Privy Council, 17th October, 1918. See (1919), A.C. 254; 88 L.J., P.C. 30; (1918), 3 W.W.R. 850; 44 D.L.R. 12.

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lend the money advanced, and guaranteed repayment of principal and interest. Later, when the money was loaned, a back letter was sent to the investor, giving particulars of the security upon which the money was loaned and that the Company held the mortgage in trust for them. The Scottish investors had sent the Company amounts aggregating $140,000, for which each received guaranteed first mortgage certificates. The Dominion Trust Company had arranged to lend one Alvo von Alvensleben, and also Alvo von Alvensleben, Limited, $140,000 on a property in Vancouver that he had purchased from the C.P.R., and upon which he was building a warehouse. Payments were made on the mortgage as the building was progressing, and a final payment of $44,000 was made on the 12th of May, 1914, when, outside of the Dalton money, only $13,000 odd remained to the credit of the Dominion Trust's trust account, the payment of $44,000 to von Alvensleben therefore including over $30,000 of Dalton's moneys. "Back letters" were written to each of the "Scottish investors" between the 20th of May and 24th of August, 1914, advising them that their money had been invested each with others in a mortgage for $140,000 to Alvo von Alvensleben on certain property that had been purchased from the C.P.R. on their reserve in Vancouver. The mortgage was not registered with the registrar of joint-stock companies, as required by section 102 of the Companies Act. The Dominion Trust Company went into liquidation on the 9th of November, 1914. In an action for a declaration that the plaintiff is entitled to a first lien or charge on the mortgage, or in the alternative for a declaration that he is entitled to an interest in the mortgage in priority to the "Scottish investors," it was held by the trial judge that Dalton's money, being invested in the land covered by the mortgage jointly with other money, has a charge upon the property to the amount invested therein, and brings him within the class protected by section 102 of the Companies Act, and the mortgage not having been reigstered, he has priority over the "Scottish investors." *Held*, on appeal, reversing the decision of MURPHY, J., that section 102 of the Companies Act was enacted for the benefit of purchasers, mortgagees and creditors of the Company creating the charge (von Alvensleben, Limited); that the plaintiff's lien was not a mortgage or charge created by von Alvensleben, Limited, in its land, and the section therefore does not apply to his case. The plaintiff's

lien is an equitable interest not founded on express trust, whereas the defendants' interests, also equitable, are founded on express trusts, evidenced by the "first mortgage investment certificates" and "back letters." The defendants therefore having the better right to call for the legal estate, their rights must prevail. DALTON v. DOMINION TRUST COMPANY *et al.* - - - - **240**

2.—— *Fire insurance — Application for Provincial licence—Similarity of name to existing company—Imitation—Can. Stats. 1910, Cap. 32, Sec. 4; 1917, Cap. 29—R.S.B.C. 1911, Cap. 113.*] When the circumstances point to an intention on the part of a company to do business under a name which might easily be mistaken for the name of an existing company doing the same class of business, and thereby deceive the public, the Court will interfere at once if the circumstances are such as to make it reasonably certain that what is sought to be restrained is in furtherance of a plan to carry on such business. *Hendriks* v. *Montagu* (1881), 17 Ch. D. 638 followed. GUARDIAN ASSURANCE COMPANY, LIMITED v. GUNTHER AND MATTHEW. - **353**

3.—— *Liquidation — Applicants for shares—No allotment by company—Shares issued and registered—Contributories.*] Certain persons applied through the plaintiff Company's fiscal agents for shares in the capital stock of the Company. No allotment of shares was ever made by the Company to the applicants, but they eventually received share certificates for shares which had been previously allotted and issued to others. The applicants were duly registered on the books of the Company as the owners of the shares received by them. Prior to liquidation two attempts had been made to reorganize the Company, and to facilitate such reorganization the applicants executed transfers of their shares in trust. The applicants did not know until after liquidation that no allotment of shares had been made to them by the Company. Upon the Company going into liquidation, the registrar placed the applicants' names upon the list of contributories. Upon motion to vary the registrar's report:—*Held*, that as no allotment of shares had been made, there was no contract between the applicants and the Company, and their names should therefore be struck from the list of contributories. WESTERN UNION FIRE INSURANCE COMPANY v. ALEXANDER, LOGGIN AND HOLMES. - **393**

4.—— *Mortgage — Registration with registrar of joint-stock companies not*

discharge. It is impossible for a winding-up judge in an involved litigation to know all its ramifications as does the liquidator and his legal advisers, and without such knowledge, interference with the conduct of suits might well be highly detrimental to the liquidation. DOMINION TRUST COMPANY v. NEW YORK LIFE INSURANCE COMPANY *et al.* - - - - - - - - **271**

6.——*Court of Appeal—Leave to appeal to Privy Council—Application for—Action for damages — Personal injuries — Privy Council Rules, 1911, r. 2(b).*] An application for leave to appeal to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal dismissing an appeal from the dismissal of an action for $1,700 damages for personal injuries will be refused. TERAINSHI v. CANADIAN PACIFIC RAILWAY COMPANY. (No. 2). **536**

7.——*Divorce—Application for security for costs—Affidavit in support—Application to cross-examine on.*] On a petition for dissolution of marriage where there is a charge of adultery, neither the respondent, co-respondent nor the petitioner, even where there is a counter charge, is bound to answer any questions tending to prove him or her guilty of adultery. ROGERS v. ROGERS. - - - - - - - - **439**

8.—— *Garnishee — Divorce — Judgment Damages assessed against co-respondent—Procedure—R.S.B.C. 1911, Caps. 14, and 67, Sec. 36—1 & 2 Vict., Cap. 110, Sec. 18 (Imperial).*] A judgment in an action under the Divorce and Matrimonial Causes Act is, by section 18 of the Judgments Act, 1838 (Imperial), enforceable by an attaching order issued under the Attachment of Debts Act. MCLEOD v. MCLEOD: LONGHURST, Co-Respondent; DAVID SPENCER, LIMITED, Garnishee. - - - - **430**

9.—— *Interlocutory order — Appeal — Application to stay action pending—"Incidental" to appeal—R.S.B.C. 1911, Cap. 51, Sec. 10—Marginal rules 880, 881a.*] If, while an action is pending, a question arises which may affect the course of the action and is the subject of an appeal, the action should be stayed until the question has been dealt with by the Court of Appeal. ESQUIMALT & NANAIMO RAILWAY COMPANY v. DUNLOP *et al.* - - - - - - - **502**

10.——*Leave to take step in action—Not obtained by plaintiff—Objection first raised in notice of appeal—War Relief Act, B.C. Stats. 1916, Cap. 74; 1917, Cap. 74, Sec. 8.*] Section 8 of the War Relief Act Amendment Act, 1917, which came into force on the 19th of May, 1917, provides that "every plaintiff or party commencing, instituting, or taking any proceedings in or out of Court shall after service of the writ, notice, or other process whereby any proceedings in or out of Court are instituted, and before taking any further step, furnish evidence to the satisfaction of such Court or of the officer or tribunal in whose office or before which any proceedings out of Court are being taken, that the defendant was not at the time of such service entitled to the benefit of this Act," etc. The writ was issued in this action on the 10th of May, 1917, and without the plaintiff complying with the above section the action was tried and judgment given in his favour on the 20th of June following. The defendant first raised the point that the plaintiff had not complied with the provisions of the War Relief Act in his notice of appeal. *Held*, that it is only when the plaintiff proposes to take a step in the action that he is required to obtain leave. In the present instance it is the defendant who is taking the step (*i.e.*, giving notice of and bringing on the appeal), in which case the provisions of the Act do not apply. BELL v. JOHNSTON BROTHERS, LIMITED. **82**

11.——*Order for service "ex juris."* - - - - - - - - - - - **405**

See COMPANY LAW. 9.

12.——*Pleading—Application to strike out—Unnecessary but not embarrassing.*] Although there may appear in the pleadings matters which are unnecessary and superfluous, if they are not embarrassing, an application to strike them out will be refused. A Court of Appeal will examine more carefully the reasons and pay more attention to the pleadings, and examine them more narrowly to see if any harm has been done by the rejection of the pleadings than in a case where the judge below refused to strike them out. WELLINGTON COLLIERY COMPANY, LIMITED, AND ESQUIMALT & NANAIMO RAILWAY COMPANY v. PACIFIC COAST COAL MINES, LIMITED. **206**

13.——*Pleading—Statement of claim—Motion to strike out—Frivolous and vexatious—Consent judgment—Action to set aside — Res judicata — Fraud — Alleged in writ but not in statement of claim.*] An action may be brought to set aside a consent judgment on the grounds of mistake or misrepresentation. The indorsement of fraud on a writ will, on application, be struck out where there is no allegation of