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 XXVI.

VICTORIA, B. C.
PRINTED BY THE COLONIST PRINTING AND PUBLISHING COMPANY, Limited
1920.

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

A

C

D

H

L

M

N

O

P

Q

Y

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

NELSON v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

THE ORDER OF THE OBLATES OF MARY IMMACULATE v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

MACDONALD, J.
(At Chambers)

1918

Sept. 6.

NELSON v. PACIFIC GREAT EASTERN RY. CO.

Practice—Costs—Plaintiffs successful in action—Certain questions in controversy decided in defendant's favour—Costs as to, for defendant—Issue—Event.

A judgment allowed the plaintiffs the costs of the action "except so much thereof as relates to the questions in controversy which were decided in favour of the defendant," and the defendant was to recover from the plaintiffs "its costs of so much of the action as relates to said questions." The action was for compensation because of a railway company improperly encroaching upon the foreshore in front of the plaintiffs' land, and for taking a portion of the plaintiffs' land for railway purposes. The plaintiffs succeeded as to the foreshore but failed to shew that any of their lands had been taken. The Company contended that under its Act of incorporation the plaintiffs were not entitled to compensation in respect of foreshore rights if the Act were complied with in the construction of the railway. The trial judge held the defendant had constructed the railway in accordance with the Act, but that the Act did not deprive the plaintiffs of the

MACDONALD, J. (At Chambers)

1918

Sept. 6.

right of compensation. The taxing officer allowed the defendant the costs of witnesses brought to prove that they had complied with the Act.

Held, on review, that the defendant having failed upon the question as to the foreshore, it was not entitled to the costs relating to that issue.

NELSON v. PACIFIC GREAT EASTERN RY. CO.

APPLICATION to review the taxation of a bill of costs. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. at Chambers in Vancouver on the 4th of June, 1918.

Dorrell, for plaintiffs.
Gibson, for defendant.

6th September, 1918.

MACDONALD, J.: Application is made to review the taxation of the bill of costs herein. These actions were tried together, and the plaintiffs succeeded. They were allowed the costs of action, "except so much thereof as relates to the questions in controversy, which were decided in favour of the defendant." Defendant was to recover from the plaintiffs "its costs of so much of the action as relates to said questions." Under this provision the defendant was allowed, in the taxation of its costs, certain witness' fees amounting to, about $500. These expenses were claimed for expert witnesses, called by the defendant to prove, that, in the construction of its railway, it had adopted "the shortest possible route" from the City of Vancouver to the City of North Vancouver and thence along the margin of Howe Sound, B.C. Considerable time was occupied at the trial in ascertaining whether the statute, authorizing the construction of the railway, had, in this respect, been complied with. I expressed a doubt, as to whether it was material to decide this point, in view of the route having been sanctioned by the Lieutenant-Governor in Council, but found as a fact that the defendant had adopted a proper route and that the line, as constructed along the foreshore in front of the plaintiffs' property, was in accordance with the legislation. Defendant contends that this finding was on a "separate issue or event," and consequently that the witness fees in connection therewith are properly chargeable against the plaintiffs. The terms of the order for judgment, in this respect, are somewhat broader than those

Judgment

usually adopted, but I do not think they were intended, nor should they give, any further costs to the defendant, than if it had declared that the defendant was entitled to the costs of "the issue," upon which it succeeded. The point then to be considered is, whether such finding was an "issue or event" found in favour of the defendant? The controversy between the parties arose, through the defendant claiming the right, in the construction of its railway, to take possession of and interfere with the use and enjoyment of the foreshore in front of the plaintiffs' property, without paying compensation. I decided that the defendant did not possess this right, and could not thus encroach upon the foreshore, without complying with the provisions of the British Columbia Railway Act, as to expropriation and payment of compensation. Not having received the consent of the owners to such occupation, it should have given notice to "treat" and take any other necessary proceedings, to utilize this land for railway purposes. After the dispute had developed, there was a stated case submitted to the Court. When it came on for disposition, the pleadings did not set up any statutory right to construct the railway. There was a letter produced from the judge, who held the trial, dealing with the matter of the "shortest possible route," but neither by the pleadings, as then existing, nor as subsequently amended, is the question of such non-compliance with the statute specifically raised. It was apparently in the mind of all parties, that evidence on this point would be required, and should be available, and so the trial proceeded without any prior notice "to admit facts" having been given.

Judgment

The plaintiffs claimed that, not only was the foreshore improperly encroached upon, but that a portion of their land had been taken for railway purposes. This created two issues, and as the plaintiffs only succeeded with respect to the foreshore, they are required to pay the costs pertinent to the issue, as to the land taken. It is, as if a party sought to recover possession of two pieces of land and failed as to one of them: see, *e.g., Slatford* v *Erlebach* (1911), 81 L.J., K.B. 372; (1912), 3 K.B. 155. It is contended by the plaintiffs, that the determination, as to whether the shortest possible route had been adopted or not, was not a "separate issue or event," and while

MACDONALD, J. (At Chambers)

1918

Sept. 6.

NELSON v. PACIFIC GREAT EASTERN RY. CO.

of importance, and closely contested, still, that it was only a branch of the defence. It was submitted that the defendant required to shew, not only the statutory authority to construct the railway, but also that the statute was applicable, and had been properly utilized, or fail in its defence. It seems clear that the defendant can only justify its trespass, by seeking to apply the statute. To accomplish this end, it was necessary to prove compliance with the statute, not only by filing plans, but by shewing that they have been sanctioned and approved by the proper authority. Then a further step, beyond proving plans, would be to shew that the line, as constructed, was in compliance with the Act. Generally speaking, if there was a lengthy discussion and argument as to the validity of the plans, or upon some other portion of the proceedings, of like nature, would it not be deemed a part of the plea of justification, and depend, as to liability for payment of costs, upon the result of such defence? Then the expenses attached, to proving the applicability of the Act, should not be on a different basis. They might possibly be segregated. Still, I do not think that they were expended, in order to alone support a separate issue, upon which the defendant would be entitled to have its costs taxed against the plaintiffs. In other words, as the defendant failed upon the issue raised by its plea of justification, it should not be entitled to tax costs in connection with a branch of such plea, upon which it succeeded. In my opinion, even though such portion of the costs of the trial could be fairly separated, still, I should not introduce a principle of taxation, that might create a most complicated state of affairs. For example, if a party raised a ground of defence, requiring proof of a number of facts to support it, then, he might claim to be entitled to costs of proving all the facts, except the one upon which he failed, and which destroyed the whole effect of such plea. I think the same position should apply, where a statute is set up as a defence, in an action of trespass to land, and the defendant deems it necessary, to prove the applicability of the Act and compliance with its terms in order to justify its acts. I should add that in coming to a conclusion, I have been influenced by the failure of the defendant to avail itself of the provisions of Order XXXII., r. 4, as to serving of notice to admit facts prior to trial. This

Judgment

was a ready means, that could have been adopted by defendant and would doubtless have brought about the result now sought to be attained. I think that the plaintiffs should not be required to pay such portion of the costs of witnesses, called by the defendant, as tended to support this branch of the defence, and the taxation should be varied accordingly.

During the argument, I dealt with the cost of examination for discovery, and expressed the opinion that the registrar was right in disallowing such costs, but there might be an allowance of two hours for inspection of documents in lieu of the cost of examination. Then as to counsel fees, I intimated, and now hold, that in view of the success of the plaintiffs in this important action, I think a senior counsel fee of $75 should be allowed in both actions. The certificate of taxation should be varied and the plaintiffs are entitled to costs of this application, fixed at $10, which, without further order, can be added to their costs.

Judgment

Order accordingly.

McKINLAY v. THE MUTUAL LIFE ASSURANCE COMPANY OF CANADA.

Negligence — Office building — Stairway — Obligation as to lighting and railings on stairs—Member of club renting rooms in building—Injury through falling—Application of city by-law requiring lighting—B.C. Stats. 1886, Cap. 32, Sec. 142(54).

The plaintiff, a member of a club renting rooms on the fourth floor of an office building owned by the defendants, left the rooms at about 8.30 in the evening. As the elevator was not running he walked down the stairway. On the fourth floor there was a corridor in front and to the left of the elevator-shaft, the stairs starting down at the back and continuing down on the right side of the shaft. The third storey was the same as the fourth, but owing to the greater height above the ground floor, the stairs started from the left of the shaft at the second floor. The corridors were lighted on the third and fourth storeys but not on the second. As the plaintiff went down, thinking the stairway started from the second storey at the same place as the others, he stepped into space at the left of the shaft and, falling

CAYLEY, CO. J.

1917

Nov. 24.

COURT OF APPEAL

1918

Oct. 1.

McKINLAY v. MUTUAL LIFE ASSURANCE CO. OF CANADA

on the stone stairway, was injured. The learned trial judge nonsuited the plaintiff.

Held, on appeal, McPHILLIPS, J.A. dissenting, that there was no duty towards the plaintiff imposed upon the defendant to light the staircase and the appeal should be dismissed.

Huggett v. *Miers* (1908), 2 K.B. 278 followed.

A city by-law provides that "The owner of any theatre . . . . office building or any public building requiring fire-escapes, shall provide the same with indicating lights at all fire-escapes and shall at all times adequately light all lobbies, halls and corridors."

Held, McPHILLIPS, J.A. dissenting, that the by-law was intended to provide protection to tenants and occupants of such buildings in case of fire, but could not be invoked in an action for personal injuries resulting from falling down an unlighted stairway.

Statement

APPEAL from the decision of CAYLEY, Co. J. in an action for damages for injuries sustained by the plaintiff in falling down stairs in the defendant Company's building. Tried at Vancouver, with a jury, on the 26th of October, 1917. The defendant owned the Insurance Exchange Building (former Dominion Trust Building) on Pender Street in Vancouver. The building is eight stories high, and suites on the fourth floor were rented to the Elks Club, of which the plaintiff was a member. The defendants reserved control of the elevator and the stairs. The stairs went down around the elevator shaft. On the fourth floor there was a corridor at the front of the elevator and on its left side, the stairs starting down at the back of the shaft. The third floor was the same, but owing to the greater height of the ground floor, the stairs started down from the second floor on the left side of the shaft. On the evening of the accident there was a light on the third and fourth floors, but there was no light on the second floor. On the 30th of July, 1917, the plaintiff, who had visited the Elks Club, came out and rang the elevator bell. After three or four minutes, the elevator not responding, he started down the stairs. On reaching the second floor, thinking the stairs would be the same as above and not start until he reached the back of the shaft, he stepped into space at the left of the shaft and, falling, was injured, sustaining a left inguinal hernia or rupture and other internal injuries. The jury found for the plaintiff in $600, but the learned judge dismissed the action.

C. W. Craig, and *D. W. F. McDonald,* for plaintiff.
Robert Smith, for defendant.

24th November, 1917.

CAYLEY, CO. J.: The plaintiff was, at the time of the occurrences herein set out in the pleadings, a member of the Elks Club, who were tenants on the fourth floor in an office building belonging to the defendant. The defendant was mortgagee, who by virtue of foreclosure proceedings became registered owner of the building on the 20th of July, 1917, he had, however, collected the rents from the 1st of July, 1917. On the 30th of July, 1917, at 8.30 in the evening, the plaintiff left the Club on the fourth floor and rang for the elevator to take him downstairs. After waiting for some minutes for the elevator, and it not coming, he proceeded downstairs by the stairway. The stairways and corridors were under control of the defendant, and were on this occasion lighted as to the third and fourth floors, but were not lighted as to any floors below the third. The consequence was that the plaintiff, after leaving the third floor, found himself in darkness. His own words were: "It was pretty dark, good and dark." When he reached the first or mezzanine floor, the plaintiff, not knowing that the stairway leading from the mezzanine floor to the ground or entrance floor was constructed differently from the stairways on the upper floors, stepped into the stairway at a point where he had no expectation of finding a stairway and fell down a flight of marble steps. The result was a rupture; whereupon the plaintiff brought action for damages against the defendant as owner of the building. The plaintiff's language at the trial was:

"On the night that I came down the stairs, after walking down from the fourth, third and second floors, and coming to the mezzanine floor, I walked off into space."

The Elks Club had a lease of the premises from the former owners of the building, which, it was contended by the plaintiff, reverted to the defendant. There was also a provision in the city by-laws which might affect this building, in regard to the lighting of buildings in Vancouver, and the plaintiff relied upon paragraph 29 of by-law No. 941, amended. At the conclusion of the plaintiff's case, a nonsuit was asked for by the defendant on the ground that there was no case to go to the jury.

CAYLEY, CO. J.

1917

Nov. 24.

COURT OF APPEAL

1918

Oct. 1.

McKINLAY v. MUTUAL LIFE ASSURANCE CO. OF CANADA

The nonsuit was refused and the jury found a verdict for the plaintiff as follows: That the plaintiff was "entitled to damages on account of injuries received through falling down an improperly lighted staircase and entitled to damages amounting to $600." The plaintiff moved for judgment and the defendant renewed his application for a nonsuit. The question is, whether in this particular case there is evidence of negligence to go to the jury. The argument of the plaintiff was that the stairway from the mezzanine floor, not following the usual course of the upper staircases, was in the nature of a trap; also that there was a contract between the defendant and tenants of the building to light the hall and stairways at night, and this contract by necessary implication extended to those who, like the plaintiff, came on business or pleasure to the premises as invitees or licensees. The plaintiff also argued that there was a city by-law which directed that in any building, such as the one in question, the hallways and corridors should be lighted at night, and that thus a duty was imposed upon the defendant which enured to the benefit of the plaintiff as one of the public. But I do not find that there was a trap because the stairway descending from the mezzanine floor did not commence at the same point that it would have if it followed the course of the upper stairway. The building was so constructed when the tenants rented it, and they took it with knowledge of its construction. It was the construction of the building also when the defendant became owner of it in July, 1917, and they had not altered it. Nor do I think there was a contract, expressed or implied, from the defendant to the tenants to keep the corridors and halls lighted at night throughout the building, arising from the expressions of the lease or the terms of the tenancy. Whether there was an implied term arising by implication from the fact that there was a city by-law governing the lighting of the building is another question. But the lease contains no express contract to supply light, as I see it. The essential terms of the lease, as far as this case is concerned, are as follows:

CAYLEY, CO. J.

"In consideration of the rents and the lessee's covenants hereinafter reserved and contained, the lessor hereby demises unto the lessee all that suite of rooms situate upon and being part of the fourth floor of the building known as No. 402 Pender Street West, Vancouver, B.C., together

with the use in common with the lessor and tenants and occupiers of the said building, entrance hall, staircases, landings and passages thereof."

"The lessee shall have the use of the elevator operated in connection with the building in common with the other tenants of the building at such time or times and in such manner or manners as the lessor shall deem fit."

"The lessee agrees to provide without any cost to the lessor all janitor services."

If we assume that this last paragraph is an error and that it is the lessor who has to provide the janitor's services, I do not read the clause as a contract to supply light, much less to light up the floors not occupied by the lessee. Nor do I read the other clauses, or any other part of the lease, as an express contract to light up the lower floor for the benefit of the occupants of the fourth floor, although in connection with paragraph 10 of the lease, which reads as follows: "The lessee agrees to pay to the lessor, in addition to the rent hereby reserved, all moneys for electric light in excess of the sum of $10 per month," there is, I think, an implied contract to furnish electric light on the fourth floor and the hallway of the fourth floor which would enable the tenants of that floor to enjoy the use of their rooms and proper access to the elevator. I do not think there is a contract implied from those expressions to light the stairways down to the entrance hall. Is there a contract by necessary implication in the same way as there is a contract by implication to keep the stairways in repair? In the argument, the majority of cases cited, as being in point, dealt with the keeping of the stairways in a state of repair. Counsel for the plaintiff used the words: "The defendant owes a duty to the tenants whom they might reasonably expect to use the premises, to keep the place in a state of repair," and counsel contended that keeping the staircases in a state of repair included keeping them lighted after dark. In *Huggett* v. *Miers* (1908), 2 K.B. 278, which was a case of staircases not lighted, Fletcher Moulton, L.J., at pp. 285-6, says:

"There is a very broad distinction between a case like the present and a case of non-repair of a staircase. If a staircase is dark, a person using it must obviously be aware that it is in that condition; whereas in the case of a person using a staircase which is out of repair, as in *Miller* v. *Hancock* (1893), 2 Q.B. 177, it may not be obvious to him that it is so."

All the judges in giving their judgments referred to the particular circumstances of the case. If keeping the stairways

CAYLEY, CO. J.

1917

Nov. 24.

COURT OF APPEAL

1918

Oct. 1.

McKINLAY v. MUTUAL LIFE ASSURANCE CO. OF CANADA

lighted was the same as keeping them in repair, then the decision in *Miller* v. *Hancock* (1893), 2 Q.B. 177 might apply here (if other considerations did not intervene), *i.e.*, that there was by necessary implication an agreement by the defendant with his tenants to keep the staircase lighted. But in *Huggett* v. *Miers, supra,* at p. 284, the President, Sir Gorell Barnes, stated that *Miller* v. *Hancock* was not an authority for that proposition, on two grounds. First, that

> "In *Miller* v. *Hancock* the person injured was regarded as using the staircase on the assumption, which he was entitled under the circumstances to make, that it was in a proper state of repair. In the present case, the staircase being pitch dark, the risk of using it without providing himself without any light was obvious to the plaintiff."

The second ground was that, under the circumstances of that case, the landlord had not undertaken to light the staircase. I think both these grounds exist in the present case. On the authority of *Huggett* v. *Miers, supra,* I think I must conclude that even if there is an implication that the landlord is bound to keep the staircase in repair, he is not obliged on that ground to keep them lighted. I leave out of view the fact that the staircase in *Miller* v. *Hancock* was the only means of approach to the upper floor, whereas in the present case there was an elevator furnishing an alternative means of ascent or descent. But counsel for the plaintiff contended further that there is a city by-law which imposed upon the defendant the duty of keeping the premises lighted, and that, failing in that duty, the plaintiff, whether as invitee or licensee, has an action, if he suffered injury by reason of the non-performance of that duty. I think that may be so, unless the object of the by-law is for another purpose. I think, too, that the by-law was properly admissible in evidence.

CAYLEY, CO. J.

In *Patterson* v. *Fanning* (1901), 1 O.L.R. 412, it was decided that evidence of a by-law of the municipality against animals running at large was admissible in aid of the plaintiff, who was injured by a horse escaping on to the streets of the city. This was affirmed on appeal, 2 O.L.R. 462, and the plaintiff recovered damages. In *Blamires* v. *Lancashire and Yorkshire Railway Co.* (1873), L.R. 8 Ex. 283, the plaintiff recovered damages from a railway which had neglected to comply with the Regulation of Railways Act. *Gorris* v.

Scott (1874), L.R. 9 Ex. 125 is, however, an authority for the proposition that where a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss. The head-note of the case states as follows:

"The defendant, a shipowner, undertook to carry the plaintiffs' sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the defendant's neglect to take a precaution enjoined by an order of Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869, s. 75:—*Held*, that the object of the statute and the order being to prevent the spread of contagious disease among animals, and not to protect them against perils of the sea, the plaintiffs could not recover."

Following this authority, I do not see how I can avoid a consideration of the object of the by-law. The by-law is No. 1195 to amend by-law 945. The electric light by-law and the section relied on by the plaintiff is section 29 of by-law 945 as amended. This reads as follows:

"The owner of any theatre, public hall, apartment-block, apartment-house, hotel, department-store, rooming-house, lodging-house, office-building, or any public building, requiring fire-escapes, shall provide the same with indicating lights at all fire-escapes, and shall at all times adequately light all lobbies, halls and corridors, and the lighting system thereof must be on separate circuits and be controlled by special cutouts. All indicating lights must consist of standard electric lamps of not less than ten candle power, enclosed in a ruby glass globe of not less than eight inches in diameter upon which must be etched the words 'Fire Escape' in letters of not less than one inch high. An indicating switch must be installed on all such lights and located in the office of building or other place approved by the city electrician."

For the sake of further light on the object of the by-law, I notice also section 30 of by-law No. 945 as amended:

"Section 30 of by-law 945 is hereby amended by striking out all the words in the first sentence of said section 30, and inserting in lieu thereof the following:

"All office-buildings not of fire-proof construction, apartment-houses, tenement-houses, hotels, rooming-houses, lodging-houses, schools, detention buildings, factories over two (2) stories in height, and all other buildings requiring fire-escapes, which are occupied at night, must be provided with electric fire-gongs. These gongs must be at least 10 inches in diameter and must be installed on each floor."

"Said section 30 of by-law 945 is hereby further amended by inserting after the word 'buildings' in the eleventh line thereof the following words:

"All department-stores shall have approved break-glass switches

CAYLEY, CO. J.

1917

Nov. 24.

installed on each floor at such places as indicated by the city electrician. These switches shall operate electric-bells on all floors and these bells shall be of sufficient size that when operated they will be distinctly heard by the employees throughout the building. The wiring for such bells must comply with the rules governing conduit work."

COURT OF APPEAL

1918

Oct. 1.

McKINLAY v. MUTUAL LIFE ASSURANCE CO. OF CANADA

I have compared section 29 as amended with the old section 29, of which it is an amendment, and find that the words "requiring fire-escapes" are inserted after the words "office-building or any public building." These words, "requiring fire-escapes," did not occur in the old section 29, therefore, it seems to me it was essential in the plaintiff's case that he should shew that the present building was one "requiring fire-escapes," and no evidence, I find, was produced on that point. But what is the object of section 29? Read in its own light, is it not to provide protection to tenants and occupants of certain buildings in case of fire? Is it not the same object as in section 30? I do not read section 29 as having any other object than to protect the public from danger in case of fire and people hurrying to escape and, therefore, under the authority of *Gorris* v. *Scott, supra,* I do not think the section can be invoked for a different object. Here it is sought to protect a person who prefers to descend a staircase at night, not to escape fire but for his own convenience, and I do not see that the section was passed for this purpose. If the landlord owed any duty to tenants and occupants to light the lower staircases in the present case, the duty, it seems to me, must arise not from this by-law but from another source. There is a duty, it seems to me, towards members of the public using the staircases for the purposes of access to the offices of tenants, where the staircases are under the control of the landlord and the staircase is the only means of ascent or descent. But this duty does not go so far as to protect imprudent persons who take unnecessary risks, nor do I think it extends to persons who both take imprudent risks and who have an elevator at hand as an alternative means of descent. Sir Gorell Barnes in *Huggett* v. *Miers, supra,* at p. 282 says:

CAYLEY, CO. J.

"The learned judge left the case to the jury, but indicated to them that, in his opinion, there was, under the circumstances, no duty towards the plaintiff imposed upon the defendant to light the staircase."

This may have been upon the facts of that case. In the

present case the facts differ in that the tenants in this case did not light their own landings as in *Huggett* v. *Miers,* but then in *Huggett* v. *Miers* there was no elevator running, as there was in this.

In regard to the elevator, the plaintiff did not produce evidence that the elevator was not running on the night in question or at the hour in question. In my charge to the jury I said: "There is nothing in the evidence to shew the elevator was not running at all. I presume from the evidence the elevator was running." Counsel for the plaintiff did not take exception to this direction, so I presume it was correct. Assuming that the plaintiff as a member of the Elks Club was in the position of an invitee, and I do not say that it was so, but I am inclined to think that a member of a club stands in a favoured position as regards the landlord, I do not see that there was any invitation extended to him to pursue his journey downstairs to a point beyond that where the lights were turned on. On the second floor he found himself in darkness. A prudent man would have turned back, or struck a match, or sought the elevator on that floor or the floor above. Instead of that he chose to continue his descent in darkness to the mezzanine floor, and it seems to me he did so at his own risk. In *Lewis* v. *Ronald* (1909), 26 T.L.R. 30, the plaintiff, delivering fish at an apartment-house, fell down an unlighted stairway, notwithstanding that the defendant entered into an agreement with the tenants that he would light the staircases on the premises "when necessary." The difference between that case and this seems to be that there the landlord "entered into an agreement with the tenants that he would light the staircase on the premises when it was necessary," and Mr. Justice Darling says: "That does not amount to a contract with anybody but the tenants," but the judgment was not based on that ground. It was based on the ground offered by Lord Blackburn in commenting in *Indermaur* v. *Dames* (1867), 36 L.J., C.P. 181 on the case of *Wilkinson* v. *Fairrie* (1862), 1 H. & C. 633. At p. 183 Lord Blackburn said:

"It always struck me that that case ought to be supported, on the ground that the plaintiff chose to go into the premises and wander about in a way ["in the dark," according to another report] the defendant could not anticipate."

CAYLEY, CO. J.
1917
Nov. 24.

Mr. Justice Darling says that "those observations apply to the present case," to wit, *Lewis* v. *Ronald, supra.* Mr. Justice Darling further says: "I can see no invitation to anybody to walk about on the staircase when it is not lighted." The plaintiff was nonsuited accordingly.

COURT OF APPEAL
1918
Oct. 1.

It seems to me that the only basis for the present action would be that section 29 of by-law 945 imposes a duty on the landlords of premises having fire-escapes to "adequately light all lobbies, hall and corridors," and that this duty enures to the benefit of the plaintiff. I have already observed that the object of section 29 of the by-law seemed to me to be of a different nature, but now I will consider that even if section 29 be considered to impose that duty on these defendants, it does not for that reason follow that a plaintiff, who could at any time, after he found himself on a dark stairway, have taken himself out of danger, can persist in continuing to go further into danger and rely on the defendants' non-performance of a duty to absolve the plaintiff from the probable consequence of his own act. A man who, in a strange building, with an alternative means of descent at hand, persists in continuing to descend an unlighted stairway, is, I think, imprudent; and if accident occurs in consequence, it is no excuse for him to say that the defendant should have had his lights on.

McKINLAY v. MUTUAL LIFE ASSURANCE CO. OF CANADA

CAYLEY, CO. J.

For the reasons given and on the authority of the cases cited, more particularly perhaps the case of *Lewis* v. *Ronald*, I think I must grant the nonsuit and enter judgment for the defendant.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 15th of April, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

C. W. Craig, for appellant: The jury was in our favour, but the learned judge dismissed the action, holding that there was no negligence as the defendant owed no duty to the plaintiff. My contention is, there was a duty cast on the defendant to keep the stairs properly lighted and in a safe condition for use, as they rented suites for business purposes and there is an implied invitation to the public to come and do business there. Secondly, the plaintiff being a member of the Elks Club, he was in effect

a tenant: see *Miller* v. *Hancock* (1893), 2 Q.B. 177 at p. 182; *Huggett* v. *Miers* (1908), 2 K.B. 278; *Lucy* v. *Bawden* (1914), 2 K.B. 318 at p. 321; *Dobson* v. *Horsley* (1915), 1 K.B. 634; *Hart* v. *Rogers* (1916), 1 K.B. 646; *Lewis* v. *Ronald* (1909), 26 T.L.R. 30. The by-laws of the city require lights to be lighted in all office buildings. It is not a fair interpretation to say this provision is only for fire protection: see *Vacher & Sons, Limited* v. *London Society of Compositors* (1913), A.C. 107 at p. 113.

Robert Smith, for respondent: With relation to the by-law, its infringement does not give the plaintiff a right of action: see *Thacker Singh* v. *Canadian Pacific Ry. Co.* (1914), 19 B.C. 575; *Love* v. *Fairview* (1904), 10 B.C. 330. We say we owe no duty to the plaintiff to keep lights on the stairway, and the trial judge has so decided: see *Wilkinson* v. *Fairrie* (1862), 1 H. & C. 633; *Cavalier* v. *Pope* (1906), A.C. 428. As to the duty imposed on the owner of a premises in the way of safeguard from danger see *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 311 at p. 313; *Fleming* v. *Eadie & Son* (1898), 25 R. 500. A nonsuit was entered by the judge below.

Argument

Craig, in reply.

Cur. adv. vult.

1st October, 1918.

MACDONALD, C.J.A.: I agree with the learned County Court judge in his reasons for judgment.

Apart from the by-law there can be no doubt that the action was not maintainable. I think the by-law was meant to protect the occupants of such a building as the one in question from personal injury by fire by requiring the owner to provide fire escapes with indicating lights and with other lights in the halls and corridors to assist the occupants to find the exits. It was not intended, if indeed the municipality had the power to so legislate, to cast on the owner a burden for the protection or convenience of either occupants or strangers in finding their way about the halls, corridors and stairways when a fire was not threatened nor in progress.

MACDONALD, C.J.A.

I would, therefore, dismiss the appeal.

CAYLEY, CO. J.

1917

Nov. 24.

COURT OF APPEAL

1918

Oct. 1.

MARTIN, J.A.: In my opinion the learned judge below has reached the right conclusion, and therefore the appeal should be dismissed.

To the cases cited on the application of fire by-laws I add *Love* v. *Fairview* (1904), 10 B.C. 330; and *Thacker Singh* v. *Canadian Pacific Ry. Co.* (1913-4), 19 B.C. 575; 5 W.W.R. 125. The by-law in question here is, at most, one aimed at fire, and not lighting in general.

McKINLAY v. MUTUAL LIFE ASSURANCE CO. OF CANADA

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The learned trial judge, in the language of Mr. Justice Darling in *Lewis* v. *Ronald* (1909), 26 T.L.R. 30 at p. 31, "has given most careful consideration to this case," but I am unable, with respect, to arrive at the same conclusion at which he did when he refused to enter judgment for the appellant upon the jury's general verdict in favour of the plaintiff. The verdict of the jury was in the following terms:

"The jury find that plaintiff is entitled to damages on account of injuries received through falling down an improperly lighted staircase. Damages—Operation, $100; hospital fees, $100 (approximately); truss, $3; time lost, $90; inconvenience, etc., $307—$600 (approximately)."

The respondent acquiring the reversion, the Order of the Elks became tenants upon the same terms with the respondent, and the plaintiff was a member of the Order entitled and invited to go upon the premises (see Foa, 5th Ed., 451; *Brydges* v. *Lewis* (1842), 3 Q.B. 603).

The learned trial judge, in a considered judgment, has reviewed the law bearing upon the question for consideration, and has very elaborately referred to and distinguished cases of a like or analogous nature, and it cannot be said that the law is at all clear when the special facts of the present case are considered. The learned judge concluded his judgment by saying:

"For the reasons given and on the authority of the cases cited, more particularly the case of *Lewis* v. *Ronald*, I think I must grant the nonsuit and enter judgment for the defendant."

Lewis v. *Ronald* was a decision of the King's Bench Division (Darling and Bucknill, JJ.), and with unfeigned respect to the Court, that decision, in my opinion, cannot be held to detract from or affect the decision of the Court of Appeal in England in *Miller* v. *Hancock* (1893), 2 Q.B. 177, a case which has received a very great deal of consideration in the following

amongst other cases: *Hargroves, Aronson & Co.* v. *Hartopp* (1905), 1 K.B. 472; *Williams* v. *Gabriel* (1906), 1 K.B. 155; *Cavalier* v. *Pope* (1906), A.C. 428; *Malone* v. *Laskey* (1907), 2 K.B. 141; *Huggett* v. *Miers* (1908), 2 K.B. 278; *Lucy* v. *Bawden* (1914), 2 K.B. 318; *Dobson* v. *Horsley* (1914), 84 L.J., K.B. 399; (1915), 1 K.B. 634; *Hart* v. *Rogers* (1916), 1 K.B. 646; 85 L.J., K.B. 273, and I would particularly refer to the language of Scrutton, J. (now Lord Scrutton) at pp. 275-6.

In the present case, unquestionably the respondent, "either expressly or by implication," undertook with the tenants, the Elks, of which Order the plaintiff was a member, "to keep in repair an approach to the demised premises" (Farwell, L.J. in *Huggett* v. *Miers* (1908), 77 L.J., K.B. 710 at p. 713). The learned counsel for the respondent relied greatly on *Cavalier* v. *Pope* (1906), A.C. 428. Here there was the control of the staircase by the landlord and the lighting of it was undertaken by and obligatory on the landlord—see what Lord Atkinson said at p. 433. With deference to the learned counsel, I cannot see any forcefulness in that case (*Cavalier* v. *Pope, supra*) in the way of assisting the respondent; rather it assists the appellant. The building is a very large, modern and up-to-date office building in the City of Vancouver. It is true there is an elevator in the building, but there is also a staircase, and the respondent is in control and charge of the staircase and lights the same, and at the floor where the accident took place at the time of the accident there was no light. At that point in the staircase the stairs were differently constructed. The appellant in coming down from the floor above, unaware of the difference of construction at this last floor, which was unlighted—the other floors being lighted—stepped into space and suffered personal injuries. Can it be said that there is not liability upon these facts? In my opinion there is. There was no obligation upon the appellant to take the elevator, and there is evidence that for some reason it was either not in commission—that is, being operated at the time—or there was some undue delay, and the appellant, quite within his rights, proceeded down the staircase and could reasonably have expected that the staircase would have been lighted, and at all hours of the night. This is not an unreasonable requirement in these modern days, con-

CAYLEY, CO. J.

1917

Nov. 24.

COURT OF APPEAL

1918

Oct. 1.

MCKINLAY v. MUTUAL LIFE ASSURANCE CO. OF CANADA

sidering modern conditions, the stamp of building and the size and importance of the City of Vancouver. Then the by-law is not to be overlooked and the legislative authority to make the same, which reads:

"54. For causing all lands, buildings and yards to be put in other respects into a safe condition to guard against fire and other dangerous risk or accident":

Vancouver Incorporation Act, 1886, B.C. Stats. 1886, Cap. 32, Sec. 142, Subsec. (54), as amended by Cap. 37, Sec. 17 of 1887. By-law 941, Sec. 37, in part reads:

"Shall have all public halls, stairways and passage-ways properly lighted."

I cannot agree that this by-law must be considered only with reference to fire prevention, and that the accident, not being referable to a fire, cannot be invoked. In my opinion there was here a breach of a statutory condition, and its breach imports negligence and gives a cause of action: see *Groves* v. *Wimborne* (*Lord*) (1898), 2 Q.B. 402; *Britannic Merthyr Coal Company, Limited* v. *David* (1910), A.C. 74; *Butler* (*or Black*) v. *Fife Coal Company, Limited* (1912), A.C. 149; *Watkins* v. *Naval Colliery Company* (*1897*), *Limited, ib.* 693 at pp. 702-3; *Jones* v. *The Canadian Pacific Railway Company* (1913), 29 T.L.R. 773; *Guardians of Holborn Union* v. *Vestry of St. Leonard, Shoreditch* (1876), 2 Q.B.D. 145; Halsbury's Laws of England, Vol. 27, p. 174.

MCPHILLIPS, J.A.

There was, upon the facts of the present case, a concealed danger. It is not necessary to, in detail, refer to the decided cases at any greater length; it would appear to me that there has been established a legal responsibility for the unfortunate happening. The appellant was the sufferer by reason of the neglect of the respondent, and there was a duty to warn and to have proper safeguards. These were not provided, and there was a breach of an implied warranty as well (see *Hayward* v. *Drury Lane Theatre* (*Limited*) *and Moss Empires* (*Limited*) (1917), 33 T.L.R. 557; *Maclenan* v. *Segar* (1917), 86 L.J., K.B. 1113). I would refer to the very recent case of *Kimber* v. *Gas Light and Coke Company* (1918), 1 K.B. 439, and in particular to the language of Bankes, L.J. at p. 445, and Scrutton, L.J. at pp. 446-7. In these modern days, staircases, elevators and other modern conveniences must be kept safe,

they are virtual highways—thousands are housed in the sky-scrapers of the modern city, and huge rents are derived from tenants. It is justice and right that there should be liability upon the landlord. Lord Shaw of Dunfermline in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited* (1915), A.C. 599 said at p. 617: "The law must adapt itself to the conditions of modern society and trade . . . ." Further, the general verdict of the jury is not to be lightly overthrown, unless there be some error in law, and I do not find that there is any error in law: see Lord Loreburn in *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *D. W. F. McDonald.*
Solicitor for respondent: *R. P. Stockton.*

IN RE COAL AND PETROLEUM ACT AND JOHNSON *ET AL.*

Mining law—Coal and Petroleum Act—Licences—Minister of lands—Right to refuse licence—Former holder's right to revive lapsed licences—B.C. Stats. 1915, Cap. 48—R.S.B.C. 1911, Cap. 159.

The petitioners applied to the minister of lands for licences under the Coal and Petroleum Act to prospect for coal and petroleum over an area upon which others had previously held licences. The petitioners had fulfilled the statutory requirements to entitle them to licences after the former licences had expired and before the holders thereof attempted to revive the same under chapter 48 of the British Columbia Statutes, 1915, being an Act to enable the Lieutenant-Governor in Council to grant relief from penalties and forfeitures in relation to moneys payable to the Crown. The minister refused the licences on the ground that the Lieutenant-Governor in Council had under said Act purported to revive or was bound by law to revive the lapsed licences.

MURPHY, J. (At Chambers)

1918

Nov. 1.

IN RE COAL AND PETROLEUM ACT AND JOHNSON

Held, on appeal, that the petitioners having fulfilled the statutory requirements after the former licences had lapsed and before the attempt was made to revive them they had a legal right to obtain their licences.

Held, further, that chapter 48 of the British Columbia Statutes, 1915, does not confer any power on the Lieutenant-Governor in Council to revive lapsed licences in face of the petitioner's legal rights.

Woodbury Mines v. *Poyntz* (1903), 10 B.C. 181 followed.

The minister of lands has no discretionary powers in the performance of his functions under the Coal and Petroleum Act; he acts as a mandatory of the statute.

APPEAL by petitioners under section 28 of the Coal and Petroleum Act from the decision of the minister of lands refusing the petitioners' applications for licences under said Act. Argued before MURPHY, J. at Chambers in Vancouver on the 26th of September, 1918.

Statement

Sir C. H. Tupper, K.C., for appellants.
A. M. Whiteside, contra.

1st November, 1918.

MURPHY, J.: On the first point, I find, as a fact, that the minister of lands refused these licences not in the exercise of any supposed discretion vested in him by statute, but on the ground that the Lieutenant-Governor in Council had, under Cap. 48, B.C. Stats. 1915, purported to revive and was bound by law to revive lapsed licences over the same ground held by other parties. I further think, however, that no such discretionary power as is contended for exists, but that the minister acts as a mandatory of the statute: *Baker* v. *Smart* (1906), 12 B.C. 129. The argument, that this decision does not apply because "may" has been substituted for "shall" in the operative section of the Act is, I think, erroneous, because the decision, as I read it, does not turn on the word "shall," and because in *Mott* v. *Lockhart* (1883), 8 App. Cas. 568, on which, as I read the case, *Baker* v. *Smart, supra,* is founded, the section construed used the word "may," not "shall." If this view is correct, then petitioners had a legal right to obtain their licences before the attempted revival of the lapsed licences, since it is admitted petitioners had fulfilled the statutory requirements to entitle them to such licences. If so, I do not think Cap. 48, B.C. Stats. 1915, confers any power on the Lieutenant-Governor

Judgment

in Council to revive lapsed licences despite such legal right. The principle involved appears to be that underlying *Woodbury Mines* v. *Poyntz* (1903), 10 B.C. 181. It is true, the language of Cap. 48, B.C. Stats. 1915, is broader than that of the statute under consideration in the *Woodbury* case, but it is not broad enough to meet the test applied in that decision. Further, to allow holders of lapsed licences to hold back and only make application for revival of such licences, with the legal right that such application must be successful, subject to such terms as the Lieutenant-Governor in Council should impose, after other parties had applied for the ground, would largely defeat the primary object of the Coal and Petroleum Act as determined by *Baker* v. *Smart, supra, i.e.,* the development of the coal and petroleum resources of the Province, for such construction of said chapter 48 would virtually tie up, so long as said Act remains in force, all areas of the Province held under licence at the time said chapter 48 was passed. When it is remembered, that said chapter 48 may by proclamation be extended to any Act of the Provincial Legislature, the far-reaching consequences on the development of possibly all the natural resources of the Province become apparent. On the other hand, I think the object of said chapter 48 is to enable the Lieutenant-Governor in Council to assist licence-holders to carry their property during the period the Act is to remain in force. This object can be attained without interfering with the object of the Coal and Petroleum Act as judicially determined in *Baker* v. *Smart, supra,* by the simple expedient of licence-holders taking advantage of the provisions of said chapter 48 before third parties acquire statutory rights to licences over the areas covered by their licences, through compliance with the provisions of the statutes in that behalf.

Judgment

The appeal is allowed.

Appeal allowed.

COURT OF APPEAL

1918

Oct. 1.

BANK OF HAMILTON v. HARTERY

THE BANK OF HAMILTON v. HARTERY *ET AL.*

Land Registry Act—Judgment—Registration in Land Registry Office—Mortgage—Executed prior to judgment but registered after registration of judgment—Priority—R.S.B.C. 1911, Cap. 127, Sec. 73—R.S.B.C. 1911, Cap. 79, Sec. 27.

Where a judgment is registered in the land registry office after the execution of a mortgage by the judgment debtor but before its registration, the judgment takes priority by virtue of section 73 of the Land Registry Act (MCPHILLIPS, J.A. dissenting).

Decision of CLEMENT, J. affirmed.

APPEAL by plaintiff from the decision of CLEMENT, J. (25 B.C. 150), in an action for a declaration that a certain judgment registered in the land registry office at Kamloops against one J. M. Harper on the 18th of April, 1916, and the assignment thereof to one W. N. Williams is void as against the plaintiff by reason of the fact that the said J. M. Harper and one A. S. McArthur executed a mortgage in favour of the plaintiff covering the lands in question on the 31st of January, 1916. The facts are fully set out in the reasons for judgment of the learned trial judge.

Statement

The appeal was argued at Vancouver on the 9th of April, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

W. C. Brown, for appellant: The contention is that section 73 of the Land Registry Act is an insuperable barrier to us, but in order to decide as he did, the learned trial judge had to read into section 27 (Subsec. (1)) of the Execution Act the word "registered." I contend the judgment can only apply to the property the judgment debtor actually has, and the plaintiff's interest in this case is not affected: see *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282. This was followed in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51; see also *Yorkshire* v. *Edmonds* (1900), 7 B.C. 348. In this case the fee has passed subject to the equity of redemption, and section 104 of the Land Registry Act has no application. A conveyance in fee and a conveyance by way of mortgage is the same as regards

Argument

the principle involved in this case. It is a question of the interpretation of section 27 of the Execution Act. A judgment creditor is not a purchaser for value but only takes subject to all equities: see *Eyre* v. *McDowell* (1861), 9 H.L. Cas. 619 at p. 647; *Beavan* v. *The Earl of Oxford* (1856), 6 De G. M & G. 507.

Housser, for respondents: The parties were on an equal footing as they were both creditors of McArthur & Harper; it then comes down to a question of the interpretation of section 73 of the Land Registry Act. The *Entwisle* case can be distinguished, as here we have a mortgage only. There is no sale. The mortgage merely creates a charge for payment of the debt, and the case was decided before the recent amendments to the Land Registry Act.

Brown, in reply.

Cur. adv. vult.

1st October, 1918.

MACDONALD, C.J.A.: I entirely agree with the learned trial judge and with his reasons for judgment, and desire only to emphasize the distinction between this case and *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51; and *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282. In each of these cases the contest was not between conflicting charges but between a beneficial right to the fee as against a charge. It is important to bear in mind, when considering questions affected by the Land Registry Act of this Province, that a clear line of demarcation has been drawn between ownership of the fee and of a charge. Section 73 of the Act gives priority to charges according to date of registration, not of execution.

MACDONALD, C.J.A.

There is no question in this appeal of priorities between the person to whom the property has been conveyed or assigned, and the person claiming a charge on the fee. In this case both parties are chargees, the one under a judgment, the other under a mortgage. They, therefore, come within the precise and unambiguous language of section 73 and priority of registration must prevail.

I would therefore dismiss the appeal.

COURT OF APPEAL

1918

Oct. 1.

BANK OF HAMILTON v. HARTERY

MARTIN, J.A.

MARTIN, J.A.: This appeal raises a question of importance which I have found difficult to answer to my satisfaction, but after much consideration of it I find myself unable to say that the conclusion reached below is erroneous. Logically, it is hard to distinguish the case from the principle that may be extracted from *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51, which I have, if I may be permitted to say so, never considered a very satisfactory decision (doubtless because the Full Court reversed my judgment); but for that very reason I am particularly disinclined to criticize it and feel it my duty to give due effect to it. But, as Lord Chancellor Halsbury said in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506; 70 L.J., P.C. 76 at p. 81:

> "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

Therefore I think *Entwisle* v. *Lenz & Leiser, supra,* "must be read as applicable to the particular facts involved" and no further, and that the question at bar should be answered on the statute which we have before us for the first time. It is clear in terms, and I shall only add, to what was said below, that if this were a case between two "charges" of the same kind, *e.g.,* mortgages, would there be any doubt as to the "priority" that ought to be declared? If so, what doubt should there be as between charges of a different kind? This construction gives effect at least to the unmistakable language of the Legislature, and if any other hidden meaning is contained therein the Legislature should declare it, but not this Court.

The appeal, I think, should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: With great respect to the learned trial judge, I find myself entirely unable to accept the view arrived at in the judgment under appeal, namely, that section 73 of the Land Registry Act (R.S.B.C. 1911, Cap. 127) is in itself conclusive of the subject-matter of the action, and that that section

is operative to give priority of position to the respondents, *i.e.*, that the judgment creditors under the registered judgment have priority to the admittedly prior mortgage, but subsequently registered mortgage, of the judgment debtors to the appellant Bank. The action cannot be looked at as one only to settle priorities; it is one claiming that the judgment constitutes a cloud on the title of the appellant, a cloud upon the title to lands previously to the registration of the judgment granted and conveyed by way of mortgage to the appellant. It becomes necessary in the inquiry to consider what the nature of the charge is, when a judgment is registered under the provisions of the Land Registry Act. To determine this, we turn to section 27 (1) of the Execution Act, R.S.B.C. 1911, Cap. 79, and we find that it is "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."

Now, the judgment was registered on the 18th of April, 1916, and the mortgage was executed in the month of March —between the 10th and 16th of March, 1916—as found by the learned trial judge, so that on the 18th of April, 1916, the judgment creditors could not then charge in writing, under their hands and seals, lands already granted and conveyed by way of mortgage to the appellant: see *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282, Sir Henry Strong, C.J. at pp. 290-91; and *Yorkshire* v. *Edmonds* (1900), 7 B.C. 348, McColl, C.J. at pp. 351, 352.

MCPHILLIPS, J.A.

It is true that section 73 (R.S.B.C. 1911, Cap. 127) raises some difficulty in applying the legal principles that govern in the matter, but with close analysis, it occurs to me the difficulty disappears. To arrive at this conclusion, it is instructive to refer to the language of Sir Henry Strong, C.J. in *Jellett* v. *Wilkie, supra,* upon the point of what rights and remedies the judgment creditors really have: see the language of the learned Chief Justice at p. 290.

Has section 73 (Cap. 127, R.S.B.C. 1911) "abrogated the principle"? In fact, can it be said to be operative or effective

COURT OF APPEAL

1918

Oct. 1.

BANK OF HAMILTON v. HARTERY

at all in determining the question? And it is to be remembered that the statute was in like terms when *Yorkshire* v. *Edmonds, supra,* was decided. In my opinion, the whole statute law has to be read together and section 73 cannot be held to be applicable. And to shew its inapplicability it is only necessary to note that the section is dealing with charges created independent of statute—"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." Now, in the case of the judgment in question, the obtaining of the judgment was not the creation of any estate or interest; no estate or interest was created until the registration was effected and then by force of the statute (Execution Act, R.S.B.C. 1911, Cap. 79, Sec. 27 (1)) the judgment constituted a charge on the lands of the judgment creditors; but can it be said that a charge was created on lands already conveyed by way of mortgage? To arrive at this conclusion one must be constrained by intractable statute law, as it is in denial of all true principles of law and of natural justice: see Lord Moulton in *Loke Yew* v. *Port Swettenham Rubber Company, Limited* (1913), A.C. 491 at pp. 504-5:

"Indeed the duty of the Court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified. . . . . The Court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the register or the correction of existing entries it can order the necessary acts to be done accordingly."

MCPHILLIPS, J.A.

The present case is not the case of a purchaser for value and not until registration is there a charge—no transfer of the legal estate in the lands is effectuated, as in the case of the mortgage to the appellant. Also see Lamont, J.A. in *Boulter-Waugh & Co., Ltd.* v. *Phillips* (1918), 3 W.W.R. 27 at pp. 33, 35 and 37 (Saskatchewan Court of Appeal).

Proceeding from this premise, it will be seen that in *Yorkshire* v. *Edmonds, supra,* although legislation in similar terms to section 73 of the Land Registry Act now relied on was existent, being section 41 of the Land Registry Act then in force (R.S.B.C. 1897, Cap. 111), and was pressed as being absolutely determinative of the point—the exact point arising upon this

appeal—yet we find the Chief Justice, that eminent judge, McColl, C.J., at pp. 351-2, refusing to give effect to the contention in the following words:

"I have given repeated consideration to the arguments strongly pressed by the Bank founded upon the words of the sections of the Land Registry Act applicable, but in my judgment the Company must succeed on the short ground that as the registration of the Bank's judgment admittedly did not affect the Company's mortgage before its registration no question of priority in the proper sense of the term could arise as between them."

Here we have the same situation, and this decision of Chief Justice McColl was of the year 1900, and has remained unchallenged for now eighteen years. Further, in the *interim* we have had *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51, a decision of the then Full Court, to the same effect; although it is to be noted that the section then standing similar to section 73, being section 53 of the Land Registry Act, B.C. Stats. 1906, Cap. 23, was apparently not referred to, and this fact gives colour for what may be said to have been a well-understood view of the law since the decision in *Yorkshire* v. *Edmonds, supra*—that the point now so strongly pressed was untenable. The head-note in the *Entwisle* case in part reads as follows:

"That the Judgments Act gives the judgment creditor only a right to register against the interest in lands possessed by the judgment debtor; and that in this case the debtor, having conveyed the land to plaintiff so long before the execution creditors' judgment was obtained, was a dry trustee of the land for plaintiff."

The governing statute now as to the effect of a judgment when registered is the Execution Act, R.S.B.C. 1911, Cap. 79, and the statute law for all purposes in the consideration of this appeal is the same as that under consideration in the *Entwisle* case.

Then it may be said that in the present action it is not the question of priorities in the books of the land registry—it may well be that the registrar will be called upon to state the priorities in giving out certificates as to the state of the title as appearing upon the books, but there is no express legislation in section 73 giving any greater right to the judgment creditor than that given under the provisions of the Execution Act. It is under the provisions of the Execution Act that the judgment creditor must assert and substantiate his right to a charge, and it is plainly evident, unless section 73 is conclusive upon the

COURT OF APPEAL

1918

Oct. 1.

BANK OF HAMILTON v. HARTERY

point, as held by the learned trial judge, that the charge of the respondent is superseded by that of the appellant: see *Yorkshire* v. *Edmonds* and *Entwisle* v. *Lenz & Leiser, supra.*

In my opinion section 73 is merely a provision for the guidance of the registrar, but cannot have the effect of destroying the title of prior equitable owners. It cannot be thought, nor was it the intention of the Legislature to interfere in this way with the well-known "broad rule of justice": see Sir Henry Strong, C. J., in *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282 at p. 290. Finally, that which fully sets the point at issue at rest, in my opinion, is section 34 of the Land Registry Act, R.S.B.C. 1911, Cap. 127, as amended by B.C. Stats. 1913, Cap. 36, Sec. 12, which is the enacting provision as to the effect of the registration of a charge. That section reads as follows:

"The registered owner of a charge shall be deemed *prima facie* to be entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing on the register, and to the rights of the Crown, and he shall be entitled to a certificate of the registration of his charge upon payment of the proper fee."

It is plainly evident that the charge may be displaced upon sufficient evidence, and the evidence in the present case is conclusive that the *prima facie* statutory charge has no place as against the previously existing mortgage of the lands in question to the appellant, *i.e.*, the judgment, upon registration, then and then only, became a lien and charge (section 73, Execution Act), but that lien and charge could only, in the language of the Chief Justice of British Columbia, in the *Entwisle* case, be upon "those lands in which the judgment debtor has a real or beneficial interest." In the present case the judgment debtors had, previously to the time of registration of the judgment, granted and conveyed the lands by way of mortgage to the appellant. It can only be as against that interest which remains in the judgment debtors, the equitable right of redemption thereof, that the judgment affects by way of lien and charge, and a declaration of that interest could only be the decree of the Court upon proper proceedings being taken to enforce the charge created by the registration of the judgment, under the provisions of the Execution Act, R.S.B.C. 1911, Cap. 79, Sec. 27 *et seq.*

MCPHILLIPS, J.A.

In *Howard* v. *Miller* (1915), A.C. 318, their Lordships of

the Privy Council had under consideration the Land Registry Act, B.C. Stats. 1906, Cap. 23, which may be said, in connection with this appeal, to be in all its provisions the same as the present statute. Lord Parker, in delivering the judgment of their Lordships at pp. 324-5 said:

"The registered owner of a charge is to be deemed to be *prima facie* entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing thereon and to the rights of the Crown (s. 29). The certificate of title is not conclusive but only *prima facie* evidence of the title of the owner of a registered charge."

The lien and charge therefore could only when registered affect that interest which the judgment debtors had in the lands, not the interest shewn in the books of the land registry office. Note what HUNTER, C.J.B.C. said on this point in the *Entwisle* case at p. 54:

"It will be observed that the language is 'on all the lands of the judgment debtor' and not all the lands registered in the name of the judgment debtor."

In this view of the matter the further language of Lord Parker at pp. 326, 327 and 328, in *Howard* v. *Miller, supra,* is apposite, as the judgment we are considering may be rightly likened to the agreement under consideration in that case.

It is therefore evident that it is for the Court to say what the lien or charge is, and at best all the respondent can be said to be entitled to by reason of the registration of the judgment is a declaration of the (adopting the language of Lord Parker at p. 326—*Howard* v. *Miller, supra*) "interest commensurate with the relief which equity would give by way of specific performance," and that interest could only be an interest subject to the prior mortgage to the appellant. The appellant in this case is entitled, in my opinion, to similar consequential relief as that granted in the *Miller* case, and also to the declaration that notwithstanding the entry on the register the appellant is entitled to be entered thereon as having a lien and charge in respect of the mortgage in priority to the judgment of the respondents; the lien and charge of the respondents to be subject to the mortgage of the appellant, that is, that the registration of the judgment as it stands at present is a cloud on the title of the appellant and the appellant is entitled to a declaration to that effect, and that all proper amendments of such registra-

MCPHILLIPS, J.A.

COURT OF APPEAL
1918
Oct. 1.

BANK OF HAMILTON v. HARTERY

tion be made by the registrar. I am therefore of the opinion that the appeal should be allowed.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Ellis & Brown.*

Solicitors for respondents: *Williams, Walsh, McKim & Housser.*

MACDONALD, J.
1918
Jan. 9.

COURT OF APPEAL
Oct. 1.

GAVIN v. KETTLE VALLEY RY. CO.

GAVIN v. THE KETTLE VALLEY RAILWAY COMPANY.

Negligence—Collision—Train and motor-car—Ultimate negligence—Direction to jury.

In an action for damages to a motor-car owing to a collision with a train of the defendant Company through the alleged negligence of its servants, the jury in answer to questions, found the defendant negligent owing to delay in the application of brakes, and that the driver of the motor-car was negligent in not keeping a proper look out. They also found that after the employees of the defendant became aware that the motor-car was in danger they could have avoided the accident by the exercise of reasonable care, and awarded the plaintiff damages. The driver of the motor-car admitted in evidence that she saw the train when from 30 to 35 yards from the track and that she could have stopped the motor in from 20 to 25 yards.

Held, on appeal, that the jury should have been asked whether the driver of the motor-car, after she saw the train coming, could by the exercise of reasonable care and skill have avoided the accident, and that such question not having been submitted there should be a new trial.

Statement

APPEAL from the decision of MACDONALD, J., and the verdict of a jury, in an action for damages to a motor-car owing to the negligence of the employees of the defendant Company, tried at Vernon on the 26th and 27th of October, 1917. On the 9th of June, 1917, at about 7 o'clock in the evening, the plaintiff's wife was driving southerly on Winnipeg Street in

Penticton. She approached the defendant Company's track at about ten miles an hour. A train of the defendant's was backing down from the west at about ten miles an hour and a brakeman at the back of the car saw the motor-car when it was about 60 feet from the track, the back of the train being at the time about 60 feet from the crossing. He thought the motor-car would stop, but when about 20 feet from the crossing, realizing there was danger, he shouted to the driver of the motor-car to stop and at the same time signalled to the engineer to stop the train. The motor-car continued on and stalled in the middle of the track, when the train was about 15 feet away. The train struck the motor-car and carried it about 25 feet, when it turned over. Mrs. Gavin admitted she saw the train when she was about 30 to 35 feet away from the track, and that she could have stopped the motor-car in from 20 to 25 feet. The questions put to the jury, and the answers, were as follow:

"(1) Was the damage to the plaintiff's automobile caused by the negligence of the defendant? Yes.

"(2) If so, in what did such negligence consist? In delaying the application of brakes.

"(3) Could the driver of the automobile by the exercise of reasonable care have avoided the accident? Yes.

"(4) If she might, in what respect was such driver negligent? In not exercising sufficient watchfulness by looking to the right as well as to the left.

"(5) If after the employees of defendant became aware or ought (if they had exercised reasonable care) to have become aware that the automobile was in danger of being injured, could they have prevented such injury by the exercise of reasonable care? Yes.

"(6) If so, in what manner or by what means could they have prevented the accident? By the speedy application of brakes.

"(7) Amount of damages? $1,485."

Statement

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

C. B. Macneill, K.C., for defendant.

9th January, 1918.

MACDONALD, J.: This action was tried at Vernon, with a special jury. It was adjourned for argument, as to the judgment that should be entered upon the following questions, and answers thereto [already set out in statement].

MACDONALD, J.

It appears that, on the 9th of June, 1917, plaintiff's motor-car was being driven on Winnipeg Street, in the town of Penticton, in charge of his wife, Alice Gavin, and at the intersection of

MACDONALD, J.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

GAVIN v. KETTLE VALLEY RY. CO.

such street with the line of the defendant's railway, the motor-car was struck, and practically destroyed, by a train of the defendant which was moving backwards towards the station.

Plaintiff contends that defendant is to blame for the collision. There were certain requirements, with which the defendant should comply at the point in question. The speed and precautions to be observed, with respect to a train nearing a crossing in a city or town, are regulated by the Railway Act, and then there are the following specific provisions in the Act, which would govern a train, operating as this one was, at the time, *viz.*: section 276 of the Railway Act (R.S.C. 1906, Cap. 37):

"Whenever in any city, town or village, any train is passing over or along a highway at rail-level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train, or of the tender, if that is in front, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway. . . . ."

The grounds of negligence, as outlined at the trial by the plaintiff's counsel, and to all of which I endeavoured to draw the attention of the jury, did not urge any breach of these requisites. The jury was requested to find any or all acts of negligence on the part of the Company causing the accident. There was, however, only one ground of negligence so found by the jury, *viz.*: as to the delay in applying the brakes prior to the collision. It is evident, from the view taken of the matter by the jury, that Mrs. Gavin created a dangerous situation, by neglecting, when approaching the railway crossing, to look to the right as well as to the left. There was no fault found by the jury on the part of the defendant Company up to the time when this dangerous situation arose. Those in charge of the train had a right to presume that the occupant of the approaching motor-car would stop it, before reaching the railway track. A brakeman was in the rear of the train, according to law, to warn persons; but, under ordinary circumstances, he would not expect that he would be required to stop the train, either to allow the motor-car to cross the track ahead of the train or to prevent a collision, through it either being stalled or stopped on the track. He might expect, as frequently occurs, that the car might be driven up, close to the track, and then stopped to allow the train to pass. Mrs. Gavin was clearly at

MACDONALD, J.

fault, and the jury so found. It is a matter of common sense, that she should have looked both ways before attempting to cross the railway. There is abundance of authority to support this statement, as to her duty; suffice to quote Channell, B. in *Stubley* v. *The London and North Western Railway Co.* (1865), L.R. 1 Ex. 13 at pp. 19-20 as follows:

"Passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended."

The question then is, whether, notwithstanding the negligence of Mrs. Gavin, the plaintiff can succeed, on the strength of the answers given by the jury to the 5th and 6th questions. It is contended that, I will not be interfering with this finding of the jury, if I should hold that it is a case of joint negligence, and that, in such event, the defendant would not be liable. This contention prevailed, in appeal, in *Rice* v. *Toronto R.W. Co.* (1910), 22 O.L.R. 446, where the questions were similar to those answered by the jury in this case. It was there found that the speed of the street-car was excessive, but that the deceased was negligent in not looking for an approaching car. It was held that the speed of the car and the neglect of the approaching pedestrian jointly contributed to the accident. Boyd, C. at p. 449, said:

"The primary and ultimate negligence of the defendants is one and the same (excessive speed). There is no evidence of other negligence than that of excessive speed, which occasioned and was the direct cause of the injury. But that negligence was concurrent with the negligence of the deceased; and in cases of joint negligence of plaintiff and defendant there can be no recovery for the plaintiff, according to well-settled rules of English law."

British Columbia Electric Railway Company, Limited v. *Loach* (1916), 1 A.C. 719 was cited on behalf of plaintiff; but I do not think that it is of assistance in the present case. There the brake was defective, and this prevented the speed of the street-car being controlled and reduced. This distinction between the facts in the *Loach* case, and those existing in a somewhat similar case, was fully discussed by Lamont, J., in a very interesting and fully considered judgment, in *Smith* v. *Regina* (1917), 1 W.W.R. 1444. It was pointed out that the motorman, in such latter case, had good brakes, but the street-car had attained too great a speed to allow the motorman to

MACDONALD, J.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

GAVIN v. KETTLE VALLEY RY. CO.

stop the car, and avoid the accident. He did not possess the present ability to do so, and was not prevented by any act of his employers, such as a defective brake. The initial negligence of running at an excessive speed was still continuing and conducing to the disaster. Here, no primary negligence is found on the part of the defendant, so that the sole point for consideration is, whether the ultimate negligence of the brakeman creates liability, or is it attached or joined to the neglect of Mrs. Gavin, so as to prevent the plaintiff from recovering? If the former conclusion be reached, and the defendant held liable, it may mean, if the *Rice* case be followed, that a railway company, properly operating its train and complying with statutory requirements (especially as to not exceeding a certain limit of speed through a town), might be in a worse position than if it were running at an excessive and illegal rate of speed, and collided with a motor-car, the occupant of which had not taken any precautions in nearing the crossing, to look out for an approaching train. There would, in that event, be joint negligence and no liability. The contrary result would follow, as to liability, if such train were being operated within the speed limit allowed by law, and, as in the present case, a failure occurred on the part of an employee in failing to stop the train in time to avoid a collision with a person, carelessly attempting to cross a railway track without taking reasonable precautions.

MACDONALD, J.

Still, there is no doubt that any one who becomes in a dangerous position, even through his own neglect, is entitled to demand from others ordinary care, at least, to avoid an injury. The point worthy of consideration in this connection is, whether, at the time of the collision, both acts of negligence were still operating, and conducing towards the accident, so as to constitute joint negligence. Even if the motor-car was either stopped, or stalled, on the railway track for an appreciable time before the collision, might it not be fairly contended that the carelessness of Mrs. Gavin was still operative, in a sense. While her neglect might be said to be quiescent and not active, still it was assisting towards bringing about the accident. The effect, however, of the finding of the jury is that Barge, even with such a dangerous condition suddenly created through negligence, might, by the exercise of reasonable care, have pre-

vented the injury to the automobile. They considered that he should have more speedily applied the brakes, and thus stopped the train. In *Rice* v. *Toronto R.W. Co., supra,* Mr. Justice Middleton, at p. 451, thus refers to the duty of a motorman, as follows:

"Upon the danger of the deceased, occasioned by his negligence, it is true, becoming apparent to the motorman, it then became his duty to take all reasonable steps to avoid, if possible, the impending accident. If the motorman neglected to discharge this duty, or was unable effectually to discharge it, either by reason of his own negligence, or by reason of any negligence of the defendants, they would be liable. This duty arose as soon as the peril of the deceased became apparent to the motorman, or should have become apparent to a reasonably careful man in his position, and quite independent of any 'original negligence.' The duty to be ready to meet such an emergency always existed."

The judgment, however, of the Court in that case was unanimous in reversing the judgment of the trial judge founded upon findings similar to those in this case. I have already referred to the fact that the judgment turned upon the excess of speed, being a continuing neglect and jointly conducing with the neglect of the deceased to bring about the accident. *Columbia Bithulithic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1, it is contended by the plaintiff, assists him. The facts, however, in that case were the same as those in the *Loach* case, *supra.* It was the same accident, and the defendant was held liable under the same circumstances. It might be argued that such judgment goes so far as to affect and destroy the decisions in *Smith* v. *Regina* and *Rice* v. *Toronto R.W. Co., supra.* Even if these cases are not considered to be thus overruled, they do not prove of material assistance in arriving at a conclusion herein, if the findings of the jury, as to not applying the brakes in time, be fully accepted.

MACDONALD, J.

Morrison v. *The Dominion Iron & Steel Co., Ltd.* (1911), 45 N.S. 466 was cited as an authority outlining the duty of a person about to cross a railway, and that the driver of a train might expect from such person due care, and that he would stop before reaching the track. In this case, however, the finding of the jury did not go far enough to relieve the plaintiff from the contributory negligence of his wife, and a different result would have followed, had the findings been similar to those in the present case. This is indicated by Mr.

MACDONALD, J.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

GAVIN v. KETTLE VALLEY RY. CO.

Justice Graham, in delivering the judgment of the Court, at pp. 471-2:

"If the jury had found that the defendant's servants could have effectually brought the train to a standstill in time, after they had notice that the plaintiff was about to commit the act of negligence she did commit, that would have been a different thing, but they found only that the accident could have been avoided if the driver had stopped the train when he first saw the team; and this as I have already said, he was not obliged to do. He could not possibly have stopped the train in time after he saw that she was coming along without pulling up at the first track she came to, and without looking out for him or for approaching trains."

In *City of Calgary* v. *Harnovis* (1913), 26 W.L.R. 565 facts were disclosed very similar to those here presented, and Mr. Justice Duff deals with the judgment of the trial judge as follows:

"The view of the learned trial judge was that, although the respondents were in fault to such a degree as would have debarred them from recovering had it not been for the conduct of the motorman after their negligence became apparent, yet (in the circumstances of this case), as the motorman could have avoided the consequences of the respondents' negligence after he became aware of it, the plaintiffs were entitled to recover. In a word, the decisive negligence was found by him to have been that of the motorman. I agree with this view, and I should dismiss the appeal with costs."

I feel myself, however, in the same position, with respect to cases cited, as Mr. Justice Garrow in *Dart* v. *Toronto R. Co.* (1912), 8 D.L.R. 121 at p. 124, where he says:

"Under the circumstances, where so much depends upon the actual facts, not much assistance can be got . . . . . from decided cases."

MACDONALD, J.

It should not be overlooked, that the neglect of the defendants, in the majority of these cases, was that of a motorman of an electric-car, who would have his car in much better control than a brakeman on the rear end of a railway train. Such motorman would also be accustomed to stop his car frequently at crossings and other points. I think the jury placed the care to be exercised by Barge, the brakeman, on rather a high standard. The degree of care required, under circumstances of this nature, where a dangerous situation has been created through neglect, is set forth as follows in *H.M.S. Sans Pareil* (1900), P. 267 at p. 288:

"It is not the rule that those who have to meet the negligence of the plaintiff have to act up to counsels of perfection. The very words of the rule, 'ordinary care and prudence,' assume a margin of deviation from counsels of perfection, and I should require to consider some time before I came to the conclusion that, having regard to the short space of time

that elapsed and the difficult circumstances in which the navigating lieutenant was placed by the misconduct of the tug and tow, the consequences of their misconduct could have been avoided by ordinary care and prudence on his part."

MACDONALD, J.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

GAVIN v. KETTLE VALLEY RY. CO.

While I entertain this opinion with respect to the matter, I do not think I should, as a trial judge, interfere with the findings of the jury. I should not hold, either, that it was a case of "joint negligence" or that the jury, as reasonable men, could not come to a conclusion on the evidence, that Barge either became aware, or ought to have become aware, that the automobile was in danger of being injured, and he did not exercise reasonable care, so as to prevent the accident. The jury, in effect, found that the "decisive negligence" was that of the brakeman; that he had the present ability to avoid the accident and failed to do so.

MACDONALD, J.

There should, therefore, be judgment entered for the plaintiff for $1,485 and costs.

From this judgment the defendant appealed. The appeal was argued at Vancouver on the 23rd of April, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C., for appellant: The evidence shews Mrs. Gavin had a very limited knowledge of motor driving. We say the jury have not considered the questions put to them, nor taken a proper view of the questions, and there was misdirection. Even if there were negligence on the part of the defendant, the accident was clearly the result of the joint negligence of both parties. She did not look for danger when about to cross the track and stalled her car on the track. Both were equally guilty of ultimate negligence. The principles set out in *Davies* v. *Mann* (1842), 10 M. & W. 546 should be considered in regard to this case: see also *Rice* v. *Toronto R.W. Co.* (1910), 22 O.L.R. 446. It is a matter of law in comparing a train and a motor-car. The most reliable evidence is that the train was 15 feet away when the motor-car stalled on the track. It was then beyond the brakeman's power to stop the train in time. The finding that the engineer was negligent in not making a speedy application of the brakes is perverse. The most important factor is that the brakeman had a right to assume

Argument

MACDONALD, J.
1918
Jan. 9.
COURT OF APPEAL
Oct. 1.
GAVIN v. KETTLE VALLEY RY. CO.

that the car would stop, and the judge should have told the jury so. The most important question to put was whether there was joint negligence, *i.e.*, whether by her using ordinary care she could have avoided the accident. The real point in the case must be brought before the jury, and when it is not, non-direction becomes misdirection.

A. H. MacNeill, K.C., for respondent: My contention is, the whole facts were fully dealt with in the charge, and the evidence supports the charge. On the question of ultimate negligence see *Banbury* v. *City of Regina* (1917), 10 Sask. L.R. 297; 21 Can. Ry. Cas. 285; *City of Calgary* v. *Harnovis* (1913), 48 S.C.R. 494. When counsel refrains from asking the judge to submit a question to the jury, a new trial will not be granted on the ground of non-direction, because the question was not put to the jury: see *Waterland* v. *Greenwood* (1901), 8 B.C. 396. As to what a trainman should expect from travellers on the road see *Morrison* v. *The Dominion Iron & Steel Co., Ltd.* (1911), 45 N.S. 466.

Argument

Davis, in reply: *Davies* v. *Mann* (1842), 10 M. & W. 546 is the only case that applies. The jury should have been told the brakeman was entitled to assume the motor-car would stop, and the answer to question 5 is perverse.

Cur. adv. vult.

1st October, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The jury found the defendant negligent "in delaying the application of brakes"; that the plaintiff's wife, the driver of the automobile, was guilty of contributory negligence "in not exercising sufficient watchfulness by looking to the right as well as to the left"; but that the defendant's servants could nevertheless have prevented the occurrence "by the speedy application of the brakes." Mrs. Gavin, plaintiff's wife, admits that she actually saw the train coming when she was yet 30 to 35 feet away from the railway tracks; she also stated that she could stop her car at the rate she was then driving, namely, ten miles an hour, in a distance of from 20 to 25 feet.

The jury's findings exclude negligence on defendant's part other than that expressly found as above set forth.

The brakeman saw the approaching automobile in time, as the jury found, to have stopped the train before reaching the point of impact with the plaintiff's car. The train was moving at about the same rate of speed as the automobile, namely, ten miles an hour. The brakeman expected, with good reason, I think, that the driver of the automobile would stop before reaching the track, but when this reasonable expectation was disappointed, he made some efforts to avoid the collision, but failed. The negligence of the plaintiff's wife, as found by the jury, was her neglect to look for the approaching train. That negligence was displaced the moment she actually saw the train. If thereafter, by the exercise of reasonable care and skill, she could have stopped her car before reaching the railway track, then I think the plaintiff was not entitled to succeed in this action.

While the jury were asked whether, when defendant's employees became aware that the automobile was in danger, they could, by the exercise of reasonable care, have avoided collision with it, yet they were not asked a like question in respect of the plaintiff's wife, nor were they instructed to consider whether or not, after she actually saw the train coming, she could, by the exercise of reasonable care and skill, have avoided injury. The obligation was mutual. It was just as much the duty of the driver of the automobile to take reasonable care to avoid the collision after she became aware of the danger as it was the duty of the defendant's servants to do likewise, but as the case was left to the jury, though the obligation of defendant was submitted, that of Mrs. Gavin was ignored. While no objection in this connection was taken by defendant's counsel at the trial, yet it was the duty of the learned judge to leave the issues to the jury with proper and complete directions on the law, and as to the evidence applicable to such issues: Supreme Court Act, Sec. 55. This duty has been emphasized in the recent decision of the Supreme Court of Canada in *Ashwell* v. *Canadian Financiers* (not yet reported). The said section also authorized an appeal, notwithstanding counsel's failure to take objection at the trial. I have, therefore, no doubt as to the propriety of ordering a new trial. Mrs. Gavin's evidence alone puts that beyond question. Damaging as is her

MACDONALD, J.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

GAVIN v. KETTLE VALLEY RY. CO.

evidence to the plaintiff's case, I do not think it necessarily conclusive against him. I think it must go back to a jury to draw the proper inferences from the whole of the evidence.

MARTIN, J.A.: There should, I think, be a new trial herein. The case is very much on the line at best, and for a time I inclined to the opinion that the answer of the jury to the fifth and sixth questions, finding the defendant guilty of ultimate negligence, could not reasonably be supported. But I think it safer to order that there should be a new trial, and when that takes place a direction to the jury as to the common-sense duty of persons crossing railway tracks and the reasonable anticipation of employees in charge of trains should be given in accordance with the judgment of the Supreme Court of Nova Scotia in *Morrison* v. *The Dominion Iron & Steel Co., Ltd.* (1911), 45 N.S. 466. If that direction had been given, as requested, by the learned trial judge, I think the case would not be before us. There can, of course, be no difference in the standard of efficiency in driving cars between men and women; their responsibilities and obligations for negligent conduct do not differ with their sex. The appeal should be allowed with costs, the costs of the first trial to abide the result of the second.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in ordering a new trial.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion a new trial should be directed. The action was one for damages to a motor-car; the motor-car was being driven by the wife of the plaintiff along Winnipeg Street in the City of Penticton, and the collision took place between the motor-car and a passenger train of the appellant, at the intersection of Winnipeg Street with the line of railway at a level crossing. The questions as put to the jury and the answers thereto were as follows: [already set out in statement.]

Upon an analysis of the evidence, it is clear to me that the only case that the plaintiff has made out is one of joint negligence, and the answer to the fifth question is perverse. I can only explain it by the view that the jury were of the opinion that if the servants of the Railway Company had applied the brakes when the plaintiff was first seen, the accident would not

have taken place, but that was not the duty of the employees and servants of the Railway Company in charge of the train. The railway was entitled to the right of way. It is true that would not entitle the running down of the motor-car, but it was reasonable and right to expect that the motor-car would not be driven upon the railway track under the circumstances then existing, with an oncoming train plainly to be seen. Nevertheless, the unexpected happened, that which was beyond all reason happened, a motor-car being driven quite slowly, advanced upon the railway track and stopped there. The facts attendant upon the accident were graphically and, I think, well explained by Mr. White, the clerk of the Nicola Hotel, a witness for the defence, whose evidence would appear to be very clearly and fairly given.

It is plainly evident that there was nothing to reasonably advise the servants of the Railway Company that the motor-car would not be pulled up and stopped before reaching the railway track. The situation created by the negligence of the lady driving the car, of inevitable accident, was only present when the train was within fifteen feet of the crossing; there is no evidence whatever warranting the jury, who must decide the fact reasonably, to say that at some earlier stage the brakes should have been applied, although it is evident that the train was proceeding slowly and was under reasonable control. In view of all the circumstances, however, if the case is capable of being viewed as one of joint negligence, then a question similar to question 5 should have been submitted to the jury having relation to the conduct of the lady driving the motor-car, *i.e.*, could she have avoided the accident when it was apparent to her that the train was not about to stop? This must have been apparent to her, and she was proceeding at such a slow pace that it was plainly evident that it was within her power to have stopped and not gone upon the track. This is demonstrated by the fact that the motor-car came to a stop between the rails. Upon what principle of law can it be postulated that there is liability when both parties are equally to blame? If the facts may be said to establish that position, and that is the most favourable view in which the case for the plaintiff can be put. And then upon which party shall the

MCPHILLIPS, J.A.

MACDONALD, J.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

GAVIN v. KETTLE VALLEY RY. CO.

liability be imposed? It is against common sense, of course, that a Court of Law should in such a case impose any liability. It is necessary and incumbent upon the plaintiff in the action to discharge the onus, and the case must be proved, that is, the jury must come "to a sensible conclusion" (*Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696, Lord Loreburn, L.C. at p. 697).

Upon the facts as adduced at the trial, it is as reasonable to say (in fact, more reasonable, in my view) that the driver of the motor-car could have avoided the accident, when the imminence of peril was present, as the brakeman of the train, and the jury should have been asked that question.

In the present case there is no question of excessive speed or defective brakes, the salient elements in *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J., P.C. 23. The statement of fact as appearing in the head-note of the case is in the following terms:

"A person attempted to cross a level crossing without taking reasonable precautions to see that the line was clear, and was knocked down and killed by an approaching car. The jury found that the car was running at an excessive speed, but could have been stopped in time to prevent the accident if the brake had been in proper working order."

Lord Sumner, in delivering the judgment of their Lordships, at p. 25 exactly states the position of things. Can the judgment in the present case for the plaintiff be sustained, when there was no excessive speed and no defective brake? I would submit not, but the contention is that ultimate negligence has been found against the appellant. This, as I have endeavoured to shew, has been merely answered to a question as to the conduct of the appellant, but obviously the conduct of the driver of the motor-car has also to be considered, and if the question were asked as applied to the conduct of the driver of the motor-car it might as reasonably (in fact, with greater reason) be answered against the driver of the motor-car. What Lord Sumner said was this:

MCPHILLIPS, J.A.

"Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car, and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death

to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered."

MACDONALD, J.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

GAVIN v. KETTLE VALLEY RY. CO.

Now, in view of this language, can it be successfully contended that upon the facts of the present case there is liability upon the defendant? It would seem to me that the legal proposition, as stated by Lord Sumner, is determinative of this case; the motor-car was being driven slowly, so slowly that it was quite expected that it would be stopped and not pass upon the railway track. However, when the motor-car was apparently still being driven onwards with a chance that it would attempt to cross the track, and this was at a distance of ten to 20 feet of the point of crossing, the brakeman became alarmed, jumped off, and again gave the emergency signal. Previously the same signal had been given, and the train was under control and slowing down. At this time the motor-car had not come upon the track but was close to it, and the fear was that it might; the speed of the motor-car was about six miles an hour and the train eight to ten miles an hour. The motor-car was stopped in the middle of the track when the oncoming train, then slowing up, was but 15 to 20 feet away from the point of intersection of the road and railway—the point of impact. Then, and for the first time, was it clearly apparent that a collision would take place, and everything had been done and nothing more could be done to stay the way of the train. The train was almost at a standstill—in the impact the motor-car was only carried about 25 feet. If a question had been put to the jury, of the following nature, in the way of arriving at the ultimate negligence (if any), "When the motor-car was seen to be across the rails and upon the railway track, could the servants of the appellant, by the exercise of reasonable care, have prevented the accident?" obviously, in my opinion, upon a careful consideration of the evidence, but one answer could be made to such a question, and it could only be in the negative, as, plainly, the servants of the Railway Compay had, upon their part, done all that could be reasonably expected of them under all the facts and circumstances as presented at the trial.

MCPHILLIPS, J.A.

It is evident that the lady driving the car was very inexperienced, and she did not look, as she should have done, in the direc-

MACDONALD, J.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

GAVIN v. KETTLE VALLEY RY. CO.

tion from which the train was coming, only looking in the other direction. The contention was, on the part of the defence, that trees obstructed the view; all the greater reason for extreme care. Further, it is evident that there was no complete obstruction of view, as before the motor-car could be driven up to the track, a clear view would be obtainable, that is, a clear view was obtainable before any zone of danger would be reached. The fact is, that there was absolute carelessness and recklessness in driving the motor-car up to and upon the railway track—a train then approaching and very near at hand—and, in my opinion, all that could be done by the Railway Company's servants was done to avert the accident, when it was apparent that a collision was inevitable. The testimony of the lady driving the motor-car is that, although not at first looking in the direction from which the train was coming, as she should have done, saw the train when it was 30 or 35 feet away from the crossing, and whilst the motor-car apparently was capable of being stopped, going at the speed it was, in 20 or 25 feet, she took 30 or 35 feet in which to stop it. I cannot see that there is any real conflict of testimony on the relevant evidence, but upon a plain reading and understanding of the undisputed facts the accident was due to the fault of the driver of the motor-car. It matters not whether her negligence "was the sole cause or the cause jointly with the Railway Company's negligence" (Lord Sumner above quoted, at p. 25). The present case is not within the language of Mr. Justice Anglin, which was quoted with approval in the *Loach* case.

MCPHILLIPS, J.A.

Here there was no negligence incapacitating the Railway Company from taking due care, and every effort was made to avoid the consequences of the negligence of the driver of the motor-car. I would refer to a Scotch case that is, in my opinion, very much in point—*M'Allester* v. *Glasgow Corporation* (1917), S.C. 430. The taxi-cab driver in that case thought he had time to cross the tracks of the tramway, and before he was clear the tram-car struck the taxi-cab. It was held that the taxi-cab driver was guilty of contributory negligence in attempting to cross in front of the tram-car (*Frasers* v. *Edinburgh Street Tramways Co.* (1882), 10 R. 264; and *Macandrew* v. *Tillard* (1909), S.C. 78 followed).

It might be that this is a case which would entitle judgment being entered for the appellant (see *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43; Duff, J. at p. 53; and *Winterbotham, Gurney & Co.* v. *Sibthorp & Cox* (1918), 62 Sol. Jo. 364; 87 L.J., K.B. 527), but the appellant's counsel has not asked that, but that a new trial be directed, submitting that the case is one of non-direction in that the question of joint negligence was not left to the jury, and that the jury should have been charged that the servants of the Railway Company had the right to assume that the motor-car would stop and that the train had the right of way. The question of what is proper direction is always a matter of difficulty, yet there must always be a proper direction. Upon this point see Lord Sumner, at p. 28, in the *Loach* case, *supra.*

In my opinion there was no sufficient direction upon the points pressed by counsel for the appellant; in particular, upon the question of joint negligence, and it was not passed upon by the jury. Further, the facts advanced at the trial only admitted of two views thereof, either that the driver of the motor-car was solely at fault, or that the accident was a combination of negligence on the part of the driver of the motor-car and the servants of the Railway Company, and in either case the plaintiff would fail. Shortly stated, the jury did not arrive at a "sensible conclusion." The jury have not in this case "come to a conclusion which, on the evidence, is not unreasonable"; on the contrary, in my view, the jury have, upon the evidence as adduced at the trial, come to an unreasonable conclusion, therefore the proper course is to direct a new trial.

MCPHILLIPS, J.A.

EBERTS, J.A. agreed in ordering a new trial.

EBERTS, J.A.

New trial ordered.

Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *Martin Griffin & Co.*

GREGORY, J.

1917

NOV. 29.

COURT OF APPEAL

1918

Oct. 1.

P. BURNS & CO., LTD. v. GODSON

P. BURNS & COMPANY, LTD. v. GODSON.

Landlord and tenant — Lease — Improvements by lessee — Provision for renewal—Terms to be mutually agreed upon—Refund by lessor in case of non-renewal.

A clause in a five-year lease gave the lessee a right of renewal for a further period of five years "upon such terms as may be mutually agreed upon." There was a further provision that in the event of the renewal not being granted the lessor should pay the lessee the cost of alterations and additions made on the premises by the lessee. The lessee upon going into possession made extensive alterations and additions. Upon the expiration of the term the parties failed to agree upon terms of renewal. In an action by the lessee to recover the cost of the alterations and additions he had made, it was held by the trial judge that as the failure to come to terms of renewal was, on the evidence, due to the unreasonable demands of the lessor the plaintiff should recover.

Held, on appeal, *per* MACDONALD, C.J.A. and EBERTS, J.A. (MCPHILLIPS, J.A. dissenting), that the appeal should be dismissed, the failure to renew being due to the unreasonableness of the lessor.

Per MARTIN, J.A.: That irrespective of the element of reasonableness, the renewal not having been made, the lessor is liable.

A proviso in the lease that "all improvements, alterations and fixtures constructed or made in and upon the said premises shall become the absolute property of the lessor" does not include the tenant's trade fixtures.

Statement

APPEAL from the decision of GREGORY, J. in an action by a lessee to recover a portion of moneys expended in improvements and repairs which became payable under the terms of the lease by reason of the defendant's failure to grant a renewal thereof. Tried at Vancouver on the 18th, 19th and 20th of October, 1917. By lease of the 1st of February, 1911, the defendant leased to the plaintiff the premises in question for a term of five years, the plaintiff to have the privilege of renewing the term for a further five years "upon such terms as might be mutually agreed upon." The plaintiff owned the adjoining premises, and it was his intention to make the two premises into one for carrying on a retail butcher's business, which entailed extensive alterations. It was further provided that the lessees

should immediately proceed with the necessary alterations to completion, that the lessors should during the second year of the term pay $5,000 to the lessees in respect of the alterations, and that in the event of the renewal of the lease not being granted at the expiration of the five years the lessor should pay the cost of the improvements, not to exceed $20,000. The total cost of the alterations was $39,000. The lessees gave due notice of its desire to renew the lease, but the parties were unable to come to terms and an arrangement was arrived at whereby the lessees continued in possession for an additional month with a view to arriving at a settlement, but the additional month failed to bring the parties to terms and the lessees vacated the premises.

Lennie, for plaintiff.

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

29th November, 1917.

GREGORY, J.: This is an action by a lessee against his lessor to recover on a covenant in the lease the sum of $15,000, being a portion of the moneys expended by it for alterations, etc., to the demised premises, and which the plaintiff alleges became payable under the terms of the lease by reason of the failure of the defendant to grant a renewal thereof.

The defence is that the defendant was at all times ready and willing to grant a renewal, and did in fact make such grant, and that in any case the plaintiff broke the contract by removing certain fixtures which the lease required to be left, and therefore he cannot now recover on the covenant.

Plaintiff occupied the demised premises for the full term of five years and by mutual consent for one month afterwards, paying the stipulated rent.

The following are the material clauses of the lease, which, for convenience of reference, I will number consecutively. After the reservation of the rent, the clause proceeds:

"1. With the privilege to the lessee of renewing said term for a further term of five years from the first day of April, 1916, upon such terms as may be mutually agreed upon between the parties hereto, and further upon the lessee giving to the lessor a notice in writing of the lessee's desire to renew same as aforesaid which said notice shall be given at least three months before the expiration of the term hereby granted." [This notice was duly given.]

"2. The lessee hereby covenants and agrees with the lessor to commence

GREGORY, J.

1917

Nov. 29.

COURT OF APPEAL

1918

Oct. 1.

P. BURNS & CO., LTD. v. GODSON

forthwith and to continue until completion such alterations to the front, and such alterations and additions to the interior of the building hereby demised as in the opinion of the lessee shall be necessary for the requirements of its business; provided, however, that the plans and specifications of any such alterations or additions shall first be submitted to and approved by the lessor."

"3. The said lessor agrees with the lessee to pay to the lessee during the second year of the term hereby granted the sum of five thousand dollars ($5,000) which sum shall be accepted by the lessee in full of all claims or demands of the lessee against the lessor for any and all alterations hereafter made to the building by the lessee as aforesaid." [The lessor paid the money.]

"4. In the event of a renewal of this lease not being granted for a further term of five years as aforesaid, then in such case, but not otherwise, the lessor shall pay to the lessee at the end of the term hereby granted, the balance of the actual cost to the lessee of such alterations and additions over and above the said sum of five thousand dollars ($5,000). Provided, however, that such total cost shall not in any case exceed the sum of twenty thousand dollars ($20,000)."

And after some provisions immaterial to the issue follows the clause:

"5. The lessee further covenants and agrees that at the expiration of the term hereby granted or of a renewal term of five years as hereinbefore provided or upon the cancellation or other termination of this lease, all improvements, alterations and fixtures, constructed or made or to be constructed or made in and upon the said premises shall become the absolute property of the lessor, subject to the payments on account thereof as hereinbefore provided."

GREGORY, J.

The plaintiff's business is that of butchers or meat-market proprietors. In accordance with the provisions of clause 2, plans and specifications for the alterations and additions were duly prepared and the work carried out. The details of this expenditure were not inquired into, the defendant admitting an expenditure of $20,000, and the plaintiff's witness made a general statement that it was far in excess of that amount, the figures, I think, were $39,000 odd. These alterations and additions were left in the building by the plaintiff when it vacated the premises.

In addition to the above alterations, etc., the plaintiff expended about $4,500 fitting up the interior of the ground floor with fixtures and fittings, including marble-topped counters, glass cases, cash and accountant's offices, etc., and a further sum of $3,700 in installing a cold storage and small heating plant, and by the removal of most of these $8,000 odd worth of fixtures the defendant contends the plaintiff has broken his

contract and cannot now recover on it. It is unnecessary to go into details of these fixtures, for all of them that were removed were, I think, tenant's trade fixtures, and in the absence of any agreement, would have been removable at any time during the term. Mr. *MacNeill,* although he advances some argument against this view, seems to be of the same opinion, for in his argument he says: "After all, it is a question of the construction of the lease." These fixtures were removed openly, and the defendant, who seems to have been constantly around the premises, never raised any objection, and on the 29th of April he sent Mr. Breeze to inspect the place, and he made no objection although the machinery had then been removed. No objection seems to have been raised until the suit was launched.

Many cases were cited to shew that the agreement for a renewal was so uncertain that it was in fact illusory and could not be enforced, the parties failing to mutually agree, and therefore it was urged the whole of clause 4 should be omitted from consideration. I am inclined to agree that it is illusory, but I cannot agree that for that reason the balance of the clause cannot be enforced. If taken with the rest of the agreement its meaning is clear and certain, nor should the defendant be allowed to take advantage of it when the failure to mutually agree was, I think, his own fault. He was most unreasonable, and, in my opinion, never accepted the reasonable suggestion of a reference to arbitration: see the remarks of Lord Blackburn in *Mackay* v. *Dick* (1881), 6 App. Cas. 251 at p. 263; see also *Sprague* v. *Booth* (1909), A.C. 576; and *Briggs* v. *Newswander* (1902), 32 S.C.R. 405.

GREGORY, J.

The defendant, I am convinced, did not want to renew the lease. His memory proved rather treacherous, and he clearly, when he first gave his evidence, forgot that while the plaintiff was using every effort to obtain a renewal he was negotiating with a third party (Pantages) and finally concluded a most advantageous agreement. His letter of the 28th of April, is not a renewal of the lease as is now claimed. It was delivered only three days before the extended time expired; it proposed terms which had already been refused; the plaintiff to his knowledge had already made other arrangements and had installed other plans in his premises adjoining. The plaintiff

GREGORY, J.

1917

Nov. 29.

COURT OF APPEAL

1918

Oct. 1.

P. BURNS & CO., LTD. v. GODSON

had to have all arrangements made before his lease or its extension of 30 days was on the eve of actually expiring, otherwise his business, if not ruined, would have been most seriously impaired. Unless the language of the lease makes it clear that it is so, I cannot think the defendant can keep the plaintiff in suspense, watch him make arrangements for new premises which it certainly was justified in thinking it would have to obtain, and then at the last moment say in effect: Now I will give you a lease on your own terms, which are reasonable, but I know you cannot in the circumstances accept it; still if you do not, I am relieved from any obligation to pay you the $15,000 I promised. If he wants to take advantage of the indefiniteness of his own contract, he must act in a reasonable manner as well as the plaintiff.

The action is based on clause 4. It was strongly urged on behalf of the defendant that that clause does not mean that the money is payable in case the parties cannot mutually agree on the terms of the lease, but that it is only payable in case a lease is not granted, and as long as Godson is willing to grant a lease, no matter what rent he asks, he is excused from paying if plaintiff will not accept such lease. I do not know why he should confine his argument to the question of rent, which is only one of the terms of the lease, and clause 1 provides that the renewal is to be for five years upon such terms as may be mutually agreed upon. The mutual agreement is not confined to rent alone. Such an interpretation is, I think, impossible, and it would entirely omit from consideration the words "as aforesaid" in clause 4, which, to my mind, clearly refers to the mutual agreement required by clause 1, which says:

GREGORY, J.

". . . . . the privilege of renewing . . . . . for a further term of five years . . . . . upon such terms," etc.,

all in one clause.

The defendant further urges that by virtue of clause 5 the plaintiff was prohibited from removing any fixtures, etc., whatever from the building—even tenant's trade fixtures. I was not referred to any cases, but it was argued that the clause could not refer to tenant's fixtures as, if the intention was that they could be taken but not the others, there was no necessity to contract at all about the matter, as that would be the

position of the parties in law without any contract. But in *Bishop* v. *Elliott* (1855), 11 Ex. 113, Coleridge, J., in delivering the judgment of the Court of Exchequer Chamber, at p. 122 said such an argument was of little weight, and he states his reasons therefor. That case, like the present, was one on the interpretation of a lease, to ascertain whether certain fixtures were included in the language of the lease or not.

It seems to me clear that the words "improvements, alterations and fixtures" refer to the alterations, etc., described in clause 2, which were not removed and which were set out and described in the plans and specifications. It would be a great hardship to hold otherwise, unless the meaning is clear. Taking the lease as a whole, I do not think any such interpretation as the defendant contends for should be put upon it: see *Lambourn* v. *McLellan* (1903), 2 Ch. 268; and *Mowats Limited* v. *Hudson Brothers Limited* (1911), 105 L.T. 400, referred to by plaintiff's counsel.

GREGORY, J.

There will be judgment for the plaintiff for $15,000.

From this judgment the defendant appealed. The appeal was argued at Vancouver on the 8th of April, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

A. H. MacNeill, K.C., for appellant: We say the clause in the lease upon which the plaintiff relies is wholly illusory. There is no provision for arbitration to provide for a reasonable arrangement for renewal: see *Briggs* v. *Newswander* (1901), 8 B.C. 402, in which the cases are collected on the question.

Lennie, for respondent: The improvements made by the plaintiff on the premises in fact cost $39,000. The defendant is not penalized by the judgment. It is a case of money returned which was legitimately spent. The improvements were all pulled down and the Pantages Theatre was built on the premises. The learned trial judge found the defendant was unreasonable in his demands during negotiations for renewal of the lease, and there is evidence to support the finding. There is nothing illusory as to the renewal clause. In the event of their not coming to terms the lessor was to pay $15,000.

Argument

MacNeill, in reply.

Cur. adv. vult.

GREGORY, J.

1917

Nov. 29.

COURT OF APPEAL

1918

Oct. 1.

P. BURNS & CO., LTD. v. GODSON

1st October, 1918.

MACDONALD, C.J.A.: There are two questions involved in the appeal. The one relates to the construction of the 4th clause of the lease, the other to the construction of the 5th clause. The fourth clause provided that "in the event of a renewal of this lease "not being granted" the lessor should pay the lessee a sum of money to recoup the lessee the costs of certain alterations to be made by him in the demised premises. By the first clause of the lease the lessee was given the right of renewal "on such terms as might be mutually agreed upon between the parties." If it were sought to enforce this as a covenant, or to recover damages from the lessor for failure to renew by reason of the terms not being agreed upon, the lessee, in my opinion, would fail; but that is not what is sought in this action. What is sought is the fulfilment of the lessor's promise that if the renewal were not brought about he would pay to the lessee a sum which is now admitted to be $15,000. What does this promise mean? A renewal could only be granted if the parties came to an agreement upon its terms. If they should agree, then no sum was payable. If they failed to agree, the only inference, I think, is that the said sum should be paid to the lessee to compensate him for the improvements he had made in the lessor's property. That the lessee *bona fide* endeavoured to bring about an agreement on reasonable terms cannot, in my opinion, be doubted, and the learned judge has so found.

MACDONALD, C.J.A.

In these circumstances, the only sensible interpretation which I am able to give to the fourth clause is that given to it in the Court below.

I am also of opinion that the learned judge has come to the right conclusion on the construction of the 5th clause, read in the light of the evidence. The lessee was authorized to make extensive alterations and additions to the demised premises. By said clause it was provided that:

"All improvements, alterations and fixtures constructed or made or to be constructed or made,"

by the lessee should, at the end of the term, or extended term, become the property of the lessor. The lessor's contention is that the tenant's trade fixtures fall within the above stipulation. I do not think so. The improvements and alterations

referred to are obviously the "alterations to the front" and "such alterations and additions" to the interior as the lessee, by the second clause of the lease, was authorized to make, and "fixtures" must, I think, be read *ejusdem generis* with the preceding words interpreted in the sense which they bear in the context.

I would dismiss the appeal.

MARTIN, J.A.: While it is true that the prospects of a later contract for renewal of the lease, "upon such terms as may be mutually agreed upon between the parties," may in general fairly be termed illusory under the first covenant, there is no "illusion" under the fourth covenant in the existing contract as to what will happen if that mutual agreement is not arrived at, because the fourth goes on to provide that "in the event of a renewal of this lease not being granted for a further term of five years as aforesaid then in such case, but not otherwise, the lessor shall pay to the lessee" the actual cost of certain alterations and additions to the demised premises, such cost not to exceed $20,000. These ascertained and precautionary consequences (not in any sense a penalty) of the failure to arrive at the hoped-for mutual agreement are thus definitely fixed and determined by a specific covenant and require no further "mutual agreement" to implement them, and they are entirely independent of the original hoped-for mutual agreement to renew. This will appear still clearer, beyond dispute I think, if the lease had provided briefly that if the parties failed to come to an agreement (which necessarily must be "mutual") to renew, then the lessor was to have the option of electing to have the premises restored to their original condition or to be paid the sum of $1,000. Now it is perfectly clear that there is nothing illusory about the landlord's right to take the benefits of such election, and how is the case altered in principle, if. as here, the tenant benefits by the failure to renew? This case comes within the express terms of the covenant, because no renewal has in fact been "granted," and whether the failure to grant is attributable to the rapacity of the landlord or the unreasonableness of the tenant makes no difference, for the landlord must pay according to the covenant. The learned judge below

GREGORY, J.

1917

Nov. 29.

COURT OF APPEAL

1918

Oct. 1.

P. BURNS & CO., LTD. v. GODSON

MARTIN, J.A.

did find that the failure to agree was the fault of the landlord and that he was "most unreasonable" in his demands, but the element of "reasonableness" has nothing to do with the question, in my opinion, and I am dealing with the matter on the assumption that both parties were reasonably inclined. The very nature of the first covenant put it in the power of either party to prevent "mutual agreement" by insisting upon unreasonable terms, but that is one of the chances that had to be taken when failure to agree was provided for by the fourth covenant; it comes down to a simple matter of business: will it pay the landlord to meet the terms of the tenant or not, exorbitant though they may be? It would, if, *e.g.*, he could let to another tenant at a greatly increased rent; it would or might not in other circumstances. The landlord's question at the worst will always be: will it pay me better to grant the tenant a renewal, even on his own harsh terms, or refuse him on mine? Shall I pay him the stipulated $20,000, and yet get a profit of $50,000 on a new long lease from a new tenant, John Doe, who wishes to rent the premises? There is no illusion here. The appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion this appeal is in exceeding small compass, and the appeal should be allowed. The sole question for disposition is, whether there was an enforceable contract for renewal of the lease for a further term of five years, in the absence of terms, *i.e.*, the rental not being agreed upon, and as to this the words as contained in the lease are "upon such terms as may be mutually agreed upon between the parties hereto." Damages were sued for and allowed upon the basis that there was a breach of contract by the appellant, in the failure to grant a renewal of the lease and that by reason thereof the respondent was entitled by way of damages to the sum of $15,000. There was no contest that this would be the correct sum to be allowed if the right of action existed.

The material clauses of the lease are referred to in the judgment of the learned trial judge.

The action really hinges upon clause 4 as above set forth. Now the evidence is conclusive that the parties, the appellant and respondent, did not agree upon the terms of renewal.

To repeat, what was agreed was a renewal "upon such terms as may be mutually agreed upon between the parties hereto" (a notice was to be given—there was some contest on this point as to whether effectually given, but I assume for the purposes of my judgment that it was effectually given). Failing mutual agreement, how can it be contended that there has been any breach of contract? It is only necessary to consider what mutually means, to see at once that when the parties could not come to a common agreement it cannot be said that there was any contract, and if no contract, it follows there can be no breach entitling damages being assessed. The respondent unquestionably took the risk under the form of the instrument that there would be joint action and common agreement as to the terms of the renewal.

It is quite evident from the evidence that earnest endeavours were made to come to an agreement; there is not a scintilla of evidence that I can see which would import that the appellant was not desirous of coming to terms, but it is patent that the respondent was insistent upon terms drastic in nature, in fact, a rental at $500 per month as against $1,000 a month as provided for in the lease for the original term. The appellant asked $850 per month to 1916, and for the balance of the renewed term $1,000 per month. This was refused. Finally, though, the appellant was agreeable to accept only $500 per month for the renewed term (this was on the 28th of April, 1916) but the respondent refused, and the contention is that it was then too late, as the respondent had made other arrangements. This offer, it is to be noted, was made before the respondent had vacated the premises and within the month following the expiry of the term, when the respondent was holding over for a month at a rental of $850 a month. In my opinion, the appellant did all that could reasonably be asked for under the circumstances, but after all that is of no importance. The matter here is the determination of the legal proposition, was there a contract enforceable in its nature, and if so has there been a breach thereof? I have no hesitation in answering in the negative. With great respect to the learned

GREGORY, J.

1917

Nov. 29.

COURT OF APPEAL

1918

Oct. 1.

P. BURNS & CO., LTD. v. GODSON

trial judge, I am entirely unable to accept the view that a right of action was shewn to exist.

In Chitty on Contracts, 16th Ed., at p. 82, we find this statement:

"So in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean; and if they do not, the agreement will be void (see *Cooper* v. *Hood* (1858), 28 L.J., Ch. 212; *Guthing* v. *Lynn* (1831), 2 B. & Ad. 232; *Pearce* v. *Watts* (1875), L.R. 20 Eq. 492)."

How can it be said that there was an agreement in the present case, when admittedly the terms were not agreed to? Here the rental, unquestionably the most important item of the terms to be agreed upon, was not agreed upon. At p. 598 of Chitty on Contracts, 16th Ed., we find this further statement:

"In two cases (*Taylor* v. *Brewer* (1813), 1 M. & S. 290; *Roberts* v. *Smith* (1859), 4 H. & N. 315, in which both Martin and Bramwell, BB. appeared to disapprove of *Bryant* v. *Flight* (1839), 5 M. & W. 114), however, service for remuneration to be fixed by the employer has been held to give no right of action against the employer."

It is clear beyond peradventure, to my mind, that upon the facts of the present case, there was no concluded contract, and I do not consider it necessary to further canvass in detail the evidence or refer to further authorities upon the point, other than to refer to *Loftus* v. *Roberts* (1902), 18 T.L.R. 532, a decision of the Court of Appeal which is decisive upon the point. There the agreement sought to be established was one of employment of an actress "at a west-end salary to be mutually arranged between us." During the argument of the appeal the following observation was made to counsel for the appellant:

MCPHILLIPS, J.A.

"Lord Justice Vaughan Williams.—A agrees to take a house for one year, and at the end of that year the tenancy is to be continued at a rent to be agreed upon. Is the latter clause a contract?

"Mr. Dickens.—Clearly not."

At pp. 534-535 the judgment of the Court is set forth.

It is incontrovertibly borne in upon my mind that the present case is not one of a concluded contract giving a right of action.

But it is further contended, although really not elaborated in argument nor were any authorities cited, that clause 4 is an independent agreement and quite apart from the question of

there having been no mutual agreement as to a renewal of the lease, the $15,000 as allowed by the learned trial judge is properly allowable. Now, as I have viewed the matter, until there was a mutual agreement there was no contract for a renewal lease. In the language of Vaughan Williams, L.J., in the case last cited, "until they had mutually agreed . . . there was no contract on which an action could be brought." The mutual agreement was a condition precedent; that is, both parties had to come to a mutual agreement, but they did not. It is only when the provisions are independent that the breach of one of them brings about a cause of action to the other party for damages; in the present case, it had to be a concurrence of minds, but that did not take place. Yet it is insisted upon that there is a right of action. Can it be for a moment deemed to have been the intention that if, for instance, the lessee had offered $1 a month for the premises for the renewal period, that the lease would have to be granted, otherwise the $15,000 would have to be paid? This would seem to me to be against all common sense, with great respect to all contrary opinions. Upon a plain reading of clause 4 of the lease, it is patent that it would only be on default in the giving of the renewal of the lease, after mutual agreement, as not until then would there be a contract, that an action could be brought for the cost of the alterations and additions, as in the clause is provided. That the clause is linked up with the mutuality of agreement is clear. It is only necessary to note the first words of the clause: "In the event of a renewal of this lease not being granted for a further term of five years as aforesaid," meaning, unquestionably, "not being granted" after mutual agreement come to. In truth, what the respondent is contending for is a right of action as if clause 4 had read, instead of "not being granted," "not being claimed or desired," but it was claimed and desired and notice given under clause 1 claiming the right to a renewal, and the learned trial judge so found. The situation then is, that the renewal being claimed, the default in not mutually agreeing is the default of both parties, *i.e.*, there is no contract. Admittedly a renewal lease at the lessee's own terms only, would be accepted. This is wholly unreasonable and could not have been

GREGORY, J.

1917

Nov. 29.

COURT OF APPEAL

1918

Oct. 1.

P. BURNS & CO., LTD. *v.* GODSON

MCPHILLIPS, J.A.

the intention of the parties. To shew the intention, when all the facts are looked at, it is clear that the lessor was not to be under the requirement to pay any further sum than the $5,000 as provided in clause 3 in respect of alterations and additions, save "in the event of a renewal of this lease not being granted for a further term of five years as aforesaid, then in such case but not otherwise the lessor shall pay . . . . ." This provision is quite understandable, as the further alterations and additions, *i.e.*, over the $5,000, may not have been of any value to the lessor at all. Clause 3 indicates that nothing more than $5,000 was to be paid; and clause 5 further indicates this. Clause 4 undoubtedly is a payment only enforceable if there is failure to grant a renewal after the terms in pursuance of clause 1 had been mutually agreed upon. No doubt, what the lessee desired was an option, but it is unthinkable that the lessor ever intended to agree that at the expiration of the original term he could be required to pay a sum as great as $20,000 for alterations and additions which would most likely be of no value whatever to him, and the lessee would be able to bring this about by unreasonable demands as to terms for the renewal lease. There is no evidence that there has been any consideration whatever received by the lessor consequent upon these further alterations and additions; in fact, there is evidence that the premises were later torn down and a theatre erected. In my opinion, applying the law to the lease under consideration, no right of action can be successfully maintained upon this ground, *i.e.*, that clause 4 amounts to an independent agreement. A great many cases might be referred to, but I do not propose to advert to them or discuss them, save in one or two instances. The principles of law which govern are dealt with in Halsbury's Laws of England, Vol. 7, pp. 434, 435 and 436; in *Bryant* v. *Beattie* (1838), 5 Scott 751, Tindal, C.J. at pp. 765-6 made use of language fitting, in my opinion, to apply to the present case:

> "It would be contrary to every principle of law to hold the defendant [lessee] to be entitled to take advantage of the non-performance of a condition which nothing but his own default has prevented the plaintiff [lessor] from performing."

Then it is to be remembered that the lessor was in the end

willing to grant the renewal lease at the lessee's own suggested terms, and there has not been any refusal to grant a renewal lease upon the part of the lessor but a refusal to accept a renewal lease upon the part of the lessee: see Bramwell, B. in *White* v. *Beeton* (1861), 30 L.J., Ex. 373 at pp. 376, 377.

In the present case the lessee took the risk of coming to terms with the lessor, but the terms were not come to. Then what is the position? Upon this point I would refer to the language of the Lord Chancellor (Lord Westbury) in *Roberts* v. *Brett* (1865), 34 L.J., C.P. 241 at p. 245; and Lord Chelmsford at p. 248.

Obviously what was provided for was this: a mutual agreement being come to as to the terms of the renewal lease, then if there was a breach and the renewal lease not granted, the stipulated damages for the breach as contained in clause 4 would be payable.

The determination as to whether the mutual agreement was a condition precedent, depending here as it does on the construction of a written contract, is a question of law for the Court to decide: *George D. Emery Company* v. *Wells* (1906), A.C. 515. The lessor in the present case could only grant a lease, after the mutual agreement as to the terms were come to, and that event not having happened, how can there be a breach? And the promise was that "in the event of a renewal of this lease not being granted for a further term of five years as aforesaid, then and in such case but not otherwise the lessor shall pay . . . . ." It cannot be said to be a promise independent of the mutual agreement having been come to; the stipulation is fundamental and without a mutual agreement being come to, there is no breach as there is no contract, and the Court cannot make it a contract. It is not a question of reasonableness or unreasonableness, further, it is not an independent promise; the mutual agreement lies at the root, and without that, clause 4 is unenforceable. It is idle to contend here that the contract is divisible; the very clause itself rebuts this in the plainest terms. I have not been able to turn to a precise case upon the point, but it rather reminds one of what that eminent jurist Lord Macnaghten once said, "the plainer a proposition is the

GREGORY, J.

1917

Nov. 29.

COURT OF APPEAL

1918

Oct. 1.

P. BURNS & CO., LTD. v. GODSON

harder it often is to find judicial authority for it." I cannot persuade myself that we have before us a contract enforceable in its nature; in truth, there is no contract, and it follows that there cannot be liquidated or other damages flowing from that which is non-existent. I would therefore allow the appeal.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. H. MacNeill.*
Solicitors for respondent: *Lennie, Clark & Hooper.*

COURT OF APPEAL

1918

Oct. 1.

EVANS v. SOUTH VANCOUVER AND TOWNSHIP OF RICHMOND

EVANS *ET AL.* v. CORPORATION OF THE DISTRICT OF SOUTH VANCOUVER, AND THE CORPORATION OF THE TOWNSHIP OF RICHMOND.

Negligence—Municipal corporation—Drawbridge—Duties in respect to—Drowning through open draw—Liability—R.S.B.C. 1911, Cap. 82.

In an action for damages under the Families Compensation Act against two adjoining municipalities (divided by the centre line of the Fraser River) owing to the death of a passenger in a jitney which fell from a bridge over the Fraser River when the draw was open, the jury found that the two corporations and the jitney driver were equally liable. No action was brought against the jitney driver and it appeared the bridge was built by the Government, one of the municipalities paying for a portion of the cost and taking over its control and maintenance upon its completion. The protection afforded vehicles was a light in the middle of the drawbridge that appeared red along the bridge when the draw was open, also light iron gates on the bridge at each side, 20 feet from the draw, these gates being closed when the draw was open. The jitney broke through the iron gate and went over the end into the river. The trial judge gave judgment against the municipality in control of the bridge but dismissed it as against the other.

Held, on appeal, *per* MACDONALD, C.J.A., and MARTIN, J.A., that no negligence had been proven against the municipality and the appeal should be allowed.

Per MCPHILLIPS and EBERTS, JJ.A.: That the appeal should be dismissed.

The Court being equally divided, the appeal was dismissed.

COURT OF APPEAL

1918

Oct. 1.

EVANS *v.* SOUTH VANCOUVER AND TOWNSHIP OF RICHMOND

APPEAL by the Township of Richmond from the decision of CLEMENT, J., of the 11th of January, 1918, in an action against the District of South Vancouver and the Township of Richmond, brought by the husband and children of Annie Evans under the Families Compensation Act for damages for the loss of the said Annie Evans, who was drowned when an automobile in which she was travelling fell from the Fraser Avenue bridge into the Fraser River owing to the draw being open. The plaintiff, Muriel Mary Evans, who was a passenger on the automobile, also claimed damages for personal injuries. About 6.30 in the evening of the 11th of November, 1916, Mrs. Evans and her two daughters boarded a jitney that was coming north towards the bridge spanning the north arm of the Fraser River. It was a clear moonlight evening. The drawbridge was a one-hundred-and-fifty-foot span, and a light was in the middle of the span which shewed red along the bridge line when the span was open. A gate on the bridge, about 20 feet from the span, was closed when the draw was open. The jitney, which was filled with passengers, while going at from 10 to 15 miles an hour, broke through the gate and went over the edge into the river. Mrs. Evans and her older daughter were drowned, the younger being saved. From the evidence it appeared the gate was first seen from the jitney when about 20 feet away, but no one appears to have seen the red light which was in the middle of the draw beyond the open space, and about 95 feet from the gate. The middle of the stream was the dividing line between the Municipality of Richmond to the south and the Municipality of South Vancouver to the north. The bridge was built by the Government under arrangement with the Municipality of Richmond, whereby the Municipality paid $20,000 towards the cost of construction, and after its completion the Municipality took control and provided the cost of maintenance. The jury found negligence and that both Municipalities and the jitney driver were equally responsible, fixing the damages at

Statement

COURT OF APPEAL

1918

Oct. 1.

EVANS v. SOUTH VANCOUVER AND TOWNSHIP OF RICHMOND

$5,000 ($1,000 for the father, $1,500 for the son, and $2,500 for the girl). The trial judge gave judgment against the Municipality of Richmond but dismissed the action as against South Vancouver. The Municipality of Richmond appealed.

The appeal was argued at Vancouver on the 11th and 12th of April, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Martin, K.C., for appellant: The bridge was built by the Government. There is no alternative plea that Richmond alone was in control of the bridge, and it has not been found that Richmond alone operated the bridge. The Municipality passed a by-law under which they paid $20,000 to assist in the construction of the bridge, and then took it over. They must get within section 338 of the Municipal Act (B.C. Stats. 1914, Cap. 52) to make us liable. We did not build the bridge. There was evidence of joint operation improperly admitted, but that should be discarded by the Court of Appeal: see *Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13. The statute says if two municipalities join in building a bridge they are liable, etc. It is a purely statutory liability. In the case of *Victoria Corporation* v. *Patterson* (1899), A.C. 615, they overlooked a by-law. They cannot make us liable without first shewing the bridge is within the Municipality, and there is no proof of the boundaries of the two Municipalities. We do not come within *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256. The learned trial judge should have withdrawn the case from the jury. We are not bound to have the best system. The evidence is that the system was not a bad one, although it might have been better: see *Albo* v. *Great Northern Railway Co.* (1912), 17 B.C. 226.

Argument

A. D. Taylor, K.C., for respondent: As to the light, there is negligence in two respects, firstly, the red light is not seen until the draw has turned to an angle of 45 degrees and, secondly, the danger point is reached 75 feet before you arrive at the light. The draw is about 150 feet in length, and there should have been a red light at both ends. The light in the middle of the bridge is not sufficient. As to liability and responsibility for public safety see *Newberry* v. *Bristol Tram-*

way and Carriage Company (Limited) (1912), 29 T.L.R. 177; *The "Bernina"* (1888), 13 App. Cas. 1; *Mathews* v. *London Street Tramways Company* (1888), 5 T.L.R. 3; *Manley* v. *St. Helens Canal and Railway Company* (1858), 2 H. & N. 840. We shewed at the trial that Richmond paid one-half of the cost of construction of the bridge, and afterwards maintained and operated it. As to costs payable to a successful defendant see *Bullock* v. *London General Omnibus Company* (1907), 1 K.B. 264; *Besterman* v. *British Motor Cab Company, Limited* (1914), 3 K.B. 181.

Martin, in reply.

Cur. adv. vult.

1st October, 1918.

MACDONALD, C.J.A.: I am of the opinion that no negligence has been proven against the appellants, and that therefore the appeal should be allowed.

This being so, it becomes unnecessary to consider the other questions involved in the appeal. The driver of the car had driven a jitney on the highway crossing this bridge daily for a period of three years. He was therefore well acquainted with the draw, the light and the gates. The lantern suspended above the middle of the bridge shed a red light down the highway when the bridge was closed to highway traffic, which could be seen, by persons approaching the bridge, at a distance of two or three miles. The light was a single light in a lantern having red and green lenses. The lantern served for the highway as well as for shipping.

MACDONALD, C.J.A.

When the bridge was swung open to navigation, the red lenses faced the highway and the green the water. When the span was open to highway traffic the green lenses faced the highway and the reds the water. In addition to the light there were gates on the highway, some distance back from the span, which were closed when the bridge was closed to highway traffic.

On the evening in question the gates were closed. The span was open to navigation and the red light was shining down the highway. Sometime before the jitney reached the bridge the red light faced the highway. Notwithstanding this fact the driver drove on heedlessly, crashed through the closed gates, and plunged his car into the river, causing the death of the passenger

COURT OF APPEAL

1918

Oct. 1.

EVANS v. SOUTH VANCOUVER AND TOWNSHIP OF RICHMOND

whom the respondent represents. If the action had been brought by the representative of the driver, who was also killed, contributory negligence would have been a complete defence. That may not be a defence to the action of this respondent, since the person whom he represents may not have been negligent or guilty of want of care in the premises. But, be this as it may, unless it can be said that the defendants were negligent, and that that negligence caused the disaster, the question of contributory negligence does not arise.

It was argued that the system of warning adopted by the lighting of the bridge in the manner above specified would not be effective while the bridge was being swung open or was being closed. This may be quite true, and had the span been in course of turning while the jitney was approaching the bridge, the jury must have considered that circumstance, but when the evidence is clear and uncontradicted that the jitney was a long distance away when the span was being turned, and that the light was in position for a considerable time before the vehicle came to the span, or even to the approach to the bridge, the defect suggested can have no bearing upon the case. To succeed the respondent would have to prove, not a negligent system of warning under all conditions, but that the system was negligently insufficient to meet the circumstances of this case. I would allow the appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: Apart from all other defences raised, there was no evidence, in my opinion, on which the jury could reasonably have found the appellant guilty of negligence. The light was adequate beyond question in the case of any driver of a motor-car taking proper precautions, and I am quite unable to see how more could be reasonably expected in the case of the gate, which, I note, was far from being of that almost gossamer description which was urged upon us. The evidence shews that it was made of iron pipe, over an inch in diameter, and "good strong wire," bolted to a post, and the two parts of it when shut were fastened together in the centre by a "good strong chain." It had been sufficient, at least, to save a motor-truck which ran into it, and split one of the posts, from disaster, though at that time the gate was only ten and a half feet from

MARTIN, J.A.

the brink of the aperture, whereas at the time of this accident it had been moved ten feet further back. I feel constrained to add that it is much to be regretted that the learned judge repeatedly refused to submit questions to the jury in a case like this, which is eminently one in which that usual and proper course should have been taken: see the cases collected on this point in my recent judgment in *Howard* v. *B.C. Electric Ry. Co.* [(1918), 3 W.W.R. 409]. The appeal, I think, should be allowed.

MCPHILLIPS, J.A.: The action was one brought under the provisions of the Families Compensation Act. The deceased Annie Evans, who was a passenger in an automobile, fell into the Fraser River and was drowned owing to the draw of the Fraser Avenue bridge being open at the time the automobile reached the bridge, the driver thereof being evidently unable to check the way of the automobile. The action was brought for the benefit of the husband and children of the deceased. The verdict of the special jury was a general verdict, finding the defendants as well as the driver of the automobile negligent. The action was not brought against the driver of the automobile, and the finding of negligence against him may be disregarded, unless it can be said that his negligence disentitles the plaintiffs to succeed, and no contention of that kind would appear to be advanced. The point is not taken in the notice of appeal nor is it tenable upon the facts. The appellants must be held bound by the course of the trial, and when the jury brought in their verdict no exception was taken that admits of any question arising upon this point at this stage. The general verdict as found by the special jury specifically finds that the defendants, both the Corporations, were guilty of negligence. Upon motion made for judgment by the plaintiff upon the findings of the jury, the Corporation of the District of South Vancouver was dismissed from the action, it appearing that the bridge in question was not within its corporate jurisdiction, and the agreement as between the defendants for the cost and maintenance of the bridge was of no force and effect owing to the necessary provisions for the change of boundaries as provided for in the South Vancouver City Incorporation Act

MCPHILLIPS, J.A.

COURT OF APPEAL

1918

Oct. 1.

EVANS v. SOUTH VANCOUVER AND TOWNSHIP OF RICHMOND

(B.C. Stats. 1910, Cap. 78) not having, in pursuance thereof, been brought into effect, and there is no cross-appeal upon the part of the plaintiffs asking judgment to be entered against the Corporation of the District of South Vancouver. So that that Corporation may be dismissed from consideration, save that the appellants contend that the action as launched was one of joint negligence as against both Corporations, and that no judgment can now be maintained as against the one remaining, namely, the Corporation of the Township of Richmond. Any such contention, in my opinion, is without force. The negligence found is negligence as against both, and if sustainable as against the Corporation of the Township of Richmond, that the Corporation of the District of South Vancouver has escaped liability is no effective answer, nor does it dispose of the liability that the verdict imposes upon the Corporation of the Township of Richmond (see *Bullock* v. *London General Omnibus Co.* (1906), 76 L.J., K.B. 127, Collins, M.R. at p. 131).

MCPHILLIPS, J.A.

Considerable argument has been addressed to the point that it has not been sufficiently shewn that the bridge in question and the place of accident were within the corporate limits or within the jurisdiction of the Corporation of the Township of Richmond. In my opinion, this defence is not open upon the pleadings, and if I were wrong in this, the evidence, in my opinion, is sufficient to establish that the scene of the accident was within the Corporation limits. Further, the course of the trial and the defence generally throughout was not, that the bridge was not within the corporate limits, that it was not the bridge of the Corporation of the Township of Richmond, but that it was maintained and operated in a proper manner and without negligence, and that the negligence was the negligence of the plaintiffs or the negligence of the driver of the automobile, which negligence the plaintiffs were chargeable with and thereby were disentitled to recover; that in any case the draw of the bridge was open at the time, and open at a time with such safeguards as to lights and barriers, that the Corporation of the Township of Richmond should be excused from all liability; that the causation of the accident was alone the negligence of the driver of the automobile, it being driven at an immoderate

rate of speed without proper and sufficient brakes and without notice being taken of the red light and gates, and the bridge tender's signals. All these defences were passed upon by the special jury and evidence was led to support the contention that the Corporation of the Township of Richmond was without negligence, but notwithstanding this, the finding is that negligence was present and if it be that upon the facts there was evidence sufficient to admit of the question being passed upon by the tribunal called upon to try the issues, the verdict must stand, unless some error in law has taken place. Counsel for the appellant has attempted to submit that it is a case of no evidence whatever, and that it was not a case which reasonably should have been submitted to a jury. With deference, no such proposition is capable of being established. The evidence is of cogent nature, well demonstrating that the bridge, considering the approach thereto and the flimsy barrier some 20 feet only from the draw, was a veritable trap for the unwary; in fact, it may reasonably be said that it was an invitation to accident. In these days of modern conditions, and within a short distance of the City of New Westminster, it would not seem unreasonable to expect that better conditions should have existed to safeguard the lives of the travelling public. It is impossible for the Corporation to shelter itself behind the fact that all this inadequacy of provision against danger to the travelling public upon the highway was known to the driver of the automobile, well known to him, and that he was reckless and regardless of the danger. Whether that be the fact or not, there is no evidence whatever that the deceased lady was at all acquainted with the facts, as they are alleged to have been known to the driver of the automobile. The extent of the knowledge of the deceased lady was apparently not more than could be gathered by a person of intelligence, a passenger as she was in the automobile, and certainly there was no apparent or reasonable warning that the automobile was approaching a bridge swung out of its normal position, leaving a gap in the highway.

It would appear that the lights in use were lights maintained in respect to the marine regulations and for the guidance of mariners, and cannot be held to be any guide or warning to users

COURT OF APPEAL

1918

Oct. 1.

EVANS v. SOUTH VANCOUVER AND TOWNSHIP OF RICHMOND

MCPHILLIPS, J.A.

of the highway. In short, it may, upon all the facts, be stated that there was no reasonable or proper safeguard or warning to the travelling public upon the highway, and the opening of the draw without proper safeguards constituted misfeasance. Were it merely non-repair of the bridge, unquestionably there would be no right of action (see *The Municipality of Pictou* v. *Geldert* (1893), 63 L.J., P.C. 37; *Maguire* v. *Liverpool Corporation* (1905), 1 K.B. 767; 74 L.J., K.B. 369. See, however, *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194. The author of the Canadian Municipal Manual, Sir William Ralph Meredith, Chief Justice of Ontario, said, relative to the above case, at p. 603 of his monumental work, that "in the opinion of the judges of the Supreme Court all the most important cases bearing upon the question in issue are collated and reviewed," and I would in particular refer to what Duff, J. said in the *McPhalen* case at pp. 209, 210, 211, 213, 214. In that there is no express provision in the Municipal Act of British Columbia imposing a liability upon a municipality for neglect to keep its highways and bridges in repair and safe for the public in their rightful user of the same, liability is confined to such only as is imposed by the common law, but when we have the active interference with the bridge, *i.e.*, the swinging of the bridge and the creation of a dangerous chasm—an open trap—unquestionably we have misfeasance proved.

Considerable argument was addressed to the question of whether the Corporation of the Township of Richmond could be said to have been legally responsible in any way in connection with the bridge; whether it was a bridge within its municipal boundaries; whether there had been the exercise of ownership or management thereof, and with respect to all these questions, in my opinion the Corporation of the Township of Richmond is, upon the facts, conclusively proved to have been in possession of the bridge, exercised the rights of ownership thereof, and it is situate within its municipal boundaries. No contention to the contrary is open upon the pleadings or capable of being successfully advanced upon the facts as proved at the trial. In passing upon this point, one fact alone demonstrates that

this bridge is the bridge of the Corporation of the Township of Richmond, namely, the Richmond Loan By-law, 1907, whereby an arrangement was made between the Corporation and the Government of the Province of British Columbia to reconstruct the bridge in question at the point where situate and where the accident took place, the total cost being $40,000, the Government contributing $20,000 and the Corporation $20,000, the Government engineer supervising the work. The bridge was constructed, taken over by the Corporation, and its quota of the cost of construction was duly paid, and thereafter the bridge was under the control and management of the Corporation, and that was the position of matters at the time of the accident. That the Corporation was in possession of the bridge is clear beyond question, and a bridge tender was employed and in charge of the bridge—an employee of the Corporation. The evidence of Stephen, the clerk of the Corporation, is conclusive upon this point (and see section 54, subsection (186), and section 332, Municipal Act, B.C. Stats. 1914, Cap. 52). The facts as proved in *Victoria Corporation* v. *Patterson* (1899), 68 L.J., P.C. 128, and the law as there defined, imposing liability upon the City of Victoria, can be relied upon in the determination of this appeal, and what the Lord Chancellor (Earl of Halsbury) said at pp. 132, 133, is particularly applicable to this present appeal.

MCPHILLIPS, J.A.

It is true that in *City of Vancouver* v. *Cummings* (1912), 46 S.C.R. 457, the statute law there under consideration imposed a duty to repair, but there was also considered the liability for misfeasance, and it was there held, as in my opinion it can be rightly held in the present case, that upon the evidence there was a proper case for submission to the jury. The headnote, in part, reads as follows:

"An unprotected opening in the sidewalk of one of the principal streets of the city, having the appearance of being recently made for some purposes in connection with the laying of gas-pipes, was permitted to remain without proper repair during most of the day, and, at about four o'clock in the afternoon, the plaintiff's injuries were sustained by stepping into the hole while making use of the sidewalk. *Held*, affirming the judgment appealed from ([(1911)], 1 W.W.R. 31; 19 W.L.R. 322), Davies and Anglin, JJ., dissenting, that evidence of these facts made out a proper case for submission to the jury, and upon which they could return findings of breach of statutory duty and misfeasance on the part of the municipal corporation."

COURT OF APPEAL

1918

Oct. 1.

EVANS v. SOUTH VANCOUVER AND TOWNSHIP OF RICHMOND

There is no point in the contention that the negligence of the driver of the automobile prevents the plaintiff's recovery in this action. That point was set at rest by the House of Lords in *The "Bernina"* (1888), 13 App. Cas. 1; also see *Mathews* v. *London Street Tramways Company* (1888), 5 T.L.R. 3; 58 L.J., Q.B. 12 (also see *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719; and *Columbia Bithulithic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1). One consideration that gives me some hesitation is, whether the verdict is in such a form as renders it unnecessary to direct a new trial, coupling as it does the negligence of the driver with that of the other defendants, but after some anxious consideration, I am of the opinion that the verdict is sufficiently definite, and certainly the facts make it clear that the deceased lady was in no way chargeable with any negligence of the driver of the automobile. In Beven on Negligence, 3rd Ed., Vol. 1, at p. 178, after reference is made to *Thorogood* v. *Bryan* (1849), 8 C.B. 115, and *The "Bernina," supra,* we find this statement:

"The solvent proposed by Lord Watson for all these difficulties is the inquiry, Does the servant in charge of the vehicle look for orders to the passengers; or have they any further right to interfere with his conduct of the vehicle, except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety? It has now been held that the proper question for the jury in this class of case must amount to, Did the negligence of those in charge of the vehicle, other than that in which the plaintiff was, in whole or in part, cause the accident? If the jury find it did, then the verdict must be for the plaintiff."

MCPHILLIPS, J.A.

In the present case, upon the facts, unquestionably the negligence was that of the Corporation of the Township of Richmond, it was the negligence of those in charge of the bridge. The head-note in the *Mathews* case, *supra,* puts the point very precisely:

"In an action by a passenger on an omnibus, against the owners of a tramway car, for compensation for injuries sustained in a collision, the direction to the jury since the decision of the House of Lords in *Mills and others* v. *Armstrong and another; The Bernina* [(1888)], 57 L.J.P., D. & A. 65; 13 App. Cas. 1, should be, 'Was there negligence on the part of the tramway car driver which caused the accident? if so, it is no answer to say that there was negligence on the part of the omnibus driver': the plaintiff in such a case not being disentitled to recover by reason of the negligence of the driver of the omnibus on which he was a passenger."

The verdict is a general one, and that being the case, it really becomes unnecessary to point out specifically what may be said to have been the negligence, but it is patent that there was not present any manner of safeguard which modern conditions can be reasonably said to require. Many could be suggested, but it is profitless to speculate thereon or intimate what they might have been. The verdict is in itself sufficient, being founded upon sufficient evidence. In *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177 at p. 179, we read:

"Now if the jury had simply given a general verdict his Lordship [the Master of the Rolls—Cozens-Hardy] thought they could not have interfered. But they had told the Court what they meant by their verdict."

Here we have no definition upon the part of the jury of the precise negligence, but it can be inferred—there may be said to have been no proper safeguard. This is a case within the language of Lord Justice Hamilton (now Lord Sumner):

"His Lordship [Lord Justice Hamilton] did not think that a jury could fix a defendant with liability for want of care, without proof given or reason assigned, out of their own inner consciousness and on their own notions of the fitness of things."

Here it is understandable, with all due and proper deference to those who may hold a contrary opinion, that many safeguards could have been provided that would most assuredly have prevented this very appalling accident and loss of life. That the verdict of the jury must not be lightly overthrown is shewn by what Lord Loreburn (the Lord Chancellor) said in *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697:

MCPHILLIPS, J.A.

"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. They thought that the appellants would have acted in exactly the same way if no payment had been made by the Dunlop Company at all. That is, in my opinion, what the finding means, and there is sufficient evidence to support it."

Certainly the present case was not one which could have been withdrawn from the jury, and we find Sir Arthur Channell in *Toronto Power Company, Limited* v. *Paskwan* (1915), A.C. 734, saying at p. 739:

COURT OF APPEAL

1918

Oct. 1.

EVANS v. SOUTH VANCOUVER AND TOWNSHIP OF RICHMOND

"It is enough to say, as both the judge who tried the case and the judges on appeal in the Supreme Court have said, that there was a case which could not have been withdrawn from the jury, and that the jury have found against the defendants. The learned judge could not have ruled that as a matter of law the answer of the defendants was necessarily conclusive in their favour. It is unnecessary to go so far as Middleton, J. did in the Court below and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable."

In my opinion, the negligence found was justifiably found, and if I am right in this conclusion, and if the facts are such as to warrant but that "one view," that the Corporation of the Township of Richmond was guilty of negligence, then the case is one entitling the Court of Appeal to sustain the verdict and the judgment entered for the plaintiffs. Even if the verdict of the jury was for the defendants or be wanting in completeness of form or have involved therein, as in the present case, a finding of negligence against the driver of the automobile as well, it matters not if the Court of Appeal has all the facts before it and no other relevant facts can be suggested as being capable of proof which would alter the case as made out, the authority of the Court of Appeal extends to the full length to give judgment for the plaintiffs: see Mr. Justice Duff in *McPhee* v. *Esquimalt and Nanaimo Rway. Co* (1913), 49 S.C.R. 43 at p. 53. See also Swinfen Eady, L.J. (now the Master of the Rolls) in *Winterbotham, Gurney & Co* v. *Sibthorp & Cox* (1918), 87 L.J.. K.B. 527 at pp. 528-9.

MCPHILLIPS, J.A.

In my opinion, upon a review of all the facts of the present case, and applying the law thereto, the proper course for this Court to adopt is to approve and sustain the entry of judgment for the plaintiff, and in my opinion that would be the proper judgment had the finding of the jury negatived negligence upon the part of the Corporation of the Township of Richmond. The case is one which comes completely within the language of the Lord Chancellor (Lord Loreburn) in *Paquin, Lim.* v. *Beauclerk* (1906), 75 L.J., K.B. 395 at pp. 401-2:

"Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the Court may enter judgment."

I would dismiss the appeal.

With respect to the cross-appeal, it must, in my opinion, be

COURT OF APPEAL

1918

Oct. 1.

EVANS v. SOUTH VANCOUVER AND TOWNSHIP OF RICHMOND

dismissed. There is no jurisdiction in British Columbia such as was relied upon and supports the judgments in *Bullock* v. *London General Omnibus Co.* (1906), 76 L.J., K.B. 127, and *Besterman* v. *British Motor Cab Company, Limited* (1914), 3 K.B. 181, *viz.*: Judicature Act, 1890, Sec. 5, giving discretion to the Court or judge over costs.

EBERTS, J.A.: I would dismiss the appeal for the reasons given by MCPHILLIPS, J.A.

Solicitors for appellant: *Cowan, Ritchie & Grant.*
Solicitor for respondents: *F. A. Jackson.*

REX *EX REL.* ROBINSON v. MARKS.

CAYLEY, CO. J.

1918

April 12.

REX v. MARKS

Criminal law — Prohibition — Appeal — Preliminary objection — Must be raised below—Arrest and trial without warrant.

If objection is not taken before the magistrate to a defect in the proceedings, the point is assumed to have been waived; objection is, however, properly taken if raised as soon as the defendant becomes aware of the defect, at any time before conviction.

A prisoner was arrested and tried without a warrant on a charge laid under the Prohibition Act. Preliminary objection was taken on the appeal that the conviction was therefore illegal.

Held, that the objection must be overruled as the accused was before the magistrate who had jurisdiction to try the case, and he need not inquire how the prisoner came there but may proceed to try it.

Reg. v. *Shaw* (1865), 34 L.J., M.C. 169; and *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614 followed.

Dixon v. *Wells* (1890), 25 Q.B.D. 249 distinguished.

Statement

APPEAL from a conviction by the police magistrate at Vancouver on a charge under the Prohibition Act, argued before CAYLEY, Co. J. at Vancouver on the 18th of March and 2nd of April, 1918.

CAYLEY, CO. J.

1918

April 12.

REX v. MARKS

W. P. Grant, for appellant, raised the preliminary objection that the prisoner having been arrested and tried without a warrant, the conviction was illegal. [He referred to *Re Paul* (*No. 2*) (1912), 20 Can. Cr. Cas. 161; *Rex* v. *Young Kee* (1917), 28 Can. Cr. Cas. 161; *Rex* v. *Pollard* (1917), 29 Can. Cr. Cas. 35.]

R. L. Maitland, for respondent, *contra*: The appearance before the magistrate without objection waives his rights. If the magistrate has jurisdiction to try and the accused appears, that is all that is necessary: see *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614; *McGuiness* v. *Dafoe* (1896), 3 Can. Cr. Cas. 139; *Rex* v. *Hurst* (1914), 23 Can. Cr. Cas. 389; *Rex* v. *Davis* (1912), 20 Can. Cr. Cas. 293; *Rex* v. *Martin* (1917), 40 O.L.R. 270; *Rex* v. *Hanley* (1917), 13 O.W.N. 220; Paley on Summary Convictions, 8th Ed., pp. 113-4.

Argument

12th April, 1918.

CAYLEY, CO. J.: A preliminary objection has been raised by the defence, that the defendant was arrested without a warrant, the charge being laid under the Prohibition statute of this Province. The objection was taken in the police court, but overruled by the magistrate. It was contended by the Crown that the objection had not been raised in the police court until after the prosecution had closed its case and that, therefore, it had been raised too late. The defence, however, claimed that they had not been aware that no warrant had been issued until a certain stage in the case had been reached, and that then they immediately raised the objection. If no objection is raised at all before the magistrate, the defendant is assumed to have waived the point. Waiver, then, seems to be the basis. I think that the point having been raised as soon as the defence became aware of the defect in the warrant, and before conviction had been made, the defence is protected. The objection itself is now to be considered, and I understand that there is no decision by any Court of Appeal in British Columbia, and that the point comes up now for the first time. The defence relied upon *Rex* v. *Pollard* (1917), 29 Can. Cr. Cas. 35, which is a decision by the Appellate Division of the Supreme Court of Alberta. It decides that in the absence of any statutory pro-

Judgment

vision in the Alberta Act (which corresponds with our Prohibition Act) for arrest without a warrant, "that such an arrest is illegal, and the magistrate before whom the accused is brought in custody without a warrant or summons after such illegal arrest has no jurisdiction to proceed with the trial in the face of defendant's objection then taken that he was not properly before the magistrate."

The case of *Rex* v. *Pollard* is in line with other decisions to the same effect by the Alberta judges. *Rex* v. *Wallace* (1915), 32 W.L.R. 264 is a decision by Stuart, J. that the magistrate in such cases has no jurisdiction to try, but this decision was based on similar decisions of Beck, J. of the same Court. *Rex* v. *Miller* (1913), 25 W.L.R. 296 is a decision by Beck, J. This decision is based upon the same judge's decision in *Re Paul* (*No. 2*) (1912), 20 Can. Cr. Cas. 161, and on *Rex* v. *Davis* (1912), 20 Can. Cr. Cas. 293, a decision by Walsh J. of the same Court, which in turn was founded on *Re Paul, supra*. *Re Paul* seems to have been the foundation for all the Alberta decisions which I have been considering, and that case seems to be founded on Halsbury's Laws of England, Vol. 19, p. 594, *Dixon* v. *Wells* (1890), 25 Q.B.D. 249 and *Pearks, Gunston & Tee, Limited* v. *Richardson* (1902), 1 K.B. 91.

Halsbury's Laws of England, Vol. 19, par. 1240, cited above, reads as follows:

Judgment

"Defects in the summons or warrant, or variations between the facts alleged in either of them and the evidence as given, are not objections fatal to the hearing of the case, but where the justices are of opinion that the defendant may have been deceived or misled they may in their discretion adjourn the hearing, upon such terms as they think fit, and grant or refuse bail to the defendant. Any irregularity in the form or service of the summons, or the form or execution of the warrant, is cured by the appearance of the party summoned or arrested, but this does not apply in the case of a defendant who appears purely for the purpose of taking objection to such an irregularity."

I should not conclude from this section that the defect in the warrant was an objection fatal to the hearing of the case, though no doubt it would give basis to a claim for adjournment. The cases cited in the foot-note to the paragraph from Halsbury above are the two before mentioned—*Dixon* v. *Wells* and *Pearks, Gunston & Tee, Limited* v. *Richardson*, and they seem to have been the foundation for the decisions referred to in the

CAYLEY, CO. J.

1918

April 12.

REX v. MARKS

Alberta Courts. Both the *Dixon* and *Pearks* cases were prosecutions under The Sale of Food and Drugs Act, 1875. The latter case merely deals with the mode of service of the summons; *Dixon* v. *Wells* dealt with the defective summons, and is more immediately our concern. Having found that the summons was invalid and that the defect was not cured by the appearance of the defendant (as he had appeared under protest), the Court found that section 10 of 42 & 43 Vict. c. 30 was imperative and that the provisions of this section, not having been complied with, the magistrate had no jurisdiction. The section reads as follows:

"In all prosecutions under 38 & 39 Vict. c. 63 [The Sale of Food and Drugs Act, 1875], and notwithstanding the provisions of s. 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug, for the sale of which in contravention to the terms of the principal Act the seller is liable to prosecution, and particulars of the offence or offences against the said Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned."

Lord Coleridge, C.J. at p. 257 says:

"It seems to me that in this case the Legislature has made it a condition precedent to the magistrate's jurisdiction that the proceedings should be brought within the operation of s. 10, and that in all prosecutions under the Act certain things shall be done and certain things shall not be done."

Judgment

Can it be said that there is any condition precedent, such as this, either in our Prohibition Act or in the Provincial Summary Convictions Act? I do not find it. And failing such a condition precedent, we must look to other decisions for the rule governing the case before us. The rule is to be found, I think, in the judgment of Erle, C.J. and Blackburn, J. in *Reg.* v. *Shaw* (1865), 34 L.J., M.C. 169, and from the language of many of the judges in *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614. It is fortunate that one of the judges who sat in the case of *Dixon* v. *Wells* was one of the judges also who sat in the case of *Reg.* v. *Hughes, viz.*: Lord Coleridge, C.J., so that he was peculiarly in a position to distinguish *Reg.* v. *Hughes* from *Dixon* v. *Wells*. Lord Coleridge says in *Dixon* v. *Wells* that he would not feel able to decide in favour of the defendant on

the point alone that he had made a protest before the magistrate. He says (p. 256):

"I cannot disguise from myself the fact that from the language of many of the judges in *Reg.* v. *Hughes* [(1879)], 4 Q.B.D. 614—although, perhaps, not necessary for the decision of the case—and the judgments of Erle, C.J., and Blackburn, J., in *Reg.* v. *Shaw* [(1865)], 34 L.J., M.C. 169, they seem to assume that if the two conditions precedent of the presence of the accused and jurisdiction over the offence were fulfilled, his protest would be of no avail."

In face of this, how can I attach that importance to the protest of the defendant in this case that his counsel seems to expect?

With regard to the rule of law settled in *Reg.* v. *Shaw* and *Reg.* v. *Hughes,* Lord Coleridge has no doubt. Here is his language (p. 255):

Judgment

"The case establishes the proposition, that when a person is before justices who have jurisdiction to try the case they need not inquire how he came there, but may try it. That decision is binding on me, and I have no wish to depart from it."

If the decision in that case was binding on Lord Coleridge, much more so must it be on this Court. I, therefore, overrule the defendant's objection.

Preliminary objection overruled.

CAYLEY, CO. J.

1918

June 28.

REX v. LONG KEE

REX *EX REL.* ROBINSON v. LONG KEE *ET AL.*

Criminal law — Disorderly house — Club — Gaming — Rake-off —"Gain"— Criminal Code, Secs. 226(a) and 229.

A club (unincorporated) having all the paraphernalia of a club, *i.e.*, a constitution, membership roll, an admission fee, monthly dues, rules, a minute-book and regular officers, with billiard-room, dining-room, kitchen and cooking utensils attached, had on the premises four fan tan tables, two servants being employed for each table to preside over the game, control the betting and deduct the rake-off. Fan tan was the regular nightly pastime of substantially all the members, as well as strangers. Although there was a notice at the outer door of "for members only," strangers were allowed to enter without payment of a fee or being introduced by members.

Held, that the make up of the premises as a whole is merely a device to give it the appearance of a *bona fide* club and is a blind made to conceal the real underlying business—which is to play fan tan. The premises is therefore a disorderly house within the meaning of section 226(*a*) of the Criminal Code.

Statement

APPEAL from a conviction by the police magistrate of Vancouver, whereby the defendants were found guilty, under section 229 of the Criminal Code, of being in a disorderly house, to wit, a common gaming-house, known as the "Lee Club" (Chinese), not incorporated. Argued before CAYLEY, Co. J. at Vancouver on the 5th of June, 1918.

Argument

J. A. Russell (*W. W. B. McInnes,* with him), for appellants: This case is covered by *Rex* v. *Riley* (1916), 23 B.C. 192, its premises being a club; see also *Downes* v. *Johnson* (1895), 2 Q.B. 203.

R. L. Maitland, for respondent: This case is distinguished from *Rex* v. *Riley* (1916), 23 B.C. 192, as strangers were admitted and paid a rake-off to the Club: see *Regina* v. *Brady* (1896), 10 Que. S.C. 539.

28th June, 1918.

Judgment

CAYLEY, Co. J.: This is an appeal from a conviction of the police magistrate of Vancouver whereby he found the defendants guilty, under section 229 of the Code, of being found in a

disorderly house, to wit, a common gaming-house, otherwise known as the "Lee Club," a Chinese club, not incorporated. The question is whether this Club is a common gaming-house under any of the subsections of section 226 of the Code, more specifically 226(*a*). The keeper of the Club was found guilty and did not appeal. All the evidence used in this case was the evidence taken in the police court in the case against the keeper, otherwise known as Wong Fong, this being by consent of all parties. The case was similar to a previous case brought before me—*Rex* v. *Ham* (1918), 25 B.C. 237—in which it had to be decided whether fan tan was a game of mixed chance and skill. I decided then, on the evidence before me, that it was a mixed game of chance and skill. In the present case it is admitted by counsel for the appellants that it is a mixed game of chance and skill, but it was contended this is a *bona-fide* club, that the rake-off was not for personal gain, that under the decision in *Rex* v. *Riley* (1916), 23 B.C. 192, the members of the Club had a right to play a mixed game of chance and skill, that the members came there as of right, that the rake-off was not compulsory, and that the case is analogous to the case of *Downes* v. *Johnson* (1895), 2 Q.B. 203. I had held in the previous case of *Rex* v. *Ham, supra,* that where strangers are admitted to an alleged club, which they enter without difficulty, although not members, and where the banker deducts the rake-off from the winnings, and the rake-off is compulsory and goes to the maintenance of the club, that a rake-off applied that way is for the gain of the club and that the case would properly fall under the decision of *Regina* v. *Brady* (1896), 10 Que. S.C. 539, and I would find the same in the present case. At the trial, however, I promised to go particularly into the question of whether such clubs as these are *bona-fide* clubs or not.

Judgment

The question then is, is the Club in question a *bona-fide* club for social purposes or a mere blind to enable the large number of Chinamen who are attracted to the game of fan tan to indulge in that pastime, which, as I have said, is admitted by counsel, in the present case, to be a mixed game of chance and skill. I have to consider, then, the nature of the Club and the whole surrounding circumstances. The Club is not incorporated, but

CAYLEY, CO. J.

1918

June 28.

REX v. LONG KEE

has all the paraphernalia of a club—a constitution, a membership roll, an admission fee and monthly dues, rules, and a minute-book, a president, secretary and other officers. It has a billiard-room, kitchen, utensils for furnishing meals, and rice as an article of food. But it has paid servants, two for each fan tan table, of which there are four tables, making eight paid servants, whose duties are in the main to preside at the fan tan games, arrange the bids and deduct the rake-off. The fan tan game is not an incident, but the regular nightly pastime, apparently, of all the members (and there are 40 or 50 at a time surrounding the tables), as well as of strangers who are not members, but who seem to have no difficulty in obtaining entrance and taking part in the games. It is true that there is a notice on the door "for members only," and that there is a doorkeeper whose ostensible duties are to keep out strangers. Nevertheless, strangers seem to find free entrance who neither pay a fee nor are introduced by members, and who, as in this case, have been there more than once partaking in the games. I conclude, therefore, that the rule against strangers, and the notice on the door, and the door-keeper are for the purpose of keeping up appearances, and there is no *bona-fide* intention to prevent strangers from taking part in the games and contributing to the rake-off. It is admitted by counsel that there are 19 or 20 such Chinese Clubs in Vancouver, and as far as I can see in this case, and the previous case of *Rex* v. *Ham,* it is the custom for those engaged in the game of fan tan to go from club to club, whether they are members or not, to play the game. As for the other appearances maintained, constitution, rules, etc., I find that when the police make their entry there is a scramble from the fan tan room to the billiard room, and everyone begins to pick up cues and knock balls around. As to the kitchen appliances, the police found a little rice and apparently nothing else, or if anything else, very little, in the kitchen. Since rice is not an article which spoils by keeping, the rice might have been there since the opening of the Club the year before. I have no doubt, and I think a reasonable man would come to the conclusion that the whole get-up is a device to give an appearance of *bona-fide* clubship to what is merely an institution to

Judgment

enable the devotees of the game of fan tan to indulge in their favourite pastime. This Club, and all clubs like it, are blinds made to conceal the real underlying business, which is to play fan tan.

As to whether the rake-off is compulsory or not, the evidence is that the nightly rake-off runs from $10 a night up, and is taken by the croupiers from the winnings and is handed by them to a designated officer of the Club and is applied to Club purposes. It is alleged that any member could object to the croupier taking the rake-off but there is no evidence that any objection is ever made, and it is evident that to say a member could object is a mere blind. The member that objected would be debarred from the game, I have no doubt. As to whether the rake-off is for purposes of gain, what is "gain"? Gain, I should judge, may be money obtained to save the members of the Club from having to put their hands in their pocket to pay the croupiers and the running expenses of the Club. All the members gain, in so far as their personal contributions to the expenses are reduced by the amount of the rake-off. Here is a club where the monthly rake-off is $300 or $400 or $500, collected compulsorily from all players, whether members or strangers. It is impossible to say whether the rake-off enables the members to declare a dividend, but I would not confine the word "gain" to a dividend. I take the view that I have mentioned, that whatever reduces the expenses by way of rake-off is clear gain to the members.

Judgment

The appeal is dismissed, with costs.

Appeal dismissed.

CAYLEY, CO. J.

1918

Feb. 26.

COURT OF APPEAL

Oct. 1.

D. E. BROWN'S TRAVEL BUREAU *v.* TAYLOR

D. E. BROWN'S TRAVEL BUREAU v. TAYLOR.

Insurance—Accident—Covering sea voyage—Premium—Action by agent for —Policy written after insured sailed—Liability.

The defendant applied to an agent at Vancouver for an accident-insurance policy to cover trip commencing the 2nd of June from Montreal to England and return, the policy to be delivered to him in Montreal before sailing. The policy was issued by the agent's principals in Montreal on the 4th of June, but was ante-dated the 2nd of June and sent to the plaintiff's office at Victoria, B.C. An action by the agent to recover the premium was dismissed.

Held, on appeal (MACDONALD, C.J.A. dissenting), that as the applicant's terms had not been observed in that the policy was not issued until after he had sailed, the defendant was not liable.

Statement

APPEAL from the decision of CAYLEY, Co. J., in an action to recover $562.50, being the amount paid as premium on a Lloyd's Accident Policy (special war risk) pursuant to the defendant's application therefor, tried at Vancouver on the 22nd and 26th of February, 1918. Mr. Taylor signed an application at the station in Vancouver on the 27th of May, 1917. He arrived in Montreal on the 1st of June and sailed for England at noon on the 2nd. The plaintiff wrote on the 29th of May to its principals, the Law Union and Rock Insurance Company, in Montreal for the policy. The policy was actually issued on the 4th of June, but was ante-dated the 2nd of June, as good for applicant's trip from Montreal to England and return. The policy was sent to the defendant's office at Victoria, where it arrived on the 16th of June. The defendant alleged the arrangement was that the policy was to be delivered to him at Montreal before he sailed on the 2nd of June, and as it was not delivered to him he had to obtain insurance through other channels. The policy did not reach his office in Victoria until after he had arrived in England.

A. Bull, for plaintiff.

Martin, K.C., for defendant.

CAYLEY, Co. J.: Mr. Taylor's contention here was that because the policy was not delivered to him in Montreal, as he seems to have expected it would have been, that whether we take it to be a contract, or whether we take it to be a question of an agent receiving instructions, he was not bound to consider the contract complete or the instructions followed. On that point, I think, in view of the letter of May 19th from Brown's Travel Bureau to the defendant, stating that they would deliver the policy to Mr. Taylor in Victoria, that they had a right to assume that delivery there would be accepted by him, and I also think that under the circumstances of a case like this, where a boat was going to leave from Montreal on the 2nd of June, and the policy was not to be written up before the 1st of June, it was quite reasonable to suppose that delivery was to be made by mailing the policy from Montreal either to Mr. Taylor's address in Victoria or to Brown's Travel Bureau in Vancouver on Mr. Taylor's account. It does not seem material to me to decide the point as to whether this was a contract or whether Brown's Travel Bureau acted as agent for the Law Union, or for the defendant. The point that governs me is, that whether it was a contract or whether it was instructions, the contract was not completed until the 4th of June, and the instructions were not obeyed until the 4th of June, while the intention of the assured was and always had been that the policy should be issued, as his application states, "from noon, standard time, of the 2nd of June, 1917, or from whichever date I shall sail from Canada or the United States to England." This application was dated, as appears in evidence, although not in the application itself, May 27th, 1917. It was followed by a letter dated May 29th, 1917, by the plaintiff to W. M. Aikin, Law Union & Rock Insurance Company, Montreal, saying: "We enclose herewith application for Lloyd's Special War Risk policy duly signed by Wm. J. Taylor. The same conditions apply to this application as to those of (naming some other applicant for insurance). Upon receipt of a wire from us you will have the policy written and forwarded here for delivery." This clearly postpones the writing up of a policy until further instructions from the plaintiff to the Law Union Company, and those instructions were not given until June 4th, when the

CAYLEY, CO. J.

1918

Feb. 26.

COURT OF APPEAL

Oct. 1.

D. E. BROWN'S TRAVEL BUREAU v. TAYLOR

following telegram was written: "Please forward policies (amongst others, the defendant's), dating same from June 2nd."

There was nothing in evidence to lead me to suppose that if, when the Law Union received that telegram in Montreal, they had refused the risk (as they might very well have done if the vessel had gone down in the preceding 48 hours) they could have been compelled to have written the policy of insurance which the defendant had arranged for. There is nothing in the evidence to shew that the taking of an application by the plaintiff is binding on Lloyd's or binding on the Law Union to issue the policy. It seems to me Mr. Taylor was plainly uninsured on June 2nd, and on June 3rd, and it was never in his contemplation, nor ought he to have been subjected to the risk, that he would be without insurance for that period. Whether, then, it was agency or a contract, neither the instructions nor the contract were carried out or completed as the defendant contemplated, and I do not think, therefore, he should be required to pay the premium.

CAYLEY, CO. J.

Judgment for the defendant with costs.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 8th and 9th of April, 1918, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Argument

Sir C. H. Tupper, K.C., for appellant: The policy was issued on the 4th of June to run from the 2nd of June. He had sailed on the 2nd and on his arrival in England was notified of the policy. He never repudiated it but travelled back under the policy, sailing on the 12th of August. In case of accident, there is no question but that his representatives could have recovered. The plaintiff was the defendant's agent and acted reasonably, considering the despatch required in carrying out the transaction. Insurance brokers have the right to sue for the premiums due: see Bowstead on Agency, 5th Ed., 268-9; *Power* v. *Butcher* (1829), 10 B. & C. 329; *General Accident Insurance Corporation* v. *Cronk* (1901), 17 T.L.R. 233; *Universo Insurance Company of Milan* v. *Merchants Marine Insurance Company* (1897), 2 Q.B. 93 at pp. 96-7. As to the policy being issued on the 4th and to be in force from the 2nd see

Roberts v. *Security Co.* (1896), 66 L.J., Q.B. 119; (1897), 1 Q.B. 111. We say we acted with promptness and the question of negligence does not arise: see Evans on Principal and Agent, p. 284. On the question of authority see *Thompson* v. *Gardiner* (1876), 1 C.P.D. 777 at p. 779.

Martin, K.C., for respondent: I say the plaintiff never gave the insurance it was asked for. No contract was ever entered into. Taylor wanted to know whether he was insured before he got on the boat. He never contemplated a policy made on the 4th of June and dated back to the 2nd of June. As to his having the benefit of the insurance on the return trip, my contention is there was no contract.

Tupper, in reply.

Cur. adv. vult.

1st October, 1918.

MACDONALD, C.J.A.: The defence pleaded in paragraphs 6, 7 and 8 of the statement of defence, shortly stated, is that plaintiff at defendant's request undertook to procure a Lloyd's war risk policy of insurance on defendant's life, covering a passage by sea to England and return, and undertook to deliver same to the defendant at Montreal before the sailing of the SS. Metagama, due to sail from that port on June 2nd, 1917, and that the defendant failed to carry out said undertaking or request. In his evidence the defendant was asked:

MACDONALD, C.J.A.

"Then the ground on which you contend that you are not liable, Mr. Taylor, is that they (plaintiffs) undertook to have the policy of insurance in Montreal ready for you on the 2nd of June . . . . and that it was not there?"

He answered, "Yes."

The learned judge found against the contention that the policy was to be delivered to the defendant in Montreal, but he also found that as the policy had not actually been written earlier than the 4th of June, whereas the defendant sailed on the Metagama on the 2nd of June, the defendant's instructions to plaintiff had not been carried out, and defendant was therefore freed from any obligation to pay the premium, notwithstanding the fact that the policy when written covered the risk on and after the 2nd of June. I have read the evidence, and have considered all the circumstances with care, and I am forced to

CAYLEY, CO. J.

1918

Feb. 26.

COURT OF APPEAL

Oct. 1.

D. E. BROWN'S TRAVEL BUREAU v. TAYLOR

the conclusion that defendant's instructions and the obligations arising thereout were reasonably carried out by the plaintiff. Moreover, the defendant after his arrival in England received a cablegram from the plaintiff, which gave him notice that the policy had been written, and as it, to his knowledge, covered the round trip, I think an obligation was cast upon him to repudiate the policy if he desired, or was entitled to do so. As the matter was left, a liability was undertaken or continued in reliance upon a request which was not withdrawn, even after notice to defendant that it had been acted upon by the plaintiff.

I think the appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the learned judge below has reached the right conclusion, and therefore the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appellant has failed to establish that the judgment appealed from is wrong. The case is one really of fact, and the learned trial judge has found the essential facts that no insurance was placed in the terms of the application; there is no evidence of any acceptance of the risk in a reasonable time, as applied to the circumstances; the respondent was on his ship at the port of Montreal on the night of the 1st of June, 1917, the ship leaving its moorings early in the morning of the 2nd of June, 1917, for England, and at that time there was no insurance existent, and not until the 4th of June, 1917, was the policy written up, and then only following instructions by telegram from the appellant to the Law Union & Rock Insurance Company. The application for the accident insurance, given by the respondent to the insurance company, was dated in May, 1917, and had thereon the following:

> "This insurance to be in force for four months from noon standard time of the 2nd of June, 1917, or from whichever date I shall sail from Canada or the United States to England,"

filled up upon a printed form of the insurance company, and had as a foot-note, in typewriting, the following:

> "Policy only to be written subject to my sailing on above or other suitable date. Advice to be given D. E. Brown accordingly. This policy to apply if I sail for England on any other steamer line or route."

Now, it would appear upon the evidence that the respondent understood, in fact he states that it was so agreed with him by the appellant, that the policy of insurance would be forthcoming and delivered to him with the passport, also being procured for him at Montreal, at the office of the Canadian Pacific Railway Company. The passport was delivered but no policy of insurance. The explanation of this fact arises and is completely explainable when it is seen that the appellant, apparently without authority at all from the respondent, undertook to advise the insurance company, under date the 29th of May, 1917, when sending on the application to the insurance company, "that upon a receipt of a wire from us you will have the policy written and forwarded here for delivery." This was an unauthorized departure from the terms of the application, and was not carrying out the agreement as between the respondent and the appellant. Nor is there any evidence that the insurance company on its part acted upon the application or accepted the risk, as and "from noon standard time of the 2nd of June, 1917." Then it was not until the 4th of June, 1917, that the appellant wired the insurance company in the following terms:

"Please forward policies [other names as well as the defendant's are mentioned] Taylor dating same from June second four months parties sailed yesterday from Montreal."

As a matter of fact the ship had sailed two days before, namely, on the 2nd of June, 1917, and then and not till then is the policy written up ante-dating same to the 2nd of June, 1917. A natural query at once arises in one's mind, what would have been the position of affairs had the ship gone down before the writing of the policy or the delivery of the same? This much at any rate is clear, that the respondent was uninsured at the time of his departure upon board the ship on the 2nd of June, 1917, the failure to effect the insurance was the failure of the appellant. That being the fact, it is idle for the appellant to contend that its position in law is that of agency only, and that it discharged its duty in the matter by forwarding the application for insurance, and that it should not be answerable for the insurance company's delay or non-acceptance of the risk within a reasonable time, the interposition of the appellant staying the hand of the insurance company, and an unauthorized

CAYLEY, CO. J.

1918

Feb. 26.

COURT OF APPEAL

Oct. 1.

D. E. BROWN'S TRAVEL BUREAU v. TAYLOR

interposition renders it impossible in law for the appellant to recover the premium from the respondent. The situation would clearly appear to have been, upon the facts as disclosed in the evidence, that when the respondent went aboard his ship at Montreal he was uninsured by the Law Union & Rock Insurance Company. If it was otherwise, and the respondent was in fact insured, the company having accepted the risk, there has been failure to prove any such case. It might be that the respondent would be liable for the premium had such a case been established, but I do not go the length of so deciding (see *General Accident Insurance Corporation* v. *Cronk* (1901), 17 T.L.R. 233), in that it is apparent in the present case special instructions were given to the appellant calling for the delivery of the policy in Montreal to the respondent, which instructions the appellant failed to carry out, the result being that the respondent had to place other insurance.

The learned counsel for the appellant relied upon *Roberts* v. *Security Co.* (1896), 66 L.J., Q.B. 119; (1897), 1 Q.B. 111. This case was referred to by their Lordships of the Privy Council in *Equitable Fire and Accident Office* v. *The Ching Wo Hong* (1906), 76 L.J., P.C. 31, Lord Davey at p. 33 saying:

"The learned counsel for the appellant company cited and relied on a decision of the Court of Appeal in England in *Roberts* v. *Security Co.* (1896), 66 L.J., Q.B. 119; (1897), 1 Q.B. 111. It is enough for their Lordships to say that the words of the instrument in that case were different from those which their Lordships have to construe, and they are relieved from saying whether they would otherwise have been prepared to follow it."

MCPHILLIPS, J.A.

The position unquestionably was that there was no insurance proved to have been placed at the time of the respondent's sailing, there was no concluded contract, and the premium not having been paid by the appellant, it is very questionable indeed whether, even on the policy issued, a claim could have been enforced if a claim had arisen, and upon this point it is to be remembered the respondent was willing to pay the premium to the appellant at Vancouver, and it is a matter for remark that the premium the appellant sues the respondent for was not paid until October, 1917, although the appellant stated that it had been paid in the letter of the appellant of July 16th, 1917. The insurance was only for four months, and the premium was

not paid until after its expiry. The fact that the premium was charged to the appellant cannot be deemed to have been payment, nor can the later payment be deemed a payment for and on account of the respondent or constitute legal liability on the respondent. The want of a concluded contract was the fault of the appellant, in withholding action upon the part of the insurance company against express instructions, a negligent act and alone suffices to disentitle the enforcement of the claim for the premium. Upon a review of all the facts, it is highly unreasonable to suppose that the respondent would have gone upon a hazardous journey, the risk of submarines and into the war zone, with such indefiniteness of understanding as to insurance as contended for by the appellant, and the conduct of the respondent throughout was the conduct which one would expect of one who from the outset of the negotiations was at all times anxious to effect a concluded contract and his every effort was to that end, only to be disappointed and harassed at the eleventh hour in Montreal and to be without the insurance he had so carefully arranged for. The conclusion, upon the facts, can only be a conclusion in complete accord with the learned trial judge; the case is not one in which the appellant has discharged the onus always resting on the appellant, of demonstrating that the judgment is wrong (*Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Lodge Holes Colliery Co., Lim.* v. *Wednesbury Corporation* (1908), 77 L.J., K.B. 847 at p. 849, and Anglin, J. in *Union Bank of Canada* v. *McHugh* (1911), 44 S.C.R. 473 at p. 492).

MCPHILLIPS, J.A.

I would dismiss the appeal.

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

Solicitors for appellant: *Tupper & Bull.*
Solicitors for respondent: *Martin & Johnson.*

MORRISON, J.

1918

March 1, 23.

COURT OF APPEAL

Oct. 1.

ISITT v. GRAND TRUNK PACIFIC RY. CO.

ISITT AND ISITT v. GRAND TRUNK PACIFIC RAILWAY COMPANY.

Trespass—Entering upon lands and taking gravel—Assumption of consent of owner—R.S.C. 1906, Cap. 37, Sec. 180.

Costs—Payment into Court—Payment in not pleaded—Leave to amend defence at trial.

In an action for damages against a railway Company for entering upon land and removing gravel for grading purposes, the trial judge found that there was at least a tentative arrangement whereby the Company proceeded as they did; that it did not ignore the plaintiffs nor defiantly or contemptuously enter upon their lands, and was reasonably justified in assuming it had the consent of the plaintiffs or at any rate that there would be little or no difficulty in making a satisfactory adjustment of the price to be paid for the gravel removed. He held that there was no trespass and that the proper basis for compensation was the value to the seller of the property in its actual condition at the time the gravel was taken with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the gravel was taken, applying the rule in *Cedar Rapids Manufacturing Co.* v. *Lacoste* (1914), A.C. 569; 83 L.J., P.C. 162.

Held, on appeal, *per* MACDONALD, C.J.A. and MARTIN, J.A., that the appeal should be dismissed.

Per MCPHILLIPS and EBERTS, JJ.A.: That the assessment of damages was based on a wrong principle and there should be a new trial.

The defendant made a payment into Court in satisfaction of the plaintiffs' claim, of which notice was given the plaintiffs, but did not amend its defence accordingly. Leave was given to amend at the commencement of the trial and the trial proceeded. On judgment being given for less than the amount paid into Court, the learned judge gave the plaintiff the costs up to the application for leave to amend the defence, and the defendant the costs subsequent thereto.

Held, on appeal, *per* MACDONALD, C.J.A. and MARTIN, J.A., that a proper order had been made as to costs.

The Court being equally divided, the appeal was dismissed.

Statement

APPEAL from the decision of MORRISON, J. in an action for damages owing to the removal of gravel by the defendant Company from certain lands in the Cariboo district on the line of the Grand Trunk Pacific, about 60 miles east of Prince George. Tried at Vancouver on the 27th, 28th and 29th of September, 1917, and the 7th of February, 1918. The land in ques-

tion was held by the plaintiffs subject to a right of way of the defendant Company across a portion thereof. The Company required gravel for grading purposes, and the plaintiffs complain that its servants entered on their land and took away, without leave or licence, 350,100 cubic yards of gravel. The plaintiff, who lives in England, was represented in British Columbia by one E. T. Flower, of Fort George. There was evidence of the train-master of the defendant Company endeavouring to arrange with Flower for the taking of the gravel, and as to what should be paid for it, but it is admitted no arrangement was arrived at as Flower decided that he had no authority to enter into any such arrangement. Flower, however, had knowledge of the gravel being taken and made no protest. The plaintiffs claimed 10 cents a yard for the gravel taken, *i.e.*, $35,100. The defendant Company paid into Court $1,000 in satisfaction of the plaintiffs' claim without admitting liability.

Statement

Sir C. H. Tupper, K.C., for plaintiffs.
A. H. MacNeill, K.C. (*Tiffin*, with him), for defendant.

1st March, 1918.

MORRISON, J.: The land upon which the defendant Company is alleged to have trespassed, is situate in or near the townsite of Prince George. It is described as lot 2400, Cariboo district, and is owned by Mrs. Isitt, the wife of the other plaintiff. She purchased it from Mrs. Hammond, the wife of George J. Hammond, who it seems was dealing extensively in selling lots in the Fort George townsite at the times material to the issues herein.

The defendant Company was then constructing its main transcontinental line through this part of the Province, and indeed had a right of way through this particular lot, which, I gather, is a bench of gravel. In fact, the whole of Prince George townsite and vicinity, as it appears from the evidence in the case, seems to be an extensive gravel deposit. There is no shortage of gravel thereabouts. Were it not for a slight inconvenience and not much extra expense, the defendant need not have troubled about entering upon this abutting gravel heap of the plaintiffs at all. However that may be, along in the spring

MORRISON, J.

MORRISON, J.

1918

March 1, 23.

COURT OF APPEAL

Oct. 1.

ISITT v. GRAND TRUNK PACIFIC RY. CO.

of 1914 the defendants put a steam-shovel upon its right of way through the lot in question and began removing material from its own property. At that time a Mr. Flower was the plaintiffs' accredited agent at Prince George, and visited the property while the steam-shovel was thus operating. When the defendant had finished on its own property, its train-master on the Pacific Division, Mr. Halfpenny, interviewed Mr. Flower about taking gravel from the plaintiffs' portion of lot 2400, its shovel already being nearby, stating that the defendant would either exchange other property it had in Prince George or pay by the yard or acre. Some four acres would be the extent of land desired. Mr. Flower told him he had no authority to carry out anything of that sort, but it seems he did not protest or object. I am satisfied that the matter was fully discussed and understood between them, and that the point of difference, if any, was as to the quantities and price. The defendant started in to take gravel from the plaintiffs' part of the lot. Mr. Flower saw them at work, and apparently made neither protest nor demand upon them to quit. This would be in July, 1914. On the 26th of August following, Mr. Flower wrote as follows to Mr. Halfpenny: "I have noticed that the steam-shovel has now ceased working at '2400,' so will you be good enough to advise me of the amount of gravel that has been taken therefrom." This letter was written by him on behalf of the London & Fort George Land Co., Ltd.

MORRISON, J.

On the 26th of September, Mr. Flower again wrote inquiring as to the amount of gravel taken. This letter likewise was written on behalf of the London & Fort George Land Co., Ltd., of which apparently Mr. Frank Isitt, the husband of the other plaintiff herein, was manager. Mr. Isitt was at this time in British Columbia. Then ensued correspondence between the defendant and its solicitor and the solicitors for the plaintiffs, the outcome being this suit.

The plaintiffs are claiming damages for defendant's trespassing upon this land and taking away their gravel.

Under section 180 of the Railway Act of Canada, R.S.C. 1906, Cap. 37, the defendant, in case it was not able to agree with the plaintiffs about the matter and upon the observance of

certain statutory requirements by them, is empowered to enter upon the lands of the plaintiffs and to take away such quantities of the plaintiffs' gravel soil as may be necessary for the purposes of its undertaking.

Having regard to all the circumstances peculiar to this particular case, I find that at the time the defendant entered upon the plaintiffs' land there was, in the words of the Act, no disagreement as to the purchase of the property. That there was at least a tentative arrangement whereby the defendant proceeded as it did. That the defendant did not ignore the plaintiffs; nor did it defiantly or contemptuously enter upon their land. That having regard to the antecedent transactions respecting this property, and the importance to land speculators of the advent of the defendant railway traversing this locality, I am of opinion that the defendant, under all the circumstances, was reasonably justified in assuming it had the consent of the plaintiffs, or at any rate that there would be little or no difficulty in reaching a satisfactory adjustment of the price to be paid for the soil removed. I find, therefore, that in law the defendant did not commit trespass, and that that phase of the plaintiffs' claim fails—*Re Ruttan and Dreifus and Canadian Northern R.W. Co.* (1906), 12 O.L.R. 187.

I think the cases of *Hanley* v. *Toronto, Hamilton and Buffalo R.W. Co.* (1905), 11 O.L.R. 91, and *Wicher* v. *The Canadian Pacific Railway Co.* (1906), 16 Man. L.R. 343, cited by *Sir Charles Tupper,* are distinguishable. In the former case the owner was entirely ignored by the company, who did not take any of the owner's land entered upon, for the purposes of the company. In the latter case the company also ignored the owner and defiantly and without regard to him proceeded to help itself.

MORRISON, J.

Then, in working out the price to be placed upon the quantities of soil removed, I accept the evidence advanced on behalf of the defendant as to the quality.

The evidence of Mr. F. P. Burdon, land surveyor, shews the area taken to be 4.55 acres. Mr. Bissell, right of way agent of the defendant Company, bought in September, 1914, 18.07 acres through this lot 2400 from Mrs. Margaret Hammond for

MORRISON, J.
1918
March 1, 23.
COURT OF APPEAL
Oct. 1.
ISITT v. GRAND TRUNK PACIFIC RY. CO.

$166 per acre. Applying the rule in the case of *Cedar Rapids Manufacturing Co.* v. *Lacoste* (1914), A.C. 569; 83 L.J., P.C. 162, I find that the plaintiffs are entitled to judgment for $755.30.

23rd March, 1918.

MORRISON, J.: During the trial hereof, I took it that the real contest turned, first, on whether there had been trespass committed by the defendant; and then on a struggle for substantial damages consequent thereupon. I was clearly of opinion that there had been no trespass as claimed. I found it a matter of comparative ease to determine the amount to which the plaintiffs were entitled, which was less than the sum paid into Court by the defendant, purporting to be pursuant to an order previously made. The defendant, however, had not accordingly amended its defence, pleading this payment in. The plaintiffs' solicitors were not ignorant of what had been done, but stood on what they contend was their right and duty, and ignored this payment in, owing to the omission from the pleadings of such a defence. The particular question now arising on the settlement of the order for judgment is, whether the payment in should have been formally pleaded, and if so, whether the requisite leave to so amend had been given at the trial. My intention certainly was to have allowed the amendments referred to in argument of counsel and to put the pleadings in proper shape in all respects, having regard to the subject-matter of the suit, to the end that all issues involved would be adjudicated upon as far as the trial Court had proper power. I think I did so. The plaintiffs' counsel, in my opinion, proceeded on that footing, and had they succeeded on their plea of trespass, and had been awarded the commensurate amount of damages thereupon, the question as to whether payment in had been formally pleaded or whether leave had been given or not, would not have seriously arisen. In short, chances were taken on the outcome of the trial, to say the least. Were it not for the close, strong argument put up by Mr. *Alfred Bull*, of counsel for the plaintiffs, I should have thought there could be no doubt as to the meaning of what happened at the beginning of the trial on this aspect of the case.

MORRISON, J.

The plaintiffs are entitled to the costs up to leave to amend the defence as to payment and otherwise, which leave was given at the commencement of the trial. The defendant having succeeded on the real or main issue before me, namely, that of trespass or no trespass, will get the costs subsequent to such amendments.

From this decision the plaintiffs appealed. The appeal was argued at Vancouver on the 18th and 19th of April, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Sir C. H. Tupper, K.C., for appellants: On the evidence it should have been found there was a trespass in this case. If the trial judge was right, there are no damages as there was no trespass: see *Last Chance Mining Co.* v. *American Boy Mining Co.* (1904), 2 M.M.C. 150; *Joseph Chew Lumber and Shingle Manufacturing Co.* v. *Howe Sound Timber Co.* (1913), 18 B.C. 312; *Adams Powell River Co.* v. *Canadian Puget Sound Co.* (1914), 19 B.C. 573; *Yukon Gold Co.* v. *Boyle Concessions* (1916), 23 B.C. 103. The relations between Flower and the defendant has nothing to do with the case, as Flower had no authority whatever to deal with the property for the plaintiffs. They took the gravel in July and August, 1914, and from April to August, 1915. The gravel was of the best quality and the potentialities are to be considered, and we are not to be held down to what was previously paid for the property. They must bear the consequences of a trespass under *Armory* v. *Delamirie* (1722), 1 Str. 505. The case of *Vezina* v. *The Queen* (1889), 17 S.C.R. 1, only applies to a right of way, and *Ha Ha Bay R. Co.* v. *Larouche* (1913), 10 D.L.R. 388, is a case of expropriation. We say they committed a wilful trespass. On the question of trespass see *Hanley* v. *Toronto, Hamilton and Buffalo R.W. Co.* (1905), 11 O.L.R. 91. On the question of the different kinds of damages see Halsbury's Laws of England, Vol. 10, pp. 306-7; *Saunby* v. *City of London Water Commissioners and City of London* (1905), 75 L.J., P.C. 25 at p. 27. As to the right of the plaintiff to have the chances of profits considered see *Chaplin*

Argument

MORRISON, J.

1918

March 1, 23.

COURT OF APPEAL

Oct. 1.

ISITT v. GRAND TRUNK PACIFIC RY. CO.

v. *Hicks* (1911), 2 K.B. 786; *The "Mediana"* (1900), A.C. 113; *Fraser* v. *Fraserville (City of)* (1917), A.C. 187 at p. 194; *In re Lucas & Chesterfield Gas and Water Board* (1909), 1 K.B. 16. The difference between expropriation cases and the present one is that here possibilities and potentialities must be considered. On the question of trespass and the estimation of damages generally see *Smyth* v. *Canadian Pacific R.W. Co.* (1908), 8 Can. Ry. Cas. 265; *Cedar Rapids Manufacturing Co.* v. *Lacoste* (1914), A.C. 569 at p. 579; *Re Ruttan and Dreifus and Canadian Northern R.W. Co.* (1906), 12 O.L.R. 187.

Argument

Alfred Bull, on the same side: As to question of costs upon payment into Court under marginal rule 255, payment may be made but only upon leave of the Court after defence is filed. This is a matter of defence, and should be pleaded. Rule 256 has not been complied with: see *Benning* v. *Ilford Gas Company* (1907), 2 K.B. 290. The payment of money in has no effect as to the costs when it is not pleaded. The plaintiffs are entitled to general costs of action and the defendant on the issues on which it has succeeded: see *Wagstaffe* v. *Bentley* (1902), 1 K.B. 124; *Powell* v. *Vickers, Sons & Maxim, Limited* (1907), 1 K.B. 71. As to the difference between "event" and "issue" see *Howell* v. *Dering* (1915), 1 K.B. 54.

A. H. MacNeill, K.C., for respondent: The trial judge gave $755.30 and he took as a basis the value of the lots. The right of way of the railroad ran right through the gravel-pit. The allowance was $166 an acre, and the former owner was willing to take $100 an acre for both land and gravel. The evidence shews Flower was acting for the plaintiffs and there was no market for gravel in the district. There is no authority for the suggestion that the measure of damages is its value to the taker of the gravel.

Tupper, in reply.

1st October, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Whether this case be regarded as one of trespass or of compensation for taking the gravel, based on permission by plaintiffs to defendant to take it, the result must, in my opinion, be the same.

I have no doubt whatever that Mr. Flower, who was, in my judgment, agent of the owner, whether plaintiffs or the land company, assented to what was done by the defendant. Therefore the defendant was not without excuse for taking the gravel. It is not a case for exemplary or punitive damages, and if I am right in this, then the question wholly turns on the value of the property taken or injuriously affected. Having regard to the evidence that there was abundance of gravel in the locality, and that it was practically worthless as a commercial commodity, it cannot be said that the learned judge was wrong in his conclusion of fact on the question of compensation. I think he was clearly right, and would therefore affirm his judgment on the main question.

MACDONALD, C.J.A.

Then as to the appeal on the question of costs. The rules of Court have not been complied with, and while the plaintiffs perhaps were not prejudiced, yet the practice is precise and ought to be strictly followed.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: There is, in my opinion, no good reason for interfering with the view taken by the learned trial judge as to the nature of the trespass and the damages awarded, which should stand. His view is supported by *The King* v. *Nagle* (1917), 17 Ex. C.R. 88. With respect to the payment into Court of $4,000 after defence and the amendment of the defence which became necessary in consequence (how can payment "be signified in the defence" as required by rule 256 unless the defence included the "signification" originally or was amended to do so? *Cf.* Archbold's Q.B. Practice, Vol. 1, pp. 343, 347; and the form of summons in Archibald's Practice at Judges' Chambers, 2nd Ed., 120; Wilson's Judicature Acts, 7th Ed., 224), we must accept the learned judge's statement that he had intended to allow such an amendment, that he thought he had done so, that it was given at the commencement of the trial, and that the plaintiffs "took chances" on its decision in their favour. Such being the case, I can only say that his direction that "the plaintiffs are entitled to the costs up to leave to amend the

MORRISON, J.

1918

March 1, 23.

COURT OF APPEAL

Oct. 1.

ISITT v. GRAND TRUNK PACIFIC RY. CO.

defence as to payment in and otherwise" is the proper one to have been made. It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The action was one for trespass, going upon the property of the appellants without colour of right and taking large quantities of gravel therefrom—gravel of the class essential in the top dressing or final ballasting of the railway, not the ordinary class of gravel used or which may be used in the first stages of the construction of the road-bed. Admittedly the statutory steps were not taken to either acquire the land, which was outside of the right of way, or steps to acquire the gravel, in pursuance of the provisions of the Railway Act of Canada (Cap. 37, R.S.C. 1906, Sec. 180). The respondent, in my opinion, cannot successfully contend that there was any agreement come to with the owners for the acquirement of either the gravel or the land in which it was, therefore the statutory steps to obtain either the gravel or the land by way of expropriation were conditions precedent to the right of entry upon the lands. Nevertheless the respondent carried railway tracks to the land in question, upon which the gravel was situate, and unauthorizedly took gravel therefrom in large quantities. I do not think it necessary to canvass or call attention to the evidence in detail, but I am clear upon the point that what the respondent did was a plain act of trespass and done with the knowledge that it was an unauthorized entry upon and interference with the land of the appellants, for which the appellants are entitled to be awarded damages on the footing of a trespass committed, without colour of right. Upon this point, and to make it clear that there was an act of trespass, it is only necessary to refer to one portion of the evidence adduced at the trial, although there is other and cogent evidence which, in my opinion, clearly establishes trespass. Halpenny, the trainmaster of the respondent, an official of the railway and in control or charge of the ballasting, in giving evidence upon the part of the defence, when under cross-examination said:

"Did you [Halpenny] say you would go and take it anyway? No.

"Did you in fact go on and take it anyway? Yes.

"And you got no permission from Mr. Flower? [Mr. Flower had acted for the appellants in regard to their property interests in some things, but it cannot be said upon the evidence that there was any authority to

bind the appellants and this cannot be successfully supported by the respondent]. No.

"You got no permission from him? No."

The situation in law unquestionably is, that none of the statutory steps being taken, a clear trespass took place and the appellants are entitled to have damages assessed, apart from the provisions of the Railway Act, and the appellants have their ordinary right of action for trespass: see *Saunby* v. *City of London Water Commissioners and City of London* (1905), 75 L.J., P.C. 25; *Champion & White* v. *City of Vancouver* (1918), 1 W.W.R. 216; Idington, J. at pp. 220, 221; Duff, J. at p. 221. The language of Mr. Justice Idington in the *Champion & White* case, at p. 220, is peculiarly fitting to the facts of the present case. He said:

"I think the course of the respondent in disregarding all the express and implied obligations resting upon it in the premises, was quite as lawless as that of the City of London in the *Saunby* case (1905), 75 L.J., P.C. 25; (1906), A.C. 110, or of the parties condemned for their action in proceeding without filing plans and duly expropriating in the *West Parkdale* case, 12 App. Cas. 602; 56 L.J., P.C. 66, in both of which cases the necessity for duly proceeding according to law was maintained by the Judicial Committee of the Privy Council. These cases seem to me, without going further, to maintain the appellants' right to proceed herein to protect their rights."

Exemplary damages may fittingly be assessed in a case such as the present one (see Halsbury's Laws of England, Vol. 10, at pp. 306, 307, 308, and Vol. 27, pp. 358-9). The principle upon which damages may be rightly assessed was considered by the Lord Chancellor (the Earl of Halsbury, L.C.) in *The "Mediana"* (1900), A.C. 113 at pp. 116-8.

Here the contention is that the land is of little value; the gravel is without a market value, in fact that the respondent can proceed in a high-handed manner and they say, in effect, "well you have suffered little or no damage," and the damages are to be assessed upon the basis of a depressed market value for the land and no market value for the gravel. That I do not consider to be the law, and I would refer, upon this point, to the trenchant exposition of the law that governs, given by Mr. Justice Duff in *Lamb* v. *Kincaid* (1907), 38 S.C.R. 516 at pp. 539, 540. With great respect to the learned trial judge, I cannot agree that the damages have been assessed upon a true

MORRISON, J.

1918

March 1, 23.

COURT OF APPEAL

Oct. 1.

ISITT v. GRAND TRUNK PACIFIC RY. CO.

MCPHILLIPS, J.A.

MORRISON, J.

1918

March 1, 23.

COURT OF APPEAL

Oct. 1.

ISITT v. GRAND TRUNK PACIFIC RY. CO.

basis, upon the contention of the respondent—the value of the land alone—at an absurd temporarily depressed market value. The damages should have been at the very least $1,000, and upon the basis even of the saving to the respondent in using the gravel of the appellants as against gravel of its own; the saving alone in cost of transportation is proved to be $5,400, and there has been wholly ignored the reasonable potential value both of the land and gravel. The Lord Chancellor (Lord Buckmaster) in *Fraser* v. *Fraserville (City)* (1917), 86 L.J., P.C. 91, stated the principle as to the assessment of damages, where lands are compulsorily acquired, and the rule in such case would be more restrictive than would be the rule which should be followed when the facts of the present case are taken into consideration. At p. 94 we find him saying:

"The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *Lucas* v. *Chesterfield Gas and Water Board, In re* (1908), 77 L.J., K.B. 1009; (1909), 1 K.B. 16; *Cedar Rapids Manufacturing Co.* v. *Lacoste* (1914), 83 L.J., P.C. 162; (1914), A.C. 569; and *Sidney* v. *North-Eastern Railway* (1914), 83 L.J., K.B. 1640; (1914), 3 K.B. 629. The principles of those cases are carefully and correctly considered in the judgments, the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case. It is this that the Courts have found that the arbitrator has failed to do, and it follows that his award cannot be supported."

MCPHILLIPS, J.A.

Important and valuable evidence was given as to the lands, the value of the gravel, and possibilities reasonably to be expected, and surely there must be something allowed for the early development of the country consequent upon the construction of a transcontinental line of railway, unless it might be said that the undertaking was wholly unwarranted, but the history of development in Canada is all in favour of at least reasonable increase of values. There must be "possibilities" (Lord Buckmaster in the *Fraser* case at p. 94) that warrant consideration, but the assessment of damages as arrived at in the present case has been wholly upon a wrong principle and totally inadequate. Lord Dunedin in delivering the judgment of their Lordships of

the Privy Council in *Odlum* v. *City of Vancouver* (1915), 85 L.J., P.C. 95, said at pp. 97-8:

"In other words, their Lordships agree with . . . . . Mr. Justice Irving, who says, 'I do not question that the present potential value may be a factor, but the potential values may be too remote at this date to enhance the value of the land, which at present is practically unproductive.' These observations are, in their Lordships' opinion, strictly in accordance with the principles laid down in *Cedar Rapids Manufacturing Co.* v. *Lacoste* (83 L.J., P.C. 162; (1914), A.C. 569) already cited."

In my opinion the assessment of damages was a totally inadequate assessment of damages, firstly, because of the "lawless" (Idington, J. in *Champion & White* case, p. 220) conduct of the respondent; secondly, because upon the evidence as adduced the amount allowed is wholly inadequate; further, because the "possibilities" and "potential value" have been ignored. It follows that, in my opinion, there must be a new trial or a reference had to assess the damages upon a proper principle.

MCPHILLIPS, J.A.

I would allow the appeal.

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

EBERTS, J.A.

The Court being equally divided, the appeal was dismissed.

Solicitors for appellants: *Tupper & Bull.*

Solicitors for respondent: *Tiffin & Alexander.*

MORRISON, J. (At Chambers)

1918

Nov. 4.

BELL v. NICHOLLS *ET AL.* *EX PARTE* RICHARDS.

Practice—Sheriff—Poundage on writ of possession—Writ of execution—Rules, Appendix M, Schedule 4 (38)—Scale of fees to sheriff.

BELL v. NICHOLLS

Where a sheriff has executed a writ of possession, he is entitled to poundage on the yearly rental value of the premises to which possession is given, which is the "sum made" within the meaning of item 38 of Schedule No. 4 of Appendix M. to the Supreme Court Rules, 1912.

APPEAL by the Sheriff of the County of Victoria from the taxation by the deputy district registrar at Victoria of the Sheriff's bill of costs and charges for executing a writ of possession. The plaintiff obtained judgment for possession of lot 441, Victoria City, and caused a writ of possession to be issued to the Sheriff. The Sheriff placed the plaintiff in possession, and claimed poundage on the yearly rental value of the premises. The deputy district registrar disallowed the claim on taxation, and the Sheriff appealed. Argued before MORRISON, J. at Chambers in Victoria on the 23rd of September, 1918.

Statement

Bullock-Webster, for the Sheriff: This is an application for an order to review the taxation of the Sheriff's bill of costs and charges as to one item, *viz.*: the poundage claimed on the execution of the writ of possession. There is no report of the question having been decided before in British Columbia, and it is of importance to the sheriffs. There is no definite provision for poundage on a writ of possession in the Schedule No. 4 of Appendix M. to the Supreme Court Rules, 1912, but if it can be established that a writ of possession is a writ of execution, it is submitted that poundage is payable as such under item 38, and it will only remain to be determined what is the "sum made" in the case of a writ of possession. Enforcement of a judgment for possession of land is provided for by marginal rule 644, and marginal rule 646 provides that upon any judgment or order for the recovery of land and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs, at the election of the

Argument

successful party. So that in this rule the term "writ of execution" is used. The statute of 3 Geo. I., Cap. 15, makes provision for the payment of poundage on a writ of possession based upon the yearly value of the lands to which possession is given, and this statute is in force in British Columbia by virtue of the English Law Act, R.S.B.C. 1911, Cap. 75, consequently poundage in British Columbia is payable on the yearly rental value of the premises, because the Act of 3 Geo. I. is not from local circumstances inapplicable, and it has not been modified and altered by legislation having the force of law in British Columbia. Poundage is claimed on $3,000, which, it is submitted, is the yearly rental value of the premises, in addition to the fees which Schedule No. 4 specifically allows.

Alexis Martin, contra: As the scale of fees referred to makes no provision for poundage on a writ of possession, none is payable. It must be presumed that the Lieutenant-Governor in Council, acting in pursuance of the power conferred by the statute to make rules and regulations and fix a tariff of fees, had before him the statute of 3 Geo. I. referred to, and not having made any provision for poundage on a writ of possession, none is payable. In any event, if it is found that such poundage is payable, it is submitted that the yearly rental value of the premises in question does not exceed $1,200.

Argument

4th November, 1918.

MORRISON, J.: The question submitted to me as arising in this application is as to whether poundage is payable on a writ of possession. I find that the "sum made" in this case is the percentage on the yearly rental value of the property in respect of which possession is given.

The writ of possession is equivalent in its effect to an execution so called.

Judgment

Under all the circumstances of this case, I think the yearly rental value should be fixed at $1,800.

The costs herein will follow the event.

Order accordingly.

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. McLELLAN AND WENBORN.

Lands—Grant from Dominion—Portions thereof excluded—Subsequent lease of coal rights—Action for trespass against lessee—Onus of proof as to portions excluded from grant—Attorney-General a party—B.C. Stats. 1884, Cap. 14—R.S.B.C. 1911, Cap. 159.

The plaintiff held a grant from the Crown through the Parliament of Canada for a tract of land including minerals from which was excluded certain portions thereof that had previously been alienated by the Crown. The defendant held a subsequent lease from the Crown through the Provincial Government of a portion of the same lands, claiming that the lands so leased were a portion of what had previously been alienated and were not included in the plaintiff's grant. In an action for trespass the trial judge held in favour of the plaintiff.

Held, on appeal, that the question of whether the land in dispute passed under the grant to the plaintiff was one of fact, and the onus of proof that it fell within the portion previously alienated lies on the defendants, and they having failed in this the appeal should be dismissed.

Held, further, that the Attorney-General was not a necessary party to the action.

Per MCPHILLIPS, J.A.: Even if the onus were on the plaintiff it has been fully discharged.

Statement

APPEAL by defendants from the decision of MORRISON, J. in an action tried by him at Victoria on the 11th and 12th of October, 1917, to set aside a lease granted by the Crown to the defendants under the Coal and Petroleum Act on the 2nd of July, 1914. Under an Act known as the Settlement Act passed in 1883 (B.C. Stats. 1884, Cap. 14) the Province granted to the Dominion a certain tract of land to aid in the construction of a railway from Esquimalt to Nanaimo. The lands so granted were not to include the portion thereof that was then held under Crown grant, lease, agreement for sale, or other alienation from the Crown, nor was it to include Indian Reserves, lands reserved for school purposes, settlements, nor Naval or Military Reserves. The grant included coal and the other metals. On consideration of the plaintiff undertaking to build the railway the Dominion granted said lands to them by way of subsidy. The defendant McLellan obtained a grant of

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

the surface rights of a portion of the land in dispute from the plaintiff and later concluding that the land in question had been reserved for school purposes, he applied to the Government for a licence to prospect for coal, which was granted to him on the 2nd of July, 1912. This licence was renewed in the following year, when McLellan proceeded to prospect for and recover coal. On the 2nd of July, 1914, the Government granted him a five-year lease of the lands, under the Coal and Petroleum Act. The plaintiff then brought this action for a declaration that the lease to the defendant is void, and for an injunction.

Davis, K.C., and *Harold B. Robertson*, for plaintiff.
Martin, K.C., and *Casey*, for defendants.

2nd November, 1917.

MORRISON, J.: By an Act of the Legislature of British Columbia passed in the year 1883, intituled An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province, being B.C. Stats. 1884, Cap. 14, and commonly called the Settlement Act, certain lands were granted to the Dominion Government for the purpose of construction and to aid in the construction of a railway between Esquimalt and Nanaimo (section 3). The lands so granted were not to include any that were then held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor to include any Indian Reserves or settlements, nor Naval or Military Reserves (section 6). Coal was enumerated as one of the minerals included in the grant. The railway was constructed and the contract consummated.

MORRISON, J.

In 1912 the Provincial Government purported to grant to the defendant a licence, pursuant to the Coal and Petroleum Act, R.S.B.C. 1911, Cap. 159, to prospect for coal, etc., in and under portions of the lands alleged to have been granted as above, and in the year 1913 they purported to renew this licence. The defendant McLellan thereupon entered upon the lands covered by his licence and proceeded to prospect for and to recover coal from the premises claimed under the grant by the plaintiff.

In 1914 the Government purported to grant to the defendant a lease for five years of the under-surface rights under the land

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

covered by these licences. The plaintiff now seeks a declaration that the lease so issued by the Crown to the defendant McLellan is null and void and that the plaintiff is entitled to the land covered by the said lease.

In limini the question was submitted by counsel on behalf of the defendant, although not raised on the pleadings, that the Court should be assisted by the Attorney-General in the adjustment of this dispute between him and the plaintiff. That the proceedings be by Petition of Right. It is urged that as all the evidence upon which I must rely in determining the issue is in the possession of the Government, the defendants are unable to properly defend the action, the Attorney-General not being a party. Mr. *Martin* urges upon me the plea *ad misericordiam* that inasmuch as all the plaintiff need do is to prove a *prima-facie* case, the defendants will be helpless under the burden then shifted upon them. Be that as it may, it must be shewn clearly that the action cannot be maintained at all without the intervention of the Attorney-General: *Attorney-General* v. *Pontypridd Waterworks Company* (1908), 1 Ch. 388. The defendants have not satisfied me on that point. From what plaintiff's counsel stated in open Court as to the knowledge of the matters in issue herein by the Attorney-General, and which was not denied by the defendants' counsel, then also present, I assume that the Attorney-General is advised to remain aloof.

MORRISON, J.

However that may be, and notwithstanding the strong argument by Mr. *Abbott,* I am bound by the decision of the Full Court in the case of *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412.

As to the merits of the case, I confess I have very little trouble in finding that the lands covered by the lease fall within the boundaries described in the statutory grant, and that they were neither alienated nor reserved previously, as claimed by the defendants.

In my opinion, it follows that the Government gave the defendant McLellan a lease of lands of which they were then not the owners.

There will be judgment for the plaintiff in the terms of the statement of claim.

From this decision the defendants appealed. The appeal was argued at Vancouver on the 7th, 8th, 9th and 10th of May, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Martin, K.C., for appellants: Section 6 of the Settlement Act provides for the exceptions from the deed, and we say the land in question was withheld from what was included in the deed under that section. These lands were previously alienated by the Government and the burden is on them to shew they were not. Land that was alienated and fell back through abandonment does not go to the Railway but to the Government. When there is a forfeiture it is to the Crown: see *The Queen* v. *Demers* (1894), 22 S.C.R. 482; *Farrell* v. *Fitch and Hazlewood* (1912), 17 B.C. 507. Our lease was given on the 2nd of July, 1914, and the Crown should be made a party, as the Crown is interested: see *Barclay* v. *Russell* (1797), 3 Ves. 423. On the question of parties see *Hamelin* v. *Newton* (1918), 1 W.W.R. 804. As to what alienation means see *Nelson and Fort Sheppard Ry. Co.* v. *Jerry et al.* (1897), 5 B.C. 396; *The Queen* v. *Victoria Lumber Co., ib.* 288. As to exceptions from the grant see *Savill Brothers, Limited* v. *Bethell* (1902), 2 Ch. 523 at p. 530; Halsbury's Laws of England, Vol. 10, p. 471; *Cooper* v. *Stuart* (1889), 14 App. Cas. 286. They must prove the land in question was not alienated when defendants received their licences.

Argument

Davis, K.C., for respondent: He says first, there is no action, as the Attorney-General is not a party; secondly, that we have not shewn the property belongs to us. We have a statutory title prior to theirs, and if this covers the ground, the lease must be void: see *Victor* v. *Butler* (1901), 8 B.C. 100; *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1906), A.C. 552. The question of parties does not arise if we have a good title to the land. We say this land was not excepted from the grant, so that the law of exception does not apply. I will assume the burden is on us to shew the land is not in the exceptions. All the block reserved in July, 1873, being a reservation for the Dominion for railway purposes, was reserved up to the Settlement Act. As to coal, the Coal Pros-

MORRISON, J.
1917
Nov. 2.
COURT OF APPEAL
1918
Oct. 1.
ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

pecting Act of 1883 would not interfere, as coal prospecting is not an alienation, and with relation to mining, a staking under any of the mineral Acts is not an alienation. The extent of the lands alienated are set out. A recital in the document is *prima-facie* evidence of the correctness of the statement therein: see *Attorney-General for Canada* v. *Giroux* (1916), 53 S.C.R. 172 at p. 192. The decision in this case being entirely between the parties, it does not affect the Crown. It says we are entitled to the coal and the Crown is not interested: see *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412 at pp. 414-5; *Great Eastern Railway Co.* v. *Goldsmid* (1884), 9 App. Cas. 927 at p. 941; *Alcock* v. *Cooke* (1829), 5 Bing. 340.

Argument

Harold B. Robertson, on the same side: The land in question is within the block granted the plaintiff. In law the proof of the exceptions lies on the defence. In asserting the exception the onus is on him: see *Thibault* v. *Gibson* (1843), 12 M. & W. 88. As to exceptions being pleaded see *Rex* v. *James* (1902), 1 K.B. 540 at p. 545; *Steel* v. *Smith* (1817), 1 B. & Ald. 94; *Rex* v. *Audley* (1907), 1 K.B. 383.

Martin, in reply.

Cur. adv. vult.

1st October, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: By the Settlement Act, B.C. Stats. 1884, Cap. 14, the Province granted to the Dominion a tract of land in Vancouver Island to aid in the construction of the railway from Esquimalt to Nanaimo. The plaintiff undertook with the Dominion to build the railway, and the Dominion, in consideration thereof, granted the said lands to them by way of subsidy. It was provided in said grant that the same should not include "any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor shall it include Indian Reserves or settlements, nor Naval or Military Reserves."

The defendants claim under a lease from the Crown in right of the Province the coal underlying part of the land included within the boundaries of said grant. Prior to the issue of the said lease, the defendant McLellan obtained from the plaintiff

a grant of the surface of part of the land under which the said coal lies, the coal being expressly excepted from said grant to McLellan. Subsequently McLellan conceived the idea that neither the surface nor the coal passed under the grant from the Province to the Dominion, but was included in the exceptions above mentioned. He therefore applied to the Provincial authorities for a lease of the coal under his own surface and some adjacent surface. His suggestion was that these lands were under reserve for school purposes at the date of the Settlement Act, and therefore did not pass to the Dominion, and hence were not acquired under plaintiff's grant from the Dominion.

The correspondence between McLellan and the Provincial lands department shews that the Provincial authorities considered that said area was an Indian Reserve on the date of the passing of the Settlement Act, and therefore did not pass from the Province, and that they were at liberty to give McLellan a lease of the coal, which they accordingly did in the year 1914. McLellan proceeded to prospect and explore for coal under colour of this lease, and this action was brought by the plaintiff for an injunction and a declaration of its title. There is no dispute about the validity of the grants from the Province to the Dominion and from the Dominion to the plaintiff. The principal question in the appeal therefore is, Was the area in question within the above mentioned exceptions?

In this appeal there is no distinction to be drawn between surface and under-surface rights, because if the subject-matter of the dispute did not pass from the Province under the grant to the Dominion, neither did the surface. In other words, the Railway Company acquired either both surface and under-surface rights, or nothing. The situation, then, is that the only suggestions made prior to the commencement of the litigation derogatory to plaintiff's title was that of defendant McLellan, who asserted that the lands in question had been reserved for school purposes; and that of the department of lands, which asserted that it was "an Indian Reserve." All sorts of suggestions were made by defendants' counsel, in argument, as to the possibility of the lands being within one or other of the several classes of exceptions above mentioned, and they contended that

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

the onus was upon the plaintiff to negative the possibility of that being so. I do not propose to follow counsel in this argument; I think I should pay no attention to suggestions other than that the lands in question were reserved for school purposes, or as an Indian Reserve or settlement.

But before taking up the merits, I wish to refer to the submission of counsel for the defendants that the Attorney-General of the Province was a necessary party to this action. The action being for trespass, the onus of proof of ownership is upon the plaintiff. If plaintiff is right, the defendants are trespassers. Defendants cannot rely upon their subsequent lease as against the prior grant. In my opinion, the lease has nothing to do with the case. The defendants put the plaintiff to proof of their title, and when they prove that their case is made out. There can be no contest as between the grant and the lease. If the defendants were to attempt to justify by setting up and proving a lease from another person, such person would not, I think, be a necessary party-defendant in an action of this kind: *Child* v. *Stenning* (1878), 7 Ch. D. 413, and I do not apprehend that a different rule is to be applied where the trespasser claims under a lease from the Crown, at all events, where that lease is subsequent to a grant which, if valid, must necessarily prevail.

MACDONALD, C.J.A.

In *Alcock* v. *Cooke* (1829), 5 Bing. 340, questions analogous to those in this dispute were in controversy. It was not there suggested that the Attorney-General was a necessary party. The same observation may be made with respect to *Vancouver Lumber Co.* v. *Corporation of Vancouver* (1910), 15 B.C. 432; affirmed in (1911), A.C. 711. I am therefore of opinion that the Attorney-General was not a necessary party.

The question whether the land and coal in issue passed under the grant to the Dominion is one of fact. If the onus of proof that it fell within the exceptions lies on the defendants, who assert it, then I think they have failed to prove their case. On the other hand, if the onus is upon the plaintiff to negative the exceptions, then I have to consider whether or not that onus has been discharged. In my opinion, the onus is on the defendants. In the construction of penal statutes it has been laid down as a rule that when an exception from the penalty is

contained in the section imposing the penalty, the party claiming it must prove that the other party is not within the exception; but where the exception is made in a subsequent section of the statute, the rule is otherwise: *Thibault* v. *Gibson* (1843), 12 M. & W. 88, which has been approved and followed in the subsequent cases on the point. I apprehend that the rule aforesaid, which requires the prosecutor or plaintiff in a penal action to negative the exception was adopted because of the penal character of the proceeding, and is not applicable to a case of this kind. I think this is consistent with principle and convenience.

Now, there is a matter put forward in evidence by the plantiff, and to which the defendants are entitled to the benefit, if any, as indicating that the area in question was set aside for purposes within the exceptions from the grant to the Dominion. A book was produced by the plaintiff from the department of lands purporting to be an index of Government Reserves from the earliest records down to the time of the trial. *Inter alia* the lands in question herein are referred to in this book, and across the page is written the words:

"These reserves are available for Indian settlements, schools, parks, or other public purposes."

Now, apart from what may be said of the authenticity of the entries made in the book, and assuming the language quoted to be authentic, and to be some evidence of the setting aside of these lands for the purposes mentioned, yet, in my opinion, they do not help the defendants. It is quite clear on the evidence that the lands were never used for school purposes, that is to say, the Province never alienated them to trustees or otherwise applied them to school purposes in the sense mentioned in *Attorney-General* v. *Esquimalt and Nanaimo Rly. Co. et al.* (1912), 17 B.C. 427, so that they have always remained at the absolute disposal of the Province, untrammelled by any alienation for school purposes. That, I think, is a sufficient answer to defendants' suggestion that they were school reserves at the date of the Settlement Act.

Then, can the inference be drawn that they were Indian Reserves or settlements from the words cited from the said book? Indian Reserves consist of lands conveyed or assigned to the Crown in right of the Dominion for the use of the

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. *v.* MCLELLAN

Indians. To say that lands are available for Indian Reserves does not make them Indian Reserves within the construction which I would place upon the language of the grant when it says that the grant shall not include Indian Reserves or settlements. It is not suggested, and there is no evidence from which such an inference can be drawn, that this land was ever used as an Indian Reserve or settlement; at most, if any value is to be attached to said index book as evidence in the case, the land in question was merely designated as land fit to be made an Indian Reserve or settlement. It is, however, in my construction of the deed, not such lands, but *de facto* or *de jure* Indian Reserves or settlements which are excepted.

I would, therefore, dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: This is a conflict between a grant from the Crown in fee simple, in the form of letters patent under the great seal of Canada, dated 21st April, 1887, to the plaintiff Company of certain lands on Vancouver Island, "including all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein, and thereunder," and a subsequent grant from the Crown, represented by the Lieutenant-Governor in Council of British Columbia, by way of a lease, dated July 2, 1914, of an alleged portion of the same lands "for coal or petroleum mining purposes" as authorized by section 21 of the Coal and Petroleum Act, Cap. 159, R.S.B.C. 1911, for a term of five years. The Government of Canada became possessed of the lands it granted as above by means of the Settlement Act (as it is called) of British Columbia, Cap. 14, 47 Vict., 1888, wherein the Legislature of the Province granted them to the Canadian Government in trust "for the purpose of constructing, and to aid in the construction of" the plaintiff's railway.

There is first raised for our determination an issue of fact which must be disposed of before the legal question can be properly considered, and it is: Does the area leased to the defendants come within the exceptions set out in sections 3 and 4 of the said Settlement Act? The learned trial judge says on this point:

"I confess I have very little trouble in finding that the lands covered by the lease fall within the boundaries described in the statutory grant, and that they were neither alienated nor reserved previously."

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

In my opinion, this is the right conclusion to be drawn from the evidence, quite apart from the question of the onus of proof, as to which see the observations of Mr. Justice Duff in *Bank of Toronto* v. *Harrell* (1917), 2 W.W.R. 1149; 55 S.C.R. 512 at p. 533. The degree and nature of proof varies according to the subject-matter of the contest, and here it is of an unusual kind, extending over a long period in sporadic localities, and not susceptible of that certainty which is always to be aimed at, though often unattainable. In such circumstances, much must be left to reasonable inferences and probabilities: as Lord Loreburn said in *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41; 56 L.J., Q.B. 229, cited with approval by their Lordships of the Privy Council in *Jones* v. *Canadian Pacific Railway* (1913), 83 L.J., P.C. 13; 13 D.L.R. 900 at p. 909:

"'It is, of course, impossible to lay down in words any scale of standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities.'"

MARTIN, J.A.

Here, I think it may well be said that the proof adduced, while it is susceptible of greater certainty, is nevertheless reasonably sufficient to support the inferences which have been drawn below.

Such being the facts, the position shortly is that the Crown in 1887 granted to the plaintiff in fee simple certain minerals, coal and coal-oil, and in 1914 granted a lease of the same minerals to the defendant, who submits that this Court cannot deal with the situation thereby created or do justice between the litigants unless the Crown is a party to the proceedings: the Court below, be it noted, was informed by the defendants' counsel that the Attorney-General had refused to take part in the proceedings. This question in two other forms has recently been before this Court in *North Pacific Lumber Co.* v. *Sayward* [(1918), 25 B.C. 322]; (1918), 2 W.W.R. 771; and *Quesnel Forks*

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. McLELLAN

Gold Mining Co. v. *Ward* [(1918), 25 B.C. 476]; (1918), 3 W.W.R. 230, but this, as I view it, is quite distinct from them and is the same in principle, though in another aspect as *Victor* v. *Butler* (1901), 8 B.C. 100; 1 M.M.C. 438, and note p. 446, wherein two placer mining Crown grants came into conflict and the earlier was held to prevail; the only difference between that case and this is that here, instead of the two grants being of equal nature and importance, the later is of a lesser estate. There are many reported cases wherein grants from the Crown have been held to be void though the Crown was not a party, and some of them are cited in a peculiar case of the kind in this Province, *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412; 7 W.L.R. 778, wherein it was held there had been a violation of an elementary principle of natural justice nullifying the grant because the Company whose lands had been taken away by a special statute had not been heard upon the application to the Lieutenant-Governor in Council for a grant of part of said lands under said statute. The three principles upon which the Court generally acts are thus laid down in the leading case of *Gledstanes* v. *The Earl of Sandwich* (1842), 4 Man. & G. 995 at pp. 1028-9; 5 Scott (N.R.) 689:

MARTIN, J.A.

"Upon consideration of the cases in which the King's grant has been held to be avoided by reason of any misdescription or mistake thereon, they will be found to fall under one of three classes; first, where the King has by his grant professed to give a *greater estate* than he had himself in the subject-matter of the grant; as in the case of *Alton Woods* [(1595-1600)], 1 Co. Rep. 40, and the other cases above considered; secondly, where the King has already granted the *same estate*, or part of the same estate, to another; in which case the second grant would work injustice, or, at all events, great inconvenience; such was the case of *Alcock* v. *Cooke* [(1829)], 5 Bing. 340; 2 M. & P. 625, cited by the plaintiff in argument, and *The Earl of Rutland's Case* [(1608)], 8 Co. Rep. 57; or, thirdly, where the King has been deceived in the *consideration* expressed in his grant; as where the consideration has been untruly stated, or the subject of the grant has been recited to be of less value than it really is, or where, as in the case of *Mead* v. *Lenthall*, 2 Roll. Abr. 189, the King recites a former grant of an office for life, and a surrender; and then grants the same office to J. S., whereas in truth, either the King had not granted the office for life, or the office had not been surrendered; here the grant would be void, because there was no such consideration as was recited."

The case at bar has been reduced to a very simple one and comes within the second class above laid down, as one in which

"the second grant would work injustice, or, at all events, great inconvenience."

In the case from this Province of *City of Vancouver* v. *Vancouver Lumber Company* (1911), A.C. 711 at p. 721; 81 L.J., P.C. 69, their Lordships of the Privy Council say:

"It is perhaps desirable to state the rule of law on which the Court of Common Pleas proceeded in delivering judgment in *Alcock* v. *Cooke* [(1829)], 5 Bing. 340. The rule is a rule of common law by which a grant by the King which is wholly or in part inconsistent with a previous grant is held absolutely void unless the previous grant is recited in it. But the rule is qualified to this extent, that if the subject had no actual or constructive notice of the previous grant, the second grant will be good to the extent to which it may be consistent with the first grant though void as to the rest. The rule arises out of a duty which the law casts upon the subject of making known any previous inconsistent grant of which he may himself have notice. If he neglect this duty he is held to have deceived the King when accepting the grant made to him, with the result that he takes nothing by his grant."

And in Coke's Institutes, section 438, 260a; Ed. 1832, Vol. II., it is said:

"If a grant by letters patents under the great seale be pleaded and shewed forth, the adverse party cannot plead *nul tiel* record, for that it appears to the Court that there is such a record; but inasmuch as it is in nature of a conveyance, the partie may denie the operation thereof, therefore, he may plead *non concessit* and prove in evidence that the King had nothing in the thing granted, or the like, and so it was adjudged."

Now, herein we have a grant by the King of certain coal and coal-oil which is "wholly inconsistent" with a previous grant of exactly the same minerals (as well as additional ones) and there is no recital in the later grant of the previous one, therefore, the later grant is "absolutely void" as their Lordships say, because there is no room for any qualification here, and we are not debarred from making this declaration by the absence of the Crown.

There is no relation or similarity in law at all between the principle applicable to a lease from the King to his subject and the case of a lease between subject and subject, so I do not refer to the latter at all. In the former the "rule of common law" is based upon the theory that the King is the mirror of justice and "can do no wrong," whatever his subjects may do, and, therefore, the King's Courts apply in proper cases the appropriate remedy without further ado. Furthermore, in the case at bar the Crown had already parted to the plaintiff with all of its

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

MCPHILLIPS, J.A.

interest that the defendants now claim. What happens when the Crown has granted a lease which is voidable at its election is a very different matter, which I have elaborately considered in the *Quesnel Forks Mining* case, *supra*.

It follows that the appeal should be dismissed.

GALLIHER, J.A.: I agree with my brother MARTIN.

MCPHILLIPS, J.A.: This appeal brings up a question which has been a matter of litigation for a very considerable time in the Courts of this Province, and in particular, two cases that require reference being made to them went on appeal to the Privy Council, namely, *Hoggan* v. *Esquimalt and Nanaimo Railway Co.* (1894), A.C. 429; 63 L.J., P.C. 97; and *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462; 76 L.J., P.C. 85. In the *Hoggan* case it was held that the lands in question were not open for settlement, being lands included in the Government grant to the company, being subsidy lands (granted by Cap. 14, B.C. Stats. 1884, to the Government of Canada and by the Government of Canada, in pursuance of an Act of 1884, Can. Stats. 1884, Cap. 6, granted in 1887 to the company), and in the *McGregor* case it was held, as against the company, that only because of the Vancouver Island Settlers' Rights Act, 1904, was McGregor entitled to the lands, *i.e.*, that the Act of 1904 (B.C.) legalized the grant and superseded the company's title. The grant from the Province to the Dominion is by statute set forth in the following terms, with the provisions and reservations, here set forth, so far as inquiry will be found necessary upon this appeal (B.C. Stats. 1884, Cap. 14, Subsec. (*f*) of preamble, and Secs. 3, 4, 5 and 6):

"(*f*) The lands on Vancouver Island to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open for four years from the passing of this Act to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of 160 acres to each such actual settler; and in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway, and stations, and workshops, shall be reserved. In the meantime, and until the railway from Esquimalt to Nanaimo shall have been completed, the Government of British Columbia shall be the agents of the Government of Canada for administering, for the purposes of settlement, the lands in this subsection mentioned; and for such purposes the Government of British Columbia may make and issue, subject as aforesaid,

pre-emption records to actual settlers, of the said lands. All moneys received by the Government of British Columbia in respect of such administration shall be paid, as received, into the Bank of British Columbia, to the credit of the Receiver-General of Canada; and such moneys less expenses incurred (if any) shall, upon the completion of the railway to the satisfaction of the Dominon Government, be paid over to the railway contractors."

"3. There is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of a railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable (but save as is hereinafter excepted), all that piece or parcel of land situate in Vancouver Island, described as follows:

"Bounded on the south by a straight line drawn from the head of Saanich Inlet to Muir Creek, on the Straits of Fuca;

"On the west by a straight line drawn from Muir Creek aforesaid to Crown Mountain;

"On the north, by a straight line drawn from Crown Mountain to Seymour Narrows; and

"On the east by the coast-line of Vancouver Island to the point of commencement; and including all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein, and thereunder.

"4. There is excepted out of the tract of land granted by the preceding section all that portion thereof lying to the northward of a line running east and west half way between the mouth of the Courtenay River (Comox District) and Seymour Narrows.

"5. Provided always that the Government of Canada shall be entitled out of such excepted tract of lands equal in extent to those alienated up to the date of this Act by Crown grant, pre-emption, or otherwise, within the limits of the grant mentioned in section 3 of this Act.

"6. The grant mentioned in section 3 of this Act shall not include any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor shall it include Indian Reserves or settlements, nor Naval or Military Reserves."

It may be further said for the purposes of this appeal that the grant from the Government of Canada to the Company was in like terms to the excerpts from the statute as above set forth. The evidence is most voluminous, and, without entering into it in detail, it is, in my opinion, most conclusive that the lands called in question in this appeal were effectually granted and conveyed to the Company by reason of the force of the Provincial statute (Cap. 14 of 1884) and the grant made in pursuance thereof by the Government of Canada to the Company. If even the onus was upon the Company (the respondent) to establish that the lands in question did not come within any of the reservations, that onus was fully discharged.

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

MCPHILLIPS, J.A.

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

The appellants relied upon the licences obtained from the Crown (the Government of British Columbia) and the lease following the same from the same authority for their entry upon the lands and mining for coal thereunder, and the learned counsel for the appellants, in his very able argument, submitted that the Crown should be a party to the action, and failing this, no declaration as to the title to the lands and the under-surface rights could be made; that in any case no title could be demonstrated in the lands or the under-surface rights, *i.e.*, the coal underlying the lands, until the reservations and exceptions are all effectively disposed of, and it was not established that the Crown had denuded itself of title to the lands; that it was not a case of an absolute statutory conveyance of the lands within the lines described in section 3 (B.C. Stats. 1884, Cap. 14), but a conveyance with exceptions, and that the evidence, as led by the respondent at the trial, did not displace the right in the Crown to grant the licences and lease impugned in the action.

MCPHILLIPS, J.A.

Firstly, with regard to the non-joinder of the Crown. We have, of course, Order XVI., r. 11 (marginal rule 133), the same as the English rule (Order XVI., r. 11, The Yearly Practice, 1918, pp. 173 to 178). It is to be noted that the objection is made at rather a late date for the first time at the trial of the action, yet, of course, that does not tie the hands of the Court, save that in this case the party said to be a necessary party is the Crown, and there is evidence that the Crown has been made aware of these proceedings, and evidently has not deemed it right to interfere, and further, it is a matter for remark that the defendants have not pleaded "that the plaintiff cannot maintain the action at all, as, for instance, in a case where he cannot maintain it without joining the Attorney-General (*Attorney-General* v. *Pontypridd Waterworks Company* (1908), 1 Ch. 388)": see The Yearly Practice, 1918, Vol. 1, at pp. 174-5. We are not without authority upon this point in the Courts of this Province, and the learned trial judge relied upon the decision of the Full Court in *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412, in which it was held that the Crown was not a necessary party. A perusal of the judgment of the Full Court upon this point will demonstrate that in many

cases of somewhat similar nature the Crown was not a party to the proceedings (also see *Victor* v. *Butler* (1901), 8 B.C. 100; 1 M.M.C. 438). It may well be considered that the Crown, by the grant of a lease, which imports the assertion of the reversionary interest being in the Crown, differentiates this case from the *Fiddick* case, and is not a case where the Crown has, without evidence to the contrary, parted with all its interest or claim to the lands, and that therefore the Crown is a necessary party. The power of the Court, however, in this matter is discretionary, and apart from the question whether the Crown can be made a party to the proceedings, not choosing to intervene—a question which I do not decide—I am of the opinion that the Court will be justified in this case in proceeding "to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it" (Order XVI., r. 11; marginal rule 133). The judgment of this Court will be in no way binding upon the Crown, and I recall that I made an observation to that effect to counsel for the respondent during the argument upon this appeal. The Crown, as it appears in the present case, granted licences and a lease to mine coal upon the lands in question. This being the situation, it would appear to me, with great respect to the Executive Government, that the Crown would be acting rightly in intervening in these proceedings, and the Crown may yet intervene if the case proceeds further. It may be that the Executive Government is acting advisedly, and it is the intention to abide by the result of the litigation as between the parties. It is instructive upon this point to note the decision of the Privy Council in *Eastern Trust Company* v. *Mackenzie, Mann & Co., Limited* (1915), A.C. 750, and what Sir George Farwell, who delivered the judgment of their Lordships, said at pp. 758 to 761.

The question as to in what cases the Crown is a necessary party is dealt with by my brother MARTIN in his judgment in *Quesnel Forks Gold Mining Co.* v. *Ward* (1918), 3 W.W.R. 230, and in that case the contest was between Crown lessees, the leases to the plaintiff being subsequent in point of time to the leasehold interest in pursuance of the powers granted by a private Act to the predecessors in title of the defendants, the defendants holding under assignment thereof, and it was held

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

that the Crown was not a necessary party and the defendants were, by the judgment of this Court, held to be entitled to the placer mining ground in dispute as against the plaintiffs, the holders of the subsequent leases (also see Lord Watson at pp. 56 and 57 in *Osborne* v. *Morgan* (1888), 57 L.J., P.C. 52). Then, with the premise that the action is a well constituted action, and that the matter for adjudication was jurisdictionally properly before the Court below, it becomes necessary to again revert to the question for decision. Whilst not of the opinion that the *onus probandi* was upon the respondent to shew that not by any possible chance were the lands in question within any of the exceptions as contained in the grant to the respondent, I am satisfied that the respondent has shewn, upon the evidence led at the trial, that the lands in question were granted to the respondent, and that the Crown had parted with its interest therein. As to the nature of the evidence, it may be said to be most complete. I would refer in this connection to the language of Chancellor Boyd in *Niagara Falls Park* v. *Howard* (1892), 23 Ont. 1 (affirmed on appeal (1896), 23 A.R. 355) at p. 4, as follows:

"The inquiry cannot be conducted on strictly legal evidence, for owing to lapse of time, the historical element has to be taken into account. Therefore, in reaching my conclusions, I have overlooked none of the miscellaneous matters which were more or less discussed during a seven days' argument, in addition to certain augmentations sent in after argument. I have drawn also from other sources, historical or statutory, of a public character, so that I might, if possible, harmonize the various claims made and transactions had, with reference to this property, which may be conveniently spoken of as 'The Chain Reserve,' *i.e.*, along Niagara River from Queenston to Fort Erie. As to the propriety, and indeed necessity of using this class of material, note the observations of Lord Halsbury in *Read* v. *The Bishop of Lincoln* [(1892)], 67 L.T. 128—now reported in (1892), A.C. 644."

MCPHILLIPS, J.A.

In *City of Vancouver* v. *Vancouver Lumber Company* (1911), A.C. 711 at p. 721:

"As to the second point it is perhaps desirable to state the rule of law on which the Court of Common Pleas proceeded in delivering judgment in *Alcock* v. *Cooke* [(1829)], 5 Bing. 340. The rule is a rule of common law by which a grant by the King which is wholly or in part inconsistent with a previous grant is held absolutely void unless the previous grant is recited in it. But the rule is qualified to this extent, that if the subject had no actual or constructive notice of the previous grant, the second grant will be good to the extent to which it may be consistent with the first grant

though void as to the rest. The rule arises out of a duty which the law casts upon the subject of making known any previous inconsistent grant of which he may himself have notice. If he neglect this duty he is held to have deceived the King when accepting the grant made to him, with the result that he takes nothing by his grant."

There can be no question that it was a notorious fact that the respondent was the grantee from the Crown (Dominion) in pursuance of the statutory grant made to the Government of Canada by the Province of the lands in question and the coal under the said lands. Any inconsistent statements of officers of the Crown, and it is to be noted that where these occur they are from officers holding office in very recent years, as to the lands in question still being Crown lands cannot be of any avail as against the grant made to the respondent within the lines of the description contained in the grant, and as to the value of these statements I would refer to what Lord Davey said at pp. 83-4 in *Ontario Mining Company* v. *Seybold* (1903), A.C. 73:

"The learned counsel of the appellants, however, says truly that his clients' titles are prior in date to this agreement, and that they are not bound by the admissions made therein by the Dominion Government. Assuming this to be so, their Lordships have already expressed their opinion that the view of their relative situation in this matter taken by the two Governments was the correct view. But it was contended in the Courts below, and at their Lordships' bar was suggested rather than seriously argued, that the Ontario Government, by the acts and conduct of their officers, had in fact assented to and concurred in the selection of, at any rate, Reserve 38 B, notwithstanding the recital to the contrary in the agreement. The evidence of the circumstances relied on for this purpose was read to their Lordships; but on this point they adopt the opinion expressed by the learned Chancellor Boyd that the Province cannot be bound by alleged acts of acquiescence on the part of various officers of the departments which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any Order in Council or other authentic testimony. They, therefore, agree with the concurrent finding in the Courts below that no such assent as alleged had been proved."

The language of Lord Davey is exceedingly apposite to the facts of the present case.

The broad question in the present case, in my opinion, is, that it being incontrovertible that the description of the grant to the respondent is comprehensive of the lands in question, and there being no sufficient evidence to shew that they fall within any of the exceptions, the grant being an express statutory grant covered by a public general statute of the paramount authority,

MORRISON, J.

1917

Nov. 2.

COURT OF APPEAL

1918

Oct. 1.

ESQUIMALT AND NANAIMO RY. CO. v. MCLELLAN

the Legislature of the Province of British Columbia, cogent evidence must be adduced establishing that the lands in question are within the reservations and exceptions as contained in the grant, because without this being established, the grant is conclusive and effective to transfer all the lands (save demonstration to the contrary) to the respondent Company within the description.

In my opinion, it is conclusively established that the respondent is the owner of the lands in question and is expressly granted the coal and other minerals underlying the lands, save the precious metals (see *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1887), 14 S.C.R. 345; (1889), 14 App. Cas. 295; 1 M.M.C. 52; *Esquimalt and Nanaimo Railway* v. *Bainbridge* (1896), 65 L.J., P.C. 98); and that was the decision of the learned trial judge, and the appellants not having shewn that the learned judge arrived at a wrong conclusion (*Colonial Securities Trust Co.* v. *Massey* (1895), 65 L.J., Q.B. 100, Lord Esher, M.R. at p. 101; *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 96; *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323, 326), the judgment of the Court below should be affirmed and the appellants restrained, as directed in the judgment appealed from, from in any way interfering with the under-surface rights in, upon, or under the lands and from exercising any acts of ownership in respect of the under-surface rights thereof.

MCPHILLIPS, J.A.

I would, therefore, dismiss the appeal.

EBERTS, J.A.

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

Appeal dismissed.

Solicitors for appellants: *Martin & Johnson.*

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

DINSMORE v. PHILIP *ET AL.*

GREGORY, J.

1917

Nov. 29.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

DINSMORE v. PHILIP

Principal and agent—Power of attorney—Authority of agent to purchase land—Subsequent arrangement to give mortgage in part payment. Evidence Act—Written instrument—Certified copy—"Sufficient evidence"—Meaning of—R.S.B.C. 1911, Cap. 78, Sec. 45.

An agent, under power of attorney, *inter alia*, "to sell and absolutely dispose of or mortgage real estate," etc., entered into an agreement to purchase two lots in Vancouver for which the vendor was to receive certain lands, stock in a building, and $6,000 cash. The transfers were duly executed and delivered, and the transaction completed with the exception of the handing over of the cash payment. A subsequent arrangement was made whereby, in lieu of the cash payment, the vendor agreed to accept $1,000 in cash and a mortgage for $5,000 on the two lots he had sold. An action for foreclosure of the mortgage was dismissed.

Held, on appeal (MACDONALD, C.J.A., dissenting), that there were two transactions, the mortgage having been accepted under a later and distinct agreement that the agent had power under the instrument in question to execute, and the plaintiff should succeed.

McKee v. *Philip* (1916), 55 S.C.R. 286 distinguished.

Under section 45 of the Evidence Act, in any action where it would be necessary to produce and prove an original instrument or document which has been registered or filed in any land registry office or County Court office, in order to establish such instrument, or the contents thereof, the party intending to prove the instrument may give notice to the opposite party of his intention to do so by certified copy, and in every such case the copy so certified shall be sufficient evidence of the instrument and of its validity and contents, unless the opposite party shall give notice disputing its validity. The plaintiff gave the first-mentioned notice of his intention to submit a certified copy of a mortgage in evidence, but no counter-notice was given by the defendant.

Held, that the failure of the defendant to give such notice did not deprive him of questioning the validity of the mortgage by reason of the want of authority of the agent to sign the instrument, as a copy of an original document offered in evidence under the Act can have no greater effect than the original if it were produced.

APPEAL from the decision of GREGORY, J., in an action for foreclosure of a mortgage, tried by him at Vancouver on the 30th and 31st of October and 1st of November, 1917. One W. R. Arnold, the manager of the Dominion Trust Company, and holding a power of attorney for the defendant Philip, approached the plaintiff, T. W. Dinsmore, with a

Statement

GREGORY, J.
1917
Nov. 29.
1918
Jan. 9.
COURT OF APPEAL
Oct. 1.
DINSMORE v. PHILIP

Statement

view to purchasing from him two lots (13 and 14, block 76, D.L. 196) on Pender Street in Vancouver. An agreement was arrived at whereby Dinsmore was to accept for the two lots $6,000 in cash, certain lots in Wetaskewin, Alberta, and $2,500 stock in the Metropolitan Building in Vancouver. The stock and the Alberta lots were transferred to Dinsmore, who duly transferred the Pender Street lots to Philip, but he was unable to collect the $6,000 from Arnold, and later an arrangement was arrived at whereby he accepted $1,000 in cash and a mortgage for $5,000 on the Pender Street lots, the mortgage being made by Arnold on behalf of Philip under the power of attorney on the 7th of April, 1914. On the 30th of April following, Arnold, on behalf of Philip, transferred the two lots to the Dominion Trust Company. The main defence was that Arnold in giving back a mortgage on the Pender Street lots in part payment of the purchase price acted outside of the authority vested in him by the power of attorney. The defendant Philip counterclaimed for the return of the $1,000 paid by Arnold to Dinsmore on account of the purchase price of the two lots.

J. A. MacInnes, for plaintiff.
A. D. Taylor, K.C., and *C. S. Arnold*, for defendant Philip.
Wilson, K.C., for Dominion Trust Company.

29th November, 1917.

GREGORY, J.: Mr. *Arnold's* motion against the Dominion Trust must be granted. The question is admittedly only one of costs, and I think the practice adopted was the correct one; it is difficult to see how it can be complained of in view of Messrs. Cowan & Ritchie's letter of the 4th of April, 1917.

GREGORY, J.

As to the defendant Philip, I think he is entitled to judgment. To a large extent the same questions arose in this action as arose in *McKee* v. *Philip* (1916), 55 S.C.R. 286. The deed and mortgage in question were executed under the same powers of attorney as the agreement in *McKee* v. *Philip*, where it was held that the attorney had no power to purchase land on terms, part cash, with a covenant for future payments.

The plaintiff was not called as a witness on his own behalf, his counsel contenting himself with putting in parts of defend-

ant's discovery and certain documents, including a certified copy of the mortgage, under the provisions of section 45 of the Evidence Act, but not including the powers of attorney. The defendant moved to dismiss on the ground that there was no evidence of non-payment of the mortgage moneys sued for, and the power of attorney under which the mortgage was executed was not proved; upon my stating that I would consider the matter, defendant decided he would put in his evidence.

I may say at the outset that I can take no exception to the defendant's manner or demeanour in the witness box. He evidently knew absolutely nothing of the transaction, and is a man of little education, but is, I believe, a truthful and honest witness. He had implicit confidence in his attorney Arnold, and would probably have entrusted him with any authority Arnold had asked him for. The question to be decided though is not what he would have done but what he actually did.

Plaintiff seeks to distinguish this from the *McKee* case on two grounds, first, that Arnold had verbal authority outside of the powers of attorney to execute the deed and mortgage, and under section 51 of the Land Registry Act neither the deed nor mortgage required to be under seal; and second, that the transaction was not one of a purchase on credit, but two distinct transactions, one a purchase for cash and subsequently a mortgage back to the vendor for $5,000, which transactions, if really distinct and genuine, the powers of attorney appear to authorize.

As to the first ground, I do not think any such verbal authority has been shewn, certainly no such authority was given to execute a mortgage. Further, it appears to me that section 51 of that Act only applies to land registry transactions, and does not make binding outside of that Act a covenant to pay moneys. A covenant must be under seal, it is an agreement by deed that is under seal. The law requires a seal—there was a seal in this case—but it is surely settled law that authority to execute an instrument which must be under seal must itself be given by instrument under seal (unless, possibly, the maker is personally present and asks someone to execute the instrument for him, but that is not this case); so verbal authority, however explicit, given by the defendant would be insufficient to enable the plaintiff to recover under the covenant a personal judgment for the amount due

GREGORY, J.

1917

Nov. 29.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

DINSMORE v PHILIP

on the mortgage, and recourse would have to be had to the powers of attorney. In addition, I think a fair reading of the pleadings shews that the authority relied on by the plaintiff was the power of attorney, and he should not now be allowed to set up the verbal authority, evidence of which was admitted against the defendant's objection, and no application was made by plaintiff for leave to amend, and if anything else is required, the mortgage itself purports to be executed under the power of attorney.

As to the second ground, it is urged that the conveyance and mortgage shew on their faces, by their dates and recitals, that they are two distinct transactions, and that therefore the defendant is estopped from denying that they were in reality only one. I cannot agree that the doctrine of estoppel applies here—if it does, it means that the attorney can do, by executing two instruments under the power of attorney, what it has been decided in *McKee* v. *Philip* he cannot do by one instrument. In analogy to the position of an infant and his guardian, it may be well that a principal is not always estopped by the deed of his attorney. A trustee in bankruptcy may also insist that a creditor shall justify his claim, and is not bound by recitals admitting the liability of the bankrupt to the creditor, though the bankrupt himself would be estopped; but apart from that, an estoppel is restricted to such recitals and statements in a deed as are intended to be agreed as true, etc. How can it be suggested that the dates and considerations expressed in the instruments were intended by the parties to be agreed to? The consideration expressed in the conveyance is $1, and the same property is mortgaged back to the vendor for $5,000. There are many cases where the true date, the true consideration, or the real transaction between the parties is permitted to be shewn notwithstanding the fact that statements in the deed will then be contradicted; it is unnecessary to quote authorities, but see Phipson on Evidence, 5th Ed., pp. 554-555 for some instances.

GREGORY, J.

The evidence of Mr. Hards, and the discovery of the plaintiff make it clear to me that in reality there was only one transaction, and that that was a purchase by Arnold for part cash and part exchange of other property and a mortgage back for the balance,

and I may mention here that I see no authority in the power of attorney for making an exchange. It is true that Arnold first agreed to buy for all cash, but he could not carry it out, and eventually the agreement, which was evidently oral only, was changed and carried out as above stated. The conveyance was no doubt executed first, but was not delivered to the defendant; on the contrary, it was held by Hards, who was Arnold's clerk, until the whole transaction was complete.

Speaking generally, one is estopped from denying the truthfulness of a recital in a deed as to his title, in an action by the other party to the deed, and the mortgage here contains such a recital; but here it must be borne in mind that the defendant Philip did not personally execute this mortgage; he is rather in the position of an innocent third party. The plaintiff knew he was dealing with an attorney for defendant and must be presumed to know that that attorney had no authority to buy on credit, and he certainly knew that he himself was still the owner of the property. It would seem to me to be a fraud on defendant to enable the plaintiff to now set up that the defendant was estopped by his attorney's acts, and so in effect carry out a transaction which to his (plaintiff's) presumed knowledge, the attorney had no authority to enter into.

Plaintiff's counsel also contends that the validity of the mortgage is established by section 45 of the Evidence Act, which makes provision, where it is necessary to produce and prove an original instrument or document registered or filed in the land registry office, for the production of a copy of such instrument certified under the hand and seal of the registrar, "and in every such case the copy so certified shall be sufficient evidence of the original instrument and of its validity and contents." In this case such a copy of the mortgage was used after due notice, and Mr. *MacInnes* contends that that obviates the necessity of proving the power of attorney or the scope of it under which the mortgage was executed, and it prohibits one from looking at the power if produced by the other side.

This provision of the statutory law of the Province has been in force since 1894 at least; there are no reported decisions upon it that I can find, and just what the full effect of it is I cannot say, but it does not seem clear to me that it cannot

GREGORY, J.

1917

Nov. 29.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

DINSMORE v. PHILIP

sensibly be held to have the force now claimed for it. To give it that effect would, in effect, extend the scope of a power of attorney, in a case like the present, beyond the powers expressed in the document itself, when a certified copy of the deed executed under it is produced instead of producing and proving the original document, which would keep the scope of the power of attorney within the bounds of the language of that document.

It may be well that in the absence of evidence to the contrary it may have that effect, but it surely does not make it conclusive, more especially in a case like the present, when the pleadings shew the defence to plaintiff's claim to be that Arnold had no authority under the power of attorney to execute the mortgage. That is a good defence unquestionably, and it would be strange indeed if it was robbed of its virtue by the mere accident of how the plaintiff attempts to prove his claim at the trial. The statute, it is to be noted, says that it "shall be sufficient evidence," etc. Surely that does not mean conclusive, but rather only that it is sufficient unless the contrary be proved, and the defendant has proved the contrary by producing the power of attorney in question, and that, too, without objection by the plaintiff.

It is also contended by the plaintiff that in any case Philip has ratified by his executing the deed of confirmation, but that cannot be, for the ratification relied on is the general language contained in a deed poll made by the defendant for the express purpose only of ratifying other specific acts of Arnold, in no way connected with this case, and the decision of the Supreme Court of Canada effectually disposes of this contention.

GREGORY, J.

The only remaining ratification or acquiescence claimed is that defendant "allowed Arnold to carry on the business generally in the loose way he did." There can be no ratification without knowledge, and it has not been shewn that the defendant had the faintest idea of how his business was being conducted. His receipt of the letters shew that he was informed as early as October, 1914, of the execution of the mortgage, but it in no way shews that he had any knowledge (and he denies having such) that the mortgage was not one which might properly have been executed by Arnold, and he forwarded them immediately to his solicitor without executing the cancellation

receipt of the fire policy enclosed with letter of the 16th of December, 1914, as requested in that letter to do so. Acquiescence must be acquiescence in the particular facts and be incapable of referring to another set of facts: see Halsbury's Laws of England, Vol. 1, par. 387.

For these reasons I think the defendant Philip is entitled to judgment.

9th January, 1918.

GREGORY, J.: As to the claim in counterclaim for the repayment of the sum of $1,000, I am unable to distinguish in principle this case from that of *McKee* v. *Philip* (1916), 55 S.C.R. 286, as expounded by the Chief Justice of the Supreme Court of Canada. The facts are, of course, somewhat different, but if I am to pay any attention to the reasons for judgment, which, of course, I should do, I am unable to come to any other conclusion than that there must be judgment in the counterclaim for the repayment by Dinsmore of that sum.

GREGORY, J.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 9th and 10th of April, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

J. A. MacInnes, for appellant: The judgment in the case of *McKee* v. *Philip* (1916), 55 S.C.R. 286 was followed. The certified copy of the mortgage was put in evidence after notice under section 45 of the Evidence Act, without objection. The validity of the mortgage is thereby established, and it is not now open to the respondents to contend there was want of authority. In addition to this, the evidence shews there was a general authority from Philip to Arnold, thereby enabling him to carry out this transaction. Philip by his subsequent actions is estopped from pleading authority as he acquiesced in the transaction after knowing of it and continued to allow his agent to enter into and carry on general business for him: see *Fry* v. *Smellie* (1912), 3 K.B. 282.

Argument

A. D. Taylor, K.C., for respondent (Philip): It is not necessary to give the notice in reply under section 45 of the Act, as the certified copy has no greater effect than the original, if produced. There was no power given to make an exchange as was

GREGORY, J.

1917

Nov. 29.

1918

Jan. 9.

done in this case: see *McMichael* v. *Wilkie* (1891), 18 A.R. 464; *Bryant, Powis, & Bryant* v. *La Banque du Peuple* (1893), A.C. 170. He says there were two distinct transactions, but this cannot be upheld. There was no second transaction but merely a change later as to the mode of payment.

MacInnes, in reply.

Cur. adv. vult.

1st October, 1918.

COURT OF APPEAL

Oct. 1.

DINSMORE v. PHILIP

MACDONALD, C.J.A.: In my opinion the powers of attorney, respondent to Arnold, did not authorize Arnold to enter into the transaction in question. It may be that they authorized the purchase, sale and mortgage of real estate by Arnold as respondent's agent, but they did not authorize the purchase of property on respondent's credit secured by mortgage. That the mortgage was part of the original transaction I have no doubt. But apart from this, the whole transaction is shrouded in mystery. Who was the owner of the Saskatchewan land? The respondent does not know, and no evidence was offered to clear this up. Whose stock was it? Respondent had no knowledge that it was his. In a letter dated the 10th of March, 1914, Arnold referred to the properties to be exchanged for appellant's lots as "belonging to Syndicate 8."

MACDONALD, C.J.A.

After a careful perusal of the evidence I find nothing to shew that respondent had any interest in these properties. This is the inference which I should draw from the evidence generally, coupled with said letter of the 10th of March, 1914, and the fact that the $1,000 paid to appellant was paid by cheque of the Dominion Trust Company and charged, not against the respondent's account with that company, if he had one, but against Syndicate 8. I refer particularly to the requisition for the cheque. It is very probable that the transaction was Arnold's affair, and that the name of the respondent was used as his, Arnold's, *alter ego,* or that of Syndicate 8. At all events, the transaction was not within the powers of attorney, and was therefore not binding on the respondent.

Then as to the respondent's counterclaim to recover $1,000, paid appellant by the Trust Company's cheque above referred to, there is no evidence that that money was taken either out

of funds belonging to respondent or was charged against his account. The reasonable inference is that it was the money of Syndicate 8, to whose account it was charged. With great respect, therefore, for the opinion of the learned trial judge, I think that *McKee* v. *Philip* (1916), 55 S.C.R. 285 is distinguishable.

The question there decided was, as is the question in this case, one of fact. Whose money was paid to the vendor, or rather was it Philip's money? Now in *McKee* v. *Philip, supra,* the inference of fact drawn by this Court, affirmed by the Supreme Court of Canada, was that it was Philip's money, but that inference might not have been drawn, and would not have been drawn by me, but for McKee's acknowledgment in the deed in question there that he had received it from Philip, coupled with the absence of other evidence to rebut the inference, and also coupled with some evidence to shew that Arnold in that case had money of Philip's in his possession at the time of the transaction. There is in this case no such acknowledgment, except as to the receipt of the nominal consideration of $1.

Respondent does not say that at the time of this transaction Arnold had moneys of his in hand. He frankly says he does not know that appellant received a cent of his money. The books of the Dominion Trust Company were not resorted to to shew that any moneys were then at respondent's credit, or that his account had been debited with the sum in question. In these circumstances the counterclaim should have been dismissed.

Defendant's counsel raised a question of some importance touching the construction of section 45 of the Evidence Act, R.S.B.C. 1911, Cap. 78. The mortgage was proved at the trial by certified copy pursuant to that section, which enacts that "in any action where it is necessary to prove an original instrument or document which has been registered or filed in any Land Registry office, or County Court office, in order to establish such instrument and the contents thereof," the party intending to prove the instrument may give notice to the opposite party of his intention to prove the instrument by certified copy. The section then proceeds:

GREGORY, J.
1917
Nov. 29.
1918
Jan. 9.
COURT OF APPEAL
Oct. 1.
DINSMORE v. PHILIP
MACDONALD, C.J.A.

"And in every such case the copy so certified shall be sufficient evidence of the instrument and of its validity and contents,"

unless the opposite party shall give notice, disputing its validity. Such first-mentioned notice was given by the appellant (plaintiff in the action), but no counter notice was given by the respondent. The certified copy was put in by the appellant shortly after the opening of the case, and the trial proceeded without further notice being taken of this method of proof. Appellant's counsel, in his argument at the close of the case, and in this Court, took the point that the validity of the mortgage had by such proof been irrefutably established, and that it was not open to the respondent to contend that the mortgage was invalid because of the want of authority of the professed agent or attorney. If this contention be sound, there was nothing to be gained by proceeding with the trial after the copy was put in evidence, as the validity of the mortgage was the sole issue, apart from the counterclaim, which also would fail with the dismissal of the action. The said section is to be found in the Ontario statutes and has been part of the law of that Province for upwards of fifty years, and has been in force in this Province at least since 1894. We have been referred to no authority, however, upon its meaning, nor have I been able to find any. No similar section is to be found in the legislation of England. It was argued by respondent's counsel that "sufficient" must mean *prima facie*. If that construction be adopted, it may be asked, what was the necessity for the counter notice? I think the answer to that question is that the party to whom the notice is given is entitled to compel the production by his opponent of the original when intending to rely on defects in the original, for example, forgery of the signature, since, in the absence of such counter notice, he would himself be compelled to put in the original. I cannot think that "sufficient" was intended to mean "irrefutable," since such a meaning might lead to the gravest injustice owing to a slip on the part of the litigant's solicitor. The present case is a good example of how that might happen.

But apart from this view of the section, I think it has no application to the case at bar. If the statute were construed according to the very letter, as appellant's counsel contends,

then it must be confined to cases coming strictly within the letter. It is only in a case where it is necessary to prove an original document that a copy is to be sufficient evidence. In this case it was not necessary to prove the mortgage. It is admitted in the pleadings. It is denied that respondent executed it, but it is admitted that Arnold executed it purporting to do so as attorney for the respondent, but without authority. Nothing turns on the proof of the instrument itself. The only question was Arnold's authority. If that had been established, then the respondent's defence must have failed. I cannot, therefore, give effect to the submission of appellant's counsel that said section of the Evidence Act concludes the case.

I would, therefore, affirm the judgment on the question of the invalidity of the mortgage, but would overrule that part of it which gives the respondent judgment upon the counterclaim.

MARTIN, J.A.: This case is distinguishable, in my opinion, from that of *McKee* v. *Philip* (1916), 55 S.C.R. 286; (1917), 1 W.W.R. 690, because I do not regard it as one purchase on terms of credit but as two distinct transactions, the mortgage being later accepted in satisfaction of the balance due which the purchaser was unable, ultimately, to pay in cash as agreed upon. The evidence, I think, supports the documents which shew on their face that such was the case.

As to the objection that only a power to sell is conferred by the power of attorney, and, therefore, the exchange was not warranted, that is settled by the language employed, *viz.*: "to sell and absolutely dispose of or mortgage and hypothecate said real estate." In my opinion, there is here a power of selling, and also one of disposition, which is much more than selling, and has a wide meaning. The cases cited deal with the former power alone. Under this language the attorney could "dispose" of the property as a gift if he felt so "disposed."

I agree, I may say, with the learned judge below that a copy of an original document offered in evidence under section 45 of the Evidence Act, R.S.B.C. 1911, Cap. 78, has no greater effect than the original, if it were produced. There would have to be very clear and definite language to warrant such a far-reaching and unusual construction, but at best there is only to be

GREGORY, J.

1917

Nov. 29.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

DINSMORE v. PHILIP

found here an ambiguous intention based upon involved and indefinite expressions. I take the object of the section to be to enable "the party intending to prove such original instrument" to do so, and "to give in evidence, as proof of the original instrument, a copy thereof certified by the registrar," etc.; that is what is aimed at, and the subsequent reference to the copy being "sufficient evidence of the original instrument and of its validity and contents" goes no further than to put the effect of the copy on the same plane of evidence as the original. This view is fortified by the fact that the penalty of costs imposed in the end of the section is only directed to "producing and proving the original." I note that the section only applies to documents filed in the Land Registry office or County Court office.

The appeal, therefore, should be allowed, and the counterclaim dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed. With great respect to the learned trial judge, I am unable to accept the view arrived at by him. The transaction would appear, upon the facts, to have been quite within the very large powers conferred under the two powers of attorney. The case is not at all similar to that of *McKee* v. *Philip* (1916), 55 S.C.R. 286. I find difficulty in following the argument that the transaction was not one that could be entered into by Arnold as agent for the respondent Philip, *i.e.*, that the transaction was in its nature *ultra vires*. The transaction was a simple one—the purchase of certain lands in the City of Vancouver by Arnold, acting as the agent for the respondent Philip, a proceeding quite within his powers under the terms and provisions of the two powers of attorney adduced in evidence at the trial. The learned trial judge, in his judgment, when stating the second point relied upon at the trial by counsel for the appellant, said that the contention was "that the transaction was not one of purchase on credit, but two distinct transactions, one a purchase for cash and subsequently a mortgage back to the vendor for $5,000, which transactions, if really distinct and genuine, the powers of attorney appear to authorize." With this contention I wholly agree. The evidence fully supports it and, with every deference to the learned judge,

that would appear to have been the view formed by him, as in his judgment he said:

"It is true that Arnold first agreed to buy for all cash but he could not carry it out and eventually the agreement which was evidently oral only was changed and carried out as above stated."

The learned judge further said:

"The evidence of Mr. Hards and the discovery of the plaintiff make it clear to me that in reality there was only one transaction and that was a purchase by Arnold for part cash and part exchange of other property and a mortgage back for the balance and I may mention here that I see no authority in the power of attorney for making an exchange."

In passing, were it necessary to even view the transaction in this light, the authority given by the respondent Philip to Arnold would, in my opinion, be sufficiently extensive. The powers of attorney dealings and conduct between the respondent Philip and Arnold were such as to constitute Arnold his absolute *alter ego* in speculating in lands, stocks and other securities, and the selling, mortgaging and hypothecation of the same. However, such was plainly not the transaction. The transaction was unquestionably for cash, and it was so understood. But the change was made after the sale was carried out, after the execution of the conveyance of the lands by the appellant to the respondent Philip, in fact, it was an executed contract of sale completed in due and proper form by a legal transfer of the land upon the part of the appellant to the respondent Philip, the consideration to be paid in cash. Later we find that difficulty arises in paying the consideration, and delays take place. The appellant, in his discovery evidence, made answer to a question put by the defence in the following terms:

"You had been getting your consideration 'piecemeal'? That is about the size of it? I got something every time I went down."

Eventually the consideration was paid by the conveyance of certain lots to the appellant in Wetaskiwin, the transfer of the Metropolitan stock, the execution of the mortgage in question in this appeal, and the payment of $1,000 in cash. This being the real transaction as carried out to satisfy the contractual obligation to pay the consideration money—all the subject-matter of negotiation and agreement come to after the initial agreement of purchase and execution of conveyance—it is utterly impossible, and it is with all respect I say it, in view of

GREGORY, J
1917
Nov. 29.
1918
Jan. 9.
COURT OF APPEAL
Oct. 1.
DINSMORE v. PHILIP
MCPHILLIPS, J.A.

GREGORY, J.

1917

Nov. 29.

1918

Jan. 9.

COURT OF APPEAL

Oct. 1.

DINSMORE v. PHILIP

contrary opinion, to look at these facts and say that it was all one transaction.

The point for determination upon this appeal is whether there is a personal liability upon the respondent Philip in respect of the mortgage, and whether the learned trial judge should not have so held at the trial. It is plain that upon the sale as made and as carried out, a balance remained due and payable to the appellant of $6,000.

The situation in law at the time was a simple one. The respondent Philip was indebted to the appellant in the sum of $6,000, and Arnold, acting in pursuance of the powers conferred upon him in the two powers of attorney, ample in their terms, borrowed the sum of $5,000 by way of mortgage to pay, along with the $1,000 paid in cash, that indebtedness of $6,000. It is not necessary to give excerpts in detail of the powers conferred under the powers of attorney, amply shewing that Arnold had sufficient power to carry out the transaction under review, and more particularly the giving of the mortgage.

MCPHILLIPS, J.A.

Fully considering all the surrounding facts and circumstances, it is without hesitation that I arrive at the conclusion that the respondent Philip is liable upon the mortgage.

It follows that, in my opinion, the judgment of the learned trial judge upon the counterclaim is wrong, wherein the return of the $1,000, part of the consideration, is ordered. The transaction being a valid transaction, in my opinion, there can be no right to the return of this $1,000.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed,
Macdonald, C.J.A. dissenting in part.

Solicitor for appellant: *J. A. MacInnes.*
Solicitor for respondent: *C. S. Arnold.*

IN THE MATTER OF THE BRITISH COLUMBIA PROHIBITION ACT AND IN THE MATTER OF THE WAR MEASURES ACT, 1914.

COURT OF APPEAL

1918

July 9.

IN RE BRITISH COLUMBIA PROHIBITION ACT

Conflict of laws—Prohibition—British Columbia Prohibition Act—The War Measures Act, 1914 — Regulations — Effect of on Provincial statute — Can. Stats. 1914, Cap. 2, Sec. 6—Regulations of 11th March, 1918, pars. 5, 11 and 13—B.C. Stats. 1916, Cap. 49, Secs. 10 and 28.

Paragraphs 5 and 11 of the regulations made and approved on the 11th of March, 1918, under the provisions of section 6 of the War Measures Act, 1914 (Dominion), do not operate to abrogate, annul or supersede the provisions of section 28 of the British Columbia Prohibition Act.

By reason of the explicit declaration of the supplementary character of the regulations in paragraph 13 thereof, said regulations apply only to cases in respect to which the Province would have no jurisdiction to legislate.

Rex v. *Thorburn* (1917), 41 O.L.R. 39 distinguished.

REFERENCE by His Honour the Lieutenant-Governor to the Court of Appeal in pursuance of an order in council approved by His Honour on the 14th of June, 1918, and passed under the authority of chapter 45, R.S.B.C. 1911. The British Columbia Prohibition Act (B.C. Stats. 1916, Cap. 49) was brought into force by the British Columbia Prohibition Act Commencement Act (B.C. Stats. 1917, Cap. 49) on the 1st of October, 1917. Section 10 of the Prohibition Act prohibits within the Province the sale of intoxicating liquor. Section 28 thereof, *inter alia,* provides that every person contravening or violating any of the provisions of said 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. By the regulations made and approved the 11th of March, 1918, under the provisions of The War Measures Act, 1914 (Can. Stats. 1915, Cap. 2, Sec. 6), it is, *inter alia,* provided that no person after the 1st of April, 1918, shall, either directly or indirectly, sell or contract to agree to sell any intoxicating liquor which is in or which is to be delivered within any Province wherein the sale of intoxicating

Statement

COURT OF APPEAL

1918

July 9.

IN RE BRITISH COLUMBIA PROHIBITION ACT

liquor is by Provincial law prohibited. By paragraph 11 of said regulations it is provided that every person who violates any of the provisions of the 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 of not less than three or more than six months, and for the second offence to imprisonment of not less than three months or more than twelve months. Paragraph 13 of the regulations provides 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. The following questions were referred to the Court for its opinion thereon:

Statement

"1. Do paragraphs 5 and 11 of the regulations made and approved the 11th day of March, 1918, under the provisions of The War Measures Act, 1914, being an Act of the Parliament of Canada, 5 Geo. V., Cap. 2, operate to abrogate, annul, or supersede the provisions of section 28 of the British Columbia Prohibition Act, being chapter 49 of the Statutes of 1916 of the Legislature of British Columbia?

"2. Do said regulations or any of them affect, and if so to what extent, the constitutional validity of the said British Columbia Prohibition Act?"

The questions were argued at Victoria on the 25th of June, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

J. W. deB. Farris, K.C., A.-G. (*Johnson, D.-A.-G.*, with him), for the Crown: There are two cases of the sale of liquor that the Provincial law does not cover: (1) Where one, say in Calgary, sells to a person in British Columbia and delivers the liquor, and (2) where the order is taken in Calgary and the liquor, which is within this Province, is delivered to the purchaser. The regulations in question are passed to cover these cases. Clause 5 of the regulations must be read with clause 13, which provides that the regulations must be construed as supplementary to the prohibitory laws of the Province and must be read to apply only to inter-provincial traffic in liquor. *Rex* v. *Thorburn* (1917), 41 O.L.R. 39, does not apply, as in that case the accused was convicted under the Provincial Act when the Dominion Act was in force there, and in conflict. As

to the construction of the statute, see Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., pp. 276 and 283. On the question of the effect of Dominion legislation on Provincial legislation with which it is repugnant, see *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at pp. 366-7; *Regina* v. *Wason* (1890), 17 A.R. 221 at p. 248. This reference was made owing to the judgment of CAYLEY, Co. J. in the case of *Rex* v. *Edwards* (1918), 25 B.C. 492.

Cur. adv. vult.

9th July, 1918.

MACDONALD, C.J.A.: This is a reference by the Lieutenant-Governor in council to the Court pursuant to the provisions of R.S.B.C. 1911, Cap. 45. The following question is submitted: [already set out in statement.]

No question was raised by the Attorney-General as to the validity of the said regulations. The Provincial Act prohibits the sale of intoxicating liquors within the Province. The validity of the Act is not open to question in the absence of occupation of the field by Federal legislation. Paragraph 5 of the said regulations 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."

Paragraph 13 of the same regulations provides:

"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."

MACDONALD, C.J.A.

So far as the regulations deal with the importation and manufacture of intoxicating liquors into and within the Province, they do not enter upon the Provincial field. The Province could in no circumstances either prohibit the importation of intoxicating liquors into the Province, or the manufacture of intoxicating liquors within the Province. Read by itself, said paragraph 5 would bear the construction that the Dominion regulations meant to enter the Provincial field and prohibit sales within the Province which would fall within the operation of the Provincial Act. Read, however, in the light of the object aimed at, as interpreted by said paragraph 13, I am of

COURT OF APPEAL

1918

July 9.

IN RE BRITISH COLUMBIA PROHIBITION ACT

opinion that paragraph 5 should be read otherwise. This does not mean that paragraph 5 is by judicial construction to be in effect deleted from the regulations. It can be applied, and I think was meant to apply only to sales which the Province had no power to prohibit, as, for example, sales made by persons outside the Province of intoxicating liquors owned by one of them within the Province.

In view, therefore, of the clear and explicit declaration contained in said paragraph 13 of the supplementary character of the regulations, I think it is clear that the regulations apply only to cases with respect to which the Province would have no jurisdiction to legislate. *Rex* v. *Thorburn* (1917), 41 O.L.R. 39, is not in point, and in my opinion has no application to the matter before us.

MACDONALD, C.J.A.

The said question should, therefore, be answered in the negative.

There is a second question submitted, but in view of this answer it becomes unnecessary to consider it.

MARTIN, J.A.

MARTIN, J.A.: While section 5 of the regulations (which "have the force of law," section 6 (2) of The War Measures Act, 1914 [Can. Stats. 1915], Cap. 2), taken by itself, would be inconsistent with the British Columbia Prohibition Act, B.C. Stats. 1916, Cap. 49, and therefore the latter would be superseded, yet it has to be read in the light of the preamble and of section 13, which declare that the intention is to "make such [Provincial] legislation more effective," and therefore "these regulations shall be construed as supplementary to the prohibitory laws now in force in any Province or Territory." Of course, if the field of legislation had been wholly occupied by the Provincial legislation, then a conflict of legislation would result and a supersession would be inevitable, despite any declaration of intention to the contrary. But it is obvious that two important classes of cases at least affected by section 5 are not the subject of such Provincial legislation, *viz.*: (1) Sales of intoxicating liquor from other Provinces to be sent here; and (2) sales in other Provinces of said liquor already here. With respect to these, the supplemental effect contemplated and directed by the regulations will attach, and section 5 may

properly be paraphrased briefly to read: "No person shall sell intoxicating liquor in British Columbia in cases not already provided for by the Legislature thereof."

The point is so clear, in my opinion, that to further consider it would only be to labour it. The learned judge below has, I fear, with all due respect, misconceived the effect of the case *Rex* v. *Thorburn* (1917), 41 O.L.R. 39; 13 O.W.N. 173; 39 D.L.R. 300, upon which he relied; when fully considered it is, if anything, an authority which tends to displace his opinion, because here, to apply the reasons of Lord Watson (in the citation quoted therein from *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348; 65 L.J., P.C. 26), these "Provincial prohibitions . . . . could have been enforced . . . . without coming into conflict with the paramount law of Canada."

MARTIN, J.A.

It follows that the first question referred to us should be answered in the negative, which renders it unnecessary to consider the second.

MCPHILLIPS, J.A.: Being in entire agreement with my brother MARTIN, I do not find it necessary to add but a word to what my learned brother has said. I see no constitutional or other difficulty, no conflict of laws of any nature or kind; all is supplementary—no displacement of Provincial legislation has occurred.

MCPHILLIPS, J.A.

EBERTS, J.A. agreed with MACDONALD, C.J.A.

EBERTS, J.A.

Question No. 1 answered in the negative.

MORRISON, J. (At Chambers)

1918

Oct. 15.

BLUE FUNNEL MOTOR LINE v. CITY OF VANCOUVER

BLUE FUNNEL MOTOR LINE, LIMITED, *ET AL.* v. CITY OF VANCOUVER *ET AL.*

Injunction—Police-court proceedings—Infraction of city by-law—Motor-vehicles—Legislation allowing city to prohibit use of—Application to stay pending determination of validity of Act—B.C. Stats. 1918, Cap. 104, Sec. 7.

Before an injunction will be granted to restrain police-court proceedings for infraction of a city by-law until the validity of the legislation upon which it is founded, and the municipal enactment is first finally determined, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiffs are entitled to relief.

Public bodies invested with statutory powers must take care to keep within the limits of the authority committed to them, and in carrying out their powers must act in good faith and reasonably and with some regard to the interest of those who may suffer for the good of the community.

APPLICATION for an injunction, the plaintiffs, having brought action to enjoin the City of Vancouver from taking further proceedings in prosecutions pending against the plaintiffs in the police court for infractions of City By-law No. 1329, until the validity of certain legislation and municipal enactment is first finally determined. The plaintiff Company and jitney drivers in plying their business seriously cut into the earning power of the British Columbia Electric Railway Company. This was considered so serious that the City Council passed a resolution in June, 1917, requesting the Lieutenant-Governor in Council to appoint a commission to investigate the matter of transportation in the City. A commissioner was appointed and after investigation reported that the Electric Railway Company could not maintain an efficient service with this competition. The City then sought and obtained from the Legislature an amendment to the City charter empowering them to pass by-laws prohibiting the operation of certain motor-vehicles, on the streets of the City and by-law No. 1329 was then passed pursuant to the amendment to the charter. The

Statement

grounds for the application were that the action of those interested in bringing about the legislation was such that the legislation and by-law in question were in their inception tainted and lack those fundamental elements of honesty and reasonableness which are requisite to their validity, and that the enactment deals interferingly with "trade and commerce" which is *ultra vires* of the Legislature. Heard by MORRISON, J. at Chambers in Vancouver on the 11th of October, 1918.

Cassidy, K.C., for the application.
Harper, and *E. F. Jones, contra.*

15th October, 1918.

MORRISON, J.: Proceedings by the City of Vancouver in the police court against the plaintiff for an infraction of a by-law of the City, known as No. 1329, are now pending. With a view to intermit this alleged attempt to interrupt it in the pursuit of its livelihood the plaintiff has commenced an action, in which it is sought to enjoin the City from further proceeding with these prosecutions until the validity of certain legislation and municipal enactment is first finally determined. The motion now before me is based upon the diverting contents of what Mr. *Cassidy,* counsel for the plaintiff, playfully calls a proposed statement of claim which, compendiously put, amounts to this, that out of the local urban transportation embroglio of a few years ago, consequent upon the advent of the Blue Funnel Line and other motor-cars, commonly known as "jitneys," plying within the territory covered by the franchise of the defendant, the British Columbia Electric Railway Company, the said British Columbia Electric Railway Company and the Vancouver City Council put their corporate and corporeal heads together and their respective hands in each others pockets, the vinculum thus created eventually developing into a concerto, the other elements thereof being Professor Adam Shortt, the Lieutenant-Governor (by implication) and isolated fluid fragments of the private bills committee of the Legislature, the Bar and the general public, the design being to inveigle the Legislature into so amending the charter of the City that the plaintiff would be prohibited from carrying on its business within the City of Vancouver. That consequently the legislation and by-

Judgment

MORRISON, J. (At Chambers)

1918

Oct. 15.

BLUE FUNNEL MOTOR LINE v. CITY OF VANCOUVER

law in question are in their inception tainted and lack those fundamental elements of honesty and reasonableness which are requisite to their validity. That inasmuch as the enactment aforesaid deals interferingly with the subject of trade and commerce, it is *ultra vires* the Legislature, "trade and commerce" being one of the subjects assigned by the British North America Act to the Dominion Parliament for exclusive treatment. Mr. *Harper* and Mr. *Jones,* counsel for the City, on the other hand, although not being averse to observing that the evidence, such as it is, points to the probability that influences had been brought to bear on the Legislature both for and against the measure, submit that the bill having duly passed the House, having received the Royal assent and been enacted as law, I may not now lift the veil and pry into a consideration of the underlying motives which may have actuated the members of the Legislature and others concerned, provided the subject-matter was one within the competence of that body to pass. Nor may I interfere with the proceedings before the magistrate unless these proceedings are being illegally taken, and it is submitted they are legally taken.

The foregoing paraphrase of the plaintiff's allegations though not so picturesquely strong as the recitation in the proposed statement filed, yet sufficiently and substantially conveys, I hope, a correct idea of that phase of their case upon which an injunction is seriously sought to restrain the proceedings before the magistrate.

Judgment

Shorn of innuendoes and imputations, I take the facts to be briefly these: The defendant Company has for many years operated an urban, suburban and interurban street railway system radiating from the City of Vancouver under an agreement with that Corporation. The plaintiff, the Blue Funnel Motor Line, Limited, was incorporated and commenced operation as an auto-motor transportation concern in 1915. The other plaintiffs are drivers of "jitneys." It appears that the plaintiff Company and the numerous jitneys which plied their business in the streets of Vancouver and vicinity, seriously cut into the earning power of the defendant Company, thus creating a state of affairs which was considered to be of such public con-

cern that the defendant, the City of Vancouver, pursuant to a resolution passed in June, 1917, requested the Lieutenant-Governor in Council to appoint a commissioner to investigate the matter of transportation in Vancouver, particularly that phase of it involving the maintenance economically of the defendant Company against the competition of the system inaugurated by the plaintiffs. Professor Shortt of Ottawa was selected by the Lieutenant-Governor in Council. A full and prolonged hearing was given all the parties concerned, including witnesses and counsel on behalf of what I shall call the plaintiffs' system. The commissioner reported in due course that the defendant Company could not provide and maintain an efficient street-car service against the competition of the other service. The defendant City, therefore, sought and obtained from the Legislature of the Province an amendment to its charter, being chapter 104, section 7, of the statutes of 1918, empowering them to prohibit the operation of certain defined motor-vehicles in the streets of Vancouver, the plaintiffs being admittedly swept within the scope of this enactment, and accordingly the by-law 1329 now impugned was passed pursuant to the amendment. The plaintiffs, however, continued, notwithstanding all this, to run their cars as before in opposition to the defendant Company. The Legislature indicated the procedure which may be taken in case of an infraction of the by-law. This procedure the City has taken, charging an infraction, and it is to restrain the City from commencing and continuing such procedure that the plaintiffs now move the Court for an injunction.

Judgment

Were it not for the very able review of the leading and well-known Privy Council cases adjudicating upon the powers of the Legislature to pass this very kind of legislation, presented by Mr. *Cassidy,* in some of which he himself acted as counsel before that tribunal, I should have very little trouble in coming to a decision.

It is not suggested that at the trial the evidence will materially, if at all, differ from that before me. The principle guiding the Court in a case of this sort is laid down by Cotton, L.J. in *Preston* v. *Luck* (1884), 27 Ch. D. 497 at p. 506:

"It is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiffs are entitled to relief."

MORRISON, J. (At Chambers)

1918

Oct. 15.

BLUE FUNNEL MOTOR LINE v. CITY OF VANCOUVER

As regards the submission that the Legislature was actuated by ulterior motives in passing the amendment in question, I have little hesitation in finding that there is no reasonable probability of anything of the kind being established at the hearing. Even although it might be that the defendant attempted what is charged against it, I should not for that reason be justified in holding that the Legislature had been the vicarious victim of such stupid and immoral tactics. As regards the City, it is true that—

"Public bodies invested with statutory powers must take care to keep within the limits of the authority committed to them, and in carrying out their powers, must act in good faith and reasonably and with some regard to the interest of those who may suffer for the good of the community": Kerr on Injunctions, 5th Ed., 113.

I find that the City has kept within the authority constitutionally delegated to it. That brings me to the charge that they have not acted in good faith and with reasonableness. In *City of Montreal* v. *Beauvais* (1909), 42 S.C.R. 211 at p. 217, Mr. Justice Duff quotes with approval from a judgment of Lord Russell of Killowen in *Kruse* v. *Slattery* (1898), 2 Q.B. 91 at p. 100 as follows:

"'A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the country, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.'"

Judgment

Again I adopt the words of Mr. Justice Eve in *Merrick* v. *Liverpool Corporation* (1910), 2 Ch. 449 at p. 463:

"If the plaintiff had established that the corporation were acting in bad faith or were endeavouring under colour of the exercise of statutory powers to evade a liability which they would otherwise be under, I think a state of things would have been proved sufficient to justify the intervention of the Court."

Here no such state of things has been proved, and in order to have any hope of succeeding in proving such state of things at

MORRISON, J. (At Chambers)

1918

Oct. 15.

BLUE FUNNEL MOTOR LINE v. CITY OF VANCOUVER

Judgment

the trial the plaintiff must strike with success at the *bona fides* of the appointment and conduct of the commissioner. There is nothing in the material before me which can with the slightest degree of reason justify me in assuming that any such contingency may happen.

I have dealt more fully with the substance of the allegations of the plaintiffs than I have done with the purely constitutional questions, because they are novel and the constitutional grounds advanced are old, having been often advanced before and adjudicated upon by the tribunal of last resort for Canadian cases so explicitly and conclusively that counsel's reliance upon them again on material such as is on file herein has at least an amazing display of fortitude to commend it.

The motion is refused with costs.

Motion refused.

GOLD v. SOUTH VANCOUVER.

MORRISON, J. (At Chambers)

1918

Oct. 19.

GOLD v. SOUTH VANCOUVER

Arbitration—Property damaged through street grading—Compensation—Municipality refuses to appoint arbitrator—Application to appoint under section 8 of Arbitration Act—Jurisdiction—R.S.B.C. 1911, Cap. 11, Sec. 8—B.C. Stats. 1906, Cap. 32, Sec. 251; 1914, Cap. 52, Sec. 358.

A motion to appoint an arbitrator under section 8 of the Arbitration Act upon the refusal of a municipality to appoint an arbitrator upon a claim made for damages alleged to have arisen through the re-grading of a street will be refused for want of jurisdiction since the coming into force of section 358 of the Municipal Act, B.C. Stats. 1914, Cap. 52.

In re Jackson and North Vancouver (1914), 19 B.C. 147 distinguished.

MOTION to appoint an arbitrator under section 8 of the Arbitration Act, heard by MORRISON, J. at Chambers in Vancouver on the 1st of October, 1918.

Statement

C. W. Craig, for the motion.

D. Donaghy, contra.

MORRISON, J. (At Chambers)

1918

Oct. 19.

GOLD v. SOUTH VANCOUVER

19th October, 1918.

MORRISON, J.: This is a motion to appoint an arbitrator under section 8 of the Arbitration Act, on the refusal of the Municipality to appoint its arbitrator upon claim being made upon it for damages alleged to have arisen from the regrading of Main Street. Mr. *Craig,* in support, relies on the case of *In re Jackson and North Vancouver* (1914), 19 B.C. 147 at p. 154, decided under section 251 of the Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, which provided for the case of a party injuriously affected who should refuse to appoint an arbitrator. It did not make any provision for the case where the Municipality refused. Under that section, if the Municipality refused to appoint an arbitrator, then, the claimant could invoke section 8 of the Arbitration Act, as has been done here. But section 251 was amended since by section 358, Cap. 52 of 1914, which provides that in case either party (which includes in this case the Municipality) shall refuse to appoint one, then it shall be the duty of any judge of the Supreme Court, on application by summons in Chambers, by either party, to nominate and appoint three different arbitrators. So that *In re Jackson and North Vancouver, supra,* ceases to be a guide in the circumstances of this motion.

Judgment

Part XV. of the Municipal Act (B.C. Stats. 1914, Cap. 52) is a code of procedure to be invoked when the question of compensation for expropriated property arises, and its provisions must be followed with that particularity of which the exigencies of the case admit. I have, therefore, no jurisdiction to grant this application.

Motion refused.

SHELLY BROS. LIMITED v. CALLOPY *ET AL.*

MACDONALD, J. (At Chambers)

1918

Oct. 21.

SHELLY v. CALLOPY

Practice — Costs —Taxation — Party and party — Increased counsel fee— Order LXV., r. 27, Subsec. (29)—Registrar's powers.

On a taxation as between party and party there is no discretion in the registrar under Order LXV., r. 27, Subsec. (29) of the Supreme Court Rules to allow an increased counsel fee above the tariff without a *fiat* of a judge to that effect.

APPLICATION for review of taxation of a bill of costs, heard by MACDONALD, J. at Chambers in Vancouver on the 19th of October, 1918.

Statement

Cassidy, K.C., for the application.
E. A. Lucas, contra.

21st October, 1918.

MACDONALD, J.: Plaintiffs, being dissatisfied with the amount allowed by the district registrar for counsel fees to Mr. *Bird,* as junior counsel, and for witness fees of their accountant, apply for a review of the taxation of their bill of costs.

As to counsel fees, the amount taxed was the limit allowed by the tariff as fixed by Appendix "M" to the Supreme Court Rules, but it is contended, that under Order LXV., r. 27, Subsec. (29), the registrar has power, and should, under the circumstances, have exercised a discretion thereunder, so as to increase the fees to such counsel. It is submitted, that when such a discretion exists, it should be exercised. Unless I am perfectly satisfied as to the correctness of such contention, I should hesitate to come to a conclusion which would be opposed to the well-established practice, that the registrar can only allow increased counsel fees beyond the tariff, if a *fiat* of a judge be granted to that effect. Notwithstanding such practice then, does subsection 29 apply? Has the registrar discretion which, in this particular instance, he is bound to exercise so as to allow an increased counsel fee, beyond the tariff, to Mr. *Bird.* It is appropos, to cite the judgment of Boyd, C. in *McGannon* v. *Clarke* (1883), 9 Pr. 555, in which he refers to the basis of the tariff, and its control over costs between party and party, as follows:

Judgment

MACDONALD, J. (At Chambers)

1918

Oct. 21.

SHELLY v. CALLOPY

"Tariffs of costs are framed on the principle laid down by Malins, V.C., in *Smith* v. *Buller* [(1875)], L.R. 19 Eq. 473, 'the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse plaintiff to conduct the litigation, and no more. Any charges for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them.'"

Under the Supreme Court Rules of 1890, marginal rule 800, the position was quite clear, and all that could be taxed, between party and party or solicitor and client, in an action in the Supreme Court, were the fees, costs and charges according to the schedule, Appendix M, to such rules; "and no other fees, costs or charges shall be allowed. . . . ." Then, by the rules now in force, the provision, in this respect, differed, and is as follows (Order LXV., r. 8):

"In all causes and matters the fees allowed shall be those set forth in Appendix M; and no higher fees shall be allowed in any case, except such as are by these Rules provided for."

Subsection (29) of rule 27 was also introduced by these rules, and provided that:

"On every taxation the taxing officer shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing officer to have been incurred or increased through overcaution, negligence, or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

Mr. *Bird,* in an affidavit filed in support of this application, states that,—

Judgment

"in view of the fact that the judges of this Court are adopting the principle of refusing to act under their powers contained in item 230 of Appendix M to award higher fees than those mentioned in said Appendix M, it is left to the officers of the Court, upon taxation, to act under said subsection (29) of said rule 27 and allow fees such as shall appear to them to be necessary for the attainment of justice."

No authorities are cited, to support the position thus strongly taken under oath, that such subsection applies to the allowance, as between party and party, of increased counsel fees. It developed at the trial of the action, while Mr. *Bird* was giving evidence, that he is one of the directors of the plaintiff Company, and it would seem unlikely that the Company, in order to attain full justice, should require to pay such counsel, additional fees beyond the tariff, nor does he so state. I do not think the material shews, that the subsection should be applied.

It is not a case of disbursements, incurred by a client in order to assist his cause, but an assertion of the duty of the registrar to tax his counsel, as against the opposite party, fees beyond the tariff; nor is it similar in its facts to those disclosed in *Peel* v. *London Northwestern Railway Company* (*No. 2*) (1907), 1 Ch. 607 where, upon a review of the taxation, it was decided that it was the duty of the Court, in that event, to determine, whether the master's decision, refusing to tax fees to three counsel, was right. In other words, he possessed, and must properly exercise, a discretion under such subsection. In that case the facts which were necessary, in order to cause this discretion to exist, were fully discussed. It was pointed out that the onus rested upon the person claiming, that three counsel ought to be allowed, and that it was not a usual expense, which ought to be paid by one of the adverse parties in a hostile litigation. Here, it is not a case of allowing counsel fees to more than two counsel, which has been met by a distinct provision, in item 228 of our tariff, preventing it: but of a junior counsel seeking to have an increased fee paid to him. There is no proof, that in order to attain justice, or otherwise, the plaintiffs paid such counsel any increased fee beyond the tariff. Even if they had done so, would it not be in direct opposition to the principle to allow such increased fees on a taxation? See on this point, *In re Parson, Parson* v. *Parson* (1901), 2 Ch. 176, where a party was not allowed a special fee of 50 guineas, stated to have been paid to a leading counsel. Joyce, J., at the conclusion of his judgment, said:

Judgment

"It is enough for me to say that, even if such a special fee could ever be allowed—and as at present advised I think it could not—there were not, in my opinion, any special circumstances sufficient to warrant the allowance in the present case."

In *Giles* v. *Randall* (1915), 1 K.B. 290 at p. 296, Buckley, L.J. deals with subsection 29 as follows:

"The earlier part of the new sub-rule says that the taxing master shall allow a certain class of costs. The latter part says that, except in one particular case, certain costs which were formerly to be disallowed are still to be disallowed. The excepted case is that of taxation of costs as between a solicitor and his own client. This part of the sub-rule in effect provides that as between solicitor and own client those costs may be allowed, but that in all other cases they shall not."

I do not think that the plaintiffs have brought themselves

MACDONALD, J. (At Chambers)

1918

Oct. 21.

SHELLY v. CALLOPY

within either portion of the subsection. The registrar was right, under such circumstances, in not allowing, without a *fiat,* an increased counsel fee to the junior counsel.

Then, as to the reduction of the fees paid by the plaintiffs to the accountants: The bill, as rendered by the firm of Helliwell, Maclachlan & Co., was admitted by defendants to cover work actually performed for the time mentioned, but objection was taken before the registrar, which prevailed, that the form of the bill shewed that the services in dispute, and now sought to be allowed, did not come within the provisions of the tariff. It was contended that the statements contained in the bill should be accepted, and they prevented such portion of the services rendered being taxed, as between party and party. Further, that such charges did not come within the provisions of subsection (36) of rule 27, Order LXV. There was no allegation before the registrar that they were either necessary or proper, for the attainment of justice. I have, then, to consider, whether such charges come within the general provisions, as to scale of fees allowed to witnesses, found in Appendix M, after item 19. The first of these, that is suggested, as applicable, is an allowance of "expenses for maps, plans or other matters, not referred to herein, if necessary and allowed by the Court or judge at the trial or afterwards." I do not, however, consider this provision applicable, as the charges do not come within its purview. Then follows a provision allowing—

Judgment

"in cases where professional or scientific witnesses are called or subpœnæd a reasonable sum for the time employed and expenses (if any) incurred by the witness in preparing matter to give the testimony expected from him."

I think that an accountant would be a scientific witness, but part of the bill, as rendered, only is applicable to the charges of this nature thus allowed. As to the quantum, for the services rendered, I do not feel disposed to interfere with the decision of the registrar, so his taxation, in this respect, is not varied.

As the plaintiffs have failed upon the application, the defendants should be allowed the costs thereof, fixed at $10, and to be set off against the costs already taxed against them.

Application dismissed.

IN RE ACADIA LIMITED.

MORRISON, J. (At Chambers)

1918

Oct. 31.

IN RE ACADIA, LIMITED

Company law—Winding-up—Contributories—Shareholder neglected to pay calls—Shares forfeited by company—Liability as contributor—R.S.C. 1906, Cap. 144, Secs. 51 and 52—R.S.B.C. 1911, Cap. 39, Table A, Sec. 28—B.C. Stats. 1912, Cap. 3, Sec. 28.

Where, under the Dominion Winding-up Act, the power of forfeiture is properly and legally exercised, the person whose shares are so forfeited ceases to be a member or shareholder of the Company and is not liable to be put on the list of contributories.

In re D. Wade Co. Ltd. (1909), 2 Alta. L.R. 117 followed.

APPLICATION to set aside the certificate of the registrar striking off the name of one Bradshaw, a shareholder in the above-named Company, from the list of contributories. Heard by MORRISON, J. at Chambers in Vancouver on the 23rd of October, 1918. Statement

Mayers, and *Baird,* for the liquidator.
J. A. MacInnes, for the contributory.
W. C. Brown, for the creditors.

31st October, 1918.

MORRISON, J.: Acadia Limited is a Company incorporated under the British Columbia Companies Act, and with some slight alterations, immaterial in consideration of the present question, adopted as its articles Table A as appended to the Companies Act.

In March, 1913, Bradshaw, the alleged contributory, became a member of the Company in respect of two shares. There is unpaid on account of his stock $150. In June, September and October, 1914, and in February and May, 1915, calls were made upon the alleged contributory of $16 each, a total of $80. None of these calls were paid. Due notice of intention to forfeit under the articles was given, and on July 5th, 1915, a formal resolution forfeiting the shares was passed under clause 28 of the articles (Table A), and notice of that forfeiture sent to the contributory. The contributory thereupon ceased to be a member from and after the 5th of July, 1915, and was not a member Judgment

MORRISON, J. (At Chambers)

1918

Oct. 31.

IN RE ACADIA LIMITED

at the commencement of the winding-up. The regularity of the forfeiture herein is not contested by the liquidator. The liquidator, in his application, asks "that the said C. W. Bradshaw be placed on the list of contributories of the above Company for the amount of $150, said sum being the unpaid balance in respect of two shares in the said Company purchased by the said Bradshaw." No question arises in these proceedings as to the remedy respecting any liability attaching to the alleged contributory by reason of calls made prior to forfeiture.

This is an application to set aside the certificate of Mr. Pottenger, the registrar, who struck off the name of Bradshaw. The Company is being wound up under the Dominion Winding-up Act, R.S.C. 1906, Cap. 144, on the ground of insolvency, and the sections involved herein are sections 51 and 52, which are as follow:

"51. Every shareholder or member of the company or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company, or otherwise.

"2. The amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act.

"52. If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the company or its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the company for the purposes of this Act, and shall be liable to contribute, as aforesaid, to the extent of his liabilities to the company or its members or creditors, independently of this Act.

"2. The amount which he is so liable to contribute shall be deemed an asset and a debt as aforesaid."

Judgment

These sections do not deal with what in the local Act and the English Acts are called "past members." There is no liability attached to a person to be placed on the list of contributories unless the incorporating Act so enacts: The Companies Act, R.S.B.C. 1911, Cap. 39, Part VIII., Table A, article 28, provides that:

"A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receives payment in full of the nominal amount of the shares."

The liability other than what may appear from the above paragraph, imposed on "past members" was swept away by subsection 3 of section 181 of the amending Act of 1912, by which the provisions of Part VIII., *supra,* dealing with "past members," are expressly excluded in the case of a winding-up under the Dominion Act.

Sedgewick, J. in *Common* v. *McArthur* (1898), 29 S.C.R. 239 at p. 246, in delivering the judgment of the Court, did not absolve the shareholder whose shares had been forfeited, because the power of forfeiture had been exercised in the interests of the shareholder and not of the Company. The Court appears to have been guided by the *ratio decidendi* of the speech of Lord Cranworth in *Spackman* v. *Evans* (1868), L.R. 3 H.L. 171 at p. 186, that where there is a power of forfeiture of shares the holders of which refuse or neglect to pay their calls, it is a power intended to be exercised only when the circumstances of the shareholder may make its exercise expedient for the interests of the Company, not a power to be exercised for the interests or supposed interest of the shareholder. I take these cases to be authority for the submission that where, as in this case, under the Dominion Winding-up Act, the power of forfeiture is properly and legally exercised, the person whose shares are so forfeited ceases to be a member or shareholder of the Company, and is not liable to be put on the list of contributories. *In re Wade Co. Ltd.* (1909), 2 Alta. L.R. 117. I, therefore, agree with the registrar, Mr. Pottenger, who has had much experience in matters of this sort.

Judgment

Application refused.

MACDONALD, J.

1918

Dec. 2.

IBBOTSON v. BERKLEY.

Malicious prosecution—Reasonable and probable cause—Malice—Acting on solicitor's advice—Prosecution to establish civil rights.

IBBOTSON v. BERKLEY

In an action for malicious prosecution if the defendant raises the defence that he consulted a solicitor before instituting criminal proceedings it must be shewn that he took reasonable care to inform himself of the true state of the case.

To improperly utilize the criminal procedure to establish a civil right constitutes malice in an action for malicious prosecution.

Statement

ACTION for malicious prosecution, tried by MACDONALD, J. at Vancouver on the 5th of November, 1918. The facts are set out in the reasons for judgment.

O'Neill, for plaintiff.

Yarwood, for defendant.

2nd December, 1918.

MACDONALD, J.: Defendant caused the plaintiff to be arrested on a charge of stealing his cow. After commitment for trial by the stipendiary magistrate at Cumberland, B.C., the plaintiff was subsequently tried and acquitted by the County Court judge. Defendant, in this action for malicious prosecution, justifies the arrest, and contends that, the evidence does not shew that he acted maliciously and without reasonable and probable cause.

Judgment

"The Courts of Law do not lay down a rule defining what will constitute reasonable and probable cause, but say that the judge must consider what will do so in each case":

see the Lord Chancellor in *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521 at p. 526.

I am assisted, to an extent, by the oft-accepted definitions of Chief Justice Tindal in *Broad* v. *Ham* (1839), 5 Bing. (N.C.) 722 at p. 725, as follows:

"In order to justify a defendant, there must be a reasonable cause,—such as would operate on the mind of a discreet man: there must also be a probable cause,—such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him."

The onus rests upon the plaintiff of shewing, that the defendant's actions were such as to impose liability upon him. The circumstances, which occurred prior to the arrest, and which alone should be considered, in dealing with the reasonableness or otherwise of initiating the prosecution, are shortly as follows: Plaintiff, according to his evidence, purchased a dark Jersey heifer from William Wain. He afterwards branded her. She was at large in the fall of 1916 and, not being found, was advertised, with full description, as being "lost" in January of the following year. Then in the spring, she was recovered, and subsequently, in August, 1917, was claimed by the defendant as his property. He brought a previous owner to identify her, but the plaintiff asserted his ownership, and stated that he had purchased the animal from Wain, who was a farmer residing in the locality. A conflict thus arose between these two farmers, as to the ownership, and right to possession, of the heifer. There was another mark on the animal which defendant concluded was his brand. Both parties, at the time, were firmly and, I may assume, honestly contending that they were right in their claim. Defendant was strengthened, in his attitude, by other parties agreeing with him on the question of identification. The plaintiff was not only asserting ownership by his possession, but by his branding. He informed the defendant, where he could obtain corroboration of the statement, that he had purchased such heifer in the ordinary course of farming, to form part of the stock. There was no danger that the plaintiff would disappear and not adhere to his position, nor was there much probability of the animal being secreted or done away with, after the claim had been made by the defendant. It was apparently a question of ownership, depending upon identification. Did the defendant, as a discreet person, then, pursue the proper course? One would have expected him to have at once inquired from Wain, as to whether he had sold the plaintiff a heifer, answering the description of the one in dispute and whether he (Wain) could identify her. He did not do so, but went to Cumberland and there met Mr. Harrison, solicitor, and outlined the situation. Mr. Harrison was not called at the trial, it being stated that he was too ill to

Judgment

MACDONALD, J.
1918
Dec. 2.
IBBOTSON v. BERKLEY

attend. The defendant swore, that he made a full and frank statement of all the facts to his solicitor and he was advised that the plaintiff was guilty of theft and should be arrested. He was very positive that he told Mr. Harrison, that the plaintiff had mentioned Wain, as the party from whom the plaintiff had purchased the heifer in question, but no suggestion even was made, as to the advisability of interviewing Wain. It was then decided, to put the criminal law in motion. This task was easily accomplished. Mr. Macdonald, the local Provincial constable, was present, during the time when the defendant was advising with his solicitor. This seemed rather unusual, unless it had been previously decided that his services should be invoked. Defendant, however, intimated that the constable simply happened to be in Harrison's office at the time and that he had no dealings with him, and did not know him, until he was in the office. If the defendant were simply seeking advice, as to his rights and course of action, it is peculiar, to say the least, that it should have been done in such a public way in the presence of a stranger. There is no evidence to shew, that all the facts were not disclosed by the defendant to his solicitor, and that he did not act on the advice given. Ordinarily speaking, the soundness of such advice would not be weighed, and where followed, it would be a good defence and complete answer to any allegation, that the defendant had acted, without reasonable or probable cause. The question to be considered is, whether, through the neglect of the defendant, in the first instance, and subsequently of his solicitor, to make inquiry from Wain, such defence is destroyed. The defendant is charged with knowledge of such facts as he would have learned, if he had interviewed Wain in the matter. I think this would have been a proper investigation for one farmer to make, before he went the length of causing the arrest of another. Is defendant, however, protected by having taken legal advice in the matter? In so doing, he was bound to act in good faith, and unless he did so he would not be protected, on the ground that he had acted upon such advice. In the first place, if defendant had not sought the assistance of a solicitor, he would, in my opinion, have acted unreasonably and without

Judgment

probable cause in taking criminal proceedings. I might, in passing, remark, that an "opinion," in this respect, depends entirely

> "on the view which the judge may happen to take of the circumstances of each particular case. And upon a careful consideration of the decisions, it seems impossible to deduce any fixed and definite principle to guide and assist the judge in any case that may come before him":

see Lord Colonsay in *Lister* v. *Perryman, supra,* at p. 540, approving and quoting Kelly, C.B. to this effect in the same case in the Exchequer Court.

Street, J., in *Hamilton* v. *Cousineau* (1892), 19 A.R. 203 at p. 210, considered that a jury was entitled and should be asked to express its opinion, whether the defendant, in an action for malicious prosecution, had taken reasonable care to inform himself of the facts before taking proceedings, only, when "the plaintiff has made out a case of *prima-facie* negligence on the part of the defendant of some inquiry which should have been made . . . and which, if made or taken, would have shewn that the information could not properly be laid." This portion of the judgment was approved of, by Burton, J. in the Court of Appeal. I think there was neglect, in the first place, by the defendant, in not making inquiries from Wain, and this neglect was repeated by his solicitor when the course to be pursued was decided upon.

Judgment

Then again, Mr. Stephens, in his book on Malicious Prosecution, in discussing *Abrath* v. *North Eastern Railway Co.* (1883), 11 Q.B.D. 79, 440; (1886), 11 App. Cas. 247, says, that he puts no other construction upon the whole of the judgments in this leading case than that, every judge, who tried an action for malicious prosecution, should put to the jury two questions, the first being: "Did the defendant take reasonable care to inform himself of the true state of the case?" If I adopt such a course, and ask myself this question, then, I feel bound, as previously mentioned, to answer it in the negative. Defendant did not avail himself of all the information obtainable and thus, if such information were important, or would have been of any moment, as to instituting or not instituting the proceedings, there was a want of reasonable and probable cause on his part. The same result follows the neglect of his

MACDONALD, J.
1918
Dec. 2.
IBBOTSON v. BERKLEY

solicitor in this connection. On this point, the only further consideration necessary is, as to whether, if such information had been obtained from Wain, defendant would have been, in all likelihood, deterred from commencing a prosecution for theft. I think, viewing the circumstances of the parties, that it would, or should, have had this effect. It is true, that even after evidence was given by Wain, before the magistrate, it does not appear to have influenced the defendant in his actions, so as to endeavour to withdraw the prosecution. This, however, may be accounted for by the fact, that the matter was out of his control, after it came before the magistrate for investigation. The result of the answer to this question, devised by Mr. Justice Cave in the *Abrath* case, is that I feel justified in holding, that want of reasonable cause on the part of the defendant has been proved.

The other query, upon which it is necessary for a plaintiff to obtain a favourable reply, in an action for malicious prosecution, is, in the words of Mr. Justice Burton in *Hamilton* v. *Cousineau, supra,* "were the proceedings initiated in a malicious spirit?" While juries are at liberty to infer the existence of malice, from the absence of reasonable cause, still, in view of the statement of the defendant, that he acted in good faith, in causing the arrest, I deem it advisable to consider, whether he was actuated by an indirect or ulterior motive. I might, in passing, refer to the fact that Mr. Stephens, in his book, at p. 39, is of the opinion, that the whole of the distinction, between malice and want of reasonable cause, is obsolete, and argues that the supposed necessity for proving malice has, since the decision of the *Abrath* case, disappeared. I prefer, however, to deal with the question of malice. The nonsuit granted by Lord Ellenborough in *Snow* v. *Allen* (1816), 1 Stark. 502, where the defendant was excused by reason of advice being given by his attorney, would apply here, were it not for the lack of counsel obtaining, and considering available information, prior to the institution of proceedings. Defendant did not immediately after his visit to the plaintiff's farm, and dispute as to ownership, immediately consult a solicitor. In answer to an inquiry by his counsel, at the trial, as to whether he went

Judgment

to see his solicitor to find out how he could get the animal, he replied, that he went to get advice and see what he could do. He afterwards emphasized this statement by admitting he went to get his cow back. I have come to the conclusion, that the defendant, in the consultation with the solicitor, and in the actions which were taken, resulting in arrest, was not concerned in the matter from a public standpoint. When the plaintiff was arrested, the cow was placed in the custody of a neighbour, to await the result of the criminal proceedings. Then after acquittal, the defendant was afforded an opportunity of proving ownership of the animal, but has refrained from taking civil proceedings. I think, although the defendant now states, that he believed at the time, in the guilt of the plaintiff, that he would not or should not have believed this, if he had made proper inquiries. Further, that the proceedings jointly taken by the defendant and his solicitor, with the constable close at hand, were for the purpose, not of vindicating a crime, but in order to obtain possession of an animal, then in dispute between the parties. He was thus improperly utilizing the criminal procedure to establish a civil right. This constitutes the malice, which, coupled with the want of reasonable cause, supports the plaintiff's right of action.

Judgment

No evidence was given, as to special damage alleged in the statement of claim. I think a proper amount to allow for damages would be $300. Judgment accordingly, with costs.

Judgment for plaintiff.

MACDONALD, J.

1918

Oct. 29.

CITY OF VANCOUVER v. B.C. ELECTRIC RY. CO.

CITY OF VANCOUVER v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Injunction — Street railway — Agreement between city and railway to increase fare—By-law to sanction same passed—Refusal of mayor to sign by-law—Effect of—B.C. Stats. 1896, Cap. 55, Sec. 39; 1900, Cap. 54, Sec. 125 (15); 1912, Cap. 59, Sec. 5.

During a strike of the Street Railway Company's employees the City of Vancouver and the Railway Company entered into an agreement whereby the City agreed to pass a by-law allowing the Company to charge a six-cent fare on its street-car service. The City Council then passed the by-law and all the formalities surrounding the same were duly complied with, with the exception of the mayor's signature to the by-law. The Company then settled the strike and commenced operating, charging a six-cent fare. Six weeks later the Council at a meeting purported to amend the by-law by providing that before its passage it should receive the assent of the electors. The by-law was submitted to the electors and on its being defeated no further action was taken by the Council. In an action by the City to restrain the Company from charging a six-cent fare:—

Held, that upon the by-law duly passed to confirm the agreement, being acted upon in good faith by a party to the agreement, the Council could not of its own motion nullify its deliberative act a month after its passage, and the action should be dismissed.

Held, further, that the mayor has no discretion but owes a public duty which should be performed by his signing both the by-law and the agreement, thereby rendering them fully effective.

The City Council has power under section 39 of the Consolidated Railway Company's Act, 1896, to enter into an agreement with the Street Railway increasing the amount of fares to be paid by passengers and may pass a by-law authorizing the same without submitting the by-law to the electors. The power of the Council under section 39 to make or vary an agreement as to fares is not affected by subsection (15) of section 125 of the Vancouver Incorporation Act, 1900, as amended by B.C. Stats. 1912, Cap. 59, Sec. 5.

Statement

ACTION to restrain the British Columbia Electric Railway Company, Limited, from charging a six-cent fare on its lines in the city of Vancouver. The defendant Company operated under the Consolidated Railway Company's Act, 1896, under section 39 of which the council of any municipality and the Company were authorized, subject to the provisions of the Act,

to make and enter into any agreement or covenant relating to the "amount of fares to be paid by passengers," and other matters. On the 14th of October, 1901, an agreement was entered into between the City of Vancouver and the Company providing for terms and conditions of future operations. A strike of the Railway Company's employees for increase in pay took place on the 1st of July, 1918. An agreement was then entered into between the City and the Company that the City would pass a by-law allowing the Company to charge a six-cent fare. The by-law was passed at a meeting of the council on the 8th of July, but the mayor, thinking the Company should be compelled to agree to a reduction in the lighting rates, refused to sign the by-law. On the passing of the by-law the Company made a settlement with its employees on the 11th of July, and started operating its cars, charging a six-cent fare. On the 24th of August the matter again came up before the council, and the mayor stated the by-law was illegal as it had not been submitted to the electors. An effort was then made to repeal the by-law of the 8th of July, but finding this could not be done, owing to lack of notice, a special meeting was called for the 27th of August, when the by-law of the 8th of July was amended by a provision that it should receive the assent of the electors. The by-law was then submitted to the electors and was defeated. No further action was taken by the council. Tried by MACDONALD, J. at Vancouver on the 21st of October, 1918.

Statement

McCrossan, and *E. F. Jones,* for plaintiff.
McPhillips, K.C., and *H. M. Smith,* for defendant.

29th October, 1918.

MACDONALD, J.: Defendant Company, as successor in title to the Consolidated Railway and Light Company, possesses all the rights, powers and privileges granted to such Company by the Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55. By section 33 of this Act, the Company was authorized to construct, maintain, complete and operate a street railway "upon and along such streets within the Cities of Vancouver and New Westminster as the Mayor and Council of the said cities respectively may direct, and under and subject to any by-laws of the Corporation of the said cities made in that

Judgment

MACDONALD, J.
1918
Oct. 29.

CITY OF VANCOUVER v. B.C. ELECTRIC RY. CO.

behalf . . . . . and to take, transport, and carry passengers upon the same," with this reservation, "that steam locomotives or motors shall not be used for such purpose upon the streets or roads of any municipality without the consent of such municipality." Section 41 of the Act gave the Company the right to use the streets of a municipality, provided that the consent of the council for that purpose was first obtained, and the municipality was authorized to grant such permission upon such conditions as to construction and for such period, as might be agreed upon between the Company and such council.

Section 39 authorized the council of any municipality and the Company, subject to the provisions of the Act, to make and enter into any agreement or covenant relating to the "amount of fares to be paid by passengers," and other matters, such as the paving of roads and streets, location of the railway, speed of the cars and period of, commencement, of the construction and of the completion of the railway. The Company constructed and operated lines within the city limits and made with the City, from time to time, various agreements, prior to the passage of the Vancouver Incorporation Act, 1900, Cap. 54. Its operations were, by this Act, recognized and its rights and liabilities dealt with. Subsequently, on the 14th of October, 1901, an agreement was entered into between the City and the Company, consolidating the previous agreements, and providing terms and conditions for the future operations of the Company. This was apparently done, in accordance with the authorization contained in said section 39, coupled with specific provisoes contained in the Vancouver Incorporation Act. This agreement was not submitted to the electors of the City for approval, but was authorized by a by-law of even date therewith. It stipulated, *inter alia,* that the Company should have the right to collect a fare not to exceed five cents from every passenger. There was no attempt, on the part of the Company, to increase its fares beyond this rate, until the 11th of July, 1918, when it asserted the right to charge a six-cent fare. It has, since that time, continued to collect this amount, contending that the agreement of the 14th of October, 1901, was altered on the 8th of July, 1918, so as to provide for such an increase. The City

Judgment

contends that there has not been such a change in the original agreement, and that the alleged by-law and agreement, dealing with the matter, are ineffective for that purpose, as they are not signed by the mayor. Further, that even if the by-law, giving the authorization for execution of the agreement for amendment, had been signed by the mayor, it would have been invalid, as it did not receive the assent of the electors in accordance with the provisions of section 103 of the Vancouver Incorporation Act, 1900, as amended.

The onus rests upon the Company of shewing that the change in fares was properly agreed upon, between the parties. The important question, then, first to be considered is, whether such by-law should, before its final passage, have been submitted to a vote of the electors? It is admitted that the council meeting, at which it purported to be finally passed, was regularly held and properly constituted. Also that all necessary formalities surrounding its passage were complied with. Subsequently, the city clerk affixed the corporate seal, as well as his own signature, so that all that remained to render the document complete, and on its face a valid by-law, was the signature of the mayor. It was the duty of the mayor, under section 226 of the Vancouver Incorporation Act, as head of the council, to sign such by-law, and speedy compliance with this statutory provision is required by paragraph 59 of the Procedure By-law of the City as follows:

"Every by-law, which has passed the Council, shall immediately be signed by the presiding officer and the city clerk and sealed with the seal of the Corporation and shall be deposited by the city clerk for security in the City safe."

Judgment

There is no power of veto vested in the mayor, nor can he, as it were, reconsider a by-law, once it has passed the council. So while the delivery of the agreement might have been, for a time, delayed, until the Company had executed and delivered the duplicate of such agreement, still, the by-law should, in ordinary course, have been immediately signed and sealed. The mayor had openly expressed his dissatisfaction at the length of period, during which the six-cent fare would be chargeable, and was thus, to this extent, opposed to the agreement authorized by the by-law. It is not suggested that this attitude was his reason for failing to sign, but that it arose through his belief that the

MACDONALD, J.
1918
Oct. 29.

CITY OF VANCOUVER v. B.C. ELECTRIC RY. CO.

Judgment

by-law was invalid, so he came to the conclusion not to further an illegal act, and expressed his intentions to the Company between the 25th and 30th of July, not to sign the by-law nor agreement. It is not clear when the mayor thus definitely decided to take this course. If he came to a determination to so act, before the 12th of August, 1918, and to withhold his signature, on the ground of illegality, he did not apparently communicate this to the council, as the minutes of council, of that date, give a different reason for the failure to sign. In the meantime, a strike amongst the street railway employees, which had occasioned negotiations by the mayor with the contending parties, and a hurried meeting of the city council to pass the by-law, and amending agreement, had been settled, and the increased fare now complained of was being charged by the Company to its passengers. It is submitted that, while it might have been the duty of the mayor to have signed the by-law and agreement, as a ministerial act, still, he should not now be called upon to do so, in view of the fact that a vote of the electors subsequently took place, which resulted in an adverse decision as to the by-law. I do not think that this fact would affect the legal position of the Company in the slightest, if the by-law were properly passed at the council meeting on the 8th of July, 1918. In other words, if such by-law became then effectual, so as to support the amending agreement, and induced the Company to incur a liability, the council could not subsequently reconsider, or virtually repeal, such by-law through the assistance of an adverse vote of the electors. On the other hand, if the by-law required the assent of the electors, before being finally passed, then, the mayor would not be required, by order of the Court, to sign, and thus supplement an illegal action of the council. If such course were now taken, it would be placing the stamp of approval upon an invalid by-law. I return, then, to discuss the question, whether the by-law required to be submitted to the electors for their approval. The Company contends that there has been no change in the legal position of the parties since the agreement of October, 1901, when the council acted, without referring the matter to a vote of the electors. It supports its position by

citing the decision of the Privy Council in *British Columbia Electric Railway Company, Limited* v. *Stewart* (1913), A.C. 816, and, at p. 824, reference is made to the wide powers, privileges and franchises possessed by the Company under its Act, and that it is only limited and restricted in their use and exercise, in three different directions:

"First, by the provision requiring the consent of the corporation to be given to the exercise of the company's powers; secondly, by the provision giving to the corporation the right to specify the streets and highways along which the rails shall be laid; and thirdly, by the provision that the corporation may dictate the manner in which and the terms upon which the railway shall be constructed and operated. These powers of the corporation are, however, of a restrictive, not of a donative, character. They do not enable the corporation to give, grant, or confer any right, power or privilege whatsoever upon the company. Their only function is to circumscribe, or impose conditions upon, the exercise by the company of the rights, powers, and privileges already conferred upon it by the Legislature."

Stress was laid upon this portion of the judgment, as greatly assisting the Company in its position, but I think it can only enure to its benefit, as shewing the source from which the power to use the streets emanates. The Legislature gives such right, but the municipality may place restrictions and conditions upon the user. The condition in the agreement, as to fares, is of a restrictive nature. When the Company received, practically exclusive control of a portion of the streets, ordinarily intended for the general use of the citizens, it was deemed proper and reasonable to restrict the fare which it should charge its passengers. While the City could not impose unreasonable conditions, so as to prevent the Company exercising its statutory rights, still, it had power to "circumscribe or impose conditions" upon the Company. Could such condition, or restriction, upon its charges for transportation, thus agreed upon in 1901, be favourably altered by the council in July, 1918, without referring the question to the electors? It is contended, by the City, that in 1912, by an amendment to subsection (15), section 125, of the Vancouver Incorporation Act, 1900, the change would require such assent to be obtained. This involves consideration of the section as it existed before the amendment, as well as the terms of the amendment itself. The section, before amendment, reads as follows:

Judgment

"For authorizing any gas, water, telephone, electric light, district messenger, power, heating, tramway, street railway company, to lay down

MACDONALD, J.

1918

Oct. 29.

CITY OF VANCOUVER v. B.C. ELECTRIC RY. CO.

pipes, erect poles, string wires under or over the public streets, lanes or squares, and to operate the business connected therewith for a period of years, subject to such regulations and such terms of payment for the privilege as the Council see fit: Provided that no gas, water, telephone, electric light, district messenger, power, heating, tramway, street railway company shall have any powers or right to lay down pipes, erect poles, string wires or in any way interfere with the streets, lanes and squares of the City, or operate any business in the City connected therewith, unless a by-law has been passed under the provisions hereof granting permission to do so and containing the terms and regulations under which the same may be done and terms of payment to the City therefor."

Then, in 1912, the following further proviso was added:

"Provided further that no by-law shall hereafter be finally passed granting or bestowing any right, privilege, franchise, or permission for any of the purposes in this subsection set forth, or extending the time for which any such right, privilege, franchise, or permission has heretofore been granted or bestowed, unless and until such by-law has first been submitted to and received the assent of the electors of the city entitled to vote on money by-laws in manner provided by and under and in accordance with the provisions of section 103 of this Act as amended."

Subsections in the Act (immediately prior to 15) dealt specifically with the Company. They made provision for purchase of the undertaking by the City, as well as other matters connected with the business then being carried on by the Company, and its subsidiary Company. Then provision was afforded the City to construct street railways on streets unoccupied by street railways, or lighting any portion of the City not lighted by the Company, subject to certain conditions, and with the qualification that the City could not pass a by-law for such construction and operation, without first submitting it for ratification to the ratepayers. Subsection (14) provided for the use of a portion of the track by the City, in case the Company refuses to construct lines in accordance with previous subsections. Then subsection (15), *supra,* follows. As it stood before the amendment, it seems clear to me, that it would not apply to the defendant Company, nor that it was so intended. The Company had already received its statutory authority from the Legislature, to construct and operate a line of railway within the City, and all that the Council could insist upon imposing would be, restrictions and conditions, not in excess of those outlined by section 39 of the Consolidated Railway Company's Act, 1896. It might be argued that the Company conceded the application of subsection (15) to its operations, by agreeing to pay the City

Judgment

a share of its gross receipts, upon a percentage basis. This is worthy of mention; but it is impossible to determine how this was arrived at, or whether it was simply a matter of adjustment at the time. Viewing the fact, that the Company was then operating its street railway in the City, and continued to extend its lines from time to time, it is not surprising that no evidence was adduced, shewing that this subsection had been applied by the City, by granting any franchise or right to operate to the Company. The mode adopted was, by an agreement between the parties, to impose restrictions and conditions, pursuant to the provisions of said section 39. Even if a contrary course had been pursued, it could not be successfully contended, in the face of the decision in *British Columbia Electric Railway Company, Limited* v. *Stewart, supra,* that the combined effect of sections 33 and 41 of the Consolidated Railway Company's Act did not "vest in the Company all the powers necessary to enable them to operate railways when constructed in the City." The "permission," authorized to be granted by said section 41, with respect to the use and occupation of the streets, only allowed conditions to be imposed, as to the plan of construction and duration of the occupation. The fact that the 1901 agreement covers these two important points, lends weight to the conclusion that this statute formed the basis for such agreement. Then, did the proviso, added as an amendment in 1912 to subsection (15), affect the situation of the parties, so that the power possessed by the council, under said section 39, was curtailed? Did it lose the power, in its own absolute discretion, to agree to a change in the amount of fares payable to the Company by its passengers? The question of such fares is not, as in section 39, specifically mentioned in subsection (15). It is contended, that it is covered by the word "permission"; but this seems to be a strained construction. If it were intended to restrict the council in its powers to this extent, I think more apt language should have been adopted. The word "permission" had already been used in the original subsection, and related to the granting of powers to a number of different companies, who might seek to utilize the streets. It made no reference to the amount of fares to be charged by a street railway company. If the subsection, as originally enacted, or subsequently amended, had

Judgment

MACDONALD, J.
1918
Oct. 29.
CITY OF VANCOUVER v. B.C. ELECTRIC RY. CO.

been clear and specific on this point, and so applicable to the Company, then, as it was later than the legislation, under which the Company obtained its powers of construction and operation, it would prevail: see *Moore* v. *Robinson* (1831), 2 B. & Ad. 817 at pp. 821-22. The turning point then is, as to whether the amendment to the subsection applies wholly or in part to the Company. Even if the 1901 agreement had not recognized the terms of the Consolidated Railway Company's Act, the dealings between the parties were such, that the City must have been taken to have been cognizant of the provisions of such private Act, granting certain privileges and rights: see Erle, C.J. in *Cahill* v. *London and North Western Railway Co.* (1861), 10 C.B. (N.S.) 154 at p. 172. One of the rights possessed by the Company, under section 39 of such Act, was to enter into an agreement with the city council, as to the fares it might charge for transportation. If these were found inadequate, then, the Company might apply to the council for a revision, and it could, if it saw fit, agree to an adjustment. It is contended that this discretionary power of the council was, by the amendment, abridged, so that if any increase in fares were sought, the matter should be referred by the council for the approval or disapproval by ballot of a portion of the people, who might, in due course, be required to pay such additional amount. This, while quite within the power of the Legislature, would be an important change, and, if so intended, should be clearly indicated. In the first place, it would result in one of the sections (39) of a private Act being substantially altered, by a second proviso, added to a subsection of another private Act. If I am right, in my opinion, that subsection (15), as originally enacted, did not apply to the Company, then the proviso by way of amendment, only applies to such subsection, and should not be extended to affect section 39, unless there is a clear indication of such intention. This would be giving this mode of legislation a far-reaching effect. The dangers attaching, to giving a wide import to a proviso, considering "the manner in which they find their way into Acts of Parliament," was considered by Lord Watson in *West Derby Union* v. *Metropolitan Life Assurance Society* (1897), A.C. 647 at p. 652. Then, Craies on Statute Law, 2nd Ed., at p. 215, refers to the criticism of

Judgment

Moulton, L.J. in *Rex* v. *Dibdin* (1910), P. 57 at p. 125, as to a proposed method of interpretation of a proviso in a statute (similar to the one here contended for), as follows:

"It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts . . . . have frequently pointed out this fallacy."

Even if the amendment had been enacted, not as a proviso, but as an independent and separate section, or could be so considered, if the same contention were presented, as to its control over section 39, this view, if adopted, would result in one section of a private Act amending or limiting a section in another private Act. According to Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., 477,

"it is a rule of law that one private Act of Parliament cannot repeal another, except by express enactment. . . . . The rule of law as to the construction of such Acts is not to do anything which would be in effect a repeal of any clause, unless in a subsequent Act some words are inserted which would operate as an express repeal of the former."

The judgment of Turner, L.J. in the *Trustees of the Birkenhead Docks* v. *Laird* (1853), 23 L.J., Ch. 457, at pp. 458 and 459, is cited as authority for this proposition of the law, but in Craies on Statute Law, at p. 506, it is stated by the author that,—

"It is doubtful whether this *dictum* would now be accepted. The rule is certainly not a rule of law, but at most a canon of construction; and it is submitted that one private Act is repealed by another by necessary implication if the two are completely inconsistent."

Judgment

It is to be noted that reference is made by the author to the fact that such *dictum* is not contained in the report of the case in 4 De G. M. & G. 732, but in the latter report, the following reference is made to the law on the point, at p. 742:

"It is not, I think, unimportant to refer to the state of the law with regard to the operation of statutes. It is thus laid down in Jenkin's 5th Century, Case 11: 'A special statute does not derogate from a special statute without express words of abrogation.'"

Compare on this point Halsbury's Laws of England, Vol. 27, p. 170, par. 234:

"A special statute is not repealed by a subsequent special statute, unless there are words which operate expressly or by necessary implication to repeal it,"

and see cases there cited.

Said section 39 was certainly not expressly referred to, nor affected by the amendment to subsection (15). It is suggested

MACDONALD, J.

1918

Oct. 29.

CITY OF VANCOUVER v. B.C. ELECTRIC RY. CO.

that the subsection, as amended, in order to have an operative effect, should be applied to the Company, and that a perusal of the amendments to its charter obtained by the City from the Legislature in 1912, would shew that such amendment was so intended. Even if this were a proper mode to adopt, in construing such amendment, I do not think it affords any assistance. The section of the 1912 Act, prior to the one providing for the amendment, dealt with the borrowing powers of the City. The council had apparently in mind, at that period of prosperity, that there was a possibility, or probability, of the City exercising its right of purchase from the Company under the 1901 agreement, because it refers to such agreement, and the borrowing powers of the City being extended, if the required notice thereunder is not given by the City before the 11th of August, 1918, of its intention "to assume the ownership of the railway lines and property of such Company." It could be argued that the next section, providing for the amendment to subsection (15), was enacted by the Legislature upon the request of the City, in order to prevent any council in the meantime granting a franchise to another company, and complicating the situation; also that the concluding portion of the amendment was inserted to prevent the council from giving an extension of any franchise. Both these events only, being controlled by a submission to the electors. If the Legislature were intending to limit or control the power of the council, in its regulations or restrictions upon companies then operating, for example, in the matter of fares, it might have so expressed itself. I think the amendment has not the effect, contended for by the City, and that the power of the council, under said section 39, to make or vary an agreement as to fares, is not affected by such amendment, and remains in the same position as it stood in 1901, when the original agreement was entered into. In my opinion, it was not necessary then, nor since, through subsequent legislation, for the city council to submit a by-law, authorizing an agreement with respect to fares, chargeable by the Company, to the electors of the City entitled to vote on money by-laws, for their approval. If I am right in this conclusion, as to the lack of necessity for submitting the by-law of the 8th of July to the electors, before its final passage, then, what is the present posi-

Judgment

tion of the Company, as to collecting fares at the increased rate? The by-law, as well as the agreement, providing for the increase of fares from 5 cents to 6 cents, are unsigned by the mayor, and thus incomplete. If I understood the position taken by counsel for the City aright, he contended that, even if the by-law were *intra vires* of the council, and thus should have been signed by the mayor, that the Company is illegally collecting the increased fare, on account of the state of the by-law and agreement, and that, notwithstanding all the surrounding circumstances, it should be restrained. It was submitted by the Company that the agreement need not be signed nor sealed, nor was a by-law required to authorize its execution. It seems to me that this proposition cannot be accepted as correct, and that the Company cannot legally continue to collect such increased fares, unless the present position of matters is altered. The agreement of October, 1901, sought to be amended, was authorized by a by-law, and I think that the council can only amend such agreement in like manner. The following definite provisions apply to the execution of contracts and by-laws by the City:

"222. All contracts, notes, bills, and other securities duly authorized to be executed on behalf of the Corporation, shall, unless otherwise specially authorized or provided, be sealed with the seal of the Corporation and signed by the Mayor and the City Clerk, otherwise the same shall not be valid, and all cheques shall be signed by the Treasurer and Mayor and countersigned by the City Clerk."

"226. All By-laws of the Corporation shall be under the seal of the Corporation and shall be signed by the head of the Council, or by the person presiding at the meeting at which the by-law was finally passed and by the City Clerk."

Judgment

Estoppel, as against the City, was not specially pleaded, but no objection was raised to the principle being considered. Acts of the mayor and council, in addition to the passing of the by-law, were given in evidence, as supporting a contention, that the City could not now take the ground that the agreement was not properly executed and binding upon the City. Delay on the part of the mayor, in declaring his intention not to sign the documents, was referred to, and allowing the Company to presume that the by-law and agreement would be signed by him in due course. It was pointed out that there was no note of warning given by the mayor or council to the Company, obligating itself by an agreement, to pay increased wages to its

MACDONALD, J.
1918
Oct. 29.

CITY OF VANCOUVER v. B.C. ELECTRIC RY. CO.

employees in order to settle the strike. Attention was also drawn to other matters of a like nature, but in the view I take of the principle of estoppel, as applied to the City, I do not consider it necessary, nor advisable, to discuss the allegations of bad faith on either side. Neither will I deal, at length, with the facts and circumstances surrounding the strike of the street-car employees, which occurred on the evening of the 1st of July, 1918, and was settled on the 11th of July, nor the part that was taken by the mayor and council. They are only incidental and indirectly pertinent to the issues. There is no material dispute as to the facts. I, then, on this basis, should direct my attention solely to the legal position of the parties. It was, however, strenuously contended, that I should consider such evidence, and form such conclusions therefrom, that the principle of estoppel would be applicable. If I were to do this, it would entail not only a weighing of the facts, but the surrounding circumstances. I think, however, that the City can only be bound in this important matter in the manner indicated by sections 222 and 226. "Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, which is the legal mode of expressing the will of the entire body": see Parke, B. in *South Yorkshire Railway Co.* v. *Great Northern Railway Co.* (1853), 9 Ex. 55 at p. 84. If, as I believe, a by-law is necessary, in order to authorize any material change in the 1901 agreement, then, the signature of the mayor to such by-law becomes necessary, in order to comply with section 226. This also applies to the amending agreement. I do not think that estoppel can operate in this matter against the City, so as to create a by-law or contract where they do not exist, properly executed in accordance with statutory provisions. An existing by-law and agreement cannot thus be varied. It could not be accomplished, even by a formal resolution of the council. This position is supported by many authorities, *e.g.*, Dillon on Municipal Corporations, 5th Ed., Vol. 2, p. 900:

Judgment

> "It is also generally laid down that when an ordinance has been enacted by the municipality it cannot be amended, repealed, or suspended by a resolution. That can only be done by ordinance enacted with all due formality."

Compare Biggar's Municipal Manual, 11th Ed., pp. 85 and 237.

As to the necessity of the City, so controlled by statute, acting

under its corporate seal, properly authenticated, in a matter of this nature, and not coming within the exceptions referred to in Meredith & Wilkinson's Canadian Municipal Manual, at pp. 6 and 7, see such binding authorities as *Hunt* v. *Wimbledon Local Board* (1878), 4 C.P.D. 48; *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa* (1883), 8 App. Cas. 517. These two cases were held in *The Waterous Engine Works Company* v. *The Corporation of the Town of Palmerston* (1892), 21 S.C.R. 556 at pp. 560-1, as being—

"express decisions on the point that contracts of a municipal corporation are absolutely void, whether executed or executory, unless they comply with all statutory requirements as regards formality of execution, a result which I should have thought clear unless the Courts have power to override and dispense with statutory provisions in their discretion."

In *Manning* v. *Winnipeg* (1911), 21 Man. L.R. 203; 15 W.L.R. 33; 17 W.L.R. 329, a barrister sought to recover for services actually rendered to the city, but failed, on the ground that his employment was not under seal. The cases, referring to the necessity of a municipal corporation, contracting under seal, with all necessary formalities, are there reviewed. So, if the Company were not seeking to support the amendment of a by-law and agreement under seal, I think it would have great difficulty in applying any principle of estoppel to the City in this matter, or coming within any of the common-law exceptions to the rule, requiring a corporation to contract by seal. They are referred to by Howell, C.J. in *Manning* v. *Winnipeg* (1911), 17 W.L.R. 329 at p. 337, as follows:

Judgment

"Those exceptions are stated in *Lawford* v. *Billericay Rural District Council* (1903), 1 K.B. 772, a decision of the Court of Appeal in England, and now the ruling case on the question. They are:—1st. Where the work done for the corporation is of a trivial nature. 2nd. Where the claim relates to matters of so frequent occurrence that they must, of necessity, be complied with without waiting for the formality of a seal. 3rd. Where the work in respect of which the plaintiff seeks to recover is work done in respect of matters for the doing of which the corporation was created, and the benefit of the work is accepted by the corporation."

Nor can the Company receive any assistance in its contention from the dissenting judgment of Mr. Justice Gwynne, in *Bernardin* v. *The Municipality of North Dufferin* (1891), 19 S.C.R. 581, as he apparently gave as a reason for not following *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa, supra,* that the language of the statute there being considered was per-

MACDONALD, J.
1918
Oct. 29.
CITY OF VANCOUVER v. B.C. ELECTRIC RY. CO.

missive, as to passing by-laws, while here, the provision is imperative. Then it was submitted that the Vancouver Incorporation Act did not require, as in Ontario, that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for." If the point is entitled to any weight in dealing with an original agreement under said section 39, as it does not refer to a by-law being required, still it would lose its force when an attempt is made to alter an existing by-law and agreement. In any event, section 222 comes into play, as to the contracts, and requires them to be, when duly authorized, sealed with the corporate seal and properly signed.

Then, if the Company cannot set up, as a justification for charging the increased fare, a properly executed and authorized agreement for that purpose, what is its position? While a board of conciliation was sitting, and before it had delivered its award or recommendation, a strike, already referred to, amongst the street railway employees took place. It also included its electrical workers, and thus affected not only the street railway service, but all the light and power supplied to the citizens. This state of affairs continued until the 6th of July, when the award was made. Negotiations had taken place in the meantime with a view of a settlement, but the employees were firm in their determination only to accept from the Companies their demands in their entirety, both as to working conditions and wages. The correspondence shews that the Company were willing to accede to such demands, especially as to increased wages, if the council would agree to adjust the rate to be charged by the Company for its passengers. Under the circumstances, emergency meetings were called, and the council finally agreed, on advice of its solicitor, in view of the undertaking of the Company, to run the risk, of not submitting a by-law to the electors, to pass a by-law, authorizing the execution of an agreement, increasing such rate to the desired extent. It is provided by section 53 of the Procedure By-law No. 960 of the City, that—

Judgment

"every by-law shall receive three several readings and on different days, previously to its being passed, except in urgent and extraordinary occasions, and upon a vote of two-thirds of the members present, when it may be read twice or thrice or advanced two or more stages in one day."

The minutes of the council meeting shew that this latter course was adopted on the 8th of July, and that—

"the by-law was read a third time and finally passed and the mayor and city clerk authorized to sign same and affix thereto their proper seal of the City."

As the by-law had thus passed the council, it was doubtless taken for granted by all concerned, that section 59 of the Procedure By-law, would be complied with, requiring immediate signature by the presiding officer and city clerk, as well as the corporate seal being attached. The Company, acting on this reasonable assumption and inducement, proceeded to carry out, on its part, the intention of all parties, that it should agree to pay the increased wages asked by its employees. This belief, as to the change in the fares being properly authorized by the council, was in all probability strengthened by the receipt from the city solicitor, about the 15th of July, of the agreement for execution, and the Company complying with such request within a few days thereafter. From the sequence of events, resulting in the apparent passage of the by-law, I have no reason to doubt that the council was, at the time, acting in good faith. It was purporting to authorize a change in the 1901 agreement, which would assist the Company in solving its difficulty as to paying the increased wages, and thus ending its labour trouble. Even apart from the dangers of a threatened sympathetic strike, the council, as the governing body of the City, was doubtless very anxious that the then existing disruption of business should speedily terminate. It probably also bore in mind, that as the City participated in the gross receipts of the Company, an early resumption of the street-car service was desirable. Although the 1901 agreement, provided for the payment of a percentage of such receipts, being made by the Company to the City monthly, still, there was no evidence adduced, as to whether the City has in the meantime accepted or rejected its proportion of the increased fare now complained of. It was stated that the liability assumed by the Company in its new agreement with its employees, as compared with the previous agreement, by reason of increased wages, coupled with changes in the working conditions, approximated a million dollars annually. It could not be claimed that all of this large increase was assumed, on the

Judgment

MACDONALD, J.
1918
Oct. 29.

CITY OF VANCOUVER v. B.C. ELECTRIC RY. CO.

strength of the change in the agreement as to fares, as the Company had already agreed to accept the increase recommended by the board of conciliation. There was, however, a substantial difference, in favour of the employees, between such recommendations and the wages agreed to be paid by the Company, after the passage of the by-law on the 8th of July. In an adapted wording of the last part of the judgment in *Toronto* v. *Toronto Electric Light Co.* (1905), 10 O.L.R. 621 at p. 627:

> "There was thus in the plaintiffs' conduct much more than a mere 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 [object to the Company charging the increased fare]."

Under all these circumstances, is the City entitled to a declaratory judgment that there has been a breach of the 1901 agreement by the Company, in collecting a fare beyond five cents from each passenger, and an injunction restraining it from the further collection of such an amount? Even although the council was acting within its powers in passing the by-law, authorizing the execution of the agreement, and intended it to be effective, can their intention be destroyed by the action of the mayor, in withholding his signature? I asked for authority that would justify a city in taking this position, after the other party interested in and affected by such by-law, had acted upon it as binding, and obligated itself accordingly. The only authority, to which I was referred, was that of *Canada Atlantic Rwy. Co.* v. *Corporation of the City of Ottawa* (1886), 12 S.C.R. 365. All the facts relating to the submission and passage of the by-law there considered, are totally different to those here presented. It was a bonus by-law, passed in 1873-1874, to assist a railway then in course of construction. The mayor, in that case, refused to sign the by-law on the ground that its consideration by the council, after receiving the assent of the electors, was premature. The position of the company expecting to receive aid was not altered by such premature consideration of the council, nor the refusal of the mayor to sign. The debentures authorized were never issued, nor any action taken upon the by-law until 1886. There were other grounds considered, in deciding that the by-law never acquired any force nor validity in law. I do not think this case assists the City

Judgment

in its contention, and I doubt if any judgment can be cited on this point in which the facts were sufficiently similar to the present case, to be a guide in determining the rights of the parties.

It was further contended that the council had a right to "reconsider" the by-law. After the mayor had determined not to sign the by-law nor agreement, he reported to that effect on the 12th of August, 1918, as already mentioned. The matter came up for consideration before the council on the 24th of August, and the mayor then stated that the by-law was illegal, on the ground that it should have been submitted to the electors. An effort was then made to have a by-law prepared, repealing the by-law passed on the 8th of July. Objection was taken to lack of the requisite notice to introduce such a by-law, so upon notice being given for that purpose, the mayor called a special meeting for the 27th of August. At this meeting, the council reconsidered the by-law passed on the 8th of July, and purported to amend it by providing that, before its final passage, it should receive the assent of the electors entitled to vote on money by-laws. The by-law was then subsequently submitted to such electors, and defeated by a large majority. This having occurred, and being reported to the council, no further action was taken in the matter. Had the council power, after finally passing this by-law, on the 8th of July, thus to reconsider and destroy its effect, so that it is not a by-law that has finally passed the council? In other words, is the by-law not now in the same position as at the close of the council meeting on the 8th of July, when it simply required for its completion the requisite signing and sealing? Section 27 of the Procedure By-law states:

Judgment

"In all unprovided cases the proceedings of the Council and committees thereof shall be guided by the rules of the Legislative Assembly of British Columbia."

I am referred to May's Parliamentary Practice, 12th Ed., 384, as supporting the procedure thus adopted by the council, but I fail to find authority covering the ground. If a bill finally passed the Legislative Assembly, and simply awaited the signature of the Lieutenant-Governor, while he might withhold his signature, still, one would not expect a bill, at this stage, to be reconsidered in the House. If the by-law in question were one

MACDONALD, J.
1918
Oct. 29.
CITY OF VANCOUVER v. B.C. ELECTRIC RY. CO.

dealing with ordinary municipal matters, for example, the good government of the City, and it was desired by the council to amend or repeal the by-law, after being finally passed but before being signed, then, it might have been signed by the mayor as a formality. A by-law could then be subsequently passed effecting the amendment or repeal. I doubt if, in a municipal body desiring to have system and regularity in its procedure, any other mode should, even as to such by-laws, be adopted. I think that when a by-law has finally passed the council, it is no longer the subject of "consideration." The fact that it still has to be signed and sealed has nothing to do with the "passage" of the by-law. "These are official acts to be performed after, and only after, the passing of the by-law": see *Re Little and Local Improvement District No. 189* (1911), 18 W.L.R. 648 at p. 654. Here, however, the position is stronger, as the by-law is to authorize a change in an agreement with a particular company regulating its business. As soon as the by-law, passed for that purpose, was acted upon in good faith by the other party to such agreement, I think the council could not, of its own motion, thus nullify its deliberative act, concerning a matter in which the Company was so interested. Such a by-law could not, over a month after its final passage, be "reconsidered."

Judgment

If I am right in these conclusions, then, as the mayor has no discretion, he owes a public duty, which should be performed by his signing both the by-law and the agreement, and thus render them fully effective. The Company, as a party interested and aggrieved, has a right to call for the execution of this ministerial act on the part of the mayor. It has a *locus standi in curia,* differing in this respect from the position of the plaintiff in *Canada Atlantic Rwy. Co.* v. *Corporation of the City of Ottawa, supra,* as discussed at p. 376. Sir Wm. Mulock, C.J. Ex., in *Re Davis and Village of Creemore* (1916), 38 O.L.R. 240 at p. 241, dealt with an almost similar situation as follows:

"Where a by-law has been passed by a municipal council, and has not been signed or sealed as the Act requires, it is for the time being of no validity, but, when so signed and sealed, becomes effective. The head of the municipality or presiding officer, as the case may be, whose duty it is, under the Municipal Act, R.S.O. 1914, ch. 192, sec. 258, to sign and seal the same, may be compelled by *mandamus* to perform his duty. To such a motion the Reeve or other presiding officer would be a necessary party,

and would have an opportunity of shewing cause, which he has not on this motion. I therefore think it would not be proper now to defeat a possible motion for *mandamus* by quashing the by-law on either the first or the second ground of attack."

MACDONALD, J.

1918

Oct. 29.

CITY OF VANCOUVER *v.* B.C. ELECTRIC RY. CO.

The difficulty there present, does not arise here, as the mayor has been added as a party defendant by counterclaim. A time can be limited by the formal order for judgment, within which the mayor should sign the by-law and agreement. The result is, that the action of the City is dismissed, and the defendant is successful in its counterclaim. Defendant is entitled to its costs.

Action dismissed.

HOAG *ET AL.* v. KLOEPFER.

MORRISON, J.

1918

Feb. 19.

COURT OF APPEAL

Nov. 5.

HOAG *v.* KLOEPFER

Sale of land—Agreement for—Covenant to pay—Assignment by purchaser —Novation—Evidence of.

The defendant purchased a property under agreement for sale, and after paying four instalments of the purchase price with interest, assigned the agreement to M., who covenanted to pay the remaining instalment (due in three years and six months), with interest. M. paid the interest, water rates and insurance for a year and a half, after which he made no further payments, and a year later gave the vendor an order to collect the rents, the vendor going into possession and exercising the rights of ownership. There was evidence of negotiations between M. and the vendor with a view to M. reconveying the property to the vendor, but it was not carried through, though M. was of the view the result of the negotiations was the turning over of the property to the vendor. The defendant, after assigning the property to M., immediately advised the vendor of the assignment, and claimed that the vendor then agreed to accept M.'s covenant in lieu of his own, in which he is corroborated by a witness present at the time. There was no further dealing as to the property between the vendor and the defendant until the commencement of the action five years later. The vendor assigned his interest under the agreement to his three sons, the plaintiffs. An action for specific performance of the agreement was dismissed, the trial judge holding that, on the facts, the original ven-

MORRISON, J.

1918

Feb. 19.

COURT OF APPEAL

Nov. 5.

HOAG v. KLOEPFER

dor had dealt with the property as his own, having taken possession and exercised other acts of ownership and had thereby made his election of remedies.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that, on the facts, M. had been accepted as debtor in place of defendant, and a novation was established.

APPEAL from the decision of MORRISON, J. in an action for specific performance of an agreement for sale of land, tried by him at Vancouver on the 19th of February, 1918. On the 18th of May, 1911, the defendant entered into an agreement with James Hogg, father of the plaintiffs (who have now changed their name from Hogg to Hoag), to purchase lot 11, block 61 of district lot 541, Vancouver District, for $9,750, of which $500 was to be paid forthwith, $500 on the 18th of August, 1911, $500 on the 18th of November, 1911, $500 on the 18th of February, 1912, and the balance of $7,750 and interest in five years from the date of the agreement. The defendant made the first four payments, also a payment of $628 for interest to the 18th of May, 1912. On the 12th of November, 1912, the defendant assigned the agreement to one Emile W. Moreau, who covenanted to pay and discharge all moneys due and to become due under the articles of agreement. Moreau paid Hogg $642 to apply on the instalments of interest due, but made no further payments, and in March, 1915, gave Hogg authority to collect the rents on the premises. Hogg then went into possession and exercised the rights of ownership, making improvements, etc. The defendant claimed that at the time he assigned the agreement of sale to Moreau, Hogg agreed that he would accept the covenant of Moreau in respect to the payment of the remaining moneys under the agreement in lieu of the defendant's covenant, and in this he was corroborated by another witness. In 1915, Hogg entered into an agreement with Moreau whereby Moreau was to transfer to him the property in question. This was not carried out, but the negotiations resulted in Moreau being of opinion that Hogg had taken the property over. In August, 1917, Hogg assigned to his three sons, the plaintiffs, all moneys due under the agreement.

Statement

Gillespie, for plaintiffs.

J. H. Senkler, K.C., for defendant.

MORRISON, J.

1918

Feb. 19.

COURT OF APPEAL

Nov. 5.

HOAG v. KLOEPFER

MORRISON, J.: This is an action for specific performance of an agreement for sale made between James Hogg, father of the plaintiffs, and now deceased, and the defendant, dated the 18th of May, 1911. The sons have now changed their name from Hogg to Hoag. The property consists of a lot in Vancouver District. On the 14th of May, 1912, the defendant resold this lot to one Emile Moreau, assigning to him the above agreement, whereby the said Moreau agreed to assume the covenants therein. On the next day James Hogg called on the defendant, when he was told by the defendant that he had sold to Moreau, and what amount had been paid to him, and told James Hogg that he could now pay him whatever was up to that time due under the first agreement, some $800, and that in about six months he would have sufficient to settle with him. In six months James Hogg called on the defendant, who said he had got $1,450, which was all that was coming to him—the defendant. That as he had assigned to Moreau he, James Hogg, would have in future to look to Moreau. James Hogg agreed.

In the meantime Moreau (who was called as a witness by the plaintiffs) had been dealing with James Hogg, paying him interest, and he also paid water rates and insurance until 1914. He also gave James Hogg an order to collect rent. Moreau, in his evidence, states that he thought he was turning over the property to James Hogg, and as he was going away, he did not want to bother any more with the matter. He also states that he thought he had given James Hogg a quit claim. What he really did was to write stating he would do so. He was quite willing that James Hogg should sell the lot. He did not have any communication or dealings with the defendant during this time. After Moreau gave James Hogg the order to collect rent, he had nothing more to do with it, and James Hogg looked after it altogether. Moreau thought he had got rid of the property, and says he would have signed any necessary document for that purpose. He says he knew James Hogg had taken possession.

MORRISON, J.

Resuming the narrative as to what took place between James Hogg and the defendant when James Hogg called upon the defendant again in six months time from May 15th, 1912, the defendant did not hear from nor see James Hogg until May,

MORRISON, J.

1918

Feb. 19.

COURT OF APPEAL

Nov. 5.

HOAG v. KLOEPFER

1916, when he called, enquiring for Moreau, who had gone to live in Alberta. He told the defendant that as Moreau had failed to make his payments, he had taken back the property. He made no demand on the defendant for principal or interest up to the time of his death. On the 13th of August, 1917, James Hogg assigned to the plaintiffs, his sons, the agreement of May 18th, 1911, and the plaintiffs are now seeking specific performance thereof. The plaintiffs' counsel takes his stand on the ground that inasmuch as neither the defendant nor Moreau registered the agreement between them, that therefore the defendant is to be held to his original agreement with James Hogg, there being no estoppel—that there can be no release except under seal.

As to the facts, I find that Moreau meant to transfer to James Hogg and thought he had done so effectually. I find that James Hogg dealt with the property on that footing. He took possession and exercised other acts of ownership. Consistent with Moreau's evidence on this point is the manner in which James Hogg dealt with the defendant, as particularly shewn by his books, in which were no records of the defendant's name. I am not overlooking the fact that entries were made as against the property, but not as against or in favour of the defendant. The defendant, so far as the evidence goes, was unaware of what was happening between Moreau and James Hogg, as well as what James Hogg was doing with the property. In 1914, when Moreau defaulted in carrying out the terms of his agreement, the defendant was not informed, nor was there any demand made upon him. It well may be that had the defendant been given an opportunity then he would have been advised accordingly to protect himself. Both Moreau and the defendant rested secure in the belief that James Hogg had taken back the property as alleged, and I find that James Hogg so dealt with it, and therefore made his election of remedies.

MORRISON, J.

Paraphrasing the language of Duff, J. in *Bark-Fong* v. *Cooper* (1913), 49 S.C.R. 14 at p. 23; 5 W.W.R. 633 at pp. 638-9: There has been such a change of position as makes it inequitable to require the defendant to carry out the contract. Delay has been of such a character as to justify the inference that the plaintiffs intended to abandon their rights under the

contract as against the defendant and his assigns. The relation of the parties, plaintiffs and James Hogg, and their knowledge of their father's affairs, justify me in saying that this was in reality a transaction *inter partes,* and, assuming they have a *status* to sue at all, they are estopped. The action is, therefore, dismissed.

From this decision the plaintiffs appealed. The appeal was argued at Victoria on the 10th of June, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Gillespie, for appellants, moved to add in evidence four documents that were put in at the trial, but were not marked as exhibits, the registrar's clerk having taken them away.

[MACDONALD, C.J.A.: You must tender them in evidence and see that they are marked exhibits.]

He referred to *In re Trimble* (1885), 1 B.C. (Pt. II.) 321; *In re Shotbolt* (1888), *ib.* 337.

Per curiam: The application is acceeded to upon payment of costs.

Gillespie, on the merits: In the case of novation the three parties must agree, and the evidence of Moreau does not support this. The fact of there having been dealings between Hogg and Moreau does not release Kloepfer: see *Clergue* v. *Vivian & Co.* (1909), 41 S.C.R. 607; *Forster* v. *Ivey* (1901), 2 O.L.R. 480; *Aldous* v. *Hicks* (1891), 21 Ont. 95; *McCuaig* v. *Barber* (1898), 29 S.C.R. 126. Argument

J. H. Senkler, K.C., for respondent: There are three grounds upon which the judgment below should be sustained: (1) Novation; (2) estoppel; and (3) election of remedies. The question of novation is one of fact, and the learned judge below having found on the evidence that Hogg had accepted Moreau's covenant for that of the defendant, his finding should not be disturbed. After Moreau went into possession in May, 1912, Kloepfer was never again consulted: see *Cornell* v. *Hourigan* (1903), 2 O.W.R. 510. The evidence is in equity ample to sustain the contention that there was a release agreed to and acted upon by the parties. Hogg told Kloepfer he had taken

MORRISON, J.

1918

Feb. 19.

the property over. This act relieved Kloepfer: see Halsbury's Laws of England, Vol. 7, p. 506, par. 1027.

Gillespie, in reply.

Cur. adv. vult.

5th November, 1918.

COURT OF APPEAL

Nov. 5.

HOAG v. KLOEPFER

MACDONALD, C.J.A.: The facts of this case can, in my opinion, lead to but one conclusion, namely, that there was a novation. Moreau was accepted as debtor in the place of the defendant, and defendant was released.

The appeal should, therefore, be dismissed.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the learned judge below has reached the right conclusion, and, therefore, the appeal should be dismissed. The evidence of Moreau, Kloepfer and Evans establishes a novation.

GALLIHER, J.A.

GALLIHER, J.A.: While I do not think the evidence as to the verbal agreement to accept Moreau as the debtor of James Hogg in the place of Kloepfer is in itself conclusive, it is, when taken in conjunction with the acts of Hogg himself subsequently to the 15th of May, 1912, sufficient to establish a novation. On that date Kloepfer had paid Hogg all that was due for principal and interest up to that time, leaving a balance of principal of $7,750, payable on the 18th of May, 1916. Kloepfer alleges that on the 15th of May, 1912, he informed Hogg that he had assigned his agreement to one Moreau, and that Moreau had undertaken to pay the balance due Hogg, and Hogg agreed to accept Moreau, and some six months later Hogg informed Kloepfer that he was looking to Moreau to pay. As I have before said, this evidence lacks definiteness, and is in itself insufficient to establish a novation. After the last-mentioned date, the evidence is that no demand was ever made upon Kloepfer either by Hogg or by anyone on his behalf until the notice served upon him, dated 1st September, 1917. In the meantime Moreau had made the three half-yearly payments of interest to Hogg on the 16th of November, 1912, the 14th of May, 1913, and the 18th of November, 1913, and had paid insurance and water rates of the property up to 1914. Subsequently to that no further payments of any kind were made, and

Moreau had given Hogg authority to collect and appropriate the rents of the property, which Hogg did. We thus find that a period of almost four years transpired after the last payment of interest, and a period of one year and three months after the balance of the principal became due, without any demand whatsoever having been made upon Kloepfer. Moreover, during this period we find Hogg and Moreau corresponding with a view to Hogg taking back the property, taking a quit-claim deed from Moreau, and allowing Moreau $5,000. This was never really done, although Moreau says he was under the impression he had given the deed, but he was always willing to do so, as circumstances were such that he could not make the payments. I think when we consider all these facts in connection with the evidence as to the agreement, Kloepfer has made out his case, and that a verbal agreement to accept Moreau and release Kloepfer was entered into. The present plaintiffs are the sons and assignees of James Hogg (who is now deceased), and their rights can be no greater than would be those of James Hogg were he the plaintiff.

The appeal should be dismissed.

MCPHILLIPS, J.A.: With great respect to the learned trial judge, I am entirely unable to accede to the view at which he arrived, namely, that the appellants are not entitled to succeed in the action, it being one for moneys due and payable under an agreement for sale of land. It is, though, with great regret that I feel impelled to disagree with the learned judge in that, upon the special facts and circumstances of this case, much can be said indicative of James Hogg's (the appellants are the successors in title to the land from James Hogg by deed, and the agreement for sale of the land was also specifically assigned to the appellants by James Hogg, and all the moneys due and payable thereunder) intention to look to one Moreau, to whom the respondent had assigned the agreement for sale, and had entered into an agreement for sale of the land as well. The agreement for sale was entered into by James Hogg on the 18th of May, 1911 (since deceased, being the father of the appellants), and the agreement was, shortly before the death of James Hogg, namely, on the 13th of August, 1917, assigned to the appellants, and he also conveyed the land set forth in the agreement to the appel-

MORRISON, J.

1918

Feb. 19.

COURT OF APPEAL

Nov. 5.

HOAG v. KLOEPFER

lants, and the appellants are the owners of the land in fee simple by indefeasible title of date the 13th of September, 1917, subject to three charges thereon, *viz.*: the agreement for sale, James Hogg to the respondent; the further agreement for sale, the respondent to Moreau; and the assignment of the respondent's right to purchase from James Hogg. The purchase price of the land upon the sale by James Hogg to the respondent was in amount $9,750. The respondent paid $2,000 thereon, but nothing more save $628.70, being interest up to the 18th of May, 1912. The respondent entered into the agreement for sale of the land to Moreau on the 14th of May, 1912, and the assignment of the agreement for sale of the land held by him from James Hogg on the 12th of November, 1912, and after the 18th of May, 1912, made no further payments to James Hogg nor any payments to the appellants. Moreau paid to James Hogg $642 on account of interest, and on the 9th of March, 1915, gave an order to James Hogg for the payment of rent of the premises. In the interim of time Moreau was in possession of the premises. James Hogg and the appellants, respectively, received the rents up to January, 1918, some $471. The respondent was sent a notice of the assignment of the moneys due under the agreement for sale, James Hogg to the appellants, under date the 1st of September, 1917, and demand was made for the moneys still remaining due and payable. The appellants were exercising rights of ownership over the land, as we have seen, and were in receipt of the rents, which continued to be the position of matters up to the time of the trial of the action. It is an admitted fact that no release of any kind was given to the respondent, nor even was it verbally agreed that James Hogg, or the appellants, should look to Moreau only for payment. It is true that the respondent said he so understood matters as between James Hogg and himself, but there is no corroboration of this of any nature or kind.

MCPHILLIPS, J.A.

The closest case to the particular facts that I have been able to find to the present case is *Cornell* v. *Hourigan* (1903), 2 O.W.R. 4. There this was said (p. 5):

> "'If you will take him so as to have no more claim on me, I will sell,'"

and this statement was confirmed. Mr. Justice Britton, in his judgment at p. 6 said:

"I find that there was not in this case a novation, that is to say, there was not an arrangement by which the old liability on the covenant of defendants should be released by J. M. Lottridge, the then holder of the mortgage, and an entirely new agreement and liability entered into on the part of Frank Howes to J. M. Lottridge in substitution of the Hourigan covenant."

The case was then carried to appeal and came before the Divisional Court, and in the report on appeal, in the same volume of the Ontario Weekly Reporter at p. 510, we read:

"The Court (Boyd, C., Ferguson, J., MacMahon, J.) held that in equity the evidence was ample to sustain the contention that there was a release agreed upon and acted on by both parties—in relinquishing and in acquiring the property—which precluded the legal enforcement of the covenant, because of the countervailing equities based upon this sufficiently proved arrangement. *Yeomans* v. *Williams* [(1865)], L.R. 1 Eq. 184, referred to. Appeal allowed with costs and action dismissed with costs."

I cannot come to the conclusion, upon the facts of the present case though, that that which took place amounted to a release. It is true negotiations took place between James Hogg and Moreau, directed to Moreau, giving a conveyance of the land to James Hogg, and James Hogg was agreeable to take a conveyance, but it was never carried through, and we see that in the books of the Land Registry office the respondent is the holder of a charge on the land; so also is Moreau, that being the present state of title, and the appellants, to have complete title, must have these charges removed. However, there is no evidence (in fact, it is to the contrary) that the appellants would agree to this disposition of the matter. The appellants insist upon the liability of the respondent to them, and I cannot see how their contention can be overborne, notwithstanding all that has taken place and the very considerable lapse of time. Unquestionably the respondent honestly believed he was released, but unfortunately he did not effectually establish that which, even in equity, is necessary to bring about a release. Here the appellants have in no way dealt with the land so as to prejudice the respondent in any way. A good title is shewn—an indefeasible title (see *Newberry* v. *Langan* (1912), 47 S.C.R. 114, Duff, J. at pp. 125-6).

In my opinion, the case which is conclusive of this appeal in favour of the appellants is *Wilson* v. *The Land Security Company* (1896), 26 S.C.R. 149, and the present case is not incom-

MORRISON, J.

1918

Feb. 19.

COURT OF APPEAL

Nov. 5.

HOAG v. KLOEPFER

MCPHILLIPS, J.A.

moded in any way, as that was, by reason of the release of portions of the land. Here the land stands intact with an indefeasible title, the appellants being able to give title in the most complete way. Any charges that exist upon the land arise only by the action of the respondent in registering the agreement of sale to himself and the giving of the agreement of sale to Moreau, and the assignment of the agreement of sale, James Hogg to himself. I would refer to the judgment of Gwynne, J. at pp. 153-4, and also to the judgment of King, J. at pp. 154-6.

I do not consider it necessary to deal with any further authorities upon the point. The law is stated most succinctly by the learned judges of the Supreme Court of Canada. The dealings of James Hogg and the appellants with the land have not brought about any prejudice; the rents and profits are being accounted for; taxes have been paid, and the property preserved from sale for taxes; the respondent is able "to get the land as it was agreed to be given": *per* King, J. at p. 156.

It follows that, in my opinion, the appeal should succeed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellants: *W. D. Gillespie.*
Solicitor for respondent: *J. H. Senkler.*

THE KOMNICK SYSTEM SANDSTONE BRICK MACHINERY COMPANY, LIMITED v. THE B.C. PRESSED BRICK COMPANY, LIMITED.

COURT OF APPEAL

1918

Nov. 5.

KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. v. B.C. PRESSED BRICK CO.

Contract—Brick-making plant—Sale and installation—Certain capacity required—Test.

Company—Action—Status—Appeal—Re-hearing—B.C. Stats. 1917, Cap. 10, Sec. 2(3).

A contract for the sale and installation of a brick-making plant provided that the final payments therefor should be made within certain periods after the plant was completed and had been demonstrated to be of a capacity of 17,000 good merchantable bricks in 10 hours or 34,000 merchantable bricks in a day of 20 hours. It appeared from the evidence that the presses have to be worked six or seven hours to produce the necessary quantity of unbaked bricks to fill the retort in which they are hardened by steam, so that when the plant is started the hardening section of it must remain idle for six or seven hours. An action for the balance of the purchase price was dismissed on the ground that it had not been demonstrated the plant was of the required capacity.

Held, on appeal, reversing the judgment of CLEMENT, J. (MARTIN, J.A. dissenting), that in making a test of the capacity of the plant allowance must be made for the initial time required to produce the necessary quantity of unbaked bricks to fill the retort and that the time for the test should then start when both sections of the plant are working continuously.

APPEAL by plaintiff from the decision of CLEMENT, J., of the 22nd of March, 1911, in an action for the balance due under a contract for the sale and installation of a plant for the manufacture of sandstone brick. The plaintiff, a company incorporated in Ontario, entered into a contract with the defendant for the sale of a brick-making plant, to be erected and installed by the plaintiff at Steveston, British Columbia. The contract price was $45,000, payable in instalments, $10,000 forthwith, $10,000 on the plant being ready for shipment, and two payments of $12,500 each in 60 and 90 days respectively after the plant was installed and demonstrated to be of a specified capacity. The plaintiff Company was not licensed to do business in British Columbia until after the plant had been

Statement

COURT OF APPEAL

1918

Nov. 5.

KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. v. B.C. PRESSED BRICK CO.

Statement

installed, said Company taking out a licence on the 13th of September, 1909, in compliance with the provisions of the Companies Act, R.S.B.C. 1897, Cap. 44, Sec. 123, and on the 24th of the same month this action was brought for the recovery of the unpaid balance of the purchase price, being the sum of $22,500, and for a declaration that the plaintiff is entitled to a lien on the machinery until payment of said balance, and for an injunction. On the 22nd of March, 1911, CLEMENT, J. dismissed the action on the ground that on the evidence the plaintiff had not shewn that it had complied with the terms of the contract. The appeal ((1912), 17 B.C. 454) was dismissed (MACDONALD, C.J.A. dissenting), on the ground that the plaintiff, being a foreign company and unlicensed, in entering into and carrying out its contract, was carrying on business in the Province in contravention of the Companies Act (R.S.B.C. 1897, Cap. 44, Sec. 123). MACDONALD, C.J.A. held that in view of the provisions of the Companies Act (B.C. Stats. 1910, Cap. 7, Sec. 166), the action was maintainable, and that on the merits the plaintiff was entitled to succeed. Section 166 was altered by the revision of 1911 (Cap. 39, Sec. 108), but this change did not take place until after the trial of the action. The Judicial Committee of the Privy Council in the case of *John Deere Plow Company, Limited* v. *Wharton* (1915), A.C. 330, held that Part VI. (sections 139-173) of the Companies Act (R.S.B.C. 1911, Cap. 39) was *ultra vires* of the Provincial Legislature, and in 1917 the Provincial Legislature repealed sections 168 and 169 of the Companies Act and substituted therefor section 2 of the Companies Act Amendment Act, 1917, subsection (3) thereof being as follows:

"(3) Where an action, suit, or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company was invalid or prohibited by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act and upon such terms as to costs as the Court may order, maintain anew such action, suit, or other proceeding as if no judgment had therein been rendered or entered."

Upon the passing of this Act the plaintiff applied to the Court of Appeal to re-enter its appeal. The application was heard on the 29th of November, 1917, by MARTIN, GALLIHER and MCPHILLIPS, JJ.A. and was dismissed. This decision was

reversed on appeal to the Supreme Court of Canada (1918), 56 S.C.R. 539, when it was decided that the expression "maintain anew," in a case where an appeal has been dismissed, not on the merits, but because of the lack of a licence, means that the Court of Appeal should hear the appeal as if its previous decision had never been rendered.

The appeal was argued at Victoria on the 24th of June, 1918, before MACDONALD, C.J.A., MARTIN and EBERTS, JJ.A.

McPhillips, K.C., for appellant: This appeal is founded on the decision of the Supreme Court, on appeal from the decision of this Court, on an application to re-enter the appeal on the list for re-hearing. Under the Companies Act Amendment Act, 1917 (B.C. Stats. 1917, Cap. 10, Sec. 2 (3)) we have a right to maintain anew our action as if no judgment had been previously rendered. The former judgment will be found in (1912), 17 B.C. 454. At page 459 the question of the merits is dealt with by the Chief Justice, who finds in our favour. There were three tests, and what trouble they had was due to their using wet sand.

Argument

Armour, for respondent: They were to produce a certain number of bricks per day, and they were to be merchantable bricks under the contract. The tests were illusory and colourable and were not real tests at all. Extra time should not be allowed for baking. The whole process should have been done in the time specified, including the baking.

McPhillips, in reply.

Cur. adv. vult.

5th November, 1918.

MACDONALD, C.J.A.: This action was brought in 1910, and dismissed. On appeal to this Court the question of the plaintiff's *status* to bring the action, having regard to the fact that plaintiff had failed to take out the licence required by the Companies Act, was raised, whereupon the majority of the Court sustained the defendant's contention that the plaintiff had no such *status,* and dismissed the appeal on that ground. From this decision I dissented, and hence was obliged to consider the appeal on the merits, which I found in plaintiff's favour.

MACDONALD, C.J.A.

COURT OF APPEAL

1918

Nov. 5.

KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. *v.* B.C. PRESSED BRICK CO.

By an Act passed in 1917, the Legislature amended the law applicable to the case, and as the result of that legislation, and the interpretation put on it by the Supreme Court of Canada in its recent decision in this case ((1918), 56 S.C.R. 539), the appeal was brought on before us this day for re-hearing on the merits. My view of the evidence has not been affected by the present argument, and hence I would allow the appeal for the reasons I then gave, and which are reported in (1912), 17 B.C. 454.

MARTIN, J.A.

MARTIN, J.A.: I find myself unable to take the view that the learned trial judge reached a wrong conclusion when he found that the "plant" had not "been demonstrated to be of the capacity" stipulated by the contract. Quite apart from the vexed question as to whether or no the plaintiff Company is entitled to the benefit of the considerable preliminary period of about seven hours (nearly a whole, and now general working day of eight hours) for "cooking" the moulded sand forms (not by any means "bricks" in the proper and legal sense of the word), there is the further very important evidence about the "incapacity" of the engine, a vital part of the plant, and I have no doubt the learned judge had that in mind when he was referring to the failure of the demonstration. He was quite justified in giving credit to the evidence of, *e.g.*, Gallagher and King, the engineer, on that point, who depose to the plaintiff's admission of failure and the manner in which the test was "struggled through" by an inefficient engine, and as I must assume he did so, I can see no justification for interfering with his judgment.

The appeal, therefore, should be dismissed.

EBERTS, J.A.

EBERTS, J.A. agreed with the Chief Justice in allowing the appeal.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *McPhillips & Smith.*

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

GORGNIGIANI v. WELCH.

COURT OF APPEAL

1918

Nov. 5.

GORGNIGIANI v. WELCH

Arbitration—Workmen's Compensation Act—Award—Lump sum—Validity of—Doctor's instructions not followed—Right to compensation subsequently thereto—Rehearing by reason of fresh evidence—Proof of reasonable diligence—R.S.B.C. 1911, Caps. 244 and 11, Secs. 13 and 14.

Where an applicant for compensation neglects to follow the instructions of his medical adviser, which, if followed, would have effected a cure, he is not entitled to compensation beyond the time when such cure would reasonably have been effected (*Per* MARTIN and GALLIHER, JJ.A.).

An award of a certain sum under the Workmen's Compensation Act is not invalid if it is the result of the addition of the several sums of a weekly allowance.

An award will not be re-opened because of the discovery of fresh evidence unless it is shewn that prior to the award there was reasonable diligence on the part of the applicant to discover such evidence.

Per MCPHILLIPS and EBERTS, JJ.A.: The award is bad on its face: it should be set aside and remitted back to the arbitrator to proceed *de novo* under the provisions of the Workmen's Compensation Act.

The Court being equally divided, the appeal was dismissed.

APPEAL from an order of MORRISON, J. of the 26th of November, 1917, dismissing an application to set aside an award of MCINNES, Co. J. of the 6th of January, 1915, under the Workmen's Compensation Act. The plaintiff was a workman in the employ of the defendant. On the 10th of August, 1914, while so employed, he was struck on the shoulder by a log, and owing to injuries resulting therefrom he was taken to the hospital at Newport, B.C., where he received treatment for five weeks. After leaving this hospital he went to Vancouver, where he received further treatment from two doctors assigned to him by the defendant, for three weeks, during which period a request was made by his solicitor for an arbitration under the Workmen's Compensation Act. The defendant paid into Court $97.50 as compensation in full for the injuries sustained, and the arbitrator found that this sum was sufficient compensation. The plaintiff appealed to a judge of the Supreme Court on the grounds that the arbitrator wrongly assumed that he was completely or almost completely cured, and that he should have pro-

Statement

COURT OF APPEAL

1918

NOV. 5.

GORGNIGIANI v. WELCH

vided for further weekly payments until such time as he was cured; also that since the award material evidence had been discovered shewing that the injury continued and developed into further disability which, had the arbitrator been aware of, would have affected his decision. He claimed that after the award the pain and disability of his arm continued and he went to the Vancouver General Hospital, where he remained eleven months, further complications having arisen in the way of tubercular inflammation, and operations were performed in attempting to effect a cure. The appeal was dismissed by MORRISON, J., from whose decision the plaintiff appealed.

Statement

The appeal was argued at Vancouver on the 22nd of May, 1918, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Goodstone, for appellant, moved to be allowed to adduce further evidence.

Gibson, for respondent, objected to an affidavit being read, a copy of which had not been served with the notice of motion and was only handed to him on the day before the hearing.

Per curiam: The affidavit will be allowed to be read.

Goodstone: The evidence of the condition of this man during the trial and after should be allowed in.

Per curiam: Motion refused, as there was no allegation of due diligence being exercised in attempting to get the evidence before the Court below.

Argument

Goodstone, on the merits: Under section 2 of Schedule 1 of the Workmen's Compensation Act, compensation should be provided during the man's incapacity. There is no power in the arbitrator to fix a lump sum. He can only decide on the amount of weekly payments under the Act: see Rules 34 and 36 of the Compensation Rules; *Powell* v. *Crow's Nest Pass Coal Co.* (1916), 22 B.C. 514. The case is one that should be sent back to the arbitrator under section 13 of the Arbitration Act: see Halsbury's Laws of England, Vol. 1, p. 477, par. 994; *Disourdi* v. *Sullivan Group Mining Co.* (1909), 14 B.C. 241; *Basanta* v. *Canadian Pacific Ry. Co.* (1911), 16 B.C. 304. The award is open to review on the ground of new evidence: see Russell on Arbitration, 9th Ed., 291 and 372; *In re Keighley, Maxsted*

& Co. and Durant & Co. (1893), 1 Q.B. 405 at p. 410; *Sprague* v. *Allen and Sons* (1899), 15 T.L.R. 150; *Burnand* v. *Wainwright* (1850), 1 L.M. & P. 455. As to calculation being one of surmise, this cannot be done: see *Mortin* v. *Burge* (1836), 4 A. & E. 973. As to effect of a mistake apparent on the face of the award see *Gaby* v. *Wilts Canal Company* (1815), 3 M. & S. 580; *Sharman* v. *Bell* (1816), 5 M. & S. 504.

Gibson, for respondent: The Supreme Court Rules apply under rule 81 of the Workmen's Compensation Rules: Russell on Arbitration, 9th Ed., 377. The award has the seal of the County Court. The grounds for setting aside an award are set out in section 14 of the Arbitration Act. Evidence of a state of facts which have arisen after the award is not admissible: Halsbury's Laws of England, Vol. 10, p. 309. As to the finality of the award see *Nicholson* v. *Piper* (1907), A.C. 215; *Taylor* v. *London and North Western Railway* (1912), A.C. 242; *Green* v. *Cammell, Laird & Co., Limited* (1913), 3 K.B. 665. Further evidence of a state of facts existing at the time of the award cannot be admitted except in exceptional circumstances: see *Brown* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 350; *Shedden* v. *Patrick and the Attorney-General* (1869), L.R. 1 H.L. (Sc.) 470; *Nash* v. *Rochford Rural Council* (1917), 1 K.B. 384; *Marino* v. *Sproat* (1902), 9 B.C. 335; *Young* v. *Kershaw; Burton* v. *Kershaw* (1899), 81 L.T. 531. They must shew (1) they had used due diligence; (2) that the evidence was not obtained owing to mistake, surprise or fraud; and (3) such evidence must be conclusive. Argument

Goodstone, in reply: The seal was affixed by the registrar and not by the judge.

Cur. adv. vult.

5th November, 1918.

MARTIN, J.A.: With respect to the objection taken to the form of the award of January 6th, 1915, made by the learned arbitrator for $97.50 as being a lump sum instead of so much per week, it is clear, and it was not disputed before us, that this amount is simply the total result of his addition of several sums computed on a basis of an allowance of 12 weeks at $8.12½—$97.50, up to November 16th, 1914, from August MARTIN, J.A.

COURT OF APPEAL

1918

Nov. 5.

GORGNIGIANI v. WELCH

24th, when compensation would begin under the Act (on November 20th the respondent had paid into Court $97.50); and I entertain no doubt about the propriety of dealing with the matter as was done by him in such circumstances. He had obviously, as the language he uses in his award shews, no intention of awarding a lump sum as such, but simply announced the result of so much arithmetic up to a certain date, based upon a sum paid into Court to cover so many weeks. That he did not, and did not intend to, award a lump sum is "the natural implication of his adjudication," as Lord Shaw puts it in *Taylor* v. *London and North Western Railway* (1912), A.C. 242; 81 L.J., K.B. 541. The learned arbitrator clearly took the view on the medical evidence, as he was entitled to (because he is "the sovereign judge of fact," as he is described by Lord Justice Phillimore in the instructive case of *Leverington* v. *A. Dodman & Co., Limited* (1916), 1 K.B. 964; 85 L.J., K.B. 832 at p. 835), that the applicant had disentitled himself to any further compensation by deliberately neglecting to take the exercises prescribed for him, which would have effected a cure "long" before the date of the award (January 6th, 1915). Now, if there is a cure "beyond" reasonable probability of "recurrence," the arbitrator can award nothing beyond the date of it, because "cure" and "incapacity" cannot co-exist, and the applicant who is cured and the applicant who refuses to be cured are on the same legal footing. The *Leverington* case, *supra*, lays it down that if there has been a cure, the arbitrator must not even make a suspensory order in the attempt to keep the award open. But if any objection could be sustainable in point of form, then I adopt the language of Earl Loreburn, L.C. in *Taylor* v. *London and North Western Railway*, *supra*, at p. 245 ((1912), A.C.):

MARTIN, J.A.

> "It seems hardly worth while to refer this case back to the County Court judge in order that he may put his decision in a strict form, because there is no doubt about the substance of his decision. But if the appellant desires it I think this ought to be done. It ought, not, however, to affect the costs, being merely a formal point."

It was decided in *Mountain* v. *Parr* (1899), 1 Q.B. 805; 68 L.J., Q.B. 447, that the arbitrator has no power to grant a new trial, and we have not to deal with an application to review the award under paragraph 9 of the first schedule, because it is

necessary to make a distinct and substantive application thereunder, as it is a fresh arbitration proceeding (Ruegg on Employers' Liability and Workmen's Compensation, 8th Ed., 629; *Watts* v. *Logan & Hemingway* (1914), 7 B.W.C.C. 82), and none has been made, nor was any point raised on that clause below, so it could not be raised before us: Ruegg, *supra,* 660; *Stevens* v. *Thorne & Co.* (1916), 2 K.B. 69; 85 L.J., K.B. 841. If the applicant were dissatisfied with the action of the learned arbitrator in the case at bar, he should have asked him to submit a question of law to a judge of the Supreme Court, for there is no appeal on fact: *Lee* v. *Crow's Nest* (1905), 11 B.C. 323; *Basanta* v. *Canadian Pacific Ry. Co.* (1911), 16 B.C. 304; 18 W.L.R. 353; *In re Lewis and Grand Trunk Railway Co.* (1913), 18 B.C. 329; 4 W.W.R. 1246; 25 W.L.R. 118; and *Cozoff* v. *Welch* (1914), 20 B.C. 552; 7 W.W.R. 531; 29 W.L.R. 774. It should be noted that there is a wider appeal under the English amended Act than there is here: Ruegg, *supra,* at p. 657, but it is not profitable to pursue these questions further, because it is probable that this will be the last case in this Province under the Act owing to changes in the law.

MARTIN, J.A.

The only other point that deserves notice is the contention that the award can be opened because of a state of facts which arose after the adjudication. What the appellant relies on is the discovery of fresh evidence by a doctor on November 24th, nearly a year after the award, as the result of an X-ray picture then taken. When the applicant was proving his case before the arbitrator on the said January 6th, one of the medical witnesses stated that he had examined him on September 30th, 1914, and "exercise" of the shoulder was "all that was necessary to effect a complete recovery in a few weeks." Another said that he had also examined him on the same day, and "I saw applicant subsequently every other day up to November 18th and urged him always to exercise his shoulder; applicant would have been well long ago if he had exercised his shoulder." It is not stated whether X-ray pictures were or were not taken on these examinations, but if not, no explanation is given why such an ordinary precaution was not taken advantage of so as to obtain the most reliable information. In any event, therefore,

COURT OF APPEAL

1918

Nov. 5.

GORGNIGIANI v. WELCH

it cannot be said that reasonable diligence has been shewn on the part of the applicant, which would be essential in an effort to open up the award just as it would be in an ordinary action: see *Marino* v. *Sproat* (1902), 9 B.C. 335; 1 M.M.C. 481; *Woodford* v. *Henderson* (1910), 15 B.C. 495; 15 W.L.R. 633; *Brown* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 350; 14 W.L.R. 459; *Young* v. *Kershaw* (1899), 81 L.T. 531; and *Nash* v. *Rochford Urban Council* (1916), 86 L.J., K.B. 370; (1917), 1 K.B. 384; *J. A. McIlwee & Sons* v. *Foley Bros.* (1917), 24 B.C. 532; (1918), 1 W.W.R. 222. The appellant relies on *Burnand* v. *Wainwright* (1850), 1 L.M. & P. 455; 19 L.J., Q.B. 423, which was the strange case of the discovery by the defendant, after the arbitration, amongst the papers of the plaintiff's wife after she had left him, of a very material document which the defendant had never seen or heard of—so the lack of reasonable diligence was necessarily excluded and the arbitrators were permitted to reopen the matter. That case was followed by *In re Keighley, Maxsted & Co. and Durant & Co.* (1892), 62 L.J., Q.B. 105; (1893), 1 Q.B. 405, wherein "further material evidence [had] since been discovered," 410—no question arose, as herein, on the lack of reasonable diligence, the point not being raised, presumably because there was no lack of it. *Sprague* v. *Allen and Sons* (1899), 15 T.L.R. 150, was a case of clear mistake of calculation, and the point of due diligence was not raised.

MARTIN, J.A.

But it was raised in *Eardley* v. *Otley* (1818), 2 Chit. 42 (23 R.R. 740) on a rule *nisi* to open an award "on an affidavit that the party had procured new evidence since the reference," and his counsel asked to make the rule absolute because "the evidence was not discovered till after the award was made," but the judges refused to do so, saying:

"Abbott, J.: That is not sufficient; you must shew by affidavit what it was, as in the case of a new trial on the same ground, that there was some surprise, and that it was not such evidence as a reasonable man might anticipate."

"Bayley, J.: That is not sufficient. The affidavit should go further, and shew that it was such evidence as a reasonable diligence could not have obtained."

This salutary rule is that which obtains in the case of ordinary judgments, and there is no suggestion that the Court

should be more lax in opening up awards than judgments: indeed the inference is all the other way, because, as Lord Justice Kay says in *In re Keighley, Maxsted's* case, *supra*, 414 ((1893), 1 Q.B.):

"The Courts have always been exceedingly cautious in dealing with awards. *Prima facie*, an award is final and not subject to appeal; the arbitrator is chosen by the parties who presumably prefer a domestic tribunal which is not bound rigidly by the rules of evidence; and a mistake of law or fact is not, *per se*, a ground for sending back the award of such a tribunal."

In the same case Lord Esher, M.R. says, pp. 410-11, that "the Court might (though, of course, it would not necessarily in every case) remit the matter for reconsideration," and in the case at bar I am of the opinion that in the proper exercise of our discretion we ought not to remit it on the ground of lack of reasonable diligence alone in the manner already indicated, not taking into consideration that very serious statement of the plaintiff's medical witness, already quoted, about the consequences of his neglect to exercise his shoulder.

MARTIN, J.A.

The appeal, therefore, should be dismissed.

GALLIHER, J.A.: Upon the evidence of Doctors English, Newcombe and Martin, given at the hearing of the arbitration, it would appear that the condition which later developed was due to the neglect of the applicant to follow instructions.

GALLIHER, J.A.

Under such circumstances I do not think that we should interfere with the decision below.

MCPHILLIPS, J.A.: In my opinion the award should have been set aside, with great respect to Mr. Justice MORRISON, who came to a contrary opinion. The award of MCINNES, Co. J. is bad on its face. The learned arbitrator under the Workmen's Compensation Act was required to fix the amount of the weekly payment; there was no jurisdiction to fix a lump sum as compensation. The weekly payment being fixed, the employer or workman may then apply, under paragraph 9 of Schedule 1 of the Act, for a review that it be ended, diminished or increased, and only after the payment for not less than six months could there be, on the application of the employer, an order made for the payment of a lump sum (see paragraph 10 of Schedule 1 of the Act). The policy of the Act, apparent in its provisions, is

COURT OF APPEAL

1918

Nov. 5.

GORGNIGIANI v. WELCH

to preserve to the applicant compensation if necessary, consequent upon later disability demonstrating itself and possibly then indiscoverable injury, as it would appear to be in the present case. There was only one way of making a final order, and the manner adopted by the learned arbitrator was a course adopted without jurisdiction. *Nicholson* v. *Piper* (1907), 23 T.L.R. 620 (a decision under the Imperial Act of 1897, similar in terms to the British Columbia Act) is not decisive of the present case. There a final order was made under paragraph 12 of the English Act, the same as paragraph 9 of the British Columbia Act. It is in truth an authority in favour of the appellant in this appeal. Lord Halsbury there said:

> "It was, moreover, competent for the appellant to appeal against the form of the order 'that the agreement be this day terminated, and that the weekly payments . . . . be ended accordingly.'"

If it can be said that the award is to be read in this way, which was the contention at this bar of counsel for the respondent, then it was without jurisdiction, and in the present case we have the appellant appealing from the form of the award, and he is not in the difficulty the workman was in that case. In my opinion, the award is wrong in form, and prejudicial to the appellant, and if not set aside the appellant will be without further remedy, unless, at least, some expression goes from this Court that the appellant is not concluded and may still proceed.

MCPHILLIPS, J.A.

The whole policy of the Workmen's Compensation Act, and it is clearly expressed in the statute (First Schedule, Sec. 1, Subsec. (*b*)), is that there shall be a weekly payment during the incapacity, with this provision only: "Provided that the total amount paid as compensation for injury causing such total or partial incapacity shall not exceed the sum of fifteen hundred dollars." There is no method of bringing the compensation to a finality save in accordance with the provisions of the Act, and the award as made is not in conformity with the provisions of the Act to bring about finality, and it would, in my opinion, be against natural justice in the carrying out of the provisions of the statute to uphold the award as made, with all respect to contrary opinion. With deference to the argument of the learned counsel for the respondent, I do not read *Taylor* v. *London and North Western Railway* (1912), A.C. 242, as at all

conclusive against the respondent in the present appeal; rather is it a decision in favour of the disposition I would make of this appeal. I would refer to the speech of Lord Atkinson, and particularly to the form of the order at p. 252, and I would refer to what Lord Shaw of Dunfermline said at pp. 252 and 253. Even where jurisdiction existed, as in the *Nicholson* v. *Piper* case, (1907), A.C. 215, "the County Court judge may feel bound to end the payment, not for ever, but for a time . . . . The simple course is, according to my view, to make the payment end until further order."

This case is not one of *res judicata,* as in *Green* v. *Cammell, Laird & Co., Limited* (1913), 3 K.B. 665. Here there is an appeal from the form of the award.

I would, therefore, allow the appeal. The award should be set aside and remitted back to the learned arbitrator to proceed *de novo* under the provisions of the Workmen's Compensation Act. The Act, although now repealed, is effective still, and its provisions may be invoked to assess the compensation to which the appellant may be held to be entitled, as all rights stand preserved existent at the time of the repeal. It is unnecessary to indicate in what way this preservation of rights exists, and this was not combatted in argument, if the result of the appeal was that the award should be set aside and remitted back for reconsideration to the learned arbitrator.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

The Court being equally divided, the appeal was dismissed.

Solicitor for appellant: *A. I. Goodstone.*

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

COURT OF APPEAL

1918

Nov. 5.

W. L. MACDONALD & CO. v. CASEIN, LTD.

W. L. MACDONALD & COMPANY v. CASEIN, LIMITED.

Contract—Sales agency—Breach by principal—Damages—Period of contract indefinite—Construction—Reasonable time—Loss of profits.

The plaintiff a resident of Vancouver and the defendant, an English manufacturing company, entered into an arrangement by correspondence whereby the plaintiff was to be the sole agent of the defendant for the sale of its goods in the four Western Canadian Provinces. A letter from the defendant setting out proposed terms of agreement after stating the percentage allowed on sales was followed by the words "this offer to be firm for one year." The letter then continued with advice as to development of sales and wound up with the words, "we are willing to give you the agency as long as you like on a small minimum turnover." There was nothing elsewhere in the correspondence fixing any definite time during which the contract was to continue. The plaintiff accepted the offer and devoted his time and attention in developing the agency and incurred considerable expenditure in advertising. The defendant Company repudiated the contract about four months later. In an action for damages it was held by the trial judge that it was not the intention of the parties to limit the contract to one year and as no time was stated a reasonable time should be allowed for the performance of the contract which he fixed at two years, allowing the plaintiff the profits he reasonably would have made during that period.

Held, on appeal, *per* MARTIN, GALLIHER and EBERTS, JJ.A. that the learned trial judge had reached a right conclusion and the appeal should be dismissed.

Per MACDONALD, C.J.A. and MCPHILLIPS, J.A.: That the plaintiff's damages should be reduced to the sum allowed for one year.

Statement

APPEAL by defendant from the decision of MACDONALD, J. of the 25th of February, 1918, in an action for specific performance of a contract contained in correspondence between the parties whereby the plaintiff was appointed by the defendant its sole agent for the four Western Provinces for the sale of a nerve tonic patented under the name of "Sanagen," for an injunction, and for damages. The defendant Company, which manufactured the article in England, entered into correspondence with the plaintiff at Vancouver, with a view to his becoming their sole agent in the Western Provinces, and on the 17th

of April, 1916, the defendant wrote stating certain terms on sales and stating, "this offer to be firm for one year." The letter then continued, and wound up with the words, "we are willing to give you the agency as long as you like on a small minimum turnover, say $5,000 after first year." The terms of this letter were accepted by the plaintiff, and he immediately devoted the greater portion of his time and energy in promoting the sale of "Sanagen," and incurred considerable expense in advertising. Some time later the defendant Company entered into negotiations with a firm in Toronto named "Harold F. Ritchie & Co.," and subsequently appointed said firm its sole agents for the whole Dominion for the sale of "Sanagen," and on the 29th of July, 1916, by letter, advised the plaintiff that the contract entered into with him was cancelled owing to the advantageous terms it was able to make with Ritchie & Co. Upon the issue of the writ an *interim* injunction was granted at the instance of the plaintiff, and on motion to dismiss the *interim* injunction, an order was made by HUNTER, C.J.B.C., on the 7th of December, 1917, continuing the injunction in so far as it applied to British Columbia. On appeal to the Court of Appeal the injunction was dissolved (see (1917), 24 B.C. 218). The letters upon which the contract is based are sufficiently set out in the reasons for judgment. The learned trial judge gave judgment for the plaintiff, allowing damages on a basis of two years' profits, fixing the profits for the first year at $2,809.90, and for the second year at $4,167.50. The defendant Company appealed.

Statement

The appeal was argued at Victoria on the 6th and 7th of June, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Armour, for appellant: On the appeal from the order granting an injunction it was intimated the remedy in this case was in damages only. The learned trial judge gave judgment for $6,977.40, basing the amount on the profits that would in the ordinary course have been obtained on a two-year contract. The only question in dispute is as to how long the contract should run. We say there was a contract for one year only and the learned judge was wrong in allowing for two years. On the

Argument

COURT OF APPEAL

1918

Nov. 5.

W. L. MACDONALD & CO. v. CASEIN, LTD.

question of the amount allowed for profits three things have to be considered: (1) That he was starting out on a new line of business; (2) the state of affairs at the time; and (3) the embargo. On the question of damages see *Laishley* v. *Goold Bicycle Co.* (1903), 6 O.L.R. 319; *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256.

Argument

Mayers, for respondent: The reference to one year in the offer by the defendant only applies to one term of the contract, *i.e.,* in relation to the period in which the business is being worked up. The offer, read as a whole, means a continual agency. It is a contract for life. Macdonald could overcome the embargo. He only had to order eight tons to make his profit for the second year. Both parties construed the contract as a continual one: see Pollock on Contracts, 8th Ed., 477. On the question of damages see *Wilson* v. *Northampton and Banbury Junction Railway Co.* (1874), 9 Chy. App. 279 at p. 284; *Chaplin* v. *Hicks* (1911), 2 K.B. 786. On the question of liability for damages see *Ogdens, Limited* v. *Nelson* (1905), A.C. 109. The difficulty of assessing damages will not deprive the plaintiff of his rights: see *Chaplin* v. *Hicks, supra,* at p. 799.

Armour, in reply.

Cur. adv. vult.

5th November, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The only questions in dispute are the duration of the agreement in question, and damages for the breach thereof, the contract and the breach thereof by defendant being admitted.

The defendant's offer, as set forth in a letter, was accepted *simpliciter* by the plaintiff. Defendant's counsel contended that it was an agreement of one year's duration only, and submitted that the damages should be assessed on that basis. The plaintiff's counsel contended that the agreement was for more than one year, namely, for as long a period as plaintiff was pleased to continue it. The said letter, and the other correspondence between the parties, indicate clearly enough that the relationship to be established between them should cover a longer period than a year. It was recognized that the first year would be one of organization and would be productive of little

profit to either party. In the body of the letter appear these words: "This offer to be firm for one year." It was argued that this had reference only to an item of the commission to be paid. It is not clear what was meant, but at any rate the defendant, at the end of the letter, said this:

"We are willing to give you the agency as long as you like on a small minimum turnover, say $5,000 after the first year."

Now, while it would appear that the arrangement was intended to be of a lasting, but not altogether a definite character, yet the agreement fixed the terms for the first year at least. If the interpretation put by plaintiff's counsel upon the words "this offer to be firm for one year" be adopted as applying to one of the items of commission or profit, the result is that the profits in subsequent years are reduced by the amount of that item, or remain to be adjusted at the beginning of the succeeding year. Assuming the former, the words above set out would not affect the stability of the contract; but then the other words at the end of the letter above set out may mean this, that "this contract is for a year, but we are willing that it should then be renewed."

MACDONALD, C.J.A.

I am not without doubt, but as I am, with respect, unable to agree with the learned trial judge in his view of the construction of the contract as to duration, I must decide the point without leaning on the judgment below. I think the contract was one for a year certain. Both parties doubtless expected that it would be continued, but they failed to fix any but one period and must abide by the writing. I would therefore reduce the plaintiff's damages to the sum allowed below for one year; and allow the appeal as to the damages assessed for the subsequent period.

MARTIN, J.A.: I find myself quite unable to say that the learned judge below has not reached the right conclusion; and, therefore, the appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: Considerable difficulty is occasioned by the wording of the letter of the 17th of April, 1916, from the defendant to the plaintiff, as to the construction of the contract entered into between the parties. Mr. *Armour,* of counsel for the appellant, contends that the contract was for a fixed term of

GALLIHER, J.A.

COURT OF APPEAL

1918

Nov. 5.

W. L. MACDONALD & Co. v. CASEIN, LTD.

one year, and does not object to the amount, $2,809.90, allowed for that year, but as to the second year allowed for by the trial judge, it is objected, first, that the contract being for a year certain, no damages can be given beyond that period; and secondly, that if it is not a contract for a year certain, the damages for the second year are excessive. Mr. *Armour* relies on the words, "this offer to be firm for one year," as fixing the time limit of the contract. Mr. *Mayers,* of counsel for the respondent, contends, and I agree with his contention, that these words refer only to the period during which a bonus on Sanagen sold would be given. The paragraph in which the reference occurs is as follows:

"Now what we will do in your case, and it is a more liberal proposition than we have ever made, is this—at the end of every six months we will figure up what your orders have been and we will give you in Sanagen an amount equivalent to 25% on your turnover. The Sanagen being figured on our wholesale prices in this country, which is 33.1/3% and 15% from the following prices:—

"2 oz. tins, 18s.; 4 oz. tins, £1 10s.; 8 oz. tins, £2 14s.; 1 lb. tins, £4 16s. This offer to be firm for one year. You can rest assured that we will always treat you with fairness and liberality. Now with these various discounts given you from the retail prices, namely, 33.1/3%; 20% and 20%, and a further 25% bonus in Sanagen as indicated above, our profits will be cut out entirely so that we will be making nothing on the proposition for the first year, and we are firmly of opinion that if you handle this matter right, you will be able to come out of it with a profit."

GALLIHER, J.A.

There is nothing elsewhere in the corespondence which fixes any definite time during which the contract is to continue, and in such case the Courts will, where a contract has been acted upon, fix a reasonable time. To ascertain what is a reasonable time, we must look at the whole correspondence, the nature of the business to be carried on, the methods that had to be adopted to insure success, the time necessarily occupied before these efforts would bear fruit, and the candid admission by both parties that neither party expected to make any reasonable profit out of the transaction for at least a year. In doing so, I have no hesitation in concluding that the parties had in contemplation a relationship extending beyond a year, and I think the learned trial judge was well within the limit in fixing a reasonable time at two years. Mr. *Armour* further contended that even had the contract not been broken the respondent could not have obtained supplies by reason of the embargo placed on exporta-

tion by the Imperial authorities, and therefore no damages could be awarded, but the respondent has adduced evidence to shew that it had made financial arrangements and could and would have ordered sufficient supplies to carry them over a period of years before the embargo took effect, and the learned trial judge has given effect to this. I do not disagree with his view. In the view I take of the contract it does not become necessary to deal with the effect of the postscript to the letter, "We are willing to give you the agency as long as you like on a small minimum turnover, say $5,000 after first year," as plaintiff has accepted the verdict below and has not cross-appealed. It is, however, another indication at least that the parties had not in contemplation a contract for one year only. As to the damages awarded for the second year, I am not prepared to say, after reading the evidence, that the learned trial judge was wrong in the amount awarded.

GALLIHER, J.A.

The appeal should be dismissed.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: In my opinion the contract for consideration on this appeal was really one, in its nature, that of a commission agency, although the respondent did buy the goods at a certain price, but the appellant fixed the sale price and the respondent received a bonus on sales, payable in goods. The negotiations shew that the respondent was contending for more than was finally agreed to, *i.e.*, an employment for life or for some lengthened period to sell the goods. At best the agency was "to be firm for one year." It will be seen what the appellant really proposed, and this only can be deemed to be the contract, which was in alliance with its custom outside of England, and the contract in the present case was of like nature, *viz.*: "on a basis of commission or price allowance on turnover that may be spent for advertising." The respondent's desire was referred to by the appellant in these words: "What you [respondent] suggest is practically starting a branch house." The only contract which may be said to be certain and which the Court can act upon, as it appears to me, is as set forth in the following excerpt from the letter above referred to: [already set out in the judgment of GALLIHER, J.A.].

Joynson v. *Hunt & Son* (1905), 93 L.T. 470 is not exactly

COURT OF APPEAL

1918

Nov. 5.

W. L. MACDONALD & Co. v. CASEIN, LTD.

in point in this case, yet it is instructive upon the point of a commission agency. Mathew, L.J., in that case, said at p. 471:

"When a person is engaged to sell goods on commission it is indispensable that goods should be sold in order to provide the fund out of which commission is paid."

And in the present case it was an admitted fact that after February, 1917, there was an Imperial embargo which prevented the export of the goods from England, that is, within a year from the entry into the contract the goods were not capable of being exported to further continue the contract even were it to be held that the contract was for longer than one year. There is some evidence that if the contract had not been claimed to be but for one year only, as set forth in the letter of the appellant of July 29th, 1916, the respondent would have stocked up and would not have been affected by the embargo, but as to this I cannot persuade myself that it would have been the case. It is merely conjectural, and the Court would not be entitled to so hold. The letter which in plain terms indicates the position the appellant took in reference to the contract, and which advised the respondent that the appellant would consider it at an end at the end of the year, was in the following terms:

"We have just cabled you as follows: 'Please cancel suggestion in our letter June 30th regarding Eastern trip. Writing you fully.'

"We had our annual meeting yesterday and in discussing the matter with our chairman regarding our policy in Canada and certain information that we have just received in regard to the movements of certain competitors of ours, we have decided that we have got to move at once in a large way or we shall be left. We have an opportunity of placing this whole agency with certain guarantees that are so advantageous to us that we cannot ignore it, and while we are committed to you as to British Columbia for one year from March 28th, 1916, yet we want to be perfectly fair and straightforward as far as you are concerned and it occurred to us that possibly you will be willing to relinquish this agency, which is tied up for a year as to British Columbia and take a commission on all the Sanagen sold by us in that territory for say two years. You would be reimbursed for expenses you have had up to the time of relinquishing this agency. We believe that our turnover will be increased sufficiently in this time so that you would in the end be better off than undertaking to finance it yourself. In all probability you can make arrangements whereby if you like, you can still take orders for Sanagen on behalf of the parties to whom we propose giving this agency. We think they will be quite agreeable to this, based on a certain amount of turnover and you can probably make such an arrangement running for a term of years, and they or we have no disposition to embarrass you in any way or cause you any hardship.

MCPHILLIPS, J.A.

On the other hand, if you allow the agency to lapse automatically at the end of a year we doubt very much if it would be anything like the advantage to you that it would be to relinquish it on the terms suggested, which are without prejudice. We have been expecting to have your reply to our letter of June 30th earlier than this but as this has not been received, we do not suppose that you have favourably considered the suggestion, and for this reason we cabled you cancelling the proposal.

"P.S.—Mr. Carpenter had to leave the office before reading or signing this letter."

After the receipt by the respondent of this letter a great deal of correspondence took place and business went on. Orders for goods were filled and sales made, the respondent protesting as to the termination of the contract, the appellant making itself plain, though, as to its position, and on the 21st of October, 1916, in a letter to the respondent is found the following statement:

"Regarding the agency to Ritchie & Co., this matter would not have come up if you had been in financial position to have swung the matter for the whole of Canada, but our directors did not feel, on the information that we had, that they could back your proposition. We have not a word of fault to find with you. On the other hand, we have nothing but praise for what you have done and we are in hopes that you can come to some sort of terms with Ritchie and if you can do that, the writer thinks that our directors would be inclined to pay you a retainer or a certain amount of commission over and above the commission that you might arrange with Ritchie. We may tell you that Mr. Ritchie put forward a thoroughly business proposition, based on a large guaranteed turnover and short credit and personal guarantees. They are very strong financially and very highly spoken of by a large number of responsible houses and banks."

And in a letter of November 8th, 1916, from the appellant to the respondent, we find the following statement:

"Regarding your agency terms, we are not in position to recede from what we have previously stated. You ask us to put up 25% for 5 years. We think that this is a pretty heavy tax—in fact it would more than wipe out all of our profit. Mr. Ritchie is quite willing that you should hold the agency for [British] Columbia and no doubt would be willing to arrange with you for other territory if you would communicate with him regarding it. We note your estimate of the amount of sales for the next three years for your territory but we shall be greatly surprised if they reach anything like this amount. It strikes us that the amount is a bit wild and certainly the directors of this company would not consider it for a moment. We tell you without prejudice, that we have not and do not acknowledge any liability beyond the limited time for which the agency was arranged, as stated in our previous letter to you and which we shall be obliged to terminate at that time unless you can make some arrangement with Mr. Ritchie, yet we shall be disappointed unless you are able to make some amicable arrangement."

COURT OF APPEAL

1918

Nov. 5.

W. L. MACDONALD & CO. v. CASEIN, LTD.

MCPHILLIPS, J.A.

To indicate the relationship and terms upon which the parties to the action were, it is perhaps useful, and in some way helpful, to note the letter last appearing in the case, of the 10th of November, 1916, from the respondent to the appellant:

"I wish to call your attention to a very important matter pertaining to your future interests in Canada, and that is the price protection of Sanagen. In doing so I do not want you to misunderstand the notice which prompts me to write you in this connection and the reason I mention this is because I feared that under present circumstances in regard to agency you might possibly feel inclined to the thought that I am finding fault with Mr. Ritchie but I assure you I have no desire to do anything of the kind. Notwithstanding the fact that being asked to relinquish the agency for Sanagen in the four Western Canadian Provinces was, to say the least a big disappointment to me, still I have nothing but the highest respect and kindly feelings for your company and your future business. I believe that you have in Sanagen absolutely one of the biggest things on the market, and even though I may not be in any way identified with the handling of same, my only desire is that your Canadian business may develop into something greater than our highest anticipations at the present time, and with this object in view one of the most important features in my mind that should be safeguarded from the beginning is the price protection.

"As already stated, I have no desire whatever to find any fault with Mr. Ritchie one way or the other, but a number of leading chemists here advised me that his method of doing business is such that the retail price is never protected on any of the lines he handles, and for the reasons mentioned, I thought the information sufficiently important to give to you for whatever it may be worth. Eno's Fruit Salt is one of his lines on which the price is being badly cut. Another splendid line which he has just recently placed on the market here is the British Lysol manufactured by Messrs. Freers, England, and although it has only been on the market here during the past two or three weeks the price is cut by dealers everywhere. These are lines which are practically without competition, the same as Sanagen, which makes it all the easier to protect the price, to say nothing of the importance of doing so, as there is nothing that will kill the sale of any product quicker than cutting the price. Therefore, if you have not had this point definitely decided with Mr. Ritchie, it would certainly be greatly to your advantage to do so without delay. I greatly appreciate your remarks contained in your letter of Oct. 21st in reference to the work I did and how the advertising that I was doing appealed to you. I have also received many evidences from merchants and others of how my advertising was reaching the people, in which I have special pleasure because of the fact that I compiled same personally. My idea of advertising practically any product is not to make your advertisements lengthy but just have one or two good sound arguments to be put up in such a convincing way that they remain in the minds of the people. Regarding the last paragraph of your letter, I would be pleased at any time to consider any proposition you may have to offer."

I have thought it well to call attention to this letter to indicate that there is nothing which imports that it is a case for the imposition of exemplary damages, were I wrong in my opinion, and the case should be one of repudiation of a contract of employment which extended beyond the period of one year. In any case the damages are to be "in the nature of compensation, not punishment" (see Lord Atkinson in *Addis* v. *Gramophone Co.* (1909), 78 L.J., K.B. 1122 at p. 1126).

The learned counsel for the appellant placed great reliance upon the case of *Rhodes* v. *Forwood* (1876), 47 L.J., Ex. 396, which I think is very much in point. In that case there was a provision relative to the termination of it, yet it was "for the term of seven years." The colliery was sold, and the coal agreed to be supplied could not be supplied by the colliery owner to the broker. The action was for breach of the agreement. It was by the House of Lords held that the action was not maintainable. The case, upon the facts, has some features similar to the present case. The Lord Chancellor, at p. 398, referring to the agreement there under consideration, said:

"The employment commences upon that footing, and the case finds clearly that the respondents were at a considerable expense in bringing the coal into the Liverpool market, and before the notice to purchasers. As a matter of course, that expense would naturally be incurred to a greater extent in the earlier part of the term of seven years than in the later part. The employment therefore during the earlier part of seven years would naturally be expected to be less remunerative than during the later part of that period. The employment went on for about three years and a half. At the end of that time the appellant sold his colliery, and therefore of necessity no more coal could come to the Liverpool market with regard to which he would be the principal and the respondents his agents. That of course was a very considerable hardship upon the respondents, for the reason I have mentioned. The expense which would fall most heavily upon them would be the expense in the earlier part of the employment, and they were deprived of the commission which they might have earned during the later years, which would have been the most productive part of their employment. But although that is a hardship upon them which naturally one would regret to see occur, still the question remains what was the contract entered into between the parties, and has there been in what has been done any violation of that contract?"

In the case before us, the respondent evidently went on the assumption that the agency would cease in March, 1917, although, of course, protesting more or less, and we have the letter of September 25th, 1916, from the respondent to the appellant, in the following terms:

COURT OF APPEAL

NOV. 5.

1918

W. L. MACDONALD & CO. v. CASEIN, LTD.

MCPHILLIPS, J.A.

"PRIVATE AND CONFIDENTIAL.

"I understand that Harold F. Ritchie of Toronto is the party to whom you have decided to give the Canadian agency for Sanagen, and I am enclosing a couple of copies of advertisements of Dr. Cassell's Tablets which is being advertised very extensively throughout Canada by his firm which may or may not be of interest to you. The thought that suggests itself, however, is the fact that Dr. Cassell's Tablets also being a nerve tonic and restorative, when any one firm advertise two different products for nerve trouble it is only reasonable to say that they cannot do justice to either. As mentioned in a previous letter, it is the object generally among large firms to control all the agencies they can, which is fine business for them, but so far as the individual manufacturers are concerned I am fully convinced that far better results are obtained without exception, when a firm concentrates their efforts on one particular line without any other irons in the fire, particularly when there are two or more lines used for the same purpose. I am enclosing a few recent copies of my advertisements, for Sanagen, also I am continually working in different other ways, all of which is bringing results that would surprise you. In order to save space and allow for more reading matter in the advertisement, I sometimes omit your name and address as this information is given on the package shewn by cut. Just before Ritchie went to England to interview you, he made a special trip to Vancouver, and as I always believe in being perfectly frank I wish to say, that when he saw for himself that I had Sanagen properly and thoroughly placed on the market and that I was giving you every satisfaction, when he would deliberately attempt to take the agency from me whether by foul means or fair, certainly does not say much for the man who would stoop to such a thing, as, under the circumstances no possible form of excuse could be offered for such action. I am not referring to Eastern Canada, nor have I any objection whatever to him approaching you for that territory, seeing that it was still open and nothing had been done there towards getting Sanagen started. As mentioned in my letter of Aug. 21st, no matter whom you may appoint as Canadian agent there is no reason whatever that it need interfere in any way with my present arrangement with you in the four Western Provinces. The parties to whom you give the agency in the East can advertise, etc., as 'Canadian Agents' and I can continue as 'Distributors for Western Canada' and do my business through you direct as heretofore. The fact that there has always been and, apparently, always will be a distinct division between Eastern and Western Canada makes this more simple and feasible. Hoping to hear from you in this connection at an early date."

The above letter indicates an effort to change the situation, but nevertheless an admission that the appellant was intending to make the change, and still the agency goes on; that is, the respondent continues dealing with the product, gives orders and writes to the appellant in reference to shipments and the bonus allowed by the respondent to the appellant: see letter of October 12th, 1916, respondent to appellant, and in that letter we have this statement:

"With reference to the three remaining shipments for Calgary, Edmonton and Regina, now at Montreal, as we do not require these at the present time at the points to which they are consigned, as mentioned in your letter you will be able to make other disposition of same, as we do not wish to stock any more goods than is required for immediate purposes, pending the adjustment of the agency arrangement."

It would appear that Ritchie & Co., Ltd., the new agents, accepted the agency of the appellant for Canada upon the following terms, amongst others:

"1. We accept your Agency for the whole of the Dominion of Canada, British Columbia included, as outlined in your letters, but British Columbia is to be turned over to us, as per your letters of July 29th and 31st and August 5th and 8th, when you have finished with Macdonald, or as soon as arrangements can be made.

"2. We are to control your line for Canada, as discussed and as outlined in your letters, and we are to sell the goods for you on a straight commission basis. The commission we are to receive is to be at the rate of 15% on the invoice price to the customer.

"3. You are not to ship goods to Canada, excepting on orders from us.

"4. You will not sell your line, for export to Canada, to London brokers.

"5. You will not allow anyone to ship your goods into Canada."

It will be seen that as to British Columbia the provision was "to be turned over to us [Ritchie & Co.] . . . . when you have finished with Macdonald or as soon as arrangements can be made," and on August 25th, 1916, the following letter was written by Ritchie & Co. to the appellant:

"Replying to your letter of August 8th and also yours of August 5th, the one thing we want to make very plain to you is that in case you find that it is necessary to have us do any work in British Columbia, the only thing that we would do would be to sell goods out there so that Mr. Macdonald could get his commission. We do not want for one minute, to handle this business by taking anything away from anyone. The fact that you say that Mr. Macdonald has been doing some business for you, and that you told me when in London, England, that Mr. Macdonald had been doing some business for you, did not strike us as your letters have done, and we are not desirous of interfering with any arrangements that you have with Mr. Macdonald for British Columbia. Unless we hear from you to the contrary, we will go ahead and work our trip in the regular way, and if you do not want us to do any business in British Columbia, cable us, but we would only do it with the understanding that Mr. Macdonald is paid his commission until such time as you make a satisfactory arrangement with him."

MCPHILLIPS, J.A.

Still there was to be "a satisfactory arrangement" with him (the respondent). In the statement of claim the respondent sets forth the following:

COURT OF APPEAL

1918

NOV. 5.

W. L. MACDONALD & CO. v. CASEIN, LTD.

"On or about first September, 1916, the defendant in writing wrongfully and unlawfully purported to appoint Harold F. Ritchie & Company, Limited, of Toronto, Canada, as its agent for the whole of Canada for the sale of Sanagen."

The action as brought was for specific performance of the contract and damages, being commenced on the 30th of November, 1916. After action the claim for specific performance was abandoned and the action was proceeded with for damages, and came to trial, and the learned trial judge entered judgment for $6,977.40, being damages on the basis of a breach of contract which was to run for at least two years, $2,809.90 for the first year and $4,167.50 for the second year. The learned judge, in his judgment, used the following language:

"I think they both fully intended that the connection thus established was to continue for at least two years, if, on the contrary, the contract were considered indefinite as to time, then, by analogy to the rule allowing a reasonable time for performance of a contract where no time is fixed this agreement should be held to have covered a reasonable period which I consider would be two years. Whether for such period or not it should, from its nature only be rescinded on reasonable notice. Such notice would under the circumstances of this case, be required to be very lengthy in order that the plaintiff might obtain the satisfactory result referred to. Then, if breach of the contract occurred without such reasonable notice, after plaintiff has worked and expended money on the strength of a contract beyond a year, he should receive the profits of which he has been deprived. He was out of pocket at the time when the defendants saw fit to cancel the contract and made the indefinite offer of paying him a commission on all 'Sanagen' sold in British Columbia for two years. I think that for this period at least the contract should, in the light of all the circumstances, be held to be binding and the plaintiff entitled to such profits as he would have earned during that time."

MCPHILLIPS, J.A.

The learned judge further said:

"It is admitted by the defendant that there was a binding agreement between the parties and that the plaintiff is entitled to damages for breach thereof."

As to the cancellation of the contract, the learned judge has this to say:

"Then, in the face of the repeated assurance of loyalty and fair dealing, defendant wrote to plaintiff on July 29th, 1916, cancelling the contract between the parties. After expressing a desire 'to move in a large way in Canada' defendant says as follows: 'I have an opportunity of placing this whole agency, with certain guarantees that are so advantageous to us, that we cannot ignore it and while we are committed to you as to British Columbia for one year from March 28th, 1916, yet we want to be perfectly fair and straightforward as far as you are concerned and it occurred to us that possibly you would be willing to relinquish this agency.

which is tied up for a year as to British Columbia and take a commission on all the 'Sanagen' sold by us in that territory for say two years. You would be reimbursed for expenses you have had up to the time of relinquishing this agency. We believe that our turnover will be increased sufficiently in this time so that in the end you would be better off than undertaking to finance it yourself."

We have seen, however, that business relations would appear nevertheless to have continued under the agency on into the month of October, 1916. The position taken by the respondent is that there was a repudiation of the contract by the appellant when the appellant took the stand that the employment ended in March, 1916, although I cannot see that the evidence really establishes that the appellant did other than to say that the contract was for a year only, ending in March, 1917. I approach the consideration of the matter as I think it can only be approached, based on the denial upon the part of the appellant that there was other than a contract for a year and really there would be no breach, but if breach there was, it was the breach of a contract for a year only, and the latter would appear to be a position that the appellant does not wish to controvert, although there was some argument that there was no concluded contract enforceable by the Court owing to uncertainty (see *Love and Stewart (Limited)* v. *S. Instone & Co. (Limited)* (1917), 33 T.L.R. 475.

Finally, though on this point the learned counsel for the appellant at this bar admitted that there was no contest, that the contract was one for a year but not more, and on the assumption that there was a breach thereof, the question is what damages the respondent was rightly entitled to? In my opinion, the damages cannot be assessed upon a higher basis than the breach of a contract the life of which was confined to one year. Some argument was addressed by the learned counsel for the respondent, as well, to the point that even if the contract was for a year only that the respondent was entitled to some notice after the expiry of the year, but in the present case the respondent chose to sue before the termination of the year, and there was notice of the construction the appellant put upon the contract. I am of the opinion, notwithstanding that it is evident that there was apparently in contemplation an agency that would continue longer than a year, that there was no concluded or

MCPHILLIPS, J.A.

COURT OF APPEAL

1918

Nov. 5.

W. L. MACDONALD & CO. v. CASEIN, LTD.

enforceable contract of that nature. It was left to be a matter of risk, as it occurs to me. The case of *Levy* v. *Goldhill and Co.* (1917), 33 T.L.R. 479 was a case where the plaintiff was employed as a traveller for an indefinite period on the terms of "half profits on receipt of orders (provided that the customer is good) . . . . . Same applies to repeats on any accounts introduced by you." "The defendants determined the agreement and dismissed the plaintiff, and declined to pay him in respect of repeat orders received by them after his dismissal from customers whom he had introduced during his employment. The plaintiff thereupon brought an action for damages for breach of the agreement and for wrongful dismissal, and he alleged that he was entitled to a reasonable notice of at least six months. *Held*, that under the agreement the plaintiff was entitled to half profits on repeat orders accepted by the defendants after the termination of his employment, from customers introduced by him during his employment, and that the plaintiff was entitled to damages for the breach of the agreement, such damages to be measured by the value of possibility of the defendants' receiving orders in the future from customers who had been introduced by the plaintiff, but that the plaintiff was not the servant of the defendants and was not entitled to any notice whatever and therefore there was no wrongful dismissal."

Mr. Justice Peterson, in a very elaborate and instructive judgment, deals with points of law which are exceedingly helpful in arriving at a decision upon this appeal, and in the course of his judgment quoted from the judgment of Mr. Justice Mathew (p. 482) in *Faulkner* v. *Cooper and Co., Ltd.*, 4 Com. Cas. 213:

MCPHILLIPS, J.A.

"'Now, this is a free country, and the defendant company had a perfect right to break their contract with the plaintiff if they pleased, but they can only do so on the usual conditions, that is to say, they must pay damages for the breach of contract.'"

That is the position of matters as it appears to me on this appeal. It is regrettable that the respondent is in the position of not being able to successfully contend that there was a contract for more than a year, as evidently his view was that it was to be in its nature a contract of lengthy duration, but if there is frailty of contract, who is to blame? He cannot escape his neglect in the matter. It is not the province of the Court to make contracts. Failing a concluded contract being found for more than a year, it is idle contention to contend that damages nevertheless must be assessed on the basis of a contract for two or more years. From what contract can they flow? The Court must be able to put its hands upon the contract—a contract certain in its terms, not left uncertain and founded only upon

ineffective writings or negotiations (see *Montreal Gas Co.* v. *Vasey* (1900), 69 L.J., P.C. 134 at p. 135). In mercantile business as well as in mercantile law, "firm for one year" is well understood. There can be no misunderstanding of this language. It rebuts any other term of duration of the contract. To merely read this resolves all doubt, and the *onus probandi* is upon the party who comes into Court to establish the contract of which he claims there has been a breach. It cannot be that there is any duty upon the Court to say what in equity and good conscience should have been the frame of the contract, and then to frame it, and to proceed to say that that was the contract intended to be entered into, and from the terms of this contract never entered into these damages flow. Rather shall it be decided, and equitably decided as well, that the parties halted at the entry into a firm contract for more than one year so as to admit of either not continuing longer than a year in the carrying out of its terms, admitting of either of the parties after the lapse of a year from further continuing in the business relationship—made firm for a year only. It is interesting to consider what would have been the position of matters in law had it been that the year had elapsed and the appellant was insisting upon the respondent continuing his relationship with it for a longer period than one year. However, this speculation is perhaps unimportant, and no doubt is undecisive of the point now to be determined. Adverting again to *Rhodes* v. *Forwood, supra,* and the consideration that upon the facts the continuance of the relationship under the terms of the contract beyond the year was a matter of risk, undertaken by the respondent, I would refer to what the Lord Chancellor said at p. 401, and what Lord Chelmsford said at p. 402.

MCPHILLIPS, J.A.

In the present case it does not become necessary to imply anything to give the contract efficacy, but, in my opinion, that efficacy is non-existent after the one year. In *The Consolidated Gold Fields of South Africa, Limited* v. *E. Spiegel and Co.* (1909), 25 T.L.R. 275, it was held that "the defendants were liable as the contract was effective as it stood, and was not subject to the suggested implied condition." I would refer to the language of Mr. Justice Bray in that case, at p. 277.

Here we have a contract "firm for one year," but the Court

COURT OF APPEAL

1918

NOV. 5.

W. L. MACDONALD & CO. v. CASEIN, LTD.

is asked to read into it "for life," "for five years," or as the learned judge has read into it, "two years." How is such a contention possible in face of the language of the contract? In the language of Mr. Justice Bray, "Now this contract is perfectly effective without the suggested implied terms." If the contract is not all the respondent contemplated or expected it is a position the respondent is in, but not one from out of which he can be lifted by the Court. It is illustrative of the present case to note the further language of Mr. Justice Bray at p. 277.

It is apparent in the present case that a time being fixed there is an effective contract, and although there may be elasticity in the law, that elasticity cannot be the elongation of a contract for a year into a contract for two years. With deference to all contrary opinion, it would seem to me to be an impossible holding. It would be legislation, a declaration that although the contract reads in concrete form "firm for one year," there shall be read in lieu thereof "firm for two years." To embark upon such a field of judicial construction of contracts would indeed be dismaying, and it is against all authority, as I understand the law. I have not overlooked giving full consideration to the cogent argument of the learned counsel for the respondent, and admit my sense of indebtedness for his careful presentation of the case for the respondent, but with deference, I cannot accept the proposition that the present case comes within the principle dealt with by Sir Frederick Pollock in the eighth edition of Principles of Contract at pp. 383, 477, 478. Here we have a definite time fixed. It is quite unnecessary to consider, and I in no way dispute what the learned author says at p. 383:

MCPHILLIPS, J.A.

> "It is clear law that a contract to serve in a particular business for an indefinite time, or even for life, is not void as in restraint of trade or on any other ground of public policy."

The other proposition upon which the learned counsel based his argument was as set forth at pp. 477-8 of Pollock on Contracts.

Now, addressing ourselves to the facts of the present case, in my opinion there is no ambiguity, and with great respect, the learned trial judge has in his judgment, and the learned counsel for the respondent supports it, done that which is inhibited in the law—altered the original effect of the contract; inserted "two" for "one," *i.e.*, read into the contract "firm for two years"

when it reads "firm for one year" only. There is, upon the facts of this case, not a scintilla of evidence that there has been any variation of the contract by mutual consent. Here, before the expiry of the fixed term of the employment, we have the appellant in no uncertain language referring to its plain terms. The learned counsel for the respondent relied upon *Ogdens, Limited* v. *Nelson* (1905), 74 L.J., K.B. 433. That case, with deference, cannot be said to be at all decisive of the present case, and I would refer to what the Lord Chancellor (Earl of Halsbury) said at p. 436—language exceedingly apposite and applicable to the facts of the present case, as the Lord Chancellor refrained from putting his judgment on implication, but on that which was expressed, and that is the way I have arrived at my conclusion:

"In this case I am of opinion that the judgment of the Court of Appeal was right and ought to be affirmed. I very much doubt whether in dealing with this contract one can get very much light from other cases decided upon other forms of contract. I do not think the question here, so far as my view of it is concerned, depends upon how much you can imply, because that part of the contract upon which I rely, and on which I think the Court of Appeal has relied, is that which is expressed."

MCPHILLIPS, J.A.

(Also see *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (1918), 1 K.B. 592, Scrutton, L.J. at pp. 605-6).

I would, therefore, allow the appeal, the damages to be reduced to the damages as found for the first year, the year that the contract covered, *viz.*: $2,809.90, and that the judgment of the learned trial judge be varied accordingly.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed,
Macdonald, C.J.A. and McPhillips, J.A. dissenting in part.

Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *Wilson & Jamieson.*

MACDONALD, J.

1918

Feb. 4.

COURT OF APPEAL

Nov. 5.

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY v. CORPORATION OF THE CITY OF VERNON.

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY v. CORPORATION OF THE CITY OF ARMSTRONG.

CANADIAN NORTHERN PACIFIC RY. CO. *v.* CITY OF VERNON

THE SAME *v.* CITY OF ARMSTRONG

Railways—Taxation—Exemption—Railway Act—Compliance with—Plans of right of way—Filing—Sanction by minister—R.S.B.C. 1911, Cap. 194, Secs. 16 to 27, 79—B.C. Stats. 1912, Cap. 32, Sec. 7; 1913, Cap. 57, Secs. 15 and 16; 1914, Cap. 52, Secs. 205 and 230.

Under paragraph 13(*e*) of an agreement between the Province and the Canadian Northern Railway Company (Schedule to Cap. 3, B.C. Stats. 1910) the properties of the Company "which form part of or are used in connection with the operation of its railway" are for a certain period "exempt from all taxation whatsoever, or however imposed, by, with, or under the authority of the Legislature of the Province of British Columbia, or by any municipal or school organization in the Province." Under the Canadian Northern Pacific Railway Extension Act, 1912, the provisions and exemptions of said agreement were extended to certain branch lines including the branch running through the defendant Corporations. In pursuance of the Act a branch line was surveyed from the main line southerly including the right of way through the Cities of Armstrong and Vernon, the plans of which were filed, and received the sanction of the minister of railways. In acquiring the ground covered by the right of way it was necessary for the Company to include in purchases a large amount of property not necessary in the construction or operation of the railway. The Company did not proceed with the construction of the road, a certain portion of the properties acquired being used for business purposes as formerly and the Company deriving rents therefrom. The defendant Corporations assessed the properties thus acquired in 1912 and following years. In an action by the Company claiming exemption from taxation it was held that the action should be dismissed except as to the strips of land within the municipalities shewn as constituting the right of way according to the plans sanctioned by the minister of railways.

Held, on appeal (affirming the decision of MACDONALD, J.), that assuming the plan and book of reference sanctioned by the minister do not comply with the Railway Act, if there has been an approval of the location of the railway and the grades and curves as shewn on the plan, it is sufficient for exemption from taxation under the Municipal Act.

Held, further, that sanction by the minister under section 18 of the Act establishes a *prima facie* case for definite appropriation and exemption and the burden is on the municipality to displace such exemption, which may be done by shewing the lands still remain in use for the purpose for which they were previously used.

Held, further, that when land that is purchased by the Company is cleared for certain purposes in connection with the operation of the railway, and is left in that state until such time should arrive for actual construction, it may be looked upon as a "definite appropriation" as part of the railway and exempt from taxation.

Canadian Northern Pacific Railway v. *New Westminster Corporation* (1917), A.C. 602 and *Canadian Northern Pacific Ry. Co.* v. *City of Kelowna* (1917), 25 B.C. 514 followed.

A person assessed need not appeal to the Court of Revision where the assessment is illegal. The jurisdiction of the Court of Revision is confined to the question of whether the assessment is too high or too low, there being no jurisdiction to decide whether the assessment commissioner has exceeded his powers.

MACDONALD, J.

1918

Feb. 4.

COURT OF APPEAL

Nov. 5.

CANADIAN NORTHERN PACIFIC RY. CO. *v.* CITY OF VERNON

THE SAME *v.* CITY OF ARMSTRONG

APPEAL from the decision of MACDONALD, J., in two actions tried together at Vancouver on the 2nd and 4th of February, 1918, the plaintiff Company claiming that certain lands it held within the two defendant Corporations were exempt from taxation. Under paragraph 13(*e*) of the agreement between the Province and the Canadian Northern Railway Company set out in the Schedule to Cap. 3, B.C. Stats. 1910, the Company became entitled to certain exemptions in connection with the construction of its railway. Under Cap. 32, B.C. Stats. 1912, the Company was empowered to construct certain branch lines within the Province, and section 6 thereof extended thereto exemptions from taxation granted under paragraph 13(*e*) of the original agreement. In pursuance thereof a branch line was surveyed south from Kamloops through the cities of Armstrong and Vernon. The plaintiff Company acquired large tracts of land within both Corporations, ostensibly for railway purposes. Under paragraph 13(*e*) of the agreement aforesaid the property of the Company was exempt from all taxes except local improvements. As the Company did not proceed to build the railway as contemplated, but rented to individuals who continued to utilize the properties as formerly, the outer portion being used for farming, and the inside portion, upon which were buildings, being used for stores, etc., the defendants assessed the lands within their respective limits for other than

Statement

MACDONALD, J.

1918

Feb. 4.

COURT OF APPEAL

Nov. 5.

CANADIAN NORTHERN PACIFIC RY. CO. v. CITY OF VERNON

THE SAME v. CITY OF ARMSTRONG

local improvements in 1913, and continued to do so in each following year. The actions were brought for a declaration that the lands are exempt from taxation and for an injunction restraining the defendants from taking proceedings by sale or otherwise to recover the taxes assessed. The defence was that section 79 of the Railway Act had not been complied with by the Company, in that it had not commenced and proceeded with the construction of its road; that it had not complied with the provisions of the Act from section 16 to 27, inclusive; that the map and plans filed did not comply with the Act; that the lands shewn on the plan did not form part of nor were they used in connection with the operation of the railway; that the Municipal Act applied to the case and the Company was not entitled to maintain the action as the proper course was to appeal to the Court of Revision in pursuance of the provisions of said Act.

Armour, and *Heggie,* for plaintiff.
W. H. D. Ladner, for defendants.

MACDONALD, J.: These two cases have been argued together, and it appears to me that my reasons for judgment, with necessary adaptations, may be utilized in the same way. Under the Act, authorizing the Canadian Northern Pacific Railway Company to construct a railway through the Province of British Columbia, coupled with the agreement thereby ratified, under paragraph 13(*e*) of the agreement in the Schedule to the Act, it became entitled in connection with the line so to be constructed, to certain exemptions. Subsequently, in 1912, the Company obtained the right to construct certain branch lines in the Province, and by section 6 of Cap. 32 of the statutes of that year, the provision as to exemption, outlined in said paragraph 13(*e*), was extended to such branch lines. The intention, with respect to this particular branch line, was that the Railway should tap that productive part of the Province, known as the Okanagan Valley. In pursuance of this intention, a line was surveyed from Kamloops southerly through the Cities of Armstrong and Vernon, and thence through the City of Kelowna. It is contended by counsel for the defence that the Railway Company could not avail itself of the exemption

MACDONALD, J.

clause, referred to in said Schedule, because it was not pleaded in such a way as to be applicable to the construction of this branch line. I allowed an amendment, so that the plaintiff Company might avail itself of the provisions of the Act of 1912, already referred to. Then in order to give the defendants every opportunity of setting up a defence as against such an amendment, I allowed them to plead the benefit of section 79 of the Railway Act. It is contended by the plaintiff Company that this section is not applicable to such branch line, and that in any event the proof rests upon the defendants to shew, not only that the line has not been completed within the period required by the statute, but that no leave has been granted by the minister extending the time for the completion of the railway. The wording of section 79 may not be apt, or put in such a way as to be applicable to the Acts, under which the Canadian Northern Pacific is proposing to construct this branch line. However, in view of the fact that the same situation must have arisen, and could have been outlined in the case of the Canadian Northern Pacific Railway against the City of Kelowna, I do not feel disposed to pass upon this ground, as, if I were to hold that it was tenable, the anomalous position would arise, of the defendants in these actions being wholly successful, and the neighbouring Municipality of the City of Kelowna being unsuccessful, under the same set of circumstances.

MACDONALD, J.

I come, then, to deal with another objection raised, and that is that the plaintiff has misconceived its action, that it should have appealed to the Court of Revision, and the result of the finding of the Court of Revision, or of an appeal from the Court of Revision, would be binding upon it. Therefore, it is not at liberty to pursue this action, for the purpose of determining its rights as to exemption. The case of *Foster* v. *Township of St. Joseph* (1917), 39 O.L.R. 525 is cited to me in support of this contention. The facts are not disclosed sufficiently in the report, to enable me to utilize it, if I were disposed to do so. Under the circumstances which have arisen and judgments rendered with respect to this question of exemption, as applied to this railway, I would not, even if I considered that the authority went as far as contended, follow it.

MACDONALD, J.

1918

Feb. 4.

COURT OF APPEAL

Nov. 5.

CANADIAN NORTHERN PACIFIC RY. CO. v. CITY OF VERNON

THE SAME v. CITY OF ARMSTRONG

MACDONALD, J.

I might add, that I doubt that it is an authority, to the extent contended for by counsel for the defendants.

Having disposed of these two points, I come then to a consideration of the situation as it arises with regard to exemptions sought to be obtained in these two Municipalities. Paragraph 13(*e*), already referred to, is in the words and figures following:

"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, A.D. 1924, be exempt from all taxation whatsoever, or however imposed, by, with, or under the authority of the Legislature of the Province of British Columbia, or by any municipal or school organization in the Province."

This paragraph was considered by the Court of Appeal in an appeal from Mr. Justice CLEMENT, arising out of an assessment in the City of New Westminster (*In re Canadian Northern Pacific Ry. Co. and City of New Westminster* (1915), 22 B.C. 247). Then an action was brought by plaintiff herein against the City of Kelowna, for the purpose of determining the right of exemption in that municipality, and the decision at the trial was in favour of the railway company, as to all the lands referred to in the statement of claim in that action. The judgment of the Court of Appeal in the *New Westminster* case was considered by the Privy Council and sustained ((1917), A.C. 602). It was held that the railway company was not entitled to the exemption contended for. An appeal had been brought in the meantime from the decision in the *Kelowna* case, and the Court of Appeal held that the railway company was entitled to a limited exemption in that city. The reasons for judgment (of which I have been afforded a copy), of a majority of the Court, are to the effect that the decision in the Privy Council was to be applied and followed. It is now contended by counsel for the defendants that I should decide differently with respect to these two Municipalities, and that even although a plan sanctioned by the minister was filed in the office of the minister of railways for the Province, and also in the proper registry office, still that this plan was not a compliance with the Railway Act —that it did not confer any rights upon the Railway Company, as far as exemption was concerned. I was particularly anxious to find, if there was any difference between the situation as

MACDONALD, J.

1918

Feb. 4.

COURT OF APPEAL

Nov. 5.

CANADIAN NORTHERN PACIFIC RY. CO. v. CITY OF VERNON

THE SAME v. CITY OF ARMSTRONG

outlined in the *City of Kelowna* case and that pertaining to the two Municipalities in question here. I had a certain amount of local knowledge, but I was naturally anxious not to apply this to the case, feeling that I should not do so. Upon questions submitted to one of the witnesses, he stated that the situation was the same. I had also had the benefit of a short perusal of the appeal book and plans in the *Kelowna* case, and I find the same points were raised, and apparently decided in that case as in these two cases now before me. I found the same contention was raised during the argument as is now raised by the counsel for these defendants. His position, broadly, is this, that until the line is actually constructed through these two Municipalities, and the plan is subsequently filed designating the portion of land used for railway purposes, that the exemption should not be given to the railway company. I can see grave difficulties in the future for the assessor in determining what amount of land should be exempt from taxation through these two Municipalities. However, I do not think that I should dwell upon this phase of the situation. It is touched upon in the latter part of the reasons for judgment in the Privy Council. Suffice for me to say, that I feel the judgment of the Court of Appeal in the *Kelowna* case is binding, and shews the application of the decision of the Privy Council. I might only add that on several points objection has been made to the form of the plans as sanctioned. That this is not a compliance with several provisions of the Railway Act; but I do not deem it necessary to decide upon the result that follows from this non-compliance with the Act, as the plans are, generally speaking, similar to the ones used in the *Kelowna* case. It appears to me, then, viewing the situation as being the same in all three municipalities, my only course is to follow the judgment of the Court of Appeal and to hold in these two Municipalities the plaintiff should be exempt from taxation (in pursuance of paragraph 13(*e*) of the Canadian Northern agreement), as to the right of way acquired by plaintiff through these Municipalities, and as indicated upon the plans sanctioned by the minister and filed in the registry office.

MACDONALD, J.

To make the position more specific, I have been afforded a copy of the formal judgment to be entered in the *Kelowna* case;

MACDONALD, J.
1918
Feb. 4.
COURT OF APPEAL
Nov. 5.
CANADIAN NORTHERN PACIFIC RY. CO. v. CITY OF VERNON
THE SAME v. CITY OF ARMSTRONG

I think it well to follow this form, agreed upon by both parties as being the result of the appeal in that case. So there will be judgment for the plaintiff in each case. I should here interject the statement that the plaintiff sought in the first instance to obtain an exemption for a large amount of land, which is now admitted cannot be exempt from taxation. It appears that in surveying the line of railway through these two Municipalities, it became necessary to purchase a large amount of property that was not really necessary for the construction of the railway. The Railway Company is entitled, under the Railway Act, to dispose of this overplus, and certainly, in the meantime, it should bear taxation in common with the other tax-bearing properties of the Municipality.

The formal judgment, then, will be that the plaintiff's actions are dismissed, except as to the strips of land within the Municipalities of Armstrong and Vernon owned by plaintiff, and shewn as constituting the Company's right of way according to the plans sanctioned by the minister of railways and deposited in the land registry office. The dates of these several plans can be determined when the formal judgment is drawn up. I further think it well to have a declaratory judgment, stating that these strips of land shewn on such plans are exempt from taxation. This judgment will still enable the defendants, if they feel so disposed, to obtain the benefit of all the objections so fully urged by their counsel.

MACDONALD, J.

Now as to the question of costs; in the *Kelowna* action it was decided that the municipality should recover against the respondent the costs of the appeal, and that the railway company should recover against the municipality the costs in the Court below. I do not know whether this portion of the judgment was arrived at by arrangement between the counsel. It does not appear to have been so decided in the reasons for judgment. It may have been by arrangement, therefore, I have to decide as to the costs in this action, without the assistance that might otherwise be gained from the conclusion in the *Kelowna* case. The plaintiff has not succeeded to the extent to which it presumably hoped, when it launched these actions. It sought exemption for a great deal more property than is now admitted to be exempt. There have been

several adjournments of these trials. I do not know whether orders have been drawn up in each case providing for the costs. It is a difficult matter to apportion the costs in a case of this kind. In the *Kelowna* case the pleadings were not exactly the same as those presented here. There was an alternative plea in that case, saying that if the plaintiff be entitled to any exemption, such exemption only existed with respect to that portion of the line shewing the right of way. Here the defendants' counsel would not accede to that position at the opening of the trial at Vancouver, and still adheres to the contention that there should be no exemption whatever. Taking that view of the case, it appears to me that the plaintiff has succeeded and will be entitled to the general costs of the action. It has established that it is entitled to have a certain portion of the land in these Municipalities that it owns for railway purposes, exempt from taxation. I cannot see that there could be any division made of the costs. There has been no particular time consumed with respect to that portion of the land, to which it failed to establish a claim for exemption.

MACDONALD, J.

1918

Feb. 4.:

COURT OF APPEAL

Nov. 5:

CANADIAN NORTHERN PACIFIC RY. CO. *v.* CITY OF VERNON

THE SAME *v.* CITY OF ARMSTRONG

As to the adjournments, I suppose that they have been properly dealt with as to costs in various orders. At any rate, as far as the adjournment that took place before me at Vernon, I have a note of that. The order was not formally drawn up. It will, of course, avail the defence for the purpose of set-off when the taxation takes place. There will be judgment accordingly.

MACDONALD, J.

From this decision the defendants appealed and the plaintiff cross-appealed. The appeals were argued at Victoria on the 19th and 20th of June, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

W. H. D. Ladner, for appellants: The Railway Company has not commenced and proceeded with the construction of the railway on the lands affected. In the absence of evidence to shew section 79 of the Railway Act (British Columbia) has been complied with the action should be dismissed. There is no appeal under the provisions of the Municipal Act and the Company never appealed from the Court of Revision: see *Foster* v.

Argument

MACDONALD, J.

1918

Feb. 4.

COURT OF APPEAL

Nov. 5.

CANADIAN NORTHERN PACIFIC RY. CO. v. CITY OF VERNON

THE SAME v. CITY OF ARMSTRONG

Township of St. Joseph (1917), 39 O.L.R. 525; *North Cowichan* v. *Hawthornthwaite* (1917), 24 B.C. 571. On the question of want of compliance with the Railway Act, the provisions of section 16 have not been complied with as there is no evidence that a location plan was ever submitted or received the sanction of the minister, nor has section 17 been complied with, as the plan sanctioned by the minister is defective in that it does not shew station ground, property lines and owners' names, nor has subsection (4) been complied with in any way, nor was the plan required under section 19 of the Act filed. Under section 15 of Cap. 57, B.C. Stats. 1913, the railway was to be completed on or before the 1st of July, 1914. It is not completed and they have no right to be on the ground: see *Canadian Northern Pacific Railway* v. *New Westminster Corporation* (1917), A.C. 602. The properties formerly used as farms and stores, etc., are still used in the same way, and the Company obtains a revenue therefrom. In Armstrong they are leased to a man who rents to individuals. Under section 157 of the Railway Act a by-law must be obtained from the corporation, but no by-law has been passed.

Argument

Armour, for respondent: These cases must follow *Canadian Northern Pacific Ry. Co.* v. *City of Kelowna* (1917), 25 B.C. 514. Appellants say that not having appealed from the assessment we cannot bring action, but that only applies to where the assessment was too much or too little. It does not apply to a case where the assessment was illegal, in which case the proper course is to bring an action: see *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809. Section 157 of the Act requiring a by-law only applies when the line runs along a street. We only cross streets. On the question of our time running out see *In re Branch Lines Can. Pac. Ry. Co.* (1905), 36 S.C.R. 42 at p. 101; *Ontario, etc., R.W. Co.* v. *Can. Pacific R.W. Co.* (1887), 14 Ont. 432; *Tiverton and North Devon Railway Co.* v. *Loosemore* (1884), 9 App. Cas. 480 at p. 505; *Midland Railway* v. *Great Western Railway* (1909), A.C. 445. We have a right to go on until the Crown interferes. The Legislature has power to waive forfeitures: *Grand Junction R.W. Co.* v. *Midland R.W. Co.* (1882), 7 A.R. 681.

Cur. adv. vult.

5th November, 1918.

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY v. CORPORATION OF THE CITY OF VERNON.

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

MARTIN, J.A.: Several questions are raised in this appeal, and I shall deal with them as briefly as possible.

With respect to the first, that the plaintiff Company should have gone to the Court of Revision and set up its claim for exemption, and because it did not it cannot maintain this action, that in principle is settled by *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809 at p. 815; 73 L.J., P.C. 120, wherein their Lordships of the Privy Council say:

"It appears to their Lordships that the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity."

With respect to the second, that the plan and book of reference do not comply with the British Columbia Railway Act, R.S.B.C. 1911, Cap. 194, though the minister has given his sanction under section 18, I am of opinion, assuming such non-compliance to be the fact, that if there has been, as here, an approval of "the location of the railway and the grades and curves thereof as shewn in such plan, profile, and book of reference," that is sufficient for the purpose of raising a claim for exemption against taxation under the Municipal Act, R.S.B.C. 1911, Cap. 170, even though it might not be a sufficient answer for non-compliance for certain purposes under the British Columbia Railway Act, for which non-compliance the railway is held responsible by section 18(2) thereof.

With respect to the third, that the plantiff has lost its right to construct its line because the time for completion has elapsed, I am of opinion that the matter is in such a confused state of legislation under various Provincial enactments that it is very difficult to determine the exact state of affairs thereunder, but seeing that the "railway works and undertakings" have been,

MACDONALD, J.

1918

Feb. 4.

COURT OF APPEAL

Nov. 5.

CANADIAN NORTHERN PACIFIC RY. CO. v. CITY OF VERNON

THE SAME v. CITY OF ARMSTRONG

MARTIN, J.A.

MACDONALD, J.

1918

Feb. 4.

COURT OF APPEAL

Nov. 5.

CANADIAN NORTHERN PACIFIC RY. CO. v. CITY OF VERNON

THE SAME v. CITY OF ARMSTRONG

by Federal statute, Cap. 20 of 1914, Canada, Sec. 15, "declared to be works for the general advantage of Canada" to become effective upon proclamation by the Governor in Council, and as such proclamation has been made on February 20th, 1917, to take effect on March 1st, 1917, it is therefore impossible to now contend that the Company has no power to bring to completion those portions of its line still under construction.

With respect to the fourth, that the words in paragraph 13(*e*) of the agreement, "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, A.D. 1924, be exempt from all taxation whatsoever . . . . ." do not apply, and no exemption is created thereby until after the railway is fully completed and the rails laid at least, I am of opinion that this is an extreme and impractical view thereof, not warranted by reason or authority. This Court decided in *In re Canadian Northern Pacific Railway Company and City of New Westminster* (1915), 22 B.C. 247; 9 W.W.R. 425, that primarily "whether or not they [lands acquired for the general undertaking] shall become part of the railway is contingent upon the sanction of the minister of railways," and their Lordships of the Privy Council upon appeal ((1917), A.C. 602; 86 L.J., P.C. 178; 36 D.L.R. 505) upheld that decision and laid it down that the word "railway" here "denoted a physical thing of which something else can form part and can be 'operated,'" and go on to say, p. 509:

MARTIN, J.A.

> "The company are no doubt justified in buying land which they expect they will 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 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."

It then becomes a question, after the sanction of the minister has been obtained, as to whether or no the lands have in fact been "definitely appropriated as part of the railway and taken from other uses," for I do not understand their Lordships to mean, nor do I mean, that it would be possible to escape taxation after sanction by acquiring, *e.g.*, a valuable block of buildings and marking it on the location plan as "station grounds" under section 17(*e*), and yet continuing to use the building for business purposes and derive rents therefrom. In the case before their Lordships, mills were being used as before, and there is no difference in principle between continuing to operate a mill or continuing to run a dance hall. But on the other hand, if, *e.g.*, after acquiring said buildings (whether then in use for shop, mill or dance hall) the Company removed them from the contemplated site for a station and left the land so cleared in that vacant state and for that purpose till the time should arrive, sooner or later, to actually build a station and its appurtenant tracks and yard, then it could fairly be said that there had been a "definite appropriation" of such land, vacant though it was, as part of "the railway," and the exemption would thereupon come into existence. Various other illustrations of sufficient "definite appropriation" might readily but not usefully be given, because it depends upon the special circumstances of each case.

As I understand the judgment of the learned judge below, he has taken the view that as to the right of way there has been such a definite appropriation, of which the sanction by the minister "of the location of the railway," etc., would establish a *prima facie* case; and no good ground has been shewn for interference with that finding of fact. There is nothing, I may say, in the recent decision of this Court in *Canadian Northern Pacific Ry. Co.* v. *City of Kelowna* [(1917), 25 B.C. 514]; (1918), 3 W.W.R. 845, December 20th, 1917, that, in my opinion, conflicts with the foregoing view. I did not sit in the case, but I find on perusing the judgment of my brother GALLIHER, with whom the Chief Justice concurred, that he relies upon the same observations as I do in the *New Westminster* case, *supra*. It follows, therefore, that the appeal should be dismissed.

MACDONALD, J.
1918
Feb. 4.
COURT OF APPEAL
Nov. 5.
CANADIAN NORTHERN PACIFIC RY. CO v. CITY OF VERNON
THE SAME v. CITY OF ARMSTRONG

We were informed that the cross-appeal is not pressed, and therefore it should be dismissed.

MCPHILLIPS, J.A.: In my opinion, the appeal of the Corporation of the City of Armstrong, as well as the cross-appeal of the Canadian Northern Pacific Railway Company, should be dismissed. That is, I am of the opinion, that upon the evidence as adduced before the learned trial judge, Mr. Justice MACDONALD arrived at the right conclusion. In passing, I feel constrained to say that if the Corporation of the City of Armstrong was in a position to shew that any portion of the right of way declared to be exempt by the judgment appealed from was in use for other than railway purposes within the meaning of the judgment of their Lordships of the Privy Council in *In re Canadian Northern Pacific Ry. Co. and City of New Westminster* (1915), 22 B.C. 247; (1917), A.C. 602; 36 D.L.R. 505, it was incumbent upon the Corporation to have established this. The Railway Company having led evidence defining and fixing its right of way, *prima facie,* the statutory exemption was operative, and without evidence to the contrary the declaratory judgment that the right of way as shewn on the plans duly approved and registered was exempt from taxation was rightly made. I was of the opinion that a new trial should be had in the *Canadian Northern Pacific Ry. Co.* v. *City of Kelowna* (1917), 25 B.C. 514, but that action was tried and the appeal therein was standing for judgment during the prosecution of the appeal to the Privy Council in *In re Canadian Northern Pacific Ry. Co. and City of New Westminster, supra.*

The trial of the present action having taken place after the judgments in both of the above mentioned actions, it is to be observed that the defence offered no satisfactory evidence whatever in justification of the assessment of the lands comprised in the right of way, to which lands only the judgment appealed from extends.

In view of the facts and circumstances therefore, and the advantage of knowing at the time of the trial and for a considerable time prior thereto, what parcels of land comprised in the right of way would not be exempt (if any) within the language of Sir Arthur Channell, who delivered the judgment of

their Lordships of the Privy Council in *In re Canadian Northern Pacific Ry. Co. and City of New Westminster, supra,* no forceful position is made out in the present case for the direction of a new trial upon any such ground. It may be further remarked that the notice of appeal of the Corporation does not ask that a new trial be directed. In any case I consider that the present case is not one requiring any such order to be made.

MACDONALD, J.

1918

Feb. 4.

COURT OF APPEAL

Nov. 5.

Then it was also submitted that the Railway Company not having appealed to the Municipal Court of Revision the present action was not maintainable. It is only necessary, upon this point, to refer to *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809 at p. 815, followed by this Court in *North Cowichan* v. *Hawthornthwaite* [(1917), 24 B.C. 571]; 42 D.L.R. 207. The head-note of the *Hawthornthwaite* case reads as follows:

CANADIAN NORTHERN PACIFIC RY. CO *v.* CITY OF VERNON

THE SAME *v.* CITY OF ARMSTRONG

> "If an assessment of land is illegal the person assessed is not compelled to resort to the remedy of an appeal to the Courts of Revision, but may resist an action under the Municipal Act (B.C. 1914, c. 52, s. 275) to recover the taxes,"

and the statute law under consideration by their Lordships of the Privy Council in the *Toronto Railway* v. *Toronto Corporation, supra,* was similar in terms to the British Columbia Municipal Act. The particular line of railway authorized to be constructed (see Canadian Northern Pacific Railway Extension Act, 1912, B.C. Stats. 1912, Cap. 32), the right of way of which has been by the learned trial judge declared exempt from taxation, is exempt from taxation by statutory exemption until the 1st of July, 1924: see Cap. 3, B.C. Stats. 1910, Schedule, paragraph 13(*e*), Canadian Northern Agreement.

MCPHILLIPS, J.A.

Now, in my opinion, the onus which rested upon the Corporation of displacing this statutory exemption was not discharged, and the Corporation has failed to shew that the learned trial judge arrived at a wrong conclusion. Likewise the Railway Company has failed to shew that the learned trial judge should have granted a more extensive exemption. I do not consider it necessary to add anything more in the way of reasons for judgment upon this appeal, further than to say, that having had the opportunity to read the judgment of my brother MARTIN, I wish to say that I am in agreement with all he has said. In the result, in my opinion, both appeals should stand dismissed and the judgment of the learned judge affirmed.

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

EBERTS, J.A.

MACDONALD, J.

1918

Feb. 4.

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY v. CORPORATION OF THE CITY OF ARMSTRONG.

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

COURT OF APPEAL

Nov. 5.

CANADIAN NORTHERN PACIFIC RY. CO v. CITY OF VERNON

THE SAME v. CITY OF ARMSTRONG

MARTIN, J.A.

MARTIN, J.A.: The judgment I have given in the *City of Vernon* case, covers all the points raised herein on the main appeal, and therefore it should be dismissed.

But the cross-appeal is pressed in this case, and it is urged that there has been a definite appropriation of more land, shewn on the location plan, *viz.*, "station grounds," etc., and that these, like the right of way, form part of the railway. This question of fact must be presumed to have been decided by the learned trial judge adversely to the defendant, for judgment has gone against it, and after perusing the evidence on the point, to which we were referred, I see no good ground for disturbing his finding. While the Company established a *prima facie* case of definite appropriation by proving the sanction by the minister "of the location of the railway," etc., yet that case has been displaced by the defendant which has sufficiently shewn that the lands so marked still "remain . . . . . in use for the purpose for which they have previously been used" (*viz.*, market gardening, or farming—"growing vegetables," as a witness describes it) as was said in *Canadian Northern Pacific Railway* v. *New Westminster Corporation* (1917), A.C. 602; 86 L.J., P.C. 178; 36 D.L.R. 505.

The cross-appeal should therefore be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The reasons for judgment given by me in *Canadian Northern Pacific Ry. Co.* v. *City of Vernon* are equally applicable to the appeal in this action. I would therefore dismiss the appeal and, being in agreement with my brother MARTIN, would also dismiss the cross-appeal.

EBERTS, J.A.

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

Appeal and cross-appeal dismissed.

Solicitors for appellants: *Cochrane & Ladner.*
Solicitors for respondent: *Heggie & DeBeck.*

DOMINION TRUST COMPANY v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA.

COURT OF APPEAL

1918

Oct. 1.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA

Fixtures—Safety-deposit boxes—Vault constructed as receptacle for boxes—Boxes resting on floor—Not otherwise attached to realty.

The vault in the Dominion Trust Company's building at Vancouver was constructed as a receptacle for safety-deposit boxes. Before the completion of the building a large number of safety-deposit boxes were installed in the vault. They were placed in steel sections containing 25 to 30 boxes each weighing about one and one-half tons, and rested on the steel floor of their own weight, not being attached to the realty in any way. After they were installed a rubber tiling, half an inch thick, was placed on the floor and made flush with the base of the boxes but not under them. Other fixtures were added to the vault, some of which it would have been necessary to tear away before the boxes could be removed. About a year afterwards another set of boxes was installed in the vault, but they rested of their own weight on the top of the rubber tiling floor and were not attached in any way.

Held (GALLIHER, J.A. dissenting), that the boxes installed during the construction of the building were part of the realty which passed to the mortgagee under foreclosure proceedings.

Held, further (MCPHILLIPS, J.A. dissenting), that the boxes installed a year later were chattels, and removable by the mortgagor.

Judgment of GREGORY, J. affirmed.

APPEAL and cross-appeal from the decision of GREGORY, J., of the 29th of November, 1917. The action is with relation to the ownership of safety-deposit boxes placed in the vaults below the Dominion Trust Building in Vancouver. This building was built by the British Canadian Securities, Limited, and in the course of its construction the owners borrowed money from the Mutual Life Assurance Company, which was secured by a mortgage on the building. After the completion of the building the Dominion Trust Company became tenants for one year, and at the expiration of the term purchased the property. There were in all 2,676 boxes placed in the vault. They rested in steel cases or sections weighing about one and one-half tons each, and each section contained from 25 to 30 boxes. Two thousand two hundred and eighty boxes (called the old boxes) had been put

Statement

COURT OF APPEAL

1918

Oct. 1.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA

Statement

in by the Securities Company. They were not attached to the realty in any way, but after being installed along the walls, and resting on the steel floor, a rubber tiling about half an inch thick was put in on top of the steel floor and placed flush with the base of the deposit-box casings which remained on the steel floor, and certain fittings were added to the vault tending to shew the permanency of the boxes. Upon the Dominion Trust Company becoming owner of the property, 396 more boxes were installed. These boxes were put in nests and rested on top of the rubber tiling. The defendant Company had obtained a final order for foreclosure of the mortgage covering the building in question; they refused to give up the safety-deposit boxes, contending they were part of the realty, and included in the security held under the mortgage. Upon the trial of the action brought by the liquidator of the Dominion Trust Company to recover the boxes, it was held by the learned trial judge that the boxes placed in the vault by the B.C. Securities were part of the realty, and included in the security covered by the mortgage, but that the 396 boxes subsequently installed by the Dominion Trust Company were chattels, and should be delivered over to the liquidator. The defendant appealed and the plaintiff cross-appealed.

The appeals were argued at Vancouver on the 26th, 29th and 30th of April, 1918, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Argument

S. S. Taylor, K.C., and *Robert Smith*, for appellant: The boxes rest on the steel floor. The rubber tiling is constructed around the old boxes, but the new ones were put in after the tiling had been completed and are on top of the tiling. I contend they are all part of the original construction: see *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174. An article standing of its own weight may become a fixture. It depends on the degree of annexation and the object of the annexation: see *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328 at p. 332; *Dickson* v. *Hunter* (1881), 29 Gr. 73 at p. 81; *Keefer* v. *Merrill* (1881), 6 A.R. 121; *D'Eyncourt* v. *Gregory* (1866), L.R. 3 Eq. 382 at p. 394. They are put there as part of the architectural design. It was built expressly for the Dominion Trust as far as the ground floor is concerned: see *Reynolds* v.

Ashby & Son (1904), A.C. 466 at p. 470; *Stack* v. *Eaton* (1902), 4 O.L.R. 335 at p. 338; *Kilpatrick* v. *Stone* (1910), 15 B.C. 158; *Canadian Bank of Commerce* v. *Lewis* (1907), 12 B.C. 398. The boxes were sold as part of the building to the Dominion Trust.

A. H. MacNeill, K.C. (*Gurd,* with him), for respondent: Neither the new nor the old boxes are annexed to the realty. They deal with the vault as part of the security, but not the boxes. Once a chattel it is always so. The law is the same in Scotland and England: see *Bain* v. *Brand* (1876), 1 App. Cas. 762. On the question of machinery being a fixture see *Ex parte Astbury* (1869), 4 Chy. App. 630. The question of annexation to the land is fully discussed in *Wiltshear* v. *Cottrell* (1853), 1 El. & Bl. 674; *Mather* v. *Fraser* (1856), 2 K. & J. 536 at p. 559; *The Metropolitan Counties, &c., Society* v. *Brown* (1859), 26 Beav. 454; *In re De Falbe* (1901), 1 Ch. 523. Unless it has come part of the house in an intelligible sense it does not pass to the mortgagee.

Argument

Taylor, in reply: On the question of intention see *Keefer* v. *Merrill* (1881), 6 A.R. 121 at p. 130.

Cur. adv. vult.

1st October, 1918.

MACDONALD, C.J.A.: The question is whether or not the safety-deposit boxes in question were part of the freehold or were merely chattels. It arises in this case as between mortgagee and the assignee of the mortgagor, who is now the owner of the equity of redemption.

The building now known as the Dominion Trust Building was erected by the British Canadian Securities Company, a company subsidiary to the Dominion Trust Company, and I think it can fairly be inferred from the facts that the building was intended mainly for occupation by the Trust Company. It was erected and equipped to meet the business requirements of the Trust Company.

MACDONALD, C.J.A.

The learned trial judge found that the boxes originally installed during the construction of the building by the said B.C. Securities Co., the mortgagors, were part of the freehold, but that certain other boxes placed in the building by the Dominion

COURT OF APPEAL
1918
Oct. 1.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA

Trust Company about a year afterwards were chattels. The term "vault" is sometimes used in this case as signifying the strong room and sometimes the boxes in the room. But this confusion in terminology apart, the case has to do with steel boxes and their frames, installed in a room specially constructed for the safe deposit and care of documents and valuables. At the date of the mortgage these boxes had not been installed, but their installation was clearly in the contemplation of the parties to the mortgage and the Dominion Trust Company. The Trust Company at first occupied a considerable part of the building, including the strong room and its equipment, as tenants of the Securities Company, and after a year of such tenancy took a conveyance of the premises subject to the mortgage. The Securities Company and the Trust Company are now in liquidation. The mortgagee is in possession, and the Trust Company brought this action to recover the boxes in dispute.

The circumstances under which the first lot of boxes were installed in the strong room are, in my opinion, important as indicating the intention of the owners of the premises, and also the understanding of the Dominion Trust Company, as to what the relationship of these boxes to the freehold was intended to be. A large number of the boxes were purchased from the Trust Company by the Securities Company for installation with others purchased from the manufacturers. They were installed in accordance with plans of the strong room prepared by the architect. The strong room was constructed specially for the business of safe deposit. The installation of these boxes appears to me to be part of the general scheme to construct and equip a building or room for a particular purpose. Those which the learned trial judge held to be part of the freehold, while not actually attached thereto by bolts or other fastenings, were placed in such a way as to suggest permanency. They occupied one side of the room from end to end and from floor to ceiling, with appropriate finished moulding along the top, and rested upon the concrete floor below the rubber tiling which covered the rest of the floor, and which was fitted against the base of the boxes. Complimentary to the boxes were certain cubicles or small apartments affixed to the freehold, designed

MACDONALD, C.J.A.

for the convenience of depositors in examining their documents in private.

It appears to be well established by authority that if an intention to make chattels part of the freehold is sufficiently established from all the circumstances of the particular case, they may be held to be part of the freehold, notwithstanding that they are not affixed otherwise than by their own weight to the freehold: *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, in which Lord Blackburn points out that in such circumstances the onus of proof lies on the party who alleges that the chattel has been made part of the realty. In *Leigh* v. *Taylor* (1902), A.C. 157 at p. 162, Lord Macnaghten said that,

"The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times."

One may be permitted to ask, in view of the fact that the Trust Company was to become tenant, why the boxes which belonged to the Trust Company should have been purchased from them by the Securities Company and installed as part of the original scheme of construction if they were to remain chattels? That portion of the building, including the strong room, which was leased by the Trust Company was leased at a lump sum, without distinction between the building as freehold and these boxes as chattels. In my opinion, the completeness of the equipment of the room by the installation of the boxes and cubicles strongly supports the defendant's contention that the boxes were intended to be a permanent adjunct of the strong room. The removal of these boxes would leave the floor of the room in an incomplete condition. The rubber tiling would have to be extended over the surface formerly occupied by the boxes, and while this is not in itself a matter of very great weight, yet, in conjunction with other circumstances, it is not to be overlooked. As regards the second class of boxes, namely, those which were placed in the strong room by the Trust Company after they became the owners of the equity of redemption, I entertain considerable doubt as to their *status*. They were no part of the original construction or installation, and I am unable to say that the learned judge came to a wrong conclusion when he held that the mortgagees did not satisfy the burden of

MACDONALD, C.J.A.

COURT OF APPEAL

1918

Oct. 1.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA

proof resting on them to shew that these boxes were made part of the freehold. They did not form even a complete "nest of boxes," and were not embraced in the general scheme of numbering applicable to the others.

I would, therefore, dismiss both appeal and cross-appeal.

GALLIHER, J.A.: I would dismiss the appeal and allow the cross-appeal. I realize that it is a case of no little difficulty, and one on which different minds can very well come to opposite conclusions, as indeed is instanced by the fact that no two minds have wholly met here.

After a careful perusal of the evidence and an endeavour to apply the authorities cited to us, and others which I have read, I am unable to conclude that the articles in question here are fixtures and come within the purview of the mortgage. Mr. *Taylor* presented to us a very forceful and elaborate argument as to the architectural design, location and numbering of the nests of boxes, the cubicles, grills and other fittings, their general erection and construction on a well-defined plan, and urged that he was well within the decision in *D'Eyncourt* v. *Gregory* (1866), L.R. 3 Eq. 382 at p. 394. In that case Lord Romilly, Master of the Rolls, expressed himself as not coming to his conclusions with any degree of confidence or complete satisfaction to himself, but even had the decision been given absolutely free from doubt, I must confess I cannot see the application of a principle under the circumstances of that case, which was the beautifying of an expensive manor house and grounds by the harmonizing and symmetrical designing and construction of objects of art, to the furnishings of a safety-deposit vault in a business block. As regards the rule laid down by Lord Blackburn (then Justice Blackburn), who delivered the judgment of the Court in *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, followed and approved in subsequent cases in England and in our Supreme Court of Canada, it resolves itself into a question of what was the intention of the parties under the particular circumstances of each case. I think we must find, upon the evidence here, that the several articles in question could be easily removed without damage to the property. Of course, that alone does not determine what are fixtures and what are chattels, and

GALLIHER, J.A.

as evidence of intention, Mr. *Taylor* points to the fact that when negotiating for the loan, the plaintiff made a point of the earning capacity of the safety-deposit vault. I think it may be assumed that, generally speaking, loan companies do not advance their money with the view of at some future time acquiring the property by foreclosure or sale proceedings, but rather for the purpose of income by way of interest on such loans, but, of course, with a view to obtaining ample security in case of failure to repay the loan and interest. After the valuation of the property as a property pure and simple, they inquire into the earning capacity of the premises, not so much perhaps with a view to placing an enhanced value thereon as to the probability of the mortgagor being able to meet his payments when due. I admit both conditions may be in mind, but not so as to warrant us in assuming that the defendant believed or the plaintiff intended that the fittings or fixtures, whichever we may for the moment call them, would be covered by the mortgage. The mortgage was upon the lands and premises, describing them, and making no reference to fixtures (though fixtures, of course, would be included), and I mention it merely to point out that in most of the cases cited to us by Mr. *Taylor*, of counsel for the defendant, which were cases where machinery was being used for manufacturing purposes, and where without the active operating creative power the purposes for which the premises were utilized could not be carried out, fixtures were specifically mentioned in the mortgage. Some of these nests of boxes were laid on steel beams, and rubber tiling, with which the floor of the vault was finished, was brought up to and against the base of the boxes, while those brought in later were placed on top of the rubber tiling, a fact which rather argues against there being an intention to attach these as fixtures to carry out a completed plan as a whole. The removal of one row of rubber tiles, which would be sufficient to enable the boxes to be removed, seems to me to affect the realty in so slight a degree as to constitute practically no appreciable damage. Nothing would be gained by dwelling upon the matter further, as rightly or wrongly, I have reached a conclusion satisfactory to my own mind as to the nature of these articles.

COURT OF APPEAL

1918

Oct. 1.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The two actions were tried together by Mr. Justice GREGORY, and involved the question of the determination as to whether the safety-deposit boxes, cubicles and other fixtures connected therewith, of the safety-deposit vault of the Dominion Trust Company were the property of the Mutual Life Assurance Company of Canada, mortgagees, later mortgagees in possession, and still later the owners of the freehold by an order absolute of foreclosure. The learned trial judge in a very careful judgment, in which he went very fully into the facts, and discussed the law as it is interpreted and applied by him, found that the safety-deposit boxes called by him as lot 1 were the property of the Dominion Trust Company, being part of the realty; that as to lot 2 they were and remained chattels of the Dominion Trust Company. The Mutual Life Assurance Company of Canada appealed as to the finding relative to lot 2, and the Dominion Trust Company cross-appealed as to the finding relative to lot 1. The British Canadian Securities, Limited, was in its action held to be entitled to the steel bookcases and map and voucher cases, and the Mutual Life Assurance Company of Canada was held to be entitled to the steel shelving and wire partition in the storage vault and counter plate glass on the counters, and in this action there is an appeal and cross-appeal. In my opinion, and with great respect to the learned trial judge, I am entirely unable to accept the view that the Dominion Trust Company or the British Canadian Securities, Limited, are entitled to any of the claimed articles, but that they are all fixtures, and are the property of the Mutual Life Assurance Company of Canada, the owners of the freehold.

It would be too long a story to in detail set forth the various changes in the business relations and realty holdings changes of the Dominion Trust Company and the British Canadian Securities, Limited, ending in disastrous financial failure, but this much can be said, that the two Companies were one in so far as that can be said where they were separate entities, managed wholly by the one person, namely, the late W. R. Arnold, who was the managing director of both companies. The mortgage held by the Mutual Life Assurance Company of Canada, now foreclosed, was given by the British Canadian Securities, Limited, the then owners of the freehold, being a most modern and

substantial office building in the City of Vancouver, of extensive proportions, and was later the home and the property of the Dominion Trust Company, subject to the mortgage, becoming subsequently to the mortgage the owner of the freehold by conveyance from the British Canadian Securities, Limited. The Dominion Trust Company (hereafter called the Trust Company) was a party to the application for the loan made to the Mutual Life Assurance Company of Canada (hereafter called the Assurance Company), and was a party to the mortgage and bond as a principal debtor, along with the British Canadian Securities, Limited (hereafter called the Securities Company) for the due payment of the mortgage. Elaborate forms of application plans and other data were placed before the Assurance Company, and great stress was laid upon the nature of the building, its adaptation, in fact, architectural design, to house the safety-deposit vaults, and to generally carry on an extensive financial and trust business of a permanent nature, and the business carried on was certainly of large, even vast, proportions, unfortunately only to end in disastrous failure. There was displayed in large letters upon the building this legend: "Dominion Trust Company The Perpetual Trustee—Armour Plate Safety Deposit Vaults," evidencing the declared permanent nature of the business carried on in the building. It is true that the whole office building was not devoted to the business of the Trust Company and the Securities Company, there being other tenants, but the building was most certainly earmarked in particular as the permanent abode of the Trust Company, and was built and especially adapted for the business of the Trust Company and the Securities Company, and this was generally impressed upon the Assurance Company. It would take too long to enter into the details as to this, but I consider that the subject warrants at least the setting forth of a letter which went to the Assurance Company from Arnold at the time of the application for the loan. It reads as follows:

MCPHILLIPS, J.A.

"We beg to advise you that we are sending you today under separate cover blue prints of our building at the corner of Pender and Homer Streets, Vancouver, as requested by Mr. R. L. Drury. With regard to the rentals for safe-deposit vaults, we beg to advise you that the earnings for the first eight months of 1912 were $5,000. The vaults being installed in the building at the corner of Pender and Homer Streets are double the

COURT OF APPEAL

1918

Oct. 1.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA

MCPHILLIPS, J.A.

size of the present vaults, and the earning capacity will be $25,000. At the present time the Dominion Trust Company have some ten different sizes of deposit boxes for rent, but a number of sizes are all rented and they are waiting to instal new boxes in the new building. We would like to know regarding this loan by wire after your full Board meeting to be held on the 10th inst. I might say that since your president and managing director were here we have refused this loan from other parties on account of assurances which they gave us at that time."

The Assurance Company finally advanced the sum of $225,000 by way of mortgage, and became possessed of the legal estate in the lands upon which the building is situate and were mortgagees thereof. The Trust Company became the owners thereof, subject to the mortgage, by purchase from the Securities Company for the sum of $625,000, being conveyed the land upon which the building is, "together with all buildings, fixtures," etc., words to be found in the conveyance. Now, at the time of the conveyance, the bulk of the articles called in question were in place and situate in the building, and in use in connection with the business there carried on, and all of the articles are in their nature not only useful, but in these modern times may be said to be necessary in the carrying on of the business, especially when carried on in the extensive way in which it was, being a business of great volume, and the building was advertised far and wide as having the most complete fittings of the most modern kind, and of undoubted convenience and safety, in fact, in perfect keeping with the character of safety-deposit vaults, now so well understood in the large cities of the United States and Canada. It is clear beyond question that a very material inducement for the making of the loan by the Assurance Company was the character of the building and its special adaptation to the business carried on, and its very complete architectural design and construction, together with all the necessary fittings of safety-deposit vaults, *i.e.*, safety-deposit box units and all the necessary attendant features to complete the same, together with the steel book cases, map and voucher cases, steel shelving, wire partition and storage vault, in short, all the claimed articles find their natural place upon the premises in which the business was being carried on, and were essential and necessary in the carrying on of the business and evidenced the special character of the building and its adaptation for the

special class of business carried on therein. I do not find it necessary to enter into detail as to which Company placed the respective claimed chattels upon the premises, it not being a matter material to the inquiry as I view it. They all became fixtures, and were not removable as against the mortgagee in possession and the owners of the building and land by way of foreclosure of the mortgage. It may be remarked in passing that no attempt was made to set up any title to the claimed chattels until after the mortgagee was in possession. The Trust Company and Securities Company are both in the course of being wound up, and the claims made are being made by the liquidators thereof—that is, the actions are being carried on in connection with liquidation.

In the argument upon the two appeals (I am dealing with the actions and the appeals in one judgment as the facts and the law are so interlaced that it would only mean undue repetition otherwise, and I cannot really see any differentiation in the matter for consideration; that is, my view of the law applicable to the special facts is equally decisive and comprehensive of both appeals) a great many authorities were referred to. I do not intend to in detail discuss all of these authorities. With deference to counsel upon both sides, some of them seem quite inapplicable, but I admit that there would appear to be quite a good deal of confusion in the many opinions of the eminent judges who have so laboriously and ably examined into the principle of law as affecting fixtures; this though is apparent throughout all the decisions and has been given voice to by the learned judges, that each case must really be decided upon the special facts thereof, that is, that the principle is elastic in its application, and should, of course, be equitably applied. In the appeals which are before this Court we have the original parties —no intervening interests. The fact that the Trust Company and Securities Company are in the course of being wound up confers no greater rights than the rights exerciseable by the mortgagors, and both companies, as we have seen, were parties to the mortgage. In passing, it may be further noted, as the evidence shews, that the conveyance from the Securities Company to the Trust Company is the only instrument passing the

MCPHILLIPS, J.A.

COURT OF APPEAL

1918

Oct. 1.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA

articles which, in the main, are the subject-matter of the appeals, that is, there is here cogent evidence of intention that they were considered fixtures and passed with the conveyance of the land upon which the building was situate. No bill of sale was executed; in fact, no evidence whatever that there was any sale independent of the sale of the realty.

It is a further matter for remark and particularly pertinent to the inquiry that the safety-deposit boxes, accompanying appliances, attachments and conveniences, were all put in place under special architectural supervision and in accordance with plans made. There is here no casual bringing into a building of chattels, the placing of same with more or less fixity to the premises with no intention whatever of making them part of the building, but here we have substantial articles all coming within the plans and scheme of the building, to constitute a permanent safety-deposit vault with all its modern accessories, and to otherwise put in place and make serviceable a modern and up-to-date office building having in particular these special features, but now the contention is, that there must be a complete emasculation of the creation which was so much enlarged upon when the very considerable loan was applied for to the Assurance Company, which loan was made upon the faith of these professions, and when the mortgagee seeks, in accordance with the terms of the mortgage, to exercise the right of possession and ownership of that which was mortgaged to it, these companies (the liquidators cannot assert any greater right) have the hardihood and effrontery to submit that the law supports them in their contention. With all respect to contrary opinion, my view is that the law fails to support any such submission, and it would be an instance, were it otherwise, of bringing the law into disrepute. We have here special circumstances that cannot be overlooked, and whatever confusion there may be in the law, no confusion can arise in its application to the special facts so apparent in these appeals. An early case, much cited in later cases, which well demonstrates what the law is and its proper application, is *Walmsley* v. *Milne* (1859), 7 C.B. (N.S.) 115 (121 R.R. 408), and it was a case of bankruptcy, the assignee claiming. The case well warrants

MCPHILLIPS, J.A.

careful perusal and consideration, and wholly supports the arguments of the learned counsel for the mortgagee, the Assurance Company, in the appeals before us. I merely quote the concluding words of Crowder, J., who delivered the judgment of the Court, at pp. 138-9:

"We think, therefore, that, when the mortgagor (who was the real owner of the inheritance), after the date of the mortgage, annexed the fixtures in question for a permanent purpose, and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage-deed in the mortgagee; and that, consequently, the plaintiffs, who are assignees of the mortgagor, cannot maintain the present action."

This case has been cited in the following cases: *Gough* v. *Wood & Co.* (1894), 1 Q.B. 713; *Hobson* v. *Gorringe* (1897), 1 Ch. 182; *Crossley Brothers, Limited* v. *Lee* (1908), 1 K.B. 86; *Ellis* v. *Glover & Hobson, Limited, ib.* 388.

The extent to which the law has been carried in its application, even where the ownership in the chattel was not really in the mortgagee, is evidenced in *Hobson* v. *Gorringe* (1896), 66 L.J., Ch. 114. A. L. Smith, L.J. at p. 121 said:

"That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold, upon the terms that the one shall be at liberty in certain events to retake possession, we do not doubt; but how a *de facto* fixture becomes not a fixture or is not a fixture as regards a purchaser of land for value and without notice, by reason of some bargain between the affixers, we do not understand, nor has any authority to support this contention been adduced."

Reynolds v. *Ashby & Son* (1904), 73 L.J., K.B. 946, a decision of the House of Lords, is a leading case dealing with the law calling for consideration upon these appeals. I will only quote one portion of the judgment of the Lord Chancellor (Earl of Halsbury) appearing at p. 950:

"The question is whether they passed by the mortgage. But for the fact that Holdway had not paid for them the question would not in my opinion be open to the slightest doubt. There is a long series of decisions of the highest authority shewing conclusively that as between a mortgagor and a mortgagee machines fixed as these were to land mortgaged pass to the mortgagee as part of the land. The decisions in question begin with *Walmsley* v. *Milne* [(1859)], 29 L.J., C.P. 97; 7 C.B. (N.S.) 115, and include *Barclay, Ex parte; Gawan, In re* [(1855)], 25 L.J., Bk. 1; 5 De G.M. & G. 403; *Mather* v. *Fraser* [(1856)], 25 L.J., Ch. 361; 2 K. & J. 536; *Climie* v. *Wood* [(1868)], 37 L.J., Ex. 158; L.R. 3 Ex. 257. In Ex. Ch.: [(1869)], 38 L.J., Ex. 223; L.R. 4 Ex. 358; *Longbottom* v. *Berry* [(1869)], 39 L.J., Q.B. 37; L.R. 5 Q.B. 123; *Holland* v. *Hodgson* [(1872)],

COURT OF APPEAL

1918

Oct. 1.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA

41 L.J., C.P. 146; L.R. 7 C.P. 328; *Gough* v. *Wood* (1894), 1 Q.B. 713; 63 L.J., Q.B. 564; and *Hobson* v. *Gorringe* (1896), 66 L.J., Ch. 114; 1897, 1 Ch. 182. Others were referred to in the argument, but I need only mention *Southport and West Lancashire Banking Co.* v. *Thompson* (1887), 57 L.J., Ch. 114; 37 Ch. D. 64, where it was held that whether the mortgagor is an owner in fee or is only a leaseholder (as in this case) is immaterial with reference to the question now under consideration. It is quite impossible to overrule these decisions."

In the present appeals there is no question that the legal estate passed to the mortgagee. *In re Samuel Allen & Sons, Lim.* (1907), 76 L.J., Ch. 362, Parker, J. (afterwards Lord Parker of Waddington, lately deceased, one of England's greatest jurists), had under consideration rights under a hire-purchase agreement. The head-note reads as follows:

"Machinery obtained by a company under a hire-purchase agreement was fixed to its business premises. Subsequently the company gave to a bank an equitable mortgage of its premises by deposit of deeds accompanied by written memoranda of charge. The bank had no notice of the hire-purchase agreement. On default in payment by the company under the hire-purchase agreement the vendor of the machinery gave notice demanding the return of the machinery. A winding-up order was made against the company, and money was still owing to the bank under its memoranda of charge:—*Held*, that the bank being an equitable mortgagee took subject to the hire-purchase agreement, that the hire-purchase agreement created an equitable interest by which a subsequent purchaser who had not the legal estate was bound, and that the interest of the bank under its mortgage was postponed to the interest of the vendors of the machinery under the hire-purchase agreement. *Gough* v. *Wood & Co.* (63 L.J., Q.B. 564; (1894), 1 Q.B. 713); *Hobson* v. *Gorringe* ([(1896)], 66 L.J., Ch. 114; (1897), 1 Ch. 182), and *Reynolds* v. *Ashby* (73 L.J., K.B. 946; (1904), A.C. 466 distinguished."

MCPHILLIPS, J.A.

The circumstances surrounding the giving of the mortgage in question in these appeals, the character of the business to be carried on upon the premises, the special construction of the building, its adaptation to the particular business, all punctuate the creation of premises of a special character of a present and potential value that should appeal to a mortgagee in making the loan, and was undoubtedly an inducement to make the same, so as to create an equitable position that the Trust Company and the Securities Company cannot be allowed to now dispute, but quite apart from that, the legal estate became vested in the mortgagee and there was no removal before the mortgagee took possession. Of course though, in my opinion, no removal would have been justified, and if there had been, there would be a

right of action therefor. A case which is apposite is *Monti* v. *Barnes* (1900), 70 L.J., Q.B. 225. The head-note is in the following terms:

"The mortgagor of a freehold dwelling-house after the execution of the mortgage removed certain fixed grates from the house and substituted for them an equal number of dog grates. The substituted dog grates were not physically attached to the freehold, but rested in their places merely by their own weight, which was considerable:—*Held*, that, the true inference being that the dog grates were substituted for the purpose of improving the inheritance, they were fixtures."

And see the judgments of A. L. Smith, M.R., Collins and Stirling, L.JJ. It is noteworthy that A. L. Smith, M.R., at p. 226, used this language:

"It is obvious that a dwelling-house cannot continue without grates, and manifestly the mortgagor never intended that the house should be without them."

Here we have a building specially constructed and with a declared present and potential value, founded upon having therein a safety-deposit vault. Of what practical value would it be without the necessary accessories—the safety-deposit boxes? To state the proposition only shews how untenable it is, that as against this declared intention the very parties who induced the Assurance Company to make this very considerable advance of money should now be interfered with in its right to the security, it should be left intact, not destroyed, and in passing, the evidence shews that the Assurance Company, in the endeavour no doubt to recoup itself for the investment made, is now maintaining and carrying on a safety-deposit vault business upon the premises.

The Scotch case of *Howie's Trustees* v. *M'Lay* (1902), 5 F. 214, is much in point. The head-note is as follows:

"*Held* that a heritable security over a factory included as part of the heritable subjects five lace looms therein, which were bolted to a long iron sole-plate attached only by its own weight to the floor, the upper part of the looms being tied by substantial iron stays to the roof beams.

Lord McLaren, at p. 220, made use of the following language, which may be aptly applied to the special facts of the appeals we have for consideration:

"I have already said, or implied, that in the question whether an article in its nature moveable is attached to the heritable estate, the law can only, as I think, establish presumptions. The actual decision must depend on the facts of the case, and I think it results from the decisions that the

COURT OF APPEAL

1918

Oct. 1.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA

presumption for attachment to the inheritance is stronger in the case of machinery used for industrial purposes than in the case of articles of domestic utility or ornament, which are usually carried by the owner from one residence to another. One reason for the distinction may be found in the fact that a building which is to contain machinery is generally designed to carry the special machinery that is to be put into it. In any case, the size and proportions of the building, the strength of its walls and girders, and the light and heat required, are elements which depend on the nature of the work to be done in the building, and the mechanism by which that work is to be carried on. I need hardly say that the degree of mutual adaptation of building and machinery will vary in different trades, and therefore there can be no absolute rule as to machinery in general, but only a presumption. In the present case the more valuable articles in dispute are lace-looms, placed in a weaving shed of suitable construction, and so proportioned to the dimensions of the looms that the uppermost part of the frame (I think it was called the Jacquard frame) admits of being bolted to the frame of the roof of the building. I think this is sufficient adaptation of the machine to the building to satisfy the notion of fixation or attachment to the inheritance."

Then it is to be noted that the facts disclose in these appeals that the fixtures were placed by the owners of the realty, and in this connection the judgment of Joyce, J. in *In re Chesterfield's (Lord) Settled Estates* (1910), 80 L.J., Ch. 186 is much in point.

Mowats Limited v. *Hudson Brothers, Limited* (1911), 105 L.T. 400 is an interesting case, although in no way decisive of the points we have to consider, being solely a case of landlord and tenant, but a statement of the law as understood by that great judge, Vaughan Williams, L.J., appearing at pp. 402-3 (although in the particular case dissenting from his brethren) is instructive.

MCPHILLIPS, J.A.

The learned Lord Justice there speaks of "the scheme for the conversion of the building into a provision shop." We have the erection of a building specially constructed and adapted for a safety-deposit vault and the carrying on of that business—"Armour Plate Safety Deposit Vaults," and the case of the granting of the legal estate. A most decisive case upon the points calling for decision upon the present appeals is that of the House of Lords in *Meux* v. *Jacob* (1875), 44 L.J., Ch. 481, the head-note reading as follows:

"Trade fixtures pass by a mortgage of the freehold or of a leaseholder's interest in the property to which they are attached, whether such mortgage be effected by a regularly executed deed, or by deposit with memorandum,

and such mortgage will be effectual, though not registered, as against any subsequent unregistered bill of sale. Trade fixtures added subsequently to the mortgage are subject to this rule as much as those attached before the mortgage."

And see the judgment of Lord Hatherley in this case at pp. 484-5. The language which is most important for consideration upon the present appeals is (p. 485):

"I apprehend that a mortgage or assignment out and out of all a leaseholder's interest in the property itself as distinguished from the fixtures carries with it also the interest in the fixtures attached to the property, although those fixtures might be subject to the right of removal if the mortgage had not been executed by the party entitled to the lease. I mention that because it appears to me to cover the question of any fixtures that may have been added subsequently to the memorandum of deposit by the mortgagor in this instance. If subsequently to the memorandum of deposit he had attached other chattels to the property, the mortgagee of the lease stood in the same position as his mortgagor, and those things when attached to the freehold, passed during the interest that still remained in the lease. Therefore the mortgage would attach to them, and the mortgagee would at any time during the lease, have the benefit which his mortgagor had of removing those chattels that first attached anterior to his mortgage and also that subsequently attached posterior to his mortgage. That being so, the only argument on this subject which we have heard to-day appears to me to be entirely untenable."

I particularly rely upon this statement of the law, as the mortgage in the present case was executed by both the Trust Company and the Securities Company, and both Companies have placed fixtures in the building which, in my opinion, passed under the mortgage and are of the freehold, the property of the Assurance Company. And upon the same point as that dealt with by Lord Hatherley, we have Lord Selborne saying, at p. 486:

MCPHILLIPS, J.A.

"Another subsidiary point is really covered by the same decisions, namely, the suggestion that although fixtures which were upon the land at the date of the mortgage, might pass, those which were placed upon it after the date of the mortgage would be in a different situation. As to that, also, it is admitted that at all events in cases of mortgages in fee, trade fixtures placed upon the land after the mortgage are so annexed to the land as to belong to the mortgagee."

The present appeals indicate that note must be taken of the modern advance in the use to which buildings are put, and that that which might be at first thought upon the cases to be trade fixtures or chattels (not fixtures) forming part of the freehold, may well have to be considered as forming part of the freehold, and in the inquiry it is particularly a matter for careful con-

COURT OF APPEAL

1918

Oct. 1.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE COMPANY OF CANADA

MCPHILLIPS, J.A.

sideration to give full effect to the intention of the parties and the special character of the building, and when that special character may be said to give the main or a particular value to the freehold, the nature of the attachment to the freehold or non-attachment at all is to be considered, but there may be no attachment at all and yet it may be just and right and a true application of the law to hold that the property in the at one time chattels has passed and has become incorporated in the freehold. In this connection the language of Lord Shaw in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited* (1915), A.C. 599 at p. 617 is indeed most instructive:

> "The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce* v. *Lady James Hay* (1852), 1 Macq. H.L. 305, by Lord St. Leonards, L.C., who observed: 'The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind.'"

In my opinion, the mortgage was effective to pass the property in question and as owners of the freehold the Assurance Company is the owner thereof, *i.e.*, the articles in question became part of the freehold, and the Trust Company and the Securities Company both fail in their appeals, and the Assurance Company should succeed in their appeals. In the result the actions should, in my opinion, be dismissed.

Appeal dismissed, Galliher, J.A. dissenting; cross-appeal dismissed, McPhillips, J.A. dissenting.

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

IN RE WAR RELIEF ACT AND *IN RE* LOT 18, SUBDIVISION F, BLOCK 174.

MURPHY, J. (At Chambers)

1918

Sept. 25.

IN RE WAR RELIEF ACT

Mortgage—Default in principal and interest—War Relief Act—Application for possession—B.C. Stats. 1916, Cap. 74, Sec. 9; 1917, Cap. 74, Sec. 7.

On an application, under section 9 of the War Relief Act (B.C. Stats. 1916, Cap. 74) as amended in 1917, by a mortgagee to enter into possession in default of payment of rentable value, the Court is to have regard, not to the ability of the mortgagor to pay, but whether there exists a sufficient equity in the mortgagor to make it reasonably certain that the mortgagee will ultimately recover.

In deciding the rentable value of a property the Court has no discretion to fix an arbitrary rent, but must on evidence adduced decide what is the rentable value as fixed by the market at the time the application is made.

APPLICATION by the mortgagor by way of petition under section 9 of the War Relief Act (B.C. Stats. 1916, Cap. 74) and amendment of 1917, for leave to enter into possession unless paid the rentable value of the property. Heard by MURPHY, J. at Chambers in Vancouver on the 25th of September, 1918. Statement

Robson, for the application: The principal and interest under the mortgage are long overdue, and I have the evidence of an independent party that the rentable value of the premises is $12 per month.

L. J. Ladner, contra: Under the statute the rentable value is fixed by the Court. In the majority of cases the wife and family of the mortgagor, who is overseas, are left in possession, and in such a case the Court should fix the rent she is able to pay or she may have to give up possession. It is in the discretion of the Court to fix the amount. Argument

MURPHY, J.: In my opinion two questions come up for decision under section 9 of the War Relief Act, *viz.*: (1), will the Court grant leave to enter into possession in default of payment of rentable value; and (2), if it does, what is such rentable value, such questions to be decided on the facts of each case? I further think that such decisions are not matters of arbitrary discretion, but are to be made on the evidence adduced. Judgment

MURPHY, J. (At Chambers)

1918

Sept. 25.

IN RE WAR RELIEF ACT

In considering the first, the Court is to have regard not to the ability of the mortgagor to pay, but to the question whether or not there exists, at the time the application is made, a sufficient equity owned by the mortgagor to, in the opinion of the Court, make it reasonably certain that the mortgagee will ultimately recover his principal and interest. If there is, leave will be refused. If not, it will be granted. I arrive at this view from a consideration of the scheme of the Act in reference to premises actually used as a residence, set out in section 5, and of the history of the amendment of section 9 as originally passed and as it now stands. If the Legislature intended to burden individual mortgagees with the obligation to furnish at their own expense homes for soldiers or their dependants, it would, I think, have clearly said so. The consideration aforesaid leads me to the conclusion that the Legislature has impliedly said the contrary.

In deciding what is the rentable value, assuming the first question resolved in favour of the applicant, I think the Court has no discretion to fix an arbitrary rent, but must, on evidence adduced, decide what is the rentable value as fixed by the market at the time the application is made. Section 9 contains no words authorizing the Court to fix a rent lower than that fixed by the market. There may well be a dispute as to what this rent is, and it is, I think, the settlement of such dispute that is meant when the section says the rentable value is to be fixed by the Court. In this case the first question was not thoroughly ventilated before me. If, therefore, the mortgagor desires to contend that there is sufficient equity in this property to justify the Court in refusing to allow entry into possession on the principle hereinbefore set out, I direct the matter to come on for re-hearing. If not, I fix the rent at $12 per month, the amount I find on the evidence to be the rentable value as fixed by the market, and which I hold I have no power under the Act to arbitrarily fix at a lower figure because of the inability of the mortgagor to pay more, or for any other reason.

Judgment

SCHETKY AND ACADIA, LIMITED v. COCHRANE *ET AL.*

HUNTER, C.J.B.C.

1918

April 5.

COURT OF APPEAL

Nov. 5.

SCHETKY v. COCHRANE

Agreement—Rescission—Fraud—Promissory note transferred under agreement—Recovered by payor from transferee for less than face value—Payor's knowledge of transaction—Transferor's right to recover.

Upon the incorporation of the Acadia, Limited, of Vancouver, a large number of the shareholders gave promissory notes in part payment for their stock and owing to difficulty in collecting on the notes the Company entered into an agreement with C., who undertook to make all collections and settle all claims. C. assumed virtual control of the Company and a month later was made managing director. In the meantime C., with a friend E., obtained the incorporation of the Union Funding Company in Seattle, they holding all the stock giving a promissory note for $150,000 in payment therefor that was never paid, the Company having no other assets. Later, through C.'s influence, E. was made a director of the Acadia, Limited, and this was followed two weeks later by his being made president. The board of directors then by resolution purported to delegate to a small executive committee all their powers to deal with the Company's property, making E. chairman, and C. a member thereof. C. and E. then having virtual control of both companies, the companies entered into an agreement whereby the Acadia, Limited, transferred to the Union Funding Company all the promissory notes it held in payment for stock, in consideration for which it received a certain number of shares in the capital stock of the Union Funding Company. Later the directors of Acadia, Limited, owing to losses occasioned thereby, endeavoured by negotiation to have the said agreement annulled and obtain the return of its assets which were handed over under the terms of the agreement, one of the directors D. being in attendance at the meetings at which the negotiations were discussed. These negotiations failed and the Acadia, Limited, went into liquidation. After liquidation D., who had been a director for a year and a half in the Acadia, Limited, prior to its being wound up and had given the Company a promissory note for $7,250 in part payment for stock, negotiated with the Union Funding Company and recovered his promissory note on payment of $1,500. An action by the liquidator of the Acadia, Limited, for rescission of the agreement between the two companies on the ground of fraud and that D. was in wrongful possession of his note was dismissed.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MCPHILLIPS, J.A. dissenting), that the scheme whereby the agreement was brought about was conceived in fraud and it should be set aside.

Held, further, that D., though not a party to the fraud, having obtained the note from the wrongful holder with full knowledge of the facts, was liable to the plaintiff for its full amount.

HUNTER, C.J.B.C.

1918

April 5.

COURT OF APPEAL

Nov. 5.

SCHETKY v. COCHRANE

APPEAL from the decision of HUNTER, C.J.B.C. in an action tried by him at Vancouver on the 25th, 27th and 28th of March, and at Victoria on the 5th of April, 1918, for the rescission of an agreement dated the 7th of April, 1914, made between the Acadia Trust Company, Limited, of Vancouver, and the Union Funding Company, of Seattle, on the ground of fraud, that it was not authorized by the directors of the Acadia Company, and that certain promissory notes handed over under said agreement to the Union Funding Company be returned. The Acadia Trust Company was incorporated in 1911, having its head office in Vancouver. The Company obtained subscribers for stock and entered into various terms and conditions as to payment, and difficulties subsequently arose owing to its inability to collect on the promissory notes given for stock. On the 19th of August, 1913, the Company entered into an agreement with one J. H. Cornish, formerly of Seattle, whereby on certain terms he undertook to collect and settle all claims and adjust differences between the shareholders and officials of the Company. Shortly after entering into said agreement Cornish assumed virtual control of the Company. On the day following his entering into said agreement he, with a friend from Seattle named E. C. Elston, procured the incorporation of the Union Funding Company in Seattle, of which Cornish and Elston held all the stock, giving in payment a joint-note for $150,000 that was never paid, the said Company having no other assets. On the 14th of September, 1913, Cornish became managing director of the Acadia Company, which position he held until the 6th of October, 1915, when the Company was wound up. On the 20th of November, 1913, the board of directors of the Acadia Company, through the influence of Cornish, appointed Elston a director of said Company, and on the 12th of December following Elston was appointed president, and the board of directors at the same meeting, by resolution, purported to delegate to a small executive committee their powers to deal with the property of the Company, making Elston the chairman of the committee, of which Cornish was a member. On the 7th of February, 1914, when Elston and Cornish were in virtual control of both Com-

Statement

panies, an agreement was entered into between the Companies whereby the Acadia Company delivered over to the Funding Company all the notes of shareholders that it held, in consideration for which it received from the Funding Company a block of the shares of the capital stock of the Funding Company. After this $4,200 was collected by the Acadia Company on account of some of the notes of the shareholders in payment for stock and said sum was paid over to the Funding Company. Subsequently the directors of the Company, finding they had suffered loss through the agreement of the 7th of February, 1914, endeavoured by negotiation to have the agreement annulled and recover the assets handed over to the Union Funding Company under the terms of the agreement, the defendant Cochrane being present at the meetings at which the proposed negotiations were discussed. The negotiations were not successful, and the Acadia, Limited, went into liquidation on the 6th of October, 1915. In December, 1916, the defendant Cochrane by paying $1,500 to the Funding Company received in return his own promissory note for $7,250, that he had given in payment for shares in the Acadia Company. The writ was issued in this action on the 19th of January, 1917. On the 24th of May, 1917, the Union Funding Company accounted to the Acadia Company for all the notes received by it and returned the notes still in its possession. The plaintiffs claim that the said agreement was entered into and the notes delivered in pursuance thereof as a result of fraud, conspiracy and breach of trust on the part of the defendants Elston and Cornish, their object being to obtain possession of the notes; that the agreement was *ultra vires* of the plaintiff Company in that its memorandum of association did not authorize the holding of stock in a foreign company; that the directors had no power to delegate their authority to Elston and Cornish, and that the defendant Cochrane, who was a director in the Acadia Company from April, 1914, until its liquidation, had knowledge of the facts when he unlawfully obtained possession of his note from the Funding Company.

Statement

S. S. Taylor, K.C., and *Baird*, for plaintiffs.
O'Neill, for defendant.
J. N. Ellis, for the creditors.

HUNTER, C.J.B.C.
1918
April 5.
COURT OF APPEAL
Nov. 5.
SCHETKY v. COCHRANE

HUNTER, C.J.B.C.: A number of points have been taken by the learned counsel. The first point raised was that there was no power in the directors to delegate their powers to a sub-committee. The answer to that is contained in Table A, which provides that "the directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on them by the directors." It is perhaps pertinent to refer, in connection with that, to section 40 of the Interpretation Act, which says that when any act or thing is required to be done by more than two persons, a majority will be sufficient to do the same. So that so far as concerns the plaintiffs' objection that there was no power in the general body of directors to delegate their powers to any sub-committee, I think there is nothing in that point.

The next point that was made was that this sub-committee never actually met as a sub-committee, but that any acts or proceedings which emanated from them in the name of the Company were simply brought about by the evil genius of the proceedings, and their signature obtained without their actually meeting and discussing the matter, as gentlemen occupying such a position no doubt should have done. And cases are referred to in which it has been decided that the proceedings were invalid by reason of the committee not having all been there. The answer to that is contained in the resolution itself, in which it is provided that this sub-committee, among other things, was to keep a record of the names of the members of the committee present at each meeting of the committee. To my mind that imports power given to a quorum of those gentlemen to meet as they saw fit; and that it was not necessary for all of them to meet. There is no point in requiring as a matter of form that the names of all the members which form the committee shall be recorded at each meeting, unless it was intended that a quorum could act as occasion required.

HUNTER, C.J.B.C.

The next point raised was that it was *ultra vires* on the part of this company to acquire shares in the company known as the Union Funding Company, a foreign corporation. As an answer to that I will refer to several clauses in the memor-

andum of association. Very wide powers indeed are taken in this memorandum of association. Among others I will refer to section 3, subsection (a), in which this company is given general power to execute a trust, loan and financial business in any part of the world. By subsection (i) it is given power "to acquire by location, purchase, lease or otherwise in the Province of British Columbia or elsewhere, real estate, improved or unimproved, and personal property of every nature and kind," and so on, which would include power to acquire shares in a foreign corporation. By subsection (q) it is given power to "sell or dispose of the undertaking, lands, property, estate, chattels and effects of this company or any part thereof, for such consideration as this company may think fit either for cash or shares, debentures or securities of any other company operating wholly or partly in the Province of British Columbia, and whether the objects of such company are altogether or in part similar to those of this company." By subsection (r) it is given power "to purchase, take on lease, or in exchange or otherwise acquire any real or personal property including stock in any other company or companies," and so on. By subsection (s) "to amalgamate with any other company now or hereafter incorporated operating or to operate wholly or partly in the Province of British Columbia," and so on. By subsection (w) "to procure this company to be registered, licensed or recognized in any Province or Territory in the Dominion of Canada, or in any Province, country or place." So that, I think, there can be no doubt whatever that so far as the power given by the memorandum of association is concerned, that there was power to acquire the shares in the Union Funding Company.

The next point that was raised was that it was *ultra vires* of the Acadia Trust Company to acquire those shares or attempt to acquire them, because the Legislature of British Columbia had no power to grant such power to any statutory company. With respect to the general question as to how far a statutory joint-stock company can be lawfully empowered by the Legislature to carry on business outside the Province, it is not now necessary for me to inquire at length as all that was sought to be done here was to acquire property in the form of shares in a foreign company, and it is not now open to doubt that the

HUNTER, C.J.B.C.

1918

April 5.

COURT OF APPEAL

Nov. 5.

SCHETKY v. COCHRANE

Legislature may validly clothe such a company with capacity to acquire foreign property. I venture to think, however, that in the final settlement of the question it will be found illusory to attempt to establish any solid line of distinction between a power to carry on business and a power to acquire property, and I do not see any sound reason why such a company may not be validly clothed with power to acquire property, and I do not see any sound reason why such a company may not be validly clothed with power to carry on business outside the Province, subject to the law of the extra-territorial jurisdiction, if the primary object of its creation is to carry on business within the Province.

The next question that was raised was that in any event the Companies Act did not empower local companies incorporated under the Companies Act to acquire property outside the Province. I find nothing to lend any support to that contention, because by section 13 of the Act all that is required is that the memorandum shall state, among other things, the objects of the company. There is no limitation whatever pointed out. So that, so far as I can see, it was the intention of the Legislature to empower every company incorporated under this Act to pursue as one of the objects of the company, any matter or thing which it was in the power of the Legislature to give it capacity to do.

HUNTER, C.J.B.C.

Now, with regard to the agreement itself, it seems to me, that on the face of it, it is a valid agreement. Not only that, but by section 86 of the Companies Act it is provided:

> "Every contract, agreement, engagement, or bargain made, and every bill of exchange drawn, accepted, or indorsed, and every promissory note . . . . in general accordance with his powers as such under the regulations of the company, shall be binding upon the company; and in no case shall it be necessary to have the seal of the company affixed to any such contract, agreement, engagement, bargain, bill of exchange, promissory note, or cheque, or to prove that the same was made, drawn, accepted, or indorsed, as the case may be, in pursuance of any regulations or special resolution or order."

So that I take it, it was the clear intention of the Legislature that where an agreement is *prima facie* valid, that is to say, executed in accordance with all the regulations concerning the matter, such as existed here, it did not intend to impose the duty of a person dealing with another person in connection with

that document to go behind the document and to inquire as to whether it was regular or irregular, or otherwise how it came into existence. *Omnia esse vita præsumuntur.* Had it been shewn that Cochrane, a director of this company, was a party to the creation of it or connived at it, a very different case might have presented itself, as it is the duty of a director to see to it, as far as he knows, that the internal regulations of the company are complied with; and the Court would not allow him to take advantage of an invalid agreement whose creation he either aided or connived at. But the difficulty is, that I cannot see that there is anything in the discovery which was brought before me to convince me that this man ought to have knowledge of the irregularities, if any, imputed to him.

Now, the next point was that in any event there was no ownership vested in these notes in the Union Funding Company. The agreement itself, I think, is sufficient to dispose of that objection. The very object of the agreement, on the face of it, was to exchange the notes for shares in the Funding Company. It was true that there was a certain clog or disability attempted to be placed upon the alienation of these notes by the Union Funding Company. That, no doubt, was done for the purpose of enabling the shareholders to turn around and make their financial arrangements within some reasonable time. It was a somewhat clumsy way of extending the time within which these shareholders should not be called upon for payment of their notes. But there is no doubt about the terms of the agreement itself, that the property in these notes was vested absolutely in the Union Funding Company, and it was only a matter of accounting between the Union Funding Company and the Acadia Trust Company as to what had been done with the proceeds of those notes. Not only that, but section 61 of the Bills of Exchange Act provides that "where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferrer had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferrer." Indeed, if such were not the law the uncertainty regarding the title to commercial paper would soon become intolerable. So that the only defence then to an action by the Union Funding Company, arising from the

HUNTER, C.J.B.C.

1918

April 5.

COURT OF APPEAL

Nov. 5.

SCHETKY v. COCHRANE

fact that these notes had not been indorsed in due course to the Funding Company, left open for the obligor on the note would be to raise any equity that he had as against the Acadia Trust Company; and there is no question of that kind arising in this case. So that when we have regard to the terms of the agreement itself and the section of the Bills of Exchange Act which I have just referred to, there can be no doubt that the Union Funding Company had become the legal holder of the note, and therefore they had power to give a good discharge, and that leaves the matter as one of accounting between the two companies.

Moreover, it seems to me that if we assume, as the argument suggests, that one of two constructions is open upon the face of the agreement—which, of course, is not a regularly drawn agreement, that is to say, it is not an agreement which was drawn by a competent solicitor—but assuming that the construction of the document is open to doubt, I take it to be a sound principle that where two persons are dealing by a document with obligations to which the obligor is not a party, that if the obligor adopts the construction of that document which gives him certain rights or vests certain rights in one of the parties to it, that he is not to have any fault imputed to him for adopting a construction which was open in the document. If people will combine together and engage in transactions of this kind without proper legal assistance, I do not see that the Court is called upon to hold that a third party, who is not a party to the document at all, can be prejudiced, or be allowed to be prejudiced if he *bona fide* adopts one of two constructions that are open on the face of it. He should not be exposed to litigation at the hands of either of the signatories by reason of their ambiguous dealings with each other. Here the payor finds the note in possession of the Funding Company, transferred to them by an *ex facie* valid assignment. Why should he not pay the Funding Company without the risk of litigation?

HUNTER, C.J.B.C.

With regard to the question of estoppel that has been raised by reason of Cochrane's letter of the 4th of April, I cannot see that there was any estoppel. In the first place, no estoppel was pleaded; but waiving that, it seems to me that this letter is simply a statement to the effect that he is indebted with

respect to these shares, that he was the purchaser of the shares, and in respect of those shares he admits that a certain amount is owing. That has nothing to do with the question as to who is the holder of the note or as to who has the right to collect the money.

It seems to me, after giving the best consideration that I can to the points raised by the learned counsel, that the liquidator is bound by the acts of the Company, and that as against Cochrane the action must be dismissed.

From this decision the plaintiffs appealed. The appeal was argued at Victoria on the 4th to the 7th of June, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers (*Baird,* with him), for appellants: The agreement whereby the notes were handed over to the Funding Company was bad owing to the position of the parties. It was a breach of trust. Cochrane's knowledge of the proceedings cannot be questioned as he was a director from the 4th of April, 1914, until the liquidation took place. Under section 10 of the articles a contract in which a director is interested is invalid unless there is full disclosure. A contract is invalid in which a director has voted if he is interested: *Transvaal Lands Company* v. *New Belgium (Transvaal) Land and Development Company* (1914), 2 Ch. 488; *Liquidators of Imperial Mercantile Credit Association* v. *Coleman* (1873), L.R. 6 H.L. 189; *In re Sharpe* (1892), 1 Ch. 154; *Russell* v. *Wakefield Waterworks Company* (1875), L.R. 20 Eq. 474 at p. 479; *Soar* v. *Ashwell* (1893), 2 Q.B. 390 at p. 394; Halsbury's Laws of England, Vol. 28, p. 184, par. 372; *In re Brogden. Billing* v. *Brogden* (1888), 38 Ch. D. 546 at p. 567. As to the memorandum of the Acadia Company (1) the agreement was *ultra vires* of the memorandum; (2) the memorandum, if it did authorize the agreement, was *ultra vires* of the Act: see *Hitchcock* v. *Way* (1837), 6 A. & E. 943; *Bonanza Creek Gold Mining Company, Limited* v. *The King* (1916), 1 A.C. 566; *Boyle* v. *Victoria Yukon Trading Co.* (1902), 9 B.C. 213. The note was the property of the Acadia Company and Cochrane

Argument

HUNTER, C.J.B.C.

1918

April 5.

COURT OF APPEAL

Nov. 5.

SCHETKY v. COCHRANE

knew of the conditions under which it was held by the Funding Company.

O'Neill, for respondent: There is no evidence of fraud. In any event the contract is binding until repudiated. In order to succeed against Cochrane the agreement of the 7th of February, 1914, must be rescinded. In other words, they must establish a case for setting aside the agreement. The settlement between the liquidator and the Funding Company was in the letter from the Funding Company of the 24th of May, 1917. This precluded the right to pursue this action: see *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26 at p. 35. As to the agreement being *ultra vires* of the Company and the memorandum of association being *ultra vires* of the Act see section 12 of the Companies Act (R.S.B.C. 1911, Cap. 39).

Argument

Mayers, in reply, referred to Halsbury's Laws of England, Vol. 20, p. 742, par. 1754; *Reese River Silver Mining Co.* v. *Smith* (1869), L.R. 4 H.L. 64. On the question of notice to a person who takes a negotiable instrument at under value see *Jones* v. *Gordon* (1877), 2 App. Cas. 616 at p. 629. An agent as a collector should receive cash only: *Williams* v. *Evans* (1866), L.R. 1 Q.B. 352 at p. 354; *Legge* v. *Byas* (1901), 7 Com. Cas. 16 at p. 19.

Cur. adv. vult.

5th November, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: In my opinion the agreement of the 7th of February was procured by fraud. Cochrane, though no party to the fraud, must, I think, on the evidence be held to have known of it, or at least that the Acadia Company was contending that the agreement was invalid. He had this knowledge long before he secured the note in question, to be delivered up to him by Elston. Cochrane was a director of the Acadia Company for a year and a half before it went into liquidation, and during a year of that period was secretary to the Board.

Prior to the winding-up, the Company was trying, as was recited in a resolution of the 30th of September, 1915, a month before the winding-up order was made, to get the agreement "set aside and cancelled." Cochrane says that his understand-

ing was that it was a question of negotiation (to get the agreement set aside). He said:

"I have heard the question of an action discussed, but I have never heard that it was contemplated because my recollection of it every time was that it would cost too much, and that it would be better to do it by negotiation."

He must, therefore, have been well aware that the agreement was considered to be open to attack in the Courts. Knowing this, and having himself voted to authorize negotiations for a settlement which would enable the Company to get back its own, he took advantage of his knowledge obtained as an officer of the Company and proceeded behind the back of the liquidator to obtain from the wrongful holder of the assets of the Company his own note for a large sum, part of said assets, by paying a fraction of its face value.

The appeal should be allowed, and judgment should be given in the action as prayed.

MARTIN, J.A. would allow the appeal.

GALLIHER, J.A.: This matter can, as I view it, be disposed of very shortly. I fail to see, nor could counsel on argument of the appeal give any plausible reason why the agreement of the 7th of February, 1914, between the Acadia, Limited, and the Union Funding Company was ever entered into. Of course, companies may enter into very foolish and useless agreements and yet be bound thereby, and we have here to go further and determine whether there was fraud. Upon the evidence before us (which it is useless to set out at length), dealing as it does with a series of occurrences leading up to the making of the agreement which had the effect of transferring a portion of the assets of a company doing business within this jurisdiction to a company doing business in a foreign jurisdiction, whose assets consisted almost entirely of unpaid notes given for stock subscriptions, and the manner in which this was brought about by Cornish, leaves no doubt in my mind that the whole scheme was conceived in fraud. This being my view, the agreement, had it not been set aside by consent of the parties, should have been set aside by this Court.

As to parties, this appeal is confined to Cochrane's liability on his note to the Acadia Company, which under the agreement

HUNTER, C.J.B.C.

1918

April 5.

COURT OF APPEAL

Nov. 5.

SCHETKY v. COCHRANE

was handed over to the Union Funding Company, and which Cochrane obtained possession of by paying the last-mentioned Company $1,500 in cash and turning over the stock held by himself or his wife in the Acadia. Cochrane is quite frank in his statement that he sent his agent Jeremy over to Seattle to make the best bargain he could to compromise his indebtedness on and to get back his note. The turning over of the shares and the giving of the Union Funding Company's cheque in supposed payment of these shares which Elston, the manager of the Company, says he never bought, and would not have bought, as he regarded them as valueless, the cheque never having gone through the bank, where Elston says it would not have been paid, and the indorsing back of the cheque to the Funding Company by Cochrane's attorney, done, as Elston says, for the purpose of making clearance entries, all goes to shew that the transaction was not a genuine one, but was, as Cochrane himself admits, an attempt to get back his note, in which he succeeded. The question is, can such a transaction stand?

Cochrane was a director of the Acadia, Limited, from the 4th of April, 1914, to the 14th of October, 1915, and was also secretary of the Company prior to its winding-up. He was fully aware of the efforts that were being made to set aside the agreement with the Union Funding Company and to recover back the notes held by them, of which his own was one. He was aware that the Acadia, Limited, were contemplating taking action to recover these notes, but owing to the expense that would be incurred it was decided to accomplish this by negotiation if possible. He was a party to a resolution to this effect. I think we must take it on the evidence and from his position as director and secretary of the Company, that he was aware of the nature of the whole transaction, the attitude of the Acadia Company and their claim that the notes were their property, and yet in the face of all this we find him, long after the Company was in liquidation, going through what I can only designate as a farcical effort to shew that he had paid his note in full to the Funding Company. Even if he had paid it in full, with his knowledge of all the circumstances, in my opinion he would still be liable to the plaintiffs.

GALLIHER, J.A.

I would allow the appeal.

McPHILLIPS, J.A.: I remain of the same opinion that I formed at the time of the argument of the appeal, and that is, that the judgment of the learned Chief Justice of British Columbia should be affirmed and the appeal dismissed. The learned counsel for the appellant, Mr. *Mayers,* in a very careful argument, endeavoured to establish the position that Cochrane, the respondent, remained liable upon the promissory note for $7,250, notwithstanding that same had been paid and delivered up to him by the holders thereof, the Union Funding Company, but stated that the $1,500 paid in cash by Cochrane as part consideration to retire the promissory note (the promissory note was delivered up on the payment of $1,500 and the transfer of certain shares), would be credited as a payment upon the note by the liquidator for the Acadia, Limited, the appellants. The agreement of the 7th of February, 1914, under which the Union Funding Company became possessed of the promissory note of Cochrane, was at the time of the payment of the promissory note by Cochrane, a subsisting agreement, and it cannot, upon the evidence, in my opinion, be gainsaid that at the time Cochrane paid the promissory note it was an admitted effective agreement under which the Union Funding Company was the holder of the promissory note in due course, and Cochrane therefore was entitled to make payment to the Company.

No fraud was alleged as against Cochrane, and at this bar and during the argument the learned counsel for the appellants expressly disclaimed any such contention. In any case, neither the pleadings nor the course of the trial would admit of any such case being attempted to be made. The agreement being an existent agreement and the Union Funding Company being the holders of the promissory note at the time of payment by Cochrane, in my opinion, it is now impossible for the appellants to say that Cochrane was not entitled to make payment of the promissory note to the Union Funding Company. That Cochrane paid less than the whole amount due upon the promissory note in cash is, with deference to the argument presented, futile and idle contention. The willingness of the appellants to give credit for the amount paid is significant. That the appellants are willing to in part admit the legality of payment to the Union Funding Company is noteworthy. If the situation was one that

HUNTER, C.J.B.C.

1918

April 5.

COURT OF APPEAL

Nov. 5.

SCHETKY v. COCHRANE

did not admit of payment to the Union Funding Company, then any payment whatever was at Cochrane's peril. This would necessarily have to be the position of the appellants, otherwise it is a wholly illogical contention. The agreement was later rescinded by mutual agreement as between the companies, but this was not until the 24th of May, 1917, and the payment of the promissory note by Cochrane was on the 7th of December, 1916, and at the time of the rescinding of the agreement it was well known that the Cochrane promissory note had been paid and had been delivered up to Cochrane by the Union Funding Company, and there is no evidence whatever that Cochrane was aware of any of the grounds upon which it was determined to rescind the agreement. Upon the part of the appellants a great deal of strenuous argument was addressed to questions of irregularity in the proceedings of the two Companies, none of which irregularities can be, in my opinion, at all relevant to the real matter for determination. In the absence of fraud, none of these irregularities affect the question. Cochrane was in no way a party to any breach of trust, nor was he in any fiduciary position which would not admit of him retiring a promissory note, upon which he was liable, upon the the best terms he could obtain from the holders thereof. The contention was made that the agreement under which the Union Funding Company became possessed of the promissory note was an *ultra vires* agreement, being outside the powers of the Company as contained in the memorandum of association, or if within the terms of the memorandum, then *ultra vires* as not being an agreement within any of the powers conferred upon a company under the Companies Act. I cannot accede to this argument. I cannot come to the conclusion, in the language of that eminent judge, Richards, C.J. (afterwards the first Chief Justice of Canada), in *Howe Machine Co.* v. *Walker* (1874), 35 U.C.Q.B. 37, that the agreement here questioned was "in any way contrary to any enactment made by our Legislature or contrary to the general policy of our laws or the interests of the people of this Province as indicated by legislation." The judgment of Chief Justice Richards may well be described as a classic upon the right of a foreign corporation to contract and carry on business, and it is instructive in this present appeal,

MCPHILLIPS, J.A.

nor do I consider that upon the facts of the present case the judgment in *Bonanza Creek Gold Mining Company, Limited* v. *The King* (1916), 1 A.C. 566 at p. 584, is in any way helpful to the appellants. It cannot be successfully contended upon the evidence that the Union Funding Company was other than a substantial company, and it was incorporated wholly distinct from and with no knowledge even of the existence of the Acadia Company. The negotiations which in the end culminated in the making of the agreement as between the companies were all directed to save the Acadia Company from financial disaster, and no fraud in the matter has been demonstrated. Further, it is a matter for notice, that with all these allegations of fraud thrown out, it would not appear that any misfeasance proceedings have been proceeded with, which one would expect would have been taken if it was felt that acts of misfeasance had occurred; and it is not to be forgotten that the appellants, as already remarked upon, expressly disclaim and do not charge fraud against Cochrane, the respondent. There was an entire lack of diligence upon the part of the appellants, if it were possible to have obtained rescission of the challenged agreement, *i.e.*, that a well-founded right of action existed. Such an action might have been brought and an injunction applied for which would have inhibited payments to the Union Funding Company, but this course was not adopted. In fact, the Union Funding Company was, under the agreement, called upon to exercise diligence in obtaining payment of the promissory notes. The payment and settlement arrived at between Cochrane and the Union Funding Company would appear to have been a business transaction. It is not the province of the Courts to say in what way business people or corporations shall do their business, unless it be that there is express statutory enactment, and that which has been done is prohibited by statute, or fraud is established, and even in the case of fraud there may be conduct which will not admit of the fraud being insisted upon. In the present case we have an agreement which was allowed to be given full effect to and recognition of the right to carry out its terms, and it may well be said that if there was sufficient ground to avoid the agreement there was, upon the facts, an election not to avoid the agreement, and equities have intervened. That is

HUNTER, C.J.B.C.

1918

April 5.

COURT OF APPEAL

Nov. 5.

SCHETKY v. COCHRANE

the position of Cochrane. The settlement he made was made with a company fully clothed with the right to effect a settlement, *i.e.*, empowered to agree as to the manner and terms of payment of the promissory note, being the holders thereof. Cochrane had no knowledge of the alleged grounds for rescission of the agreement. That there was afterwards rescission by mutual arrangement between the parties to the agreement proves nothing. In an action brought for rescission it might well have failed. It is fitting to remember upon this point what Mr. Justice Mellor said in *Clough* v. *London and North Western Railway* (1871), 41 L.J., Ex. 17 at p. 23:

> "In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that, so long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to shew that he has so determined."

(Also see *United Shoe Machinery Company of Canada* v. *Brunet* (1909), A.C. 330.)

MCPHILLIPS, J.A.

As I have stated, the retirement of the note by Cochrane and the settlement arrived at between himself and the Union Funding Company was a business transaction. The payment of the $1,500 and the transfer of the shares was accepted by the holders of the promissory note, and the note delivered up. If there is any enforceable right of action in reference to this transaction it cannot be one which lies as against Cochrane, but one only as between the two companies—parties to the agreement. That the shares transferred were of no value cannot enter into the question. Again, that was a business transaction, and the Union Funding Company must be held to be entitled to do its business in its own way, and there is evidence that the shares have value. Undoubtedly the Union Funding Company must have considered that they were of value. The Court cannot enter into this question. Again, this would be a matter of accounting as between the two companies.

The appellants ask on this appeal for the reversal of the judgment of the learned Chief Justice of British Columbia, who, as is evident from the reading of his careful judgment, gave full consideration to the conduct of the parties and as well to the documentary evidence. There is no charge of fraud, and as remarked upon, it was expressly disclaimed by counsel for the appellants. The transaction attacked was an ordinary business transaction, and without the element of fraud, and fraud established, how is it possible to avoid the transaction? The learned Chief Justice did not see his way to grant any relief, and in conformity with the decisions as to the province of a Court of Appeal, I am not of the opinion that this is a case where there should be interference with the judgment of the Court below (*Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Re Wagstaff; Wagstaff* v. *Jalland* (1907), 98 L.T. 149; *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95).

I would also in particular refer to what Lord Loreburn, L.C. said at p. 326 in *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326:

"My Lords, I regard the finding of Jelf J. 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 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."

MCPHILLIPS, J.A.

In my opinion none of the points of law taken in any way affect that which was, in all its elements, a business transaction simply. The dealings were between the proper parties; the payment of the promissory note was made to the holders thereof; fraud is not alleged; and no fiduciary position or trusteeship existed that affected Cochrane in what he did.

This appeal has given me much anxious consideration, and I cannot say that it is without hesitation I have come to the conclusion I have, but with no fraud charged against Cochrane, or that he was a party to a fraud, it seems to me that in dealing with the holder in due course of the promissory note he was not in the position of a trustee; he was entitled as a debtor to

HUNTER, C.J.B.C.

1918

April 5.

COURT OF APPEAL

Nov. 5.

SCHETKY v. COCHRANE

treat with his creditors and retire the promissory note by any business arrangement that could be come to. Payment in cash and the transfer of shares was a "contractual relation" (see Lord Esher, M.R. in *Soar* v. *Ashwell* (1893), 2 Q.B. 390 at p. 393), and in so doing it cannot be said that Cochrane was a trustee, nor can it be said that Cochrane "assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property" (see Lord Esher, M.R. in *Soar* v. *Ashwell, supra,* at p. 392). Upon the facts of the present case and in view of the judgment of the learned Chief Justice of British Columbia thereon, to which I attach, as it deservedly requires, the highest consideration, I cannot persuade myself that the principle of law dealt with by Lord Esher, M.R. in *Soar* v. *Ashwell, supra,* and the Lord Chancellor of Ireland, Sir Ignatius J. O'Brien, in *Hahesy* v. *Guiry* (1918), 1 I.R. 135 at pp. 138-9, can be said to be applicable to or determinative of this appeal. Even if the case were left in doubt, the proper course would be to resolve that doubt in favour of the respondent. I am not satisfied that the onus which always rests upon the appellant of shewing that the judgment is wrong, has been satisfactorily discharged in this case.

MCPHILLIPS, J.A.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellants: *W. J. Baird.*
Solicitor for respondent: *J. E. Jeremy.*

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. TREAT.

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. v. TREAT

Crown grant—Settlement Act—Grant from Dominion to E. & N. Ry. Co.—"Coast-line," meaning of—High-water mark—B.C. Stats. 1884, Cap. 14.

The term "coast-line" as descriptive of the eastern boundary of the block of land granted by the Province to the Dominion and by the latter granted to the plaintiff to aid in the construction of the Esquimalt and Nanaimo Railway, means the detailed coast-line as fixed by high-water mark.

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

APPEAL from the decision of CLEMENT, J. in an action to determine the ownership of the foreshore from the mouth of the Chemainus River, on Vancouver Island, to a point 80 chains southerly therefrom. Tried at Victoria on the 6th and 7th of March, 1918. In pursuance of the Coal and Petroleum Act the defendant staked the land in question, and on the 19th of November, 1917, was granted a licence to prospect for coal on said lands and the lands under the sea adjoining. The plaintiff claims that said foreshore is included in the lands conveyed by the Province, under the Settlement Act of 1884, to the Dominion, and reconveyed by the Dominion by way of subsidy to the plaintiff Company to aid in the construction of the railway. The question at issue is the construction of the Esquimalt and Nanaimo land grant and the statutes dealing with the grant, *i.e.*, whether the grant includes any lands below the high-water mark.

Statement

Davis, K.C., and *Harold B. Robertson*, for plaintiff.
Bass, for defendant.

25th March, 1918.

CLEMENT, J.: This action must, I think, be dismissed.

I can see nothing in the circumstances surrounding the passing of the Provincial Act, B.C. Stats. 1884, Cap. 14, to warrant me in ascribing to the Legislature an intention to depart from the recognized rule of construction in the case of a grant of land bordering upon tidal water, that the seaward limit of

CLEMENT, J.

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. v. TREAT

CLEMENT, J.

the grant is high-water mark, as indicated in *Attorney-General* v. *Chambers* (1854), 4 De G.M. & G. 206. The decision of that very careful judge, the late Mr. Justice IRVING, in *Mowat* v. *North Vancouver* (1902), 9 B.C. 205, does not assist me much, as the question there was one of municipal jurisdiction and not of proprietary right; moreover, the island (so-called) there in question was not an island at low tide, but a peninsula. I do not think there was any idea of departing from the well-established rule of interpretation in the case of grants above referred to.

The grant to the plaintiff Company by the Dominion Government does not purport to grant anything not held by the Crown in right of Canada. At that time it was a moot point whether the Dominion had not some proprietary interest in the sea-shore. The legal advisers of the Dominion so contended until the ownership by the Provinces of the land within their respective borders covered by the territorial waters of Canada (other than public harbours) was affirmed in 1898 by the judgment of the Privy Council in *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700. The position of the controversy in the 'eighties may account for the form of the grant to the plaintiff Company. Action dismissed, with costs.

From this decision the plaintiff appealed. The appeal was argued at Victoria on the 18th and 19th of June, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Argument

Harold B. Robertson, for appellant: We brought this action to determine the right to the foreshore. The whole area covered by the defendant's licence is under the sea except what is foreshore. The question is, did section 3 of the Settlement Act, B.C. Stats. 1884, Cap. 14, pass to the Dominion the foreshore. The descriptive words are "on the east by the coast-line of Vancouver Island." This question was passed on in *Mowat* v. *North Vancouver* (1902), 9 B.C. 205. As to the definition of "coast" see Abbott's Law Dictionary, Vol. 1, p. 235; Bouvier's Law Dictionary, Vol. 1, p. 337; Murray's Dictionary, Vol. 2, p. 555. That the "coast-line" goes to low-water mark see *The Queen* v. *Musson* (1858), 8 El. & Bl. 899; *Embleton* v. *Brown*

(1860), 3 El. & Bl. 234; *The Queen* v. *Keyn* (1876), 2 Ex. D. 63; *Carr* v. *Fracis Times & Co.* (1902), A.C. 176 at p. 181. If the Settlement Act did not give us the foreshore, the Province agreed to the transfer of same by the Dominion to us by reason of the agreement between the Province and the Dominion found in Dominion order in council of the 16th of November, 1886. In support of this see *Attorney-General for Canada* v. *Giroux* (1916), 53 S.C.R. 172 at p. 192; *Calvert* v. *Sebright* (1852), 15 Beav. 156 at p. 157; *Cope* v. *Doherty* (1858), 4 K. & J. 367; *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas. 295 at pp. 303-4.

Bass, for respondent: Section 3 of the Act of 1883 confines itself to the bald description of the land. It was re-enacted in the same terms in the 1884 Act, which shews the Legislature had the same intention throughout. The agreement deals with land, and land only. As to section 3 of chapter 6 of the Canada Statutes (1884), the gift under this section is only operative in the case of the Dominion holding the foreshore. The word "coast-line" means high-water mark; see Encyclopædia Britannica, 11th Ed., Vol. 27, p. 108. The foreshore does not pass unless expressly set out in the instrument: see *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700; *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas. 295. Argument

Robertson, in reply, referred to *Capital City Canning Co.* v. *Anglo-British Columbia Packing Co.* (1905), 11 B.C. 333; 2 W.L.R. 59; and *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1886), 14 S.C.R. 345 at pp. 357-8.

Cur. adv. vult.

5th November, 1918.

MACDONALD, C.J.A.: I agree entirely with the conclusion arrived at by CLEMENT, J. in the Court below. I think "coast-line," as descriptive of the eastern boundary of the block of land granted by the Province to the Dominion, and by the latter granted to the plaintiff to aid in the construction of the Esquimalt & Nanaimo Railway is, in relation to the subject-matter in dispute synonymous with "shore." I think it is well settled MACDONALD, C.J.A.

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. v. TREAT

that when a conveyance describes one of the boundaries of land as extending to the shore of the sea, that boundary is high-water mark. In the Encyclopædia Britannica, Vol. 8, 10th Ed., speaking of coast-line geographically, it is said:

"It is necessary to distinguish between general coast-line measured from point to point of the head lands disregarding the smaller bays, and detailed coast-line which takes account of every inflection shewn on the map employed and follows up the river estuaries to a point where tidal action ceases."

I think what was meant by "coast-line" in the conveyance in question was the detailed coast-line, and hence that its boundary is to be found at high-water mark.

It was further contended by defendant's counsel, at our bar, that an inference should be drawn, from certain transactions between the two Governments and railway contractors mentioned in the proceedings, that the Province intended to grant more than the land to high-water mark. I do not think such an inference a permissible one to draw from that source.

MACDONALD, C.J.A.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: What occasions the difficulty here is the employment in the statute of an expression which is not used by lawyers in determining the boundaries of land. The statute says "the piece or parcel of land" that is granted is "bounded on the east by the coast-line of Vancouver Island," but the diligence of counsel has been unable to find a legal definition of "coast-line," and I have been equally unsuccessful. This throws the inquiry back upon "coast" as a starting point, and that is found to be a very indefinite and inexact expression including land, or sea, or the foreshore between them. As is said, generally, in Gould on Waters, 3rd Ed., par. 28, p. 64:

"The term 'coast,' or 'sea-coast,' appears to have no fixed meaning apart from the context, and to be equally applicable to the space between high and low-water mark, or to the territory bordering on the sea, or to that part of the sea which adjoins the land."

And in *Rex* v. *Forty-nine Casks of Brandy* (1836), 3 Hag. Adm. 257, it is said, at p. 275:

"Now the coast is, properly, not the sea, but the land which bounds the sea; it is the limit of the land jurisdiction, and of the parishes and manors—bordering on the sea—which are part of the land of the country. This limit, however, and its character, varies according to the state of the tide: when the tide is in, and covers the land, it is sea; when the tide

is out, it is land as far as low-water mark: between high and low-water mark it must therefore be considered as *divisum imperium*."

"Coast" perhaps more usually contemplates the shore of the mainland as distinguished from the outlying islands, but great islands at least, such as this Island of Vancouver, have their own "mainland," which is a relative term after all. A wider application of the term in a maritime and international sense includes islands which are the "natural appendages of the coast on which they border": *The Anna* (1805), 5 C. Rob. 373 at p. 385*c*, and a narrower one excludes it from land fronting on rivers at their outlets to the sea—*The Queen* v. *Cox* (1858), 1 P.E.I. 170—wherein Mr. Justice Peters, delivering the judgment of the Court, said, p. 173:

"The term coast, in its popular sense is, we believe, applied to the land fronting on the open sea, or inlets off the sea, or bays, but is never applied to that fronting on rivers. And taking the word in that sense it appears to us, evidently, used to contradistinguish high-water mark on what is popularly called the coast from high-water mark on the rivers, and to limit the reservation to the former, and prevent its extending to the latter."

In that interesting case the language in question was "five hundred feet from high-water mark on the coast of the tract hereby granted," and the point was, did "coast" extend to tidal rivers? It is instructive to note that high-water mark was treated as part of the "coast," and the reservation of the Crown on the "coast" began at that point and ran inland 500 feet, therefore the expression "coast" would be satisfied landwards upon reaching high-water mark, which would exclude the foreshore, which is the same as sea-shore in legal parlance—Halsbury's Laws of England, Vol. 28, p. 361. But once the foreshore is reached, then it must in general pass from the Crown by a grant which expressly refers to it or has words which aptly describe it, though less apt words will suffice if the grantee can shew user under his grant—Halsbury's Laws of England, Vol. 28, pp. 366-7. It is clear, to my mind at least, that in the statute in question we have not words that express the intention of going beyond high-water mark on the coast and extending the boundary to include the foreshore. If some such word as "sea beach" or even "sea" had been used (which are quite distinct from sea-shore or foreshore), a guide would have been afforded us, as there was in *Musselburgh Real Estate Company* v. *Musselburgh (Provost)* (1905), A.C. 491; 7 F.

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. v. TREAT

113, 308 (cited in Stroud's Judicial Dictionary, Supplement, 1909, p. 510), wherein it was held that in Scotland at least, a "boundary by the 'sea,' which would carry the right of the defenders over the shore to low-water mark," whereas the word "sea-beach" means that "the line of boundary is reached when the beach is reached, and that to pass on to the beach is to pass the boundary"; and therefore " 'sea-beach' as a boundary must be held to exclude the beach itself for that which is bounded by another thing cannot include the whole of that thing itself."

I am of opinion, therefore, that, in the case at bar, as soon as the coast is reached the boundary is reached, and as it is beyond question that the "coast" includes high-water mark at least, so when the land in the plaintiff's grant reaches high-water mark, at least it has reached that "coast" which is its boundary, and the grant is satisfied literally and in substance. Whatever meaning may be attributed to "coast-line" it cannot, from a conveyancer's point of view at all events, be a wider expression than coast.

MARTIN, J.A.

With respect to the contention that as the wider expressions in the grant from the Governor-General in Council include foreshore rights they form a wider agreement under the statutes of 1884, I am of opinion, shortly, that as the Dominion Government was simply a trustee of the lands granted by the Legislature of British Columbia for specific purposes, the legislative grant could not thus be extended, and that such wider expressions were inserted, subject to the reservations therein set out ("in so far as such land . . . . foreshore rights, etc., are vested in Her Majesty . . . ."), so as to give the plaintiff Company whatever unknown rights in the lands that the Dominion Government might be found to have (it turned out it had none) as the result of the constitutional controversy which was then on foot, as referred to by the learned judge below.

It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The respondent is in possession of the land in question under a licence from the Crown (Provincial) to prospect for coal, issued in pursuance of the Coal and Petroleum Act (Cap. 159, R.S.B.C. 1911), and the land in question is particularly described as follows:

"Commencing at a post planted at high-water mark at the mouth of Chemainus River in the County of Nanaimo, Vancouver Island, B.C., thence east eighty chains thence south eighty chains thence west to high-water mark, thence following the line of high-water mark to the point of commencement."

The land is all below high-water mark, on the foreshore, and under the sea. The appellant is the owner of a vast tract of land upon Vancouver Island, having received the grant thereof as being part of the aid given for the construction of the line of railway built and operated by it upon Vancouver Island, the Province conveying the land to the Dominion and the Dominion granting the same to the appellant. The statutes under which the grant and conveyance were made are Cap. 14, B.C. Stats. 1883, and Cap. 6, Can. Stats. 1884. The appellant relies upon its title to the land in question by reason of the description as contained in the Provincial statute—"On the east by the coast-line of Vancouver Island" (see Cap. 14, Sec. 3, B.C. Stats. 1883). The land in question is situate on or off the coast-line of Vancouver Island. The contention of the appellant is that the coast-line is to be read as inclusive of the foreshore, *i.e.*, the land below high-water mark and even the lands under the sea abutting upon the foreshore, and in aid of this further contention cites the language of the grant from the Dominion. The appellant, putting its contention at the very least, strenuously maintains that its title is inclusive of all the land down to and inclusive of all that lying between the high and low-water marks at the point in question.

The determination of the meaning of "coast-line" is determinative of this appeal. It will be observed that in the description of the subsidy land as contained in the Provincial Act (Cap. 14, Sec. 3, B.C. Stats. 1884) no reference is made to the foreshore, section 3 reading as follows:

"There is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of a railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable (but save as is hereinafter excepted) all that piece or parcel of land situate in Vancouver Island, described as follows:—

"Bounded on the South by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca;

"On the West by a straight line drawn from Muir Creek aforesaid to Crown Mountain;

"On the North, by a straight line drawn from Crown Mountain to Seymour Narrows; and

CLEMENT, J.

1918

March 25.

"On the East by the Coast line of Vancouver Island to the point of commencement; and including all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein, and thereunder."

COURT OF APPEAL

Nov. 5.

It is noticeable, however, that in the Dominion Act (Cap. 6 of 1884, Sec. 3) reference is made to the foreshore, section 3 reading as follows:

ESQUIMALT AND NANAIMO RY. CO. *v.* TREAT

"The Governor in Council may grant to 'The Esquimalt and Nanaimo Railway Company' mentioned in the said agreement, and incorporated by the Act of the Legislature of British Columbia lastly hereinbefore referred to, in aid of the construction of the said railway and telegraph line, a subsidy in money of seven hundred and fifty thousand dollars, and in land, all of the land situated on Vancouver Island which has been granted to Her Majesty by the Legislature of British Columbia by the Act last aforesaid, in aid of the construction of the said line of railway, in so far as such land shall be vested in Her Majesty and held by Her for the purposes of the said railway, or to aid in the construction of the same; and also all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in, on or under the lands so to be granted to the said company as aforesaid, and the foreshore rights in respect of all such lands as aforesaid, which are to be granted to the said company as aforesaid, and which border on the sea, together with the privilege of mining under the foreshore and sea opposite any such land and of mining and keeping for their own use all coal and minerals, herein mentioned, under the foreshore or sea opposite any such lands, in so far as such coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever, and foreshore rights are vested in Her Majesty as represented by the Dominion Government."

MCPHILLIPS, J.A.

In passing it may be said that it would be idle contention to advance any argument to the effect that the Dominion Act could expand the terms of the Provincial statutory conveyance to the Dominion Government, save it were that the Dominion Government had lands or foreshore rights within the described area independent of the Provincial grant arising under the provisions of or in the exercise of the right of acquirement of lands for Dominion purposes under the British North America Act, 30 & 31 Vict., c. 3 (Imperial), such as public harbours, but there is no evidence whatever of this. Therefore, unless the description of the boundary of the subsidy lands "on the east by the coast-line of Vancouver Island" is wide enough in its terms to include the language in the Dominion Act, "the foreshore rights in respect of all such lands . . . . .," it is clear that the grant of the land as made to the appellant by the Dominion Government cannot extend to any such foreshore

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. v. TREAT

all that can be said to be vested is what was statutorily granted by the Province, and the order in council, P.C. 2081, recites "that the conveyance shall be made by the description stated in the third clause of the Settlement Act (Cap. 14, B.C. Stats. 1884). It is true it goes on and says:

"The determining of the exact boundaries shall be left between the Provincial Government and the Railway Company."

This is understandable, as there were to be dealings with the lands within the described area pending the conveyance by the Dominion to the Railway Company, but nothing is apparent which would admit of any expansion of the described area. There might be and would be a possible reduction of area but no expansion of it.

Now as to what "coast-line" means, it was stated by counsel upon the argument that they were unable to refer the Court to any precise definition of the meaning to be attached to these words, but counsel for the appellant strenuously argued that the words were comprehensive of the foreshore and the lands under the sea abutting upon the foreshore. In *In re British Columbia Fisheries* (1913), 47 S.C.R. 493; (1914), A.C. 153, the question whether the shore below low-water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers for protective and police purposes, was tentatively passed upon, and said to be not a matter which belonged to municipal law alone, and it was further stated that it was not at present desirable that any municipal tribunal should pronounce upon it. In Murray's New English Dictionary, Oxford, Vol. 2, under "Coast," we find this statement:

MCPHILLIPS, J.A.

"The edge or margin of the land next the sea, the sea-shore. a. In the full phrase, coast of the sea, sea-coast—seaside. Formerly sometimes land's coast."

In Vol. 3 of Halsbury's Laws of England we find "sea-shore" dealt with and we read at p. 118:

"The boundary between the sea-shore (The sea-shore consists of the land lying between the high and low-water marks, and *prima facie* the presumption is that it belongs to the Crown not only in the case of the sea itself, but also in the case of the arms of the sea (Hargreaves' Law Tracts, p. 5; *Attorney-General* v. *Chambers* (1854), 4 De G. M. & G. 206; *Attorney-General* v. *Chambers, Attorney-General* v. *Rees* (1859), 4 De G. & J. 55. Compare *Mellor* v. *Walmesley* (1905), 2 Ch. 164, C.A. *per* Romer, L.J. at p. 176), and in this respect there is no distinction between the sea and a

rights (see *Attorney-General of Canada* v. *Keefer* (1889), 1 B.C. (Pt. II.) 368; *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.* (1914), 20 B.C. 333; (1915), 52 S.C.R. 78; *Attorney-General* v. *C.P.R.* (1905), 11 B.C. 289; (1906), A.C. 204; *Attorney-General* v. *Ludgate* (1901), 8 B.C. 242; (1904), 11 B.C. 258; (1906), A.C. 552).

The Crown grant (Dominion) of the subsidy land was made on the 21st of April, 1887, and reads as follows: [after setting out the grant his Lordship continued].

It will be seen that the Crown grant, taken in all its terms, is made in pursuance only of the Provincial statutory grant (Cap. 14, B.C. Stats. 1884), and that which is first recited is section 3 of the Provincial Act, which sets out the boundaries. It is true that in the Dominion Crown grant we find this language:

"AND WHEREAS it has been agreed by and between the Government of Canada the Government of British Columbia and the said company that the grant of the said lands to the said company shall be by the description hereinafter contained that the exact boundaries of the lands covered by such grant shall be as settled and agreed upon between the Government of British Columbia and the said company. . . . ."

and we find that "the foreshore rights in respect of such of the lands as border on the sea together with the privilege of mining under the foreshore and the sea opposite any such lands" are specifically dealt with. Now I cannot see any warrant for this additional language, *i.e.*, in extension of that set forth in section 3, Cap. 14, B.C. Stats. 1884. Section 3, dealing with the mines only, says, "and including all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder," which would be "all coal," etc., under the lands coming within the description as contained in section 3. It is to be noted, too, that in the Dominion grant care is taken to not transcend the statutory grant to the Dominion; that is, although this additional language is used all is relegated to that which was granted to the Dominion, as we have this language "in so far as such coal, ... and foreshore rights are vested in us as represented by the Government of Canada." The order in council, P.C. 2081, is in no way helpful to the appellant. It recites section 7 of the Dominion Act (Cap. 6, Can. Stats. 1884), "in so far as the same shall be vested in Her Majesty," *i.e.*, the Crown Dominion, and

tidal river (*Bridgwater Trustees* v. *Bootle-cum-Linacre* (1866), L.R. 2 Q.B. 4). See title Waters and Watercourses. As to the public right of passing and repassing along the shore, see title Highways, Streets and Bridges) and the adjoining land is, as a general rule, in the absence of usage, the line of the medium high tide between the ordinary spring and neap tides (*Attorney-General* v. *Chambers*, *supra*; *Attorney-General of the Straits Settlement* v. *Wemyss* (1888), 13 App. Cas. 192. Compare *Lowe* v. *Govett* (1832), 3 B. & Ad. 863) but the boundary of land described in a conveyance as bounded by the sea may, in certain circumstances, include the foreshore below this line."

There is no evidence of the user of the foreshore by the appellant (*Van Diemen's Land Company* v. *Table Cape Marine Board* (1906), A.C. 92 at pp. 97-8; *Watcham* v. *Attorney-General* (1918), 34 T.L.R. 481, Lord Atkinson at p. 483), and we have the declared exercise of ownership thereof by the Crown by the issuance of the mining licence.

The strong presumption then being that the foreshore is the property of the Crown, what language has been used in the Provincial statutory grant which can be said to in any way impugn or displace the title of the Crown? Certainly we do not find it in the Provincial legislation, unless it is covered by "Bounded . . . . . on the East by the coast-line of Vancouver Island" (Cap. 14, Sec. 3, B.C. Stats. 1884). I do not lay any stress upon the specific language as contained in the Dominion Crown grant in which the foreshore is mentioned, as it is *dehors* the statutory grant from the Province. It is clear that there is no mention of foreshore in the Provincial statutory grant, or words inclusive of the foreshore; we merely have "coast-line." If it had been "bounded by the sea," the foreshore would not have passed, as we have seen, save in cases which, in my opinion, this is not one (see *Attorney-General* v. *Jones* (1863), 2 H. & C. 347; *In re Belfast Dock Act* (1867), I.R. 1 Eq. 128; *Beaufort* v. *Mayor of Swansea* (1849), 3 Ex. 413; *Lord Advocate* v. *Young* (1887), 12 App. Cas. 544). It would seem to me that "sea-shore" is much more comprehensive and operative in its effect when it constitutes the boundary than "coast-line." We have in the use of the word "sea-shore" language which, in itself, might be said to have application to the foreshore, but yet we find it is not so interpreted. In the Encyclopædia Britannica, 11th Ed., Vol. 26, in the article on Surveying under the sub-heading "Coast lining," we read:

MCPHILLIPS, J.A.

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. *v.* TREAT

"In a detailed survey the coast is sketched in by walking along it fixing by theodolite or sextant angles and plotting by tracing paper or station pointer. A sufficient number of fixed marks along the shore afford a constant check on the minor coast line stations which should be plotted on or checked by lines from one to the other wherever possible to do so . . . . . It is with the high water line that the coast liner is concerned delineating its character according to the Admiralty Symbols. . . . . Coast-line may be sketched from a boat pulling along the shore fixing and showing up any natural objects on the beach from positions at anchor."

Then in the article in the same work, Vol. II., on Geography, at p. 632, this is found:

"It is usual to distinguish between the general coast line measured from point to point of the headlands disregarding the smaller bays and the detailed coast-line which takes account of every inflection shewn by the map employed and follows up river entrances to the point where the tidal action ceases."

It is apparent that when the coast-line is spoken of, its meaning is high-water mark; as naturally only at high-water mark can the coast-line be defined, so that at all times the line of demarcation is plain to be seen, *i.e.*, with the tide in, the natural or other marks at low-water mark would be non-observable. It is clear that the foreshore cannot be confused with the boundary coast-line; further it is in accord with common sense that this should be so, especially in the present case, where the Legislature is making a land subsidy grant of such a vast area of land —the coast-line of Vancouver Island being some 285 miles in length, along which coast-line for the greater part lies this subsidy land. It is inconceivable that the Legislature of British Columbia was intending to part with the foreshore and the lands under the sea along this very considerable coast-line; it would be a grant so extensive in its meaning, and as we have seen, so manifestly against the presumption that the title is vested in the Crown, that we must find apt words to so interpret the grant. In my opinion no ambiguity exists in the description of the statutory grant as contained in the Provincial grant, which must be the controlling factor in solving the question we have to decide. Could, however, it be considered that there is any ambiguity in the statutory grant, it is instructive to read that portion of the judgment of their Lordships of the Privy Council as delivered by Lord Atkinson in *Watcham* v. *Attorney-General, supra,* treating with the law applicable to latent and patent ambiguities, at pp. 482-4. Lord Atkinson concludes his dis-

MCPHILLIPS, J.A.

cussion of the law and cases relative thereto as to ambiguities in that case by saying:

"Now applying the principles established by these authorities to the present case how does the matter stand as regards the first issue upon which the case went to trial, namely, what is the area covered by the original certificate of the Riverside estate, granted by Government to the defendant to which he is now entitled?"

And here we have the like inquiry as to the *locus in quo, i.e.*, the title to the foreshore and the lands abutting thereon under the sea. In the case last cited there was no evidence, as there is no evidence here, what land the appellant went into possession of—certainly no evidence whatever that the appellant ever went into possession of the foreshore, or the lands under the sea. Lord Atkinson in the case last cited, at p. 483, referred to *Van Diemen's Land Company* v. *Table Cape Marine Board, supra,* and said, referring to that case:

"The plaintiffs sought to prove their title to the *locus in quo*, including the foreshore, by proof of acts of ownership over it before the grant, namely, that they had been in possession of it and had spent money in improving it, and had continued in possession of it after the making of the grant. The Judge at the trial rejected this evidence, and a new trial was moved for because of this rejection. The deed of July 17, 1898, contained a recital 'that the company have been authorized to take possession of several portions of land, and have ever since been . . . . in possession thereof.' It was held that the evidence above mentioned was improperly rejected. Lord Halsbury, in delivering judgment, is, at page 98, after referring to this recital, reported to have said:—'When these are the circumstances under which the grant is actually made—why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved? . . . . . It would be a singular application of the maxim quoted by Coke (2 Institutes, 11), *Contemporanea expositio est fortissima in lege,* to suggest that proof of user, must be confined to ancient documents, whatever the word 'ancient' may be supposed to involve. The reason why the word is relied on is because the user is supposed to have continued and thus to have brought us back to the contemporaneous exposition of the deed. The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to shew the intention of the parties whether before or after the execution of the deed itself may be relevant, and in this case their Lordships think are very relevant, to the questions in debate.'"

In the present case there was no attempt to make any such proof, and it is to be assumed that no such proof could have been led in evidence.

In *Attorney-General* v. *Chambers* (1854), 4 De G. M. & G. 206 (102 R.R. 89), it was held that—

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. v. TREAT

"In the absence of all evidence of particular usage, the extent of the right of the Crown to the sea-shore landwards is *prima facie* limited by the line of the medium high tide between the springs and the neaps."

The Lord Chancellor in his judgment, at pp. 217-18, said:

"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. Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the Crown, that such lands are for the most part dry and maniorable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is, that the Crown's right is limited to land which is for the most part not dry or maniorable."

Unquestionably the *locus in quo* here and as covered by the mining licence is within the area, title to which is presumed to be in the Crown, and unless there has been a grant thereof to the appellant, the title thereto must be presumed to be in the Crown, and that, of course, is the Crown Provincial not the Crown Dominion, and any grant from the Crown Dominion would be wholly inoperative and ineffective.

In Halsbury's Laws of England, Vol. 28, p. 361, we have this proposition of law stated:

"The sea-shore or foreshore (for in legal parlance these expressions mean one and the same thing (*Mellor* v. *Walmsley* (1905), 2 Ch. 164) is that portion of the realm of England which lies between the high-water mark of the ordinary tides and low-water mark (*Scratton* v. *Brown* (1825), 4 B. & C. 485, 496; *Attorney-General* v. *Chambers* (1854), 4 De G. M. & G. 206, 216)."

MCPHILLIPS, J.A.

And at p. 363 of the same volume we read:

"*De jure communi* the Crown is *prima facie* entitled to every part of the foreshore of this realm between the ordinary high-water mark and the low-water mark (*A.-G.* v. *Emerson* (1891), A.C. 649; *Malcomson* v. *O'Dea* (1863), 10 H.L. Cas. 593; *Gann* v. *Whitstable Free Fisheries* (1865), 11 H.L. Cas. 192)."

Then at pp. 366-7 of the same volume (par. 669) we have the further proposition:

"Foreshore passes from the Crown by a grant which expressly refers to it by that name or has words which aptly describe it. . . . . ."

Here we have no grant "which expressly refers to it by that name," nor have we "words which aptly describe it"; nor have we "user" or "apparent intention," and if the present case could be said to be one of "doubt," which I do not assent to, then in the absence of user that doubt would be resolved in favour of the Crown (*Attorney-General for Ireland* v. *Vandeleur* (1907), A.C. 369; 76 L.J., P.C. 89).

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. v. TREAT

Wyatt v. *Attorney-General of Quebec* (1911), 81 L.J., P.C. 64 (on appeal from the Supreme Court of Canada, see (1906), 37 S.C.R. 577) is very much in point in the present case. The head-note reads as follows:

"By letters patent granted in 1883 the predecessor in title of one of the appellants became entitled to lands on the banks of a river proved by the evidence to be navigable. There was no express grant of fishing rights: —*Held*, that the letters patent must be construed according to their terms, which were plain and unambiguous, and could not be added to or diminished by oral or written negotiations or by correspondence between the grantee or Crown officials or by long and uninterrupted enjoyment of fishing from which a large revenue was derived without the expenditure of money."

In passing I would refer to that portion of the judgment of Girouard, J. appearing at p. 592 (37 S.C.R.) where the learned judge said:

"Now let us look at the terms of the letters patent which were issued more than one year after, in 1883. They do not purport to transfer fishing grounds or fishing rights, but only tracts of land situate on both sides of the River Moisie. It cannot be doubted that the Crown never expressly intended to grant by these letters patent the right of fishing in front of the said lands. It is now well settled law that, without such special grant, the fisheries in public or navigable rivers do not pass from the Crown. The authorities are all collected in *Re Provincial Fisheries* [(1896)], 26 S.C.R. 444; (1898), A.C. 700. We therefore reverse the judgment of the Court of Appeal which, quite irrespective of the navigability of the River Moisie, construed the negotiations and correspondence leading up to the granting of the letters patent as, in themselves, constituting a collateral or independent contract establishing the patentees' right to a fishing grant, although at variance with the plain and unambiguous language of the letters patent themselves"

MCPHILLIPS, J.A.

This language is exceedingly apposite to the present case. Here we have dealt with that which arises before us—orders in council and negotiations leading up to the grant from the Dominion to the appellant. All this and the added words of description in the Dominion grant must be disregarded, as the statutory grant only is the controlling definition of what was to be comprised in the grant to the appellant, the Dominion being merely a trustee to carry out the plain intention of the Legislature of British Columbia. The Crown in right of the Dominion had no real proprietory interest in the lands—was merely a conduit-pipe in the matter.

It is clear and beyond question that the legislative grant of the lands to which the appellant became entitled, did not

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

NOV. 5.

ESQUIMALT AND NANAIMO RY. CO. v. TREAT

purport to transfer the foreshore or the lands under the sea, but only tracts of land within certain boundaries, and the boundary "coast-line," in my opinion, must be held to halt at, not extend over, the foreshore. There must be apt words to displace the title of the Crown. Were any used? In my opinion there can only be a negative answer to this question. I would refer to the judgment of their Lordships of the Privy Council in *Wyatt* v. *Attorney-General of Quebec, supra,* as delivered by Lord Macnaghten at pp. 64-5. It would seem to me that much of what Lord Macnaghten said is cogent reasoning determinative of this appeal in favour of the respondent.

In *Attorney-General* v. *Emerson* (1891), 61 L.J., Q.B. 79, the head-note in part reads as follows:

"The Crown is *prima facie* entitled to every part of the foreshore between high and low-water mark, and a subject can only establish a title to any part of that foreshore, either by proving an express grant thereof from the Crown, or by giving evidence from which such a grant, though not capable of being produced, will be presumed. But the possession of a right of several fishery, even in the case of tidal waters, is evidence of the ownership of the soil over which it is exercised, although such possession is not inconsistent with the foreshore's being still the property of the Crown."

It is very instructive and useful in the determination of this appeal to read what Lord Herschell said in his judgment at pp. 80-81. Note also that he uses the word "coast-line."

MCPHILLIPS, J.A.

It is apparent that the manors as found by Lord Herschell, extending "along the coast-line," were not in their boundaries inclusive of the foreshore. The right to the foreshore arose because of the "fishery" held. Note what Lord Herschell said:

"It is not now in dispute that the defendants are possessed of a several fishery over a part of the foreshore, but it is said, and truly, that this is not inconsistent with the foreshore over which this right is possessed being still in the Crown."

It is apparent that if the title to the foreshore could only be claimed by reason of the boundaries, no title to the foreshore could have been established, and in the present case we have no express grant of the foreshore from the Crown in right of the Province, nor the grant of any right to the appellant which can be presumed to confer title to the foreshore. The obvious result therefore must be that the title to the foreshore and lands under the sea is in the Crown in the right of the Province and has not been parted with to the appellant.

In the inquiry in the present case it is to be remembered that in a grant from the Crown it is not permissible to contend that anything has passed by implication (*Royal Fishery of Banne Case* (1610), Dav. Ir. 55), therefore the whole contention must be based upon and based only upon the language giving the eastern boundary, namely, "coast-line."

In *Scratton* v. *Brown* (1826), 4 B. & C. 485 at p. 498 (28 R.R. 344), Bayley, J. said:

"The land between high and low-water marks originally belonged to the Crown, and can only vest in a subject as the grantee of the Crown."

The learned editor of the Revised Reports, in a foot-note to this case, said (see 28 R.R. at p. 344):

"Cited as 'a very important authority' by Lindley, L.J., in *Hindson* v. *Ashby* (1896), 2 Ch. 1, 11; 65 L.J., Ch. 515, 519."

Here, as we have seen, there is no grant in terms of the "sea-shore" or "foreshore," all rests on "coast-line."

In *Hindson* v. *Ashby, supra,* Kay, L.J. at p. 521 of the Law Journal report, said:

"The plaintiffs are bound, in order to maintain an action of trespass like the present, either to prove that they are in actual possession of the land in question, or to establish a title which will sustain the action. There is no evidence of any act of ownership by the plaintiffs on any of the land below the bank. They or their tenants have always cultivated the land above the bank, and they claim that their possession of that land is possession of all the land down to the river. But no actual use or occupation of the land below the bank by the plaintiffs or their predecessors in title is proved by the evidence."

In the present case, it is beyond question that the respondent is in possession, the appellant never was.

It is a notorious fact, that coal measures are to be found under the foreshore along the eastern coast of Vancouver Island, in fact, large coal workings have been in operation for many years under the sea at Nanaimo, and it is inconceivable that the Legislature, without the use of apt words, meant to part with all this coal-bearing area, an area of such magnitude and potential value, a source of revenue to the Crown for years to come, and to so construe the legislation must be because the language is intractable and incapable of being given any other meaning, but, in my opinion, such construction is untenable. The word "coast-line" is in its meaning descriptive of a boundary, not inclusive of an area, to determine the boundary

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. v. TREAT

the "coast-line" must be laid down, *i.e.*, surveyed, and a surveyor under instructions to define the "coast-line" must necessarily proceed in accordance with known and established practice in surveying, and with "coast-line" only as a boundary, custom, practice, professional knowledge and the law itself points to and the authorities emphasize it to be fixed at high-water mark. Had we apt words to indicate any inclusive meaning of "coast-line" comprehensive of the foreshore, of course nothing to the contrary could be said. *Smart & Co.* v. *Suva Town Board* (1893), 62 L.J., P.C. 88 is an interesting case. See *per* Right Hon. George Denman at p. 89, in delivering the judgment of their Lordships of the Privy Council.

In the case last cited there could, of course, be no question as to what was included within the stated boundary.

The grant of the subsidy lands by statute "to the Dominion Government . . . . . in trust," as to the Eastern boundary reads:

> "On the East by the Coast line of Vancouver Island to the point of commencement; and including all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder."

The coal and other minerals, of course, were granted but confined to the land specifically described "thereupon, therein and thereunder" (Cap. 14, Sec. 3, B.C. Stats. 1884).

MCPHILLIPS, J.A.

For the appellant to succeed, it is incumbent to find that there has been a valid grant conveying the foreshore and the lands under the sea to the appellant in clear and unambiguous terms, there being in the present case no evidence of acts of user (*Van Diemen's Land Company* v. *Table Cape Marine Board, supra*).

Parmeter v. *Attorney-General* (1822), 10 Price 412 is a case very much in point in the present case. General words in the statutory grant cannot carry the foreshore, or the lands under the sea, and the *onus probandi* is upon the appellant. Here we find language confining the grant to high-water mark and an entire absence of any express words necessary to extend the meaning to low-water mark. The head-note in the *Parmeter* case reads as follows: [His Lordship quoted the head-note and continued].

The authority which, in my opinion, is decisive in the present case is *Att.-Gen. for Nigeria* v. *Holt & Co.* (1915), 84 L.J.,

P.C. 98. The description as contained in the Crown grants there under consideration went to the sea ("bounded by the sea"—see the report of the case in (1915), A.C. 599, at p. 600). This was a case of artificial reclamatory work done by the individual owners of the land beyond the foreshore, and the judgment of the Chief Justice (Osborne, C.J.) of the Supreme Court of Southern Nigeria was affirmed, it being held that the foreshore was the property of the Crown and that the accretion to same also was the property of the Crown, the judgment of the Full Court being set aside which had reversed the judgment of the Chief Justice. In this *Nigeria* case, the facts were dealt with by Lord Shaw as well as the law in a most illuminating way in a very elaborate and instructive judgment, and so clearly dealt with, that, in my opinion, it is only necessary to fully understand the judgment and any doubts that one may have had in the present case may be forever dispelled. See pages 99, 101-2.

Here we have no question of change in the foreshore—the foreshore is rock bound—no question of natural and gradual accretion from the sea or artificial reclamatory work adding to the foreshore. It is interesting, however, to observe what Lord Shaw said upon this point at pp. 103-4; and see page 105.

In the present case there is not even possession in the appellant of the foreshore, and no question of accretion, natural or artificial, yet the appellant claims as set forth in the statement of claim the following:

"(a) A declaration that it is the owner of all the coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever on or under the said lands, the foreshore of the lands . . . . . and the foreshore rights in respect of the said lands aforesaid, together with the privileges of mining under the foreshore and sea opposite the said lands, and of mining and keeping for its own use all coals and minerals mentioned in the said Crown grant of the 21st of April, 1887, under the foreshore or sea opposite the said lands;

"(b) For an injunction restraining the defendant from trespassing upon the said lands;

"(c) For an injunction restraining the defendant from applying for a coal prospecting licence over the said lands in alleged pursuance of the Coal and Petroleum Act and of any Acts;

"(d) For damages."

In view of this decision of their Lordships of the Privy Council, where it was taken as an admitted fact "that the prop-

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. *v.* TREAT

erties were each and all . . . . . bounded in fact by the sea," the titles being evidenced by Crown grant, can there be any question, in the present case, that the foreshore and the lands abutting upon the same under the sea, are vested in other than the Crown in the right of the Province? The answer must be in the negative, it being clear that originally and now the absolute right of the Crown thereto is established. In the language of Lord Shaw, "there was no express grant of the foreshore made" (in the statutory grant from the Province to the Dominion—Cap. 14, Sec. 3, B.C. Stats. 1884), "nor can any grant of foreshore be implied looking to the language of description which is employed." The only language of description that the appellant can rely upon is, "On the east by the coast-line of Vancouver Island." Is this even as definitive or as complete as being "bounded by the sea," the description in the *Nigeria* case? In my opinion the description in the present case lacks the definiteness and completeness of the *Nigeria* case, which to the lay mind, at least, would seem reasonably to take you to the sea itself, whilst coast-line, to the same mind, would have its indefiniteness always having to be defined, yet as we have seen in law, the foreshore was held not to pass in the *Nigeria* case. *A fortiori* in the present case there has not been made use of, in the statutory grant from the Province, such apt words as would entitle any declaration being made that the foreshore and the lands under the sea abutting thereon are other than the property of the Crown in the right of the Province. No title thereto in the appellant is possible of being declared. And it is to be noted that in the Crown grant from the Dominion we find this language:

MCPHILLIPS, J.A.

> "And the foreshore rights in respect of all such lands as aforesaid, which are to be granted to said company as aforesaid, and which border on the sea, together with the privilege of mining under the foreshore and sea opposite any such lands, and of mining and keeping for their own use all coal and minerals, herein mentioned, under the foreshore or sea opposite any such lands, in so far as such coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever, and foreshore rights are vested in us, as represented by the Government of Canada."

And previously to this language as appearing in the grant, is recited the Act which conferred upon the Dominion its title, *viz.*: "An Act relating to the Island Railway the Graving Dock

and Railway Lands of the Province" (Cap. 14, B.C. Stats. 1884). It follows that no greater title could be conferred than that granted to the Government of Canada, nor is any greater title really intended to be conferred. All is relegated to the root of title and that which was capable of being transferred in furtherance of the trust created by the Government of British Columbia and accepted by the Government of Canada. The lands in dispute in the action could only be transferred if same were transferred by operation of the statute recited, not otherwise. It is further a matter for remark that the Government of Canada in its grant does not really in terms pretend to grant the title to the foreshore or the lands under the sea opposite thereto, but foreshore rights only and mining rights thereunder and under the sea opposite thereto, so that it is only as to these rights that the Government of Canada in terms expands the grant beyond the terms of the statutory grant to it from the Province, *i.e.*, the Government of Canada would appear to have construed the statutory grant as conferring these rights. Now as to the ordinary foreshore rights, undoubtedly these did pass to the appellant, such rights as all riparian land holders have, but no such rights as are above set forth ever pass. The case of *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; 46 L.J., Ch. 68, shews what these rights are, but such rights could never be implemented to the degree of mining and keeping the coal and minerals underlying the foreshore and the lands under the sea opposite thereto.

MCPHILLIPS, J.A.

Finally, it can only be upon the construction of section 3 of the Settlement Act (Cap. 14, B.C. Stats. 1884) that the appellant could succeed, *i.e.*, that the word "coast-line" includes in its meaning the foreshore and the lands under the sea. Lord Atkinson in the *City of London Corporation* v. *Associated Newspapers, Limited* (1915), A.C. 674 at p. 693, dealt with the principle of construction of statute law. He said:

"It is a well-established principle to be followed in the construction of the statute that if the words of a statute be ambiguous and susceptible of two meanings, one of which leads to absurd, unjust, or mischievous results and the other does not lead to any results of that character, the latter construction should be preferred, since it is not to be presumed that the Legislature meant to bring about results of this kind; but that if the words of the statute are plain and clear, then effect must be given to

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 5.

ESQUIMALT AND NANAIMO RY. CO. v. TREAT

them irrespective of what results may follow: See *Vacher & Sons* v. *London Society of Compositors* (1913), A.C. 107."

In my opinion the words are plain and clear in their meaning, and exclude the foreshore and the lands under the sea, but if "ambiguous and susceptible of two meanings," to give them the meaning the appellant claims should be attached to them would lead to "absurd, unjust [and] mischievous results," denude the Crown Provincial of lands and minerals of incalcuable value and seriously affect the revenue of the Province. That the Legislature intended to do so in such general words descriptive of a boundary line of subsidy lands is unthinkable, therefore the latter construction, as stated by Lord Atkinson, should be applied, and "coast-line" should be held to mean and be confined to high-water mark.

MCPHILLIPS, J.A.

The appellant, in my opinion, has failed to discharge the onus which rested upon it to displace the title of the Crown in the right of the Province to the *locus in quo*. Therefore, in my opinion, the appeal should stand dismissed and the judgment of the Court below affirmed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

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

Solicitors for respondent: *Bass & Bullock-Webster.*

IN RE LAND REGISTRY ACT AND GRANBY CONSOLIDATED, MINING, SMELTING & POWER COMPANY LIMITED AND THE REGISTRAR-GENERAL OF TITLES.

COURT OF APPEAL

1918

Nov. 5.

IN RE LAND REGISTRY ACT AND GRANBY CONSOLIDATED MINING, &C., CO.

Practice—Petition for registration—Appeal—Notice of settling appeal book—"Parties interested"—R.S.B.C. 1911, Cap. 127, Sec. 114—B.C. Stats. 1914, Cap. 43, Sec. 65.

Any interested party, who has been served with a petition to a judge in Chambers under section 114 of the Land Registry Act, is, on appeal from the decision given on the hearing, entitled to notice of, and to appear upon the settlement of the appeal book before the registrar.

All material before the judge below should be included in the appeal book.

MOTION by the Esquimalt & Nanaimo Railway Company to the Court of Appeal, to quash the appeal or in the alternative to add certain material to the appeal book on the ground that the appeal book had been settled without notice to said Company. The matter in dispute was with reference to the title to section 2 and the east 60 acres of section 3, range 7, Cranberry District, B.C. On the 24th of December, 1890, the Esquimalt & Nanaimo Railway Company granted these lands to one Joseph Ganner excepting the mines and minerals therein and thereunder, and on the 13th of March, 1905, the trustees of Joseph Ganner granted to one Bing Kee all the estate and interest of Joseph Ganner in said lands. The title of Bing Kee was registered and he later transferred said lands to Harry W. Treat, who duly registered the conveyance. In pursuance of the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, an application was made by the executors and trustees of Joseph Ganner to the Lieutenant-Governor in Council for a grant in fee simple of the lands in question and notice of the hearing on the 9th of February, 1918, was served on the solicitors of the Esquimalt & Nanaimo Railway Company, who appeared and opposed the application, but a grant in fee simple was issued to the executors of Joseph Ganner, deceased, on the 15th of February, 1918, and on the 18th of February, 1918,

Statement

COURT OF APPEAL

1918

Nov. 5.

IN RE LAND REGISTRY ACT AND GRANBY CONSOLIDATED MINING, &C., CO.

Statement

said executors conveyed said lands in fee simple to Harry W. Treat, who on the same day conveyed to the Granby Consolidated Mining, Smelting & Power Company, Limited. Writs were issued on the 14th and 18th of February, 1918, in an action brought by the Esquimalt & Nanaimo Railway Company against the executors of Joseph Ganner for a declaration that the Crown grant issued to said executors in pursuance of the Settlers' Rights Act, 1904, Amendment Act, 1917, is null and void in so far as it purports to grant the defendant, (a) the coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances in, upon or under the said lands; (b) that part of the surface of the said lands to which or upon which the plaintiff is entitled to exercise acts of ownership, purchase, or rights of easement; and for an injunction. Certificates of *lis pendens* were filed with the Registrar-General of Titles on the 14th and 18th of February, 1918, respectively, and on the 15th of March, 1918, a certificate of *lis pendens* was also filed with the Registrar-General of Titles, issued in an action by Bing Kee against said executors. On the 22nd of May, 1918, the Granby Consolidated Mining, Smelting & Power Company, Limited, applied in the Land Registry office to be registered as owner in fee simple with an indefeasible title to the said lands and by notice in writing dated the 22nd of May, 1918, the Registrar-General declined to register said title on the ground that the certificates of *lis pendens* registered against the said lands must first be released. The Granby Consolidated Mining, Smelting & Power Company, Limited, then petitioned the Court that the Registrar-General be ordered to register the petitioner's title. The petition was heard by MACDONALD, J. on the 17th of June, 1918, counsel appearing on behalf of the Esquimalt & Nanaimo Railway Company and opposing the application and submitting in evidence that there was a petition pending before the Governor-General at Ottawa for disallowance of the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, and that word had been received that said Act had been disallowed. The petition was dismissed by MACDONALD, J. on the 17th of June, 1918. The Granby Consolidated Mining, Smelting & Power Company, Limited,

COURT OF APPEAL

1918

Nov. 5.

IN RE LAND REGISTRY ACT AND GRANBY CONSOLIDATED MINING, &C., CO.

appealed and the appeal book was settled by the registrar without notice to the Esquimalt & Nanaimo Railway Company.

Heard at Vancouver on the 5th of November, 1918, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C. (*Harold B. Robertson,* with him), for the motion: They took the position that we were not entitled to be present and the appeal book was settled without notice to us. We contend we are entitled to the minerals and to exercise acts of ownership on portions of the surface. We have brought action for a declaration to this effect and have filed *lis pendens.* Certain material has been left out of the appeal book. Under section 110 of the Land Registry Act we applied for a *caveat* for protection, which came up at the same time as the petition, when the matter was left in *statu quo.* We require the material before the Court of Appeal as well as before the Court below. There is no question of our being interested, and the Act says "all parties interested including the registrar" shall be served.

Argument

Mayers, contra: The rule providing for settling an appeal book is section 24 of the Court of Appeal Act: see also marginal rule 866. The registrar refused our application. He is the only one who is interested in the appeal. Everything is there that should be, and the Registrar-General approved of it.

Davis, in reply: The Registrar-General is merely a nominal party; he is acting in a judicial position. The principle is well settled that litigation should be done in the cheapest and most expeditious way.

MACDONALD, C.J.A.: In my opinion the motion ought to be granted. Section 114 of Cap. 127, R.S.B.C. 1911, as amended by section 65 of Cap. 43, B.C. Stats. 1914, extends the service of the notice of hearing before the learned judge to all parties interested. Before that amendment was made the petition was served only upon the registrar and the person complaining of the ruling of the registrar, they being the only proper parties to the proceedings. The Legislature, however, has provided in words which seem to me to make each of the other parties interested, served with the petition, a respondent as well as the

MACDONALD, C.J.A.

COURT OF APPEAL

1918

Nov. 5.

IN RE LAND REGISTRY ACT AND GRANBY CONSOLIDATED MINING, &C., CO.

registrar himself. The words are these: "The petition shall be served upon all parties interested including the registrar." Now, that petition being served upon others than the registrar, I fail to see why the others should not be in the same position as the registrar, and why they should not be entitled to notice of settlement of the proceedings. No doubt they would have the right to be heard on the appeal, and I do not see why they should not be represented on the settlement of the appeal book. I think they should have been, and that an order should be made either that the appeal book should be referred back to the registrar to be resettled or that we admit the evidence which Mr. *Davis* says ought to be in the appeal book. I think the latter course perhaps will be the least expensive, and sufficiently satisfactory, that is to say, that the new material shall be incorporated into the appeal book and the appeal book put in proper shape before it comes up for argument.

MACDONALD, C.J.A.

MARTIN, J.A.: Dealing with this matter, the principle which is the safest way to deal with it appears to me perfectly plain, that once a party has been served with notice of appeal he then is invited to take part in that appeal, and it follows from that that he must have the right to say what should be included in the appeal book, because there can be no appeal without an appeal book, that is the foundation for the whole matter, and once we get to that stage there is no difficulty, because there is the invitation and the notice, and he was, as a matter of fact, entitled to be represented before the registrar. Then the next stage is, what should we do in regard to the appeal book. It is perfectly apparent that any material which was before the judge below should be before us. It is equally apparent from that fact that there was certain material before the learned judge which is not before us, therefore it ought to be before us. What ought to be done with regard to this matter I quite agree that one of two courses is open to us: either refer this matter back to the registrar, which would be perhaps the strict way to do, if there is any controversy; but if there does not appear to be any controversy as to what ought to be included, I do not suppose there will be any objection, once we arrive at the conclusion it

MARTIN, J.A.

ought to be included, to waive that formality and allow the matter to be added to the appeal book now.

GALLIHER, J.A.: I am in agreement with what has already been said, and I think the most expeditious and least expensive course would be to agree to Mr. *Davis's* suggestion, that it be included in the appeal book.

MCPHILLIPS, J.A.: In my opinion this motion ought not to be dealt with differently than in other cases; the same principle applies to all. The root principle is that the Appeal Court shall have before it all the Court below had before it, subject, of course, to this consideration—I think very often we have had appeals here that were too voluminous, as by agreement of counsel a great deal of material could be usefully eliminated; but in the absence of that it seems to me that in the abstract, the Court of Appeal should have everything before it that the Court below applied its mind to. It may be that some of that material may be useless, but unless there is an agreement between the parties it should all come before this Court.

MCPHILLIPS, J.A.

EBERTS, J.A.: I agree with the decision to settle the appeal book including such evidence as Mr. *Davis* says should have gone into the appeal book, and which was produced before the trial judge.

EBERTS, J.A.

MACDONALD, C.J.A.: The motion is granted and the parties will no doubt be able to agree amongst themselves with respect to inserting the further material in the appeal book, or the putting in of a supplemental appeal book.

MACDONALD, C.J.A.

Motion granted.

MURPHY, J.

1917

Sept. 4.

1918

Feb. 12.

COURT OF APPEAL

Nov. 5.

IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

IN RE DOMINION TRUST COMPANY, LIMITED, BOYCE AND MACPHERSON.

Company law—Winding-up—Assets transferred to new Company—Shareholders entitled to exchange for shares in new Company—Petitioner—Shareholder—No exchange made for new shares—Status—R.S.B.C. 1911, Cap. 39.

By agreement between two companies (termed "old" and "new" respectively) which was ratified by the Legislature, the assets and liabilities of the old company were transferred and taken over by the new. The agreement contained a clause saving the rights of creditors of the old company and further provided that the shareholders in the old company were entitled to exchange for shares in the new company. A shareholder in the old company whose shares were not fully paid up petitioned under the Companies Act (R.S.B.C. 1911, Cap. 39) for the winding up of the old company. The new company was at the time in process of being wound up and the petitioner, who had not applied for or been allotted shares in the new company, had been placed upon the list of contributories by the district registrar without objection on his part. An order was made winding-up the old company.

Held, on appeal (affirming the order of MURPHY, J.), that the petitioner's shares not having been fully paid up he had the right to petition for the winding-up as a contributory in the old company, and there being evidence of the company having both assets and liabilities, although proof of assets was not necessary, and the objects for which the company was incorporated having ceased to exist, it was in the circumstances, just and equitable that it should be wound up.

Statement

APPEAL by MacPherson from the order of MURPHY, J. of the 12th of February, 1918, directing the winding-up of the Dominion Trust Company, Limited (old company). The company was incorporated under the Companies Act on the 27th of November, 1903, under the name of "Trust Agency and Loan Corporation, Limited," said name being altered to that of Dominion Trust Company, Limited, on the 10th of June, 1905. On the 1st of April, 1912, the Dominion Trust Company (new company) was incorporated by an Act of the Parliament of Canada (2 Geo. V., Cap. 89), the object being to acquire the stock and business and assume the liabilities of the old company. The two companies entered into an agreement in 1913, whereby the old company assigned the whole of its

property and undertaking to the new company and the new company assumed all liabilities of the old company, and the shareholders in the old company were to be allowed to exchange their shares for an equal number of shares in the new company. It was a term of the agreement that it would not come into effect until ratified and confirmed by an Act of the Legislature. An Act ratifying and confirming the agreement was passed by the Legislature in 1913 (B.C. Stats. 1913, Cap. 89). Upon the passing of this Act the old company suspended business. The new company continued its business until October, 1914, when it was ordered to be wound-up under the Winding-up Act. The petitioner (Boyce) was the holder of five shares in the old company. In December, 1912, he received notice of an extraordinary general meeting of the shareholders of the old company, to be held on the 17th of January, 1913, setting out that the business to be brought before the meeting was the consideration of the agreement between the old company and the new. The shareholders at the meeting, by resolution, approved of the carrying out of the agreement. The petitioner did not personally apply for, and had not been allotted shares in the new company. Upon the winding-up of the new company the district registrar certified that the petitioner was a contributory in the new company on the 6th of March, 1916, and although certain persons who were at the same time placed upon the list of contributories, appealed and were successful in having their names struck from the list, the petitioner did not appeal, and his name was left on the list as settled by the district registrar. The petition herein was presented to the Court on the 4th of October, 1916.

Statement

Martin, K.C., for the petitioner Boyce.

J. A. MacInnes, Savage, Hooper, Jamieson, Bucke, Murray and *Russell & Co.*, for various shareholders.

4th September, 1917.

MURPHY, J.: It is objected that petitioner, being a shareholder, has no *status* to present this petition, because by the agreement between the Dominion Trust Company, Limited, and the Dominion Trust Company ratified by the Legislature by

MURPHY, J.

MURPHY, J.
1917
Sept. 4.
1918
Feb. 12.
COURT OF APPEAL
Nov. 5.
IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

B.C. Stats. 1913, Cap. 89, the rights of shareholders of the Dominion Trust Company *qua* shareholders "shall consist only of and be limited to the" right of each such shareholder to a certain number of shares "in the capital stock" of the Dominion Trust Company. By section 24 of the said Act, the rights of creditors against the Dominion Trust Company, Limited, are expressly reserved. By section 26, the powers of said Company are determined, except, *inter alia,* for its winding-up. These sections, in my opinion, preserve the liability of the shareholders to be made contributories in a winding-up. The right of presenting a petition for winding up is by section 188 of the Companies Act conferred on a contributory under certain conditions, which the petitioner herein has fulfilled. There can be no question, I think, that it is just and equitable that the Company should be wound up, and it is so ordered.

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: first, 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, second, 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.

MURPHY, J.

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, did not *per se* make the shareholders of the latter Company shareholders of the former. This decision was confirmed on appeal. 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

MURPHY, J.

1917

Sept. 4.

1918

Feb. 12.

COURT OF APPEAL

Nov. 5.

IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

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 March 6th, 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 of the order winding up the Dominion Trust Company, *viz.*: October 27th, 1914. To this, there are two answers; first, 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 second, that even if estoppel by record did make him a shareholder, by its very

MURPHY, J.

MURPHY, J.

1917

Sept. 4.

1918

Feb. 12.

COURT OF APPEAL

Nov. 5.

IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

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

MURPHY, J.

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 and did say was, that by his conduct he had estopped himself from saying he should not be 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* deter-

mining 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 rather a 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 British Columbia 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 no 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 Dominon 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.

MURPHY, J.

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 Dominon Trust Company is the beneficial owner, subject to the possible qualification above set out, of the assets sought to be recovered herein answers this: see Stroud's Judicial Dictionary, 2nd Ed., p. 1139, *sub tit.* maintenance.

The previous order for winding up is confirmed.

The appeal was argued at Victoria on the 7th and 10th of June, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

MURPHY, J.

1917

Sept. 4.

1918

Feb. 12.

COURT OF APPEAL

Nov. 5.

IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

J. A. MacInnes, for appellant: On the winding-up of the new company the registrar made up the list of contributories, and those who did not appeal were placed permanently on the list. Boyce was on the list and did not appeal. He cannot now claim to be a member of the old company, and not being so he has no *status* to present this petition. He was not a contributory under section 183 of the Companies Act: see *Webb* v. *Whiffin* (1872), L.R. 5 H.L. 711 at pp. 720-1. The statute affirming the agreement between the old and new companies takes away any obligation from the old company. There are no assets and no liabilities and a winding-up would be a futility. There are no grounds for winding-up shewn in the petition. The right to recover for misfeasance would be in the new company: see *The General Exchange Bank* v. *Horner* (1870), 39 L.J., Ch. 393. It is not just and equitable that the company should be wound up: see *In re Anglo-Australian Assurance Co., In re British Provident Society* (1860), 8 W.R. 170. The Act confirming the agreement is a statutory winding-up of the old company.

Argument

Wilson, K.C., for the old company: As to *status* of Boyce, he was a shareholder in the old company. The agreement provided for the mode of transfer but there had never been a proper transfer of the shares from the old to the new company. If Boyce is a member of the company he is a contributory: see Palmer's Company Precedents, 11th Ed., Vol. 2, p. 573. He must have his name taken off the register: see *Winstone's Case* (1879), 12 Ch. D. 239. As to the order being just and equitable, there were 400 on the list originally and the list was settled without a large number who were in the last appeal claiming they were still members of the old company.

Gurd, for the new company: The winding-up order having been made, Boyce is no longer *dominus litæ,* as it accrues to the benefit of all parties. This is the only means whereby we can get in this asset, and it is just and reasonable.

MacInnes, in reply: If Boyce has no *status* the whole proceeding falls: see *In re The South African Syndicate (Limited)* (1883), 28 Sol. Jo. 152. Under the statute Boyce only had the right to exchange.

Cur. adv. vult.

5th November, 1918.

MACDONALD, C.J.A.: The difficulties and complications which have already arisen, and which may hereafter arise, out of the agreement between the two companies and the Act ratifying same, being chapter 89 of the Acts of the Legislature, 1913, make it desirable that I should confine the expression of my opinions to the narrowest limits consistent with the decision of this appeal.

The petitioner, the holder of shares in this Company, was by such agreement entitled to exchange them for shares in the Dominion Trust Company, a company incorporated by Act of the Dominion Parliament, created to take over the business and assets of the company. One of the principal questions involved in this appeal turns on whether or not the petitioner made such exchange, or, to be more precise, ceased to be a shareholder of this company. For convenience I shall hereinafter refer to this company as the "old company," and to the Dominion Trust Company as the "new company."

The appellant's counsel argued that because the petitioner had been settled on the list of contributories of the new company in liquidation, the proper inference to be drawn from that fact was that he had become by exchange of shares a shareholder of that company before the date of the order to wind it up, and therefore, before that date, he ceased to be a shareholder of the old company. It is conceded that the shares upon which he was settled on the list in the new company are the shares upon which he assumes to qualify as a petitioner for the winding up of the old company.

It would appear from the reasons for judgment that counsel on both sides substantially conceded in the Court below that the petitioner had not applied for and had not been allotted shares in the new company in exchange for his shares in the old company, and was therefore in this respect in the same position as were the respondents in *In re Dominion Trust Co. and Allan* (1917), [24 B.C. 450]; 37 D.L.R. 251, in which this Court held that such respondents were not shareholders in the new company. The petitioner may, by reason of estoppel of record, be liable to contribute to the assets of the new company for the payment of its liabilities, but that circumstance does not prove

MURPHY, J.

1917

Sept. 4.

1918

Feb. 12.

COURT OF APPEAL

Nov. 5.

IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

MACDONALD, C.J.A.

MURPHY, J.
1917
Sept. 4.
1918
Feb. 12.
COURT OF APPEAL
Nov. 5.
IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

that he ceased to be a shareholder of the old company. There is no sufficient evidence that he did in fact cease to be such shareholder. Now, while the agreement aforesaid divested the old company of the beneficial ownership in all its assets, and vested the same in the new company, there is a clause in the said agreement saving the rights of creditors of the old company. This fact is sufficient to meet the contention that a winding-up of the old company would be futile, and also is sufficient to meet the other contention of the appellants that because the new company was by said agreement and Act made liable for the debts and obligations of the old company, that that circumstance had some bearing on the petitioner's right to petition, or on the discretion of the Court to make the winding-up order. The petitioner's shares were not fully paid up, therefore he falls within the definition of contributory, and a contributory has the right under the British Columbia Companies Act, the provisions of which apply to the old company, to petition for a winding-up order on several grounds, one being the ground upon which the order appealed from was made, namely, that it was "just and equitable" to make the order. The petitioner is in a peculiar position. He is on the new company's list of contributories on the ill-founded assumption that he had exchanged his shares in the old for shares in the new company, and he has now the carriage of an order, one of the contemplated consequences of which will put him on the list of contributories in the winding-up of the old company in respect of the very same shares. But this circumstance cannot, in my opinion, curtail his right to petition for the winding-up of this company.

MACDONALD, C.J.A.

It was suggested by appellant's counsel that the petition herein was promoted by the liquidator of the new company. He appeared by counsel on this appeal in support of the order without objection from the appellant's counsel, and while he may have no *locus standi* as a party to these proceedings, this is now immaterial. The liquidator of the new company has the right to call upon the directors or liquidator of the old company, to exercise their or his powers under the Companies Act, on his behalf to get in the uncalled capital available to him: see *dictum* of Kekewich, J. in *Sadler* v. *Worley* (1894), 2 Ch. 170 at p.

175. My decision herein is, however, founded on the strength of the petitioner's *status* alone.

Then it is argued that because the agreement and Act aforesaid limit the rights of shareholders in the old company to the privilege of exchanging their shares for shares in the new company, the shareholders' right to petition is taken away. I do not think so. I agree with MURPHY, J. Rights *qua* shareholders only are taken away. A contributory's liability is not affected, then why should his right to petition be?

To sum up, the petitioner was, in my opinion, a contributory in relation to the Dominion Trust Company, Limited, the old company. No proof of assets is necessary, but if it were, it appears that the company had in fact both assets and liabilities. The objects for which the company was incorporated have ceased to exist. In these circumstances it is just and equitable that the company be wound up. As to how the words "just and equitable" have been applied in other cases, I refer to those mentioned in Palmer's Company Law, 10th Ed., 391. This company having outlived its objects, the petitioner is within his right in seeking to have it wound up.

I would, therefore, dismiss the appeal.

MURPHY, J.

1917

Sept. 4.

1918

Feb. 12.

COURT OF APPEAL

Nov. 5.

IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

MACDONALD, C.J.A.

MARTIN, J.A.: This appeal should be dismissed, because I think the learned judge has reached the right conclusion.

MARTIN, J.A.

GALLIHER, J.A.: I would dismiss the appeal for the reasons given by the learned trial judge.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion Mr. Justice MURPHY arrived at the right conclusion and the appeal should be dismissed. It is clear that the respondent, the petitioner, established his right to petition for the winding-up under section 188 of the Companies Act. Whatever may have occurred in connection with proceedings taken to place him on the list of contributories of the new company, *i.e.*, on the list of contributories of the Dominion Trust Company (Can. Stats. 1912, Cap. 89), cannot be held to affect the right to a winding-up under the Companies Act (R.S.B.C. 1911, Cap. 39). The legislation, both Federal and Provincial, in its terms in no way by statute

MCPHILLIPS, J.A.

MURPHY, J.
1917
Sept. 4.
1918
Feb. 12.
COURT OF APPEAL
Nov. 5.
IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

operated to change the *status* of the shareholders of either company in so far as winding-up proceedings are concerned. It became necessary for the shareholders of the Dominion Trust Company, Limited, to do some conscious act to transfer their shares into shares of the new company (the Dominion Trust Company), and even when that was effectively done, the question as to what sum was due and payable upon shares would be determined by the state of accounts, *i.e.*, as to what sum had been paid up thereon. Possibly where there was an effective transfer from the old company to the new, the sum remaining due thereon can be said to be the property of the new company, subject, however, to winding-up proceedings of the old company, if such should take place. The only way this could be obviated by the new company would be for it to pay all the liabilities of the old company, as provided in the agreement set forth in the Schedule to the Dominion Trust Company Act, 1913. That not being done, it is only in the furtherance of natural justice to the creditors of the old company that any assets of the old company should be made available to pay the debts of the old company and it would be only the surplus (if any) of such assets or property that the new company would become eventually entitled to. The judgment of this Court in *In re Dominion Trust Co. and Allan* (1917), 24 B.C. 450; 3 W.W.R. 483, passes upon this point. See in particular at pp. 497-8, when I had occasion to deal with this question. The debts of the old company not having been paid, and a sufficient case being made out for winding-up, it is right and proper that a winding-up be had. It is only necessary to read sections 24 and 26 of the Dominion Trust Company Act, 1913, to see that all proper saving clauses were enacted to admit of saving the rights of creditors and admit of winding-up proceedings. In the winding-up proceedings primarily any moneys due upon their shares by the shareholders of the old company may be made and shall be made where necessity requires it, available in the liquidation to discharge the debts of the old company. That any of the shareholders have effectively taken steps to become shareholders in the new company by reason of their holdings in the old company creates no hindrance to these winding-up proceedings—the whole scheme

MCPHILLIPS, J.A.

as covered by the legislation is capable of being worked out. In the agreement set forth in the Schedule to the Dominion Trust Company Act, 1913 (see B.C. Stats. 1913, Cap. 89, p. 596), we find this clause:

"The new company shall deliver to each shareholder of the old company, in exchange for and upon the delivery of a certificate with indorsed transfer thereof duly executed or share warrant for fully paid shares in the capital stock of the old company, a certificate representing an equivalent number of fully paid shares of the capital stock of the new company. No certificate for shares in the capital stock of the new company not fully paid or in respect of which there is any sum due for premium shall be issued until all sums due on said shares, whether for premium or otherwise, shall have been fully paid."

It will be seen that where shareholders of the old company do take steps to become members of the new company, they only become entitled to a certificate for the shares when fully paid, and they may become fully paid by reason of the winding-up proceedings of the old company. It is plain to me that all is workable under the existing legislation. It is idle contention though, with deference to all contrary opinion, to now say, that because of steps being taken by members of the old company in pursuance of the legislation to become members of the new company, that in such cases no effective winding-up proceedings can be taken against those shareholders who were shareholders in the old company and who have become shareholders in the new company in respect of these shares, although not fully paid, for the purpose of winding-up proceedings they still are members of the old company, and whatever moneys they may pay in respect of the shares not fully paid will constitute and must be treated as payment in respect of the shares. To illustrate matters, take the case of a member of the old company holding one share upon which 50 per cent. has been paid up, he wishing to become a member of the new company would execute a transfer of the share and be entitled to a share in the new company paid up to the same extent, not to be delivered out, of course, as we have seen, until fully paid. That in the course of things a winding-up takes place of either the old or new company cannot change or alter this position, if the old company was without debts; nevertheless, there might be a winding-up, and no necessity would arise to call up moneys due in respect of the shares

MURPHY, J.

1917

Sept. 4.

1918

Feb. 12.

COURT OF APPEAL

Nov. 5.

IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

MCPHILLIPS, J.A.

not fully paid, but with debts, the shareholder cannot escape being placed upon the list of contributories of the old company —that position was preserved by the legislation and all is workable. In the liquidation proceedings of the new company, the shareholder in the old company who has elected to become a member of the new company in respect of this share in the old company not fully paid, can only in the final result be called upon to pay to the liquidator of the new company such sum only (if any) that remains due and owing upon the shares not called up in the winding-up proceedings of the old company. It may be that I have gone somewhat further afield than is requisite to cast a horoscope, that is, what I have last said was the expression of " a legal proposition . . . . . [not] a necessary step to the judgment" (*Charles R. Davidson and Company* v. *M'Robb or Officer* (1918), 34 T.L.R. 213, Lord Dunedin at p. 217). The "legal proposition" though in short compass in this appeal is, that the petitioner established the right to apply for the winding up of the old company (the Dominion Trust Company, Limited), and winding-up proceedings were preserved by the legislation which has been referred to.

I would therefore, as before stated, dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *McLellan, Savage & White.*
Solicitor for respondent: *W. W. B. McInnes.*

WELLINGTON COLLIERY COMPANY, LIMITED AND ESQUIMALT & NANAIMO RAILWAY COMPANY v. PACIFIC COAST COAL MINES, LIMITED.

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 8.

WELLINGTON COLLIERY CO. v. PACIFIC COAST COAL MINES

Mining law — Coal — Trespass — Removal of coal — Sinister intention — Measure of damages.

Where a company in working its mine enters upon and works the coal on adjoining property without the consent or knowledge of the owners, and takes it for the purpose of sale, the proper estimate of damages is the value of the coal without deducting any of the necessary expenses of working and taking it out.

APPEAL from the decision of CLEMENT, J. in an action for damages for the wrongful taking of coal from a property of the Wellington Colliery Company known as the Alexandra Mine in the Cranberry District, Vancouver Island. Tried at Victoria on the 5th, 6th and 7th of February, and the 5th of March, 1918. There were old workings in the mine that had been abandoned by the Wellington Colliery Company for some years. The defendant Company acquired adjoining property and found that from their workings they could take the remaining coal including the pillars from the Alexandra mine to advantage, through their property. In October, 1912, they obtained leave from the plaintiff Company to take the coal from the Alexandra mine on a 15 cents per ton royalty basis, subject to their discontinuing on three days' notice. Notice to discontinue operations was given on the 5th of March, 1913. Subsequently Mr. Charles P. Hill, managing director of the defendant Company, endeavoured to bring about an exchange of properties whereby the defendant Company could take the remaining coal from the Alexandra mine. These negotiations were carried on in Montreal and New York, and from time to time he reported progress by letter to Mr. Tonkin, the resident manager of the defendant Company. Owing to the satisfactory tone of these letters and in expectation of an early arrangement being made for an exchange of properties, Tonkin proceeded to take coal from the Alexandra mine from September, 1914, until April, 1915, taking out in all 21,365.9 tons.

Statement

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 8.

WELLINGTON COLLIERY CO. v. PACIFIC COAST COAL MINES

Davis, K.C., and *Harold B. Robertson*, for the Wellington Colliery Company.

Luxton, K.C., for Esquimalt & Nanaimo Railway Co.

W. J. Taylor, K.C., for defendant.

25th March, 1918.

CLEMENT, J.: At the hearing I resolved all questions of title in favour of the plaintiff Company. The defendant Company admits that the trespass complained of results in the removal of 21,365.9 tons, and the only question now is whether the defendant Company should be mulcted in damages according to the *in foram* rule or according to the milder rule which obtains where the trespass was inadvertent or made in mistake of title. Upon further consideration of the evidence I can find no reason for releasing the defendant Company. In my opinion the trespass was wilful, clandestine and "sinister" in the fullest sense indicated in *Lamb* v. *Kincaid* (1907), 38 S.C.R. 516. I assess the damages at $3 per ton, a total of $64,097.70. There will be judgment for that sum with costs; the counterclaim, as intimated at the hearing, is dismissed with costs.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 7th and 8th of November, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. J. Taylor, K.C., for appellant: The trial judge finds that our action was wilful, clandestine and sinister, but my submission is the evidence does not justify any such finding. In October, 1918, under arrangement, we were allowed to work the Alexandra mine subject to notice, and we worked until the following March, when we received notice to stop work. Mr. Hill, on behalf of the defendant Company, then saw Mr. Mackenzie in Montreal with a view to continuing the work, and he advised the local manager that negotiations were progressing favourably. When the work is continued under such circumstances we should not be subjected to exemplary damages. There is, in addition, the claim of a squatter (one Beck) under the 1904 statute. If he has title the plaintiff has no action. On

Argument

the question of exemplary damages see *Lamb* v. *Kincaid* (1907), 38 S.C.R. 516 at p. 532; *Trotter* v. *Maclean* (1879), 13 Ch. D. 574 at p. 584; *Last Chance Mining Co.* v. *American Boy Mining Co.* (1904), 2 M.M.C. 150; *Yukon Gold Co.* v. *Boyle Concessions* (1916), 23 B.C. 103; *In re United Merthyr Collieries Company* (1872), L.R. 15 Eq. 46 at p. 49.

Davis, K.C., for respondent: Under the Vancouver Island Settlers' Rights Act, 1904, a Crown grant must be issued before any title is obtained: see *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462 at p. 466. We had a possessory title and have a right of action: see Halsbury's Laws of England, Vol. 27, p. 851. As to *quantum* of damages the trial judge is specially competent to pass on the question of *bona fides*. They knew of our suspicions that they were taking our coal, and this accounts for their efforts to make a settlement. When we gave notice to stop taking coal from the Alexandra mine in March, 1913, they stopped paying royalty, sent no statements, and would not allow our engineer to inspect the property. Argument

Taylor, in reply.

MACDONALD, C.J.A.: I think the appeal must be dismissed. I was of that opinion at the close of Mr. *Taylor's* argument. I thought he had not referred us to anything which would entitle us to interfere with the conclusion arrived at by the learned trial judge on the question of damages. On the other point, I have only to say that as I understand it this question of title was raised simply to preserve the rights of the parties in the event of the case going further. It is therefore not now necessary to consider it.

[Mr. *Taylor*: I would like you to consider it.]

I will put it this way: Neither in your opening nor your reply have you referred us to anything which, in my opinion, would entitle us to come to any different conclusion from that arrived at by the learned trial judge, on the question of title.

MARTIN, J.A.: In my opinion the appeal should be dismissed. There is nothing which would justify us in interfering with the judgment of the learned judge below. It is only necessary

CLEMENT, J.

1918

March 25.

COURT OF APPEAL

Nov. 8.

WELLINGTON COLLIERY CO. v. PACIFIC COAST COAL MINES

to refer to the case cited: [*Last Chance Mining Co.* v. *American Boy Mining Co.* (1904)], 2 M.M.C. 150.

GALLIHER, J.A.: I also think the appeal should be dismissed. There was some doubt in my mind for a time as to the effect of the conversation with Fleming in New York. Mr. Hill on his examination states distinctly that he had talked from time to time with Mr. Fleming about the Alexandra mine, that he had told him about those pillars being removed. This question, as to direct contradiction, never was put up to Mr. Fleming, because it could not be on account of Hill's examination being taken after the trial took place, after the evidence was in, but there is, as the parties admit, no dispute that Fleming denied generally that he ever had heard anything about the taking out of coal up to the time of this interview, whatever the interview was. Evidently the trial judge has seen fit to take that as the correct version, and makes his finding accordingly. I do not think I would be justified in taking a different view from that, and saying that the trial judge was wrong in taking that view.

GALLIHER, J.A.

So far as the question of title is concerned, I must say that I think I cannot interfere with the trial judge's finding on that, and am of opinion that the appeal should be dismissed.

MCPHILLIPS, J.A.: In my opinion the appeal must be dismissed. In this particular case, the evidence is, it is true, to some extent conflicting, yet there is no real conflict upon the crucial point, that is, there is nothing to shew that there was any assent or reasonable expectation of assent by the respondent Company to the appellant Company, admitting of the working out of these pillars. If all the evidence is analyzed, it was always apparent that there was an obstacle in the way of bringing that about. I can understand there may be in a case such conflict of evidence which would entitle the Court to say that damages should not have been assessed on the basis of a wilful trespass. In this case though, it is plain from the evidence that there was an obstacle throughout. Mr. Mackenzie in the first place had difficulty with his London Board, and then there was difficulty with the New York interests.

MCPHILLIPS, J.A.

Now then, with regard to the general manager, Mr. Tonkin, I think there had been such representations made to him by Mr. Hill that may well have led him to believe that it would be merely taking what in commercial life is said to be a business risk, or colloquially speaking a long chance that the assent would assuredly come, but if Mr. Tonkin's evidence is analyzed, and critically analyzed, together with the letters and wires from Mr. Hill, it will be noticed that Mr. Hill emphasized that the matter had not been settled and that there were still obstacles in the way. Now, looking at the probabilities, this assent might have been achieved, but it was never achieved. I think that in such cases it is impossible to prevent the rule of law being applied, that is, you go upon other people's property at your risk. Trespass is well known to the law, and it is well known that damages follow trespass. In this particular case the respondent Company was the owner in fee simple in possession. It was suggested that the property in the land and in the coal was really in a settler entitled to a Crown grant under the Vancouver Island Settlers' Rights Act, 1904 (B.C. Stats. 1903-04, Cap. 54), but no sufficient evidence was adduced, and it is admitted that no Crown grant has issued in pursuance of that Act, and in the case of *McGregor* v. *Esquimalt and Nanaimo Railway,* which went to the Privy Council [(1907), A.C. 462], as I interpret it, it is plain that until the Crown grant issues from the Provincial authority to the settler, the title is in the Esquimalt and Nanaimo Railway Company, therefore in this particular case the title remains in the Esquimalt and Nanaimo Railway Company.

MCPHILLIPS, J.A.

I cannot see that there is evidence upon which we would be entitled to vary the judgment arrived at by the learned trial judge. A trespass is admitted; that it was wilful is denied. As to this, the finding of the trial judge is that it was wilful. No case for a reversal of this finding has been made out, at the same time I want to make it clear that I would not like to say that this case is one where there was any moral turpitude, or an attempt to abstract the coal without intention to account for it.

I would like to add that this question of trespass and the principle of assessment of damages therefor has recently been

CLEMENT, J.
1918
March 25.
COURT OF APPEAL
Nov. 8.
WELLINGTON COLLIERY CO. v. PACIFIC COAST COAL MINES

dealt with by this Court, and I would refer to my judgment in the case of *Isitt* v. *Grand Trunk Pacific Ry. Co.* [*ante* p. 90] and my reasons for judgment in that case, are as applied to the facts of the present case, equally applicable.

Appeal dismissed.

Solicitor for appellant: *W. J. Taylor.*

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

COURT OF APPEAL
1918
Nov. 8.
BOUCH v. RATH

BOUCH AND BOUCH v. RATH.

Practice — Appeal — Failure to enter in time — Application to set down — Special circumstances.

On giving notice of appeal, an appeal book was left with respondents' solicitor for approval when appellant was advised the book would be approved upon security for costs being put up. Nothing further was done for four weeks, when appellant on the fourth day prior to the last day for setting the case down, called for the appeal book. The book had been mislaid in respondents' office but appellant was reminded that security for costs had not been put up. Appellant then perfected the security and submitted another copy of the appeal book which was approved and returned to the appellant who, on the following day (the day prior to the last day for entry), applied to the registrar at Vancouver for entry of the appeal, but was advised the books had to be approved by the registrar at Nanaimo. They were immediately sent to Nanaimo for approval but arrived back in Vancouver three days late. Application was then made to set the case down for hearing.

Held (MACDONALD, C.J.A. dissenting), that as the parties were at arm's length, the failure of the appellant to send the books to Nanaimo in time for their return and entry was no excuse for failure to comply with the statute and the application should be refused.

Statement

MOTION to the Court of Appeal for liberty to file appeal books and for an order setting down the appeal for hearing. Notice of appeal had been given for the November sittings of the Court, the appeal to be set down and the appeal books filed on or before the 1st of November. An appeal book was left with respondents' solicitor for approval on the 30th of Septem-

ber, when appellant was advised the book would not be approved until security for costs of the appeal was paid in. Nothing further was done by the appellant until the 28th of October, when he applied for the return of the book, duly approved. He was then advised that upon being served with notice of payment in of security for costs the appeal book would be approved. In the meantime the appeal book submitted was mislaid but on service of notice of payment in of security another book was submitted and duly approved by the respondents' solicitor on the 30th of October. On the following day the appeal books were delivered to the registrar at Vancouver, who directed that they should first be approved by the registrar at Nanaimo, and on the same day the books were sent to Nanaimo, where they were approved by the registrar, but they did not arrive back in Vancouver until the 4th of November. Application was made on the same day for leave to file the appeal books and set the case down for hearing at the November sittings.

Statement

J. A. Russell, for the motion, submitted that the delay was due first to the respondents' solicitor taking an unreasonably long time in approving of the appeal book, they having mislaid the first book submitted to them, and added to this was the delay occasioned by the unexpected necessity of having to send the book to Nanaimo for approval by the registrar there.

Argument

Cassidy, K.C., contra: The respondents' solicitor would not approve of the appeal book until security for costs was given, and the delay is entirely due to their not putting up the required security. [He referred to *B.C. Independent Undertakers, Ltd.* v. *Maritime Motor Car Co.* (1917), 24 B.C. 300.]

MACDONALD, C.J.A.: The difficulty I see in this case, and perhaps the only difficulty as against the respondents, and in your favour Mr. *Russell* is, that while you were in default in not bringing the matter on earlier, there was no stay of the appeal pending the giving of security. You were entitled, if the other party refused to settle the appeal book, at the time you requested them to do so, to take out an appointment before the registrar and have it settled, irrespective of whether security was then given or not. The delay in giving security is not a

MACDONALD, C.J.A.

COURT OF APPEAL
1918
Nov. 8.
BOUCH v. RATH

stay of proceedings, and therefore it was open to you to take out the appointment. The other side is not bound to assent. You had the power in your own hands to force the matter along. You did not give security until the 21st, but then again, strictly speaking, they were not bound to settle the appeal book; they might wait until you took out your appointment to have the appeal book settled by the registrar. When you did finally send the appeal book to the registrar at Nanaimo, it appears that there was some delay there which in the ordinary course of events was not anticipated by you, and that is the only thing which you can make out in your favour, in asking for an extension of time. That was the registry in which the action was commenced, but owing to the fact that the papers had been sent away the registrar at Nanaimo thought that he could not settle the book, and a delay which you did not anticipate occurred, but that is one of the penalties of leaving the matter until almost the last moment.

MACDONALD, C.J.A.

In this case if it had not been for the difficulty in the Nanaimo registry, in my opinion we should follow the rule, but under these circumstances I would extend the time.

MARTIN, J.A.: In my opinion this case is governed by the authority cited by Mr. *Cassidy*. The principle there is perfectly plain. As to the failure of the solicitor to send the appeal book to the registrar in Nanaimo in time when the parties had been at arm's length all through, is no excuse for failure to follow the statute in this respect.

MARTIN, J.A.

GALLIHER, J.A.: I think, strictly speaking, we ought to follow the rule as it has been laid down. I might say that I do not like to prevent appeals being set down, but I think that following the decision of this Court referred to by Mr. *Cassidy*, we ought to adhere to the rule we have laid down.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the motion must be refused. I think, in these matters where there is lack of expedition and where there has been no lulling into a sense of security by the opposite side, that the statutory requirement should be strictly adhered to.

MCPHILLIPS, J.A.

Motion refused, Macdonald, C.J.A. dissenting.

BUSCOMBE SECURITIES COMPANY, LIMITED v. HORI WINDEBANK AND QUATSINO TRADING COMPANY, LIMITED.

MORRISON, J. (At Chambers)

1918

Nov. 14.

BUSCOMBE SECURITIES CO. v. HORI WINDEBANK AND QUATSINO TRADING CO.

Practice—Foreclosure action—No proceeding for one year—Application to consolidate actions—"Proceeding"—Rule 973.

On an application to consolidate two actions where it appears that no proceeding has been taken in the first action for one year, the notice required under marginal rule 973 must be given.

APPLICATION to consolidate two actions. In the first the plaintiff obtained the usual order *nisi* in 1916 for foreclosure in respect of a mortgage securing a certain advance. In 1918 he commenced another action to foreclose another mortgage securing the same advance and included in it the subject-matter of the first action. Heard by MORRISON, J. at Chambers in Vancouver on the 14th of November, 1918.

Statement

Armour, for the application.

Bloomfield, contra, raised the preliminary objection that no notice had been given by the plaintiff under Order LXIV., r. 13, before taking any further step in the first action.

Argument

MORRISON, J.: These two actions are independent proceedings, and even if they were consolidated that would not alter their independent character: *Bake* v. *French* (1907), 76 L.J., Ch. 299. The application to consolidate the first action with the second is a step in the proceedings, previous notice of which must be given pursuant to Order LXIV., r. 13: *Blake* v. *Summersby* (1889), W.N. 39.

Judgment

Application dismissed.

COURT OF APPEAL

1918

Nov. 20.

ALEXANDER *v.* LETVINOFF

ALEXANDER *ET AL.* v. LETVINOFF *ET AL.*

Contract — Written — Action for repayment of money — Oral evidence required that contract was carried out—Evidence for defence to vary or contradict—Admissibility.

In an action for repayment of money due on a written contract, the fact that it is necessary for the plaintiff to shew by oral evidence that the contract had been carried out, does not entitle the defendant to submit evidence to vary or contradict the contract.

APPEAL by plaintiffs from the decision of MORRISON, J. of the 23rd of April, 1918, dismissing the plaintiffs' action as trustees of the estate of Solomon Weaver, deceased, to recover $5,000 on a written agreement signed by the defendants and worded as follows:

"In consideration of your advancing us the sum of $5,000 we hereby jointly and severally covenant, promise and agree to repay to you the said sum of $5,000 within two years from the date hereof with interest on the same or on so much thereof as may from time to time remain due as well after as before maturity at the rate of 6% per annum.

"It is understood and agreed that the sum of $5,000 may be repaid from time to time and at any time within the said period of two years in sums of not less than $50 and the interest on the sums so repaid shall cease as from the date of the payment of the respective instalments."

Statement

The question involved arose while the Sons of Israel in Vancouver were in the course of making financial arrangements for the building of a synagogue. On the day following the signing of the agreement Weaver made a cheque for $5,000, payable to the defendants, who indorsed and cashed the cheque. The main defence was that Weaver had agreed to give $5,000 to the Sons of Israel if an additional $5,000 was raised by the rest of the congregation, and it was submitted that evidence should be allowed in on the trial that he had so promised. The evidence shewed that the $5,000 advanced by Weaver was used in paying off debts of the Sons of Israel.

The appeal was argued at Vancouver on the 20th of November, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

COURT OF APPEAL

1918

Nov. 20.

ALEXANDER v. LETVINOFF

S. S. Taylor, K.C., for appellants: The action is on a contract. The document in which they agree to repay the $5,000 is in clear terms and there is no ground for allowing in evidence to vary this document: see Taylor on Evidence, 10th Ed., pars. 1132-5, 1158 and 1194. They say, first, that it was a donation and, secondly, that the whole congregation was to sign the agreement. It was an executed contract. They took the money and agreed to repay. They are estopped from raising any further defence.

Cassidy, K.C., for respondent: There is a difference in saying "in consideration of your advancing" from "in consideration of your having advanced." In the case in question something else has to be proved and my contention is that when something else has to be proved the whole case is open to review: see *King* v. *Wilson* (1904), 11 B.C. 109. He does not say in the statement of claim that the money was paid on the following day. When he relies on the document he is held strictly to his pleading: see *Edevain* v. *Cohen* (1889), 43 Ch. D. 187 at p. 190. The question here is whether Weaver promised to give the church $5,000, and the evidence was taken without objection; see *Schwersenski* v. *Vineberg* (1891), 19 S.C.R. 243. The fact that the $5,000 was used to pay the Sons of Israel's debts is not a contradiction of the agreement: *Barton* v. *Bank of New South Wales* (1890), 15 App. Cas. 379; Norton on Deeds, 2nd Ed., 128; Halsbury's Laws of England, Vol. 13, p. 365, par. 775.

Argument

MACDONALD, C.J.A.: I think the appeal must be allowed. The plaintiffs are the trustees of the estate of the late Solomon Weaver and bring this action upon a written contract, which is very clear in its terms. It reads: [already set out in statement].

MACDONALD, C.J.A.

That seems to me to be an unambiguous contract. It is a contract between these very defendants and Mr. Weaver, and it does not make any difference what the money was used for, whether for the benefit of the makers of the contract or some nominee of theirs. It is not necessary to assume, but I will assume that Mr. *Cassidy* has some ground for saying that it was intended for the benefit of the church; to be used in paying

COURT OF APPEAL

1918

Nov. 20.

ALEXANDER v. LETVINOFF

off debts of the church. That does not appear on the face of the document. But even if it did, if they had agreed that if Mr. Weaver would pay $5,000 they would hand it over to the church, and yet had signed the contract as they did here, that they would repay Mr. Weaver, they would be bound to repay it. The mere fact that they did not get the money for their own personal use would make no difference in their contract with Mr. Weaver. The case appears to be a very simple one. Mr. *Cassidy's* position is based very largely on the words: "On your advancing us." It must be admitted that if the language was "Your agreeing to advance," it would have been the ordinary case of agreement to repay, upon the money being advanced. Those words, "on your advancing us," really mean "your agreeing to advance," and according to my interpretation, the plaintiffs would have to prove, as in the ordinary case, that the agreement had been carried out, by advancing the money; nothing else would be required to be proved in a case of that kind, so how it can be contended that parol evidence can be given that it is a gift to the church or that it was intended that all the members of the congregation should sign, I cannot see. As I view the case, the learned judge ought not to have admitted evidence to vary or contradict the written contract, and ought to have given judgment for the plaintiffs.

MACDONALD, C.J.A.

MARTIN, J.A.: This is a contract under seal relating to the advance and repayment of money. If it is to be conceded that, as respondents' counsel submits, that it does not relate to an advance which has been made but to an advance which is contemplated to be made, it is true then that the statement of claim should have alleged payment thereunder, and it is true, as counsel contends, that there is no suggestion of that allegation by them, in the statement of claim. Nevertheless, there is this to be found, that the fact of payment under that agreement appears repeatedly throughout the evidence without objection, brought out by defendants' counsel and on Letvinoff's examination by plaintiffs' counsel, and it is also admitted in the statement of defence. However, apart from that admission, which in itself would be sufficient (and I think that covers this case), we have the course of the trial, which is of such a nature that

MARTIN, J.A.

that allegation can be dispensed with, according to the decision of this Court in *Scott* v. *Fernie* (1904), 11 B.C. 91. Looking at this case from the most favourable point of view of the respondents, which contemplates a future advance of money, it is contended that because a contract under seal which has been entered into contemplates a future advance of money, therefore the whole contract is open and you can adduce parol evidence to vary or contradict the original document. That position, of course, cannot be supported by any authority, and therefore this case is brought within the rule. I see no ground at all upon which the objection of plaintiffs' counsel was taken. There is only one course for this Court to adopt, and that is to maintain the rule. I refer particularly to pages 36, 37 and 38 of the appeal book, shewing that this money was paid under this memorandum.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of opinion that the appeal should be allowed. It seems to me this case can be put in a very small compass, with all deference to the very strenuous argument of the learned counsel for the respondents.

This contract was a contract made between people—speaking from the point of view of their nationality—who have shewn themselves to be generally efficient people, and I see on the face of this transaction efficiency demonstrated. You cannot go upon the terminology of a contract to determine what is meant by it in every case. Very often it is set in language which is not concrete, still it says, "In consideration of your advancing us." Now, let us read into this document the cheque paying the $5,000, to the very parties who signed this document and addressed it to Mr. Weaver, and Mr. Weaver makes the same parties the payee of the cheque, it is evidence that this payment is referrable to this contract. The *onus probandi* was on the respondents in this appeal to shew that there was no payment, that the consideration was not paid. In the first place, being under seal, consideration is assumed. Now, has that burden been discharged? I do not care to enter into the details or to differentiate the evidence at all. If I were called upon

MCPHILLIPS, J.A.

COURT OF APPEAL

1918

Nov. 20.

ALEXANDER v. LETVINOFF

MCPHILLIPS, J.A.

to give a considered opinion I would hold that the onus was not properly discharged. The statute covers this case: section 11 of the Evidence Act.

The judgment which has been obtained is a judgment of an opposite party, and is without the corroboration called for by the statute, that it was a donation or a gift. I think it would be a very dangerous precedent to establish, and I think we would be establishing a precedent if, having a document in these terms, evidence such as adduced here to displace the contract should be held to have been properly receivable and capable of being cited to support a judgment of the Court. In my opinion the appeal should be allowed and judgment be entered for the plaintiffs.

EBERTS, J.A.

EBERTS, J.A.: I have nothing to add to the remarks of my brothers. I would allow the appeal. It is suggested that this money was to go to the church. If as business men (and I imagine that the men who signed this document are business men), these men wanted to protect themselves, all they had to do was to give a receipt, "Received from Solomon Weaver the sum of $5,000 to be paid to the church." They could have then been given a cheque and passed it over, but as business men they sign an absolute agreement. Mr. *Cassidy* has attempted to say that there is no evidence that the money was paid, yet the pleadings shew it, and the evidence goes to shew that the money was paid to the particular men on a particular day. I think the judgment should be set aside and the appeal allowed.

Appeal allowed.

Solicitors for appellants: *McLellan & White.*
Solicitor for respondents: *A. H. Fleishman.*

IN RE J. HENDERSON, DECEASED.

MORRISON, J. (At Chambers)

1918

Nov. 25.

IN RE J. HENDERSON, DECEASED

Probate—Will—Executor, an unlicensed company—Application to appoint manager administrator—R.S.B.C. 1911, Cap. 4, Sec. 12.

Where a company in Manitoba, not licensed to do business in British Columbia, is appointed executor of an estate under the will of a deceased person an application to appoint the manager of said company administrator of the estate in British Columbia will be refused.

Statement

APPLICATION under section 12 of the Administration Act to appoint the manager of the Canadian Guarantee Trust Company, doing business in Manitoba, to administer deceased's estate in British Columbia under a power of attorney from said company, the executor under the will of the deceased. The deceased died in Manitoba appointing the Canadian Guarantee Trust Company sole executor of his estate. Heard by MORRISON, J. at Chambers in Vancouver on the 25th of November, 1918.

Argument

C. F. Campbell, for the application: This is an application to have the manager of the company appointed to administer deceased's estate in British Columbia, as the company itself has not power to act in British Columbia.

McTaggart, for official administrator: Under section 41 of the Administration Act, it is obligatory upon the official administrator in such a case to apply for letters of administration. An unlicensed extra-provincial company is precluded by our statutes from doing business in British Columbia, and the appointment of the manager under a power of attorney would amount to an evasion of the Trust Companies Act.

Judgment

MORRISON, J.: It is questionable practice to permit an unlicensed extra-provincial company to carry on its business here directly or indirectly. The circumstances of this case justify the appointment of the official administrator.

Application refused.

COURT OF APPEAL

1918

Nov. 27.

IN RE DOMINION TRUST COMPANY, LIMITED, BOYCE AND MACPHERSON. (No. 2.)

Judgment—Motion to vary minutes—Counsel appearing not on record—Parties interested—Costs.

IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

Upon an interested party appearing when not a party to the appeal, he must apply for and obtain a *status* on the record in order to recover costs if successful (MCPHILLIPS, J.A. dissenting).

Statement

MOTION to the Court of Appeal to vary the minutes of the judgment of the Court of Appeal of the 5th of November, 1918, on appeal from the order of MURPHY, J. of the 12th of February, 1918, directing the winding-up of The Dominion Trust Company, Limited (old company). The petition for winding-up was made by one Tully Boyce, a shareholder, and notice of hearing was served on the Company and certain directors, the motion being heard by MURPHY, J. on the 8th of February, 1918. One, Robert MacPherson, a member and shareholder of the Dominion Trust Company, Limited, who appeared and opposed the granting of the order, appealed to the Court of Appeal on the 27th of March, 1918, notice of appeal being served on the petitioner and his solicitor only. On the hearing of the appeal on the 7th of June, 1918, Mr. *Charles Wilson, K.C.*, appeared on behalf of the liquidator of the old company and one Oxley, a creditor; and Mr. *Gurd* appeared as representing the liquidator of the new company. Both counsel took part on the argument but neither made formal application to be placed on the record. The appeal (reported *ante*, p. 302) was dismissed with costs on the 5th of November, 1918. The registrar refused to allow the costs of counsel for the liquidators, as they did not appear on the record.

The motion was heard at Vancouver on the 27th of November, 1918, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Gurd, for the motion: The liquidators of both companies are parties interested and counsel appeared and were heard.

COURT OF APPEAL

1918

Nov. 27.

IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

J. A. MacInnes, contra: They were not on the record and have no *status* to make this motion: see *Re Smith* (1902), 9 B.C. 329.

MACDONALD, C.J.A.: I think the application must be dismissed. The situation is this: Boyce was the petitioner, and MacPherson was respondent. When the matter came into this Court, they were the only parties to the appeal. When the appeal came on for hearing Mr. *MacInnes* appeared for appellant. Mr. *Wilson* appeared and said he would like to be heard on behalf of the liquidator of the old company, and also on behalf of Oxley, one of the creditors, and we decided that so far as the creditor was concerned, counsel would not be heard. Mr. *Gurd* appeared and said he represented the liquidator of the new company. Now, if both these gentlemen had asked to be given a *status* on the record, and then we had decided, as we did, to dismiss the appeal, the costs would follow the event, and they would be entitled to costs, but the present position has arisen through their failure to actually get themselves clearly on the record. While there may be some hardship in their not getting costs, I think it would be laying down a very bad practice to hold a *post mortem,* as it were, months after the matter had come before the Court. Therefore I think the application should be dismissed.

MACDONALD, C.J.A.

MARTIN, J.A.: This matter should be dealt with strictly, in order to disentangle it from the situation into which it has got, owing to the omission of counsel who appeared on behalf of the new and old companies to make the application which should have been made, in order to put themselves firmly on the basis of becoming parties to the appeal, strictly speaking. It does seem unfortunate that, having had the benefit of the argument of Mr. *Wilson* whose arguments are always able, and also of Mr. *Gurd,* they should not obtain the fruits thereof, and I can only hope that on future occasions, when victorious, they will have not only the honour but the reward.

MARTIN, J.A.

GALLIHER, J.A.: In the absence of any authority, I would dismiss the motion, agreeing with the remarks of the Chief Justice and my brother MARTIN.

GALLIHER, J.A.

COURT OF APPEAL

1918

Nov. 27.

IN RE DOMINION TRUST CO., BOYCE AND MACPHERSON

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: With great respect and deference to the contrary opinion expressed by my learned brothers, I do not look for any authority. It is traditional in the Courts that counsel appearing for parties affected by the judgment under appeal or liable to be affected by the judgment of the Court of Appeal, being heard in support or in opposition to the judgment under review, are deemed to be representing their clients as parties to the appeal. If objection is to be raised to their being heard, that objection must be made at the time of claimed audience; if not, counsel should not be admitted to later raise any such objection. In the result, it means they have been allowed to intervene as appellants or respondents, as the case may be, with the right to or liability for costs in accordance with the event of the appeal. No objection is later tenable when the right to or responsibility for costs arises. It would be interesting to consider what position the learned counsel for the appellant, who now objects, would have taken had the appeal been successful and he had, as he would have been entitled to, insisted upon the right to recover costs from the parties so represented by counsel upon this appeal.

EBERTS, J.A.

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

Motion dismissed, McPhillips, J.A. dissenting.

MORRISON, J. (At Chambers)

1918

Dec. 3.

MARIACHER v. GRAY

MARIACHER v. GRAY.

Practice—War Relief Act—Application to proceed—Application to collect rents included—B.C. Stats. 1916, Cap. 74; 1917, Cap. 74; 1918, Cap. 97, Sec. 5(4).

On the plaintiff applying for leave to proceed under subsection (4) of section 5 of the War Relief Act Amendment Act, 1918, the registrar referred the application to the judge in Chambers when the plaintiff included in his summons an application that he be at liberty to collect the rents of the premises in question in the action.

Held, that the application as framed should be dismissed and that the application for rents should be the subject of a substantive application.

MORRISON, J. (At Chambers)

1918

Dec. 3.

MARIACHER v. GRAY

APPLICATION by the plaintiff under subsection (4) of section 5 of the War Relief Act Amendment Act, 1918, which was referred by the registrar to a judge in Chambers. Heard by MORRISON, J. at Chambers in Vancouver on the 3rd of December, 1918. The summons was as follows:

"Take notice that a motion will be made on behalf of the plaintiff before the presiding judge in Chambers at the Court House, Vancouver, B.C., on Monday the 18th day of November, 1918, at 10.30 o'clock in the forenoon or so soon thereafter as the motion can be heard by way of appeal from the registrar.

"For an order under the War Relief Act Amendment Act, 1917, and amending Act that the restrictions, prohibitions and conditions of the War Relief Act Amendment Act, 1917 and amending Act, be dispensed with and that the plaintiff be at liberty to carry on and proceed with this action as if the said War Relief Act Amendment Act, 1917 and amending Act had not been passed.

"And for an order under the War Relief Act, 1916, and the War Relief Act Amendment Act, 1917 and the War Relief Act Amendment Act, 1918, that the plaintiff or his agent be at liberty to collect and receive the rents or rentable value of the premises forming the subject-matter of this action."

Statement

The defendant raised preliminary objections, (1) that plaintiff should state in his summons on what grounds the registrar refused the application; (2) that plaintiff cannot make a double-barrelled application. He can only ask now for leave to proceed under the War Relief Act. The application for possession must be a substantive application; and (3) that if plaintiff is right in asking for both leave to proceed and possession in his summons, an order cannot be made for possession as the plaintiff in order to invoke section 9 of the War Relief Act, B.C. Stats. 1916, and amendments, must apply by way of petition to the Court.

Rubinowitz, for the application.
E. J. Grant, contra.

MORRISON, J.: The application in its present form must be dismissed. The request for leave to proceed must be made as a separate one, and not by way of a double-barrelled application as is done here. That involves the dismissal of the appeal, the only part of the summons to which regard can now be had.

Judgment

Application dismissed.

COURT OF APPEAL

1918

Dec. 4.

REX v. STEERS

REX v. STEERS.

Criminal law—Stated case—Sufficiency of—Mens rea—Criminal Code, Sec. 454(c).

A case reserved for the Court of Appeal must contain all the findings of fact upon which the judge below based his decision.

CRIMINAL APPEAL by way of case stated from HOWAY, Co. J., the accused having been convicted on a charge under section 454 (*c*) of the Criminal Code. The facts as set out in the case stated were that Steers acted as solicitor for the plaintiff in a certain action in the Supreme Court and as such solicitor wrote the following letter, dated the 3rd of June, 1918, to Messrs. Russell, Hancox, Wismer & Anderson, Vancouver, defendant's solicitors:

"Dear Sirs:

MEEKER VS. KING *et al.*

"In this matter Mr. MacInnes who is going to the Court of Appeal in Victoria has handed over the judgment and other papers, and I desire to say this matter must be settled today. King, I was informed this morning, started to demonstrate at Spencer's today and I have just this to say, if this is not closed this morning, I shall not only move to commit King but shall lay an information against him for perjury on cross-examination on his affidavit. I have got him with the goods on and if I start proceedings I won't stop. I understand you are having some difficulty controlling him and perhaps it would be better if I took him in hand. I will wait until this afternoon to hear from you and am specially delivering this letter. By 2 o'clock this afternoon I will lay the information against him for perjury in the police court and issue a warrant for his arrest and shall proceed also with the application for his attachment under civil process."

Statement

The following questions were submitted by the trial judge for the opinion of the Court:

"1. Was I right in holding that the words in the charge 'with intent to gain the benefits of existing litigation' are surplusage?

"2. Was I right in holding as I did, that it was not necessary for me to find that the accused had any intent to gain something to which he did not reasonably believe his client was entitled?

"3. Is an intent to gain the benefit of existing litigation such an intent to gain as is referred to in subsections (*a*) and (*b*) of section 454 of the Criminal Code?

"4. Was I right in holding that it was not necessary that the intent referred to in subsections (*a*) and (*b*) must be shewn in order to convict of an offence under subsection (*c*) of section 454 of the Criminal Code?

"5. Was I right in law in holding that the letter of the 3rd of June, 1918, was such a document as comes within subsection (*c*) of section 454?

"6. Was I right in holding that the circumstances disclosed by the evidence brought the charges within subsection (*c*) of section 454 of the Criminal Code?"

The appeal was argued at Vancouver on the 3rd and 4th of December, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. H. MacNeill, K.C., for appellant: Steers wrote the letter to the solicitors and not the litigant. This is a statutory offence and agency cannot come into the transaction. The words "with such intent as aforesaid" must be repeated at the beginning of clause (*c*) of the section. There must be an intent to extort or gain. On the question of *mens rea* see *The Queen* v. *Tolson* (1889), 23 Q.B.D. 168; *Sherras* v. *De Rutzen* (1895), 1 Q.B. 918; *Rex* v. *Young* (1917), 24 B.C. 482. If the solicitors did not hand over the letter to the litigant there was no crime: see *Williamson* v. *Norris* (1899), 1 Q.B. 7. As to the reasonable belief that he was entitled to what he claimed see *Regina* v. *Coghlan* (1865), 4 F. & F. 316 at p. 321; *Regina* v. *Lyon* (1898), 29 Ont. 497; *Reg.* v. *Nicholson* (1868), 7 S.C.R., C.L. 155. The section says "causes a person to receive." The fact of the solicitor forwarding the letter to the client does not make Steers liable for the forwarding. He must be the *"causa causans"*: see *Regina* v. *Pocock* (1851), 17 Q.B. 34 at p. 39; *Reg.* v. *Clerk of Assize of Oxford Circuit* (1897), 1 Q.B. 370 at p. 374. "Caused to be delivered" must mean "caused directly to be delivered": see *Mann* v. *State* (1890), 26 N.E. 226.

Argument

Wood, for the Crown: The learned judge below included in the case all the evidence. Paragraph 6 of the case stated shews this, as he states the circumstances disclosed in the evidence brings the charge within the section of the Code under which the charge is made.

MACDONALD, C.J.A.: I think the appeal must be allowed, and the conviction quashed. It is not necessary to put my

MACDONALD, C.J.A.

COURT OF APPEAL

1918

Dec. 4.

REX v. STEERS

judgment on any other ground than this, and I refrain from deciding some of the questions which have been debated at the bar, the fifth clause of the stated case contains the learned judge's findings of fact; he simply finds that the accused was solicitor for Meeker, and that he wrote the letter which is referred to in the case. There may have been other facts found but if so they should have been in the stated case. If there had been before him proof of such matters as intent, or proof that Mr. Steers had caused King to receive the letter, those were things which the learned judge should have found as facts and have stated in the case. The findings of fact are for the learned judge, not for this Court. Now, without expressing any opinion on the question of *mens rea* raised by counsel, I think it sufficient in this case to say that there is no finding that Mr. Steers caused the receipt by King of the letter in question. A broad inference might be drawn from the sixth clause of the stated case, that the judge had come to that conclusion, but we cannot decide this criminal case on such an inference. There must be distinct findings of fact upon which we can decide questions of law. Therefore I am basing my reasons for my conclusion on the one circumstance, that as we must assume that the facts stated were the only ones upon which the learned judge founded his decision, and as they, in my opinion, do not in law support the conviction, it must be quashed and the questions submitted answered accordingly.

MACDONALD, C.J.A.

MARTIN, J.A.

MARTIN, J.A.: I am of the same opinion.

GALLIHER, J.A.

GALLIHER, J.A.: I only wish to add that the facts presented to us in the stated case, as found by the learned trial judge, are not sufficient to warrant us in saying he was right in law in convicting this man within the purview of the section of the statute in question.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: It would seem to me that upon the facts of the stated case set forth in paragraphs 5 and 6, no case of infraction of section 454 (*c*) of the Criminal Code was established. If I were called upon to give an opinion with regard to the question of intent, in my opinion, as at present advised, intent must be shewn. The Code should be read throughout,

save where it may be found to be expressed in apt words to the contrary, as always requiring the establishment of *mens rea.* (See *Williamson* v. *Norris* (1899), 1 Q.B. 7; *Rex* v. *Young* (1917), 3 W.W.R. 1066 and at p. 1068.)

The learned judge rather intimates that a letter written which might contain accusations or threats would *simpliciter* constitute a crime. If that were so, I am afraid a great many of His Majesty's subjects would at times be in great danger. Of course, if the accusation or threat is coupled with intent to extort or gain something, that is a very different matter.

Conviction quashed.

Solicitor for appellant: *A. H. MacNeill.*
Solicitor for respondent: *Herbert S. Wood.*

REX v. WONG JOE.

Practice—Writ of certiorari—Motion—Order nisi—Not necessary—Signature of solicitor to notice sufficient—Crown Office Rules 28 and 33.

A judge has power on a motion for a writ of *certiorari* to make an order absolute on the first hearing. The notice of motion may be signed by a solicitor on behalf of his client.

Statement

MOTION for writ of *certiorari* heard by MORRISON, J. at Vancouver on the 30th of September, 1918.

Argument

E. A. Lucas, for the motion.

Wood, for the magistrate, raised the preliminary objections first, that the motion was for a writ of *certiorari,* whereas under Crown Office Rule 28, the motion should have been for an order *nisi;* and secondly, that under Crown Office Rule 33, the notice must be given and signed by the party serving out the writ, and not the solicitor.

Lucas, contra, cited *Rex* v. *Justices of Lancashire* (1821), 4 B. & Ald. 289.

Judgment

MORRISON, J.: As to the first objection, the latter part of Crown Office Rule 28 gives a judge power to make an order absolute on the first hearing. As to the second objection, notice signed by the solicitor on behalf of his client is a sufficient compliance with rule 33.

Preliminary objections overruled.

MORRISON, J. (At Chambers)

CAINE v. CORPORATION OF SURREY *ET AL.*

1918

Dec. 5.

Practice—Venue—Plaintiff's right of selection—Convenience and expense—Preponderance.

CAINE v. CORPORATION OF SURREY

Although the plaintiff has the selection in the first instance of the place of trial, if the preponderance of convenience and expense lies in favour of another place the venue will on application be changed.

Statement

APPLICATION by defendants for a change of venue to New Westminster, the plaintiff having set the case down for hearing at Vancouver. Plaintiff sued the defendants for damages and for an injunction restraining defendants from building a road and encroaching on plaintiff's property, said property being situate in the district of Langley. Heard by MORRISON, J. at Chambers in Vancouver on the 5th of December, 1918.

Argument

McQuarrie, for the application: The *locus in quo* being Surrey, New Westminster is the *locus* where the trial should be held. If the trial is held in Vancouver, all the witnesses will have to go through New Westminster to Vancouver.

R. Smith, *contra*.

Judgment

MORRISON, J.: The preponderance of convenience and expense lies in favour of New Westminster as being the place of trial hereof. Although the plaintiff in a case of this kind has the selection in the first instance of the place of trial, yet the elements above mentioned must not be disregarded, which, if they are, he runs the risk of having the venue changed. The venue is, therefore, changed to New Westminster.

Application granted.

IN RE DOMINION TRUST COMPANY AND U.S. FIDELITY CLAIM.

MURPHY, J. (At Chambers)

1918

Dec. 6.

IN RE DOMINION TRUST CO. AND U.S. FIDELITY CLAIM

Banks and banking — Provincial company — Power to accept money on deposit and pay interest—Constitutionality.

Trusts and trustees—Trustees authorized to hold money on deposit—Withdrawals by cheque—Right to allow.

It is within the province of the Provincial Legislature to incorporate companies for the purpose of carrying on that branch of the banking business which consists of accepting money on deposit, paying interest thereon and allowing the customer to issue cheques against such deposit.

A trustee authorized to hold money on deposit pending investment and to pay interest on same, may enter into an arrangement with its *cestui que trust* that pending such investment the *cestui que trust* may withdraw such sums as he wishes by cheque and even after investment continue to do so.

APPLICATION for an order to vary the certificate of the deputy district registrar of the Supreme Court whereby he excluded the applicants' claims from the list of claims to be allowed against the Dominion Trust Company, in liquidation. The applicants claimed that they gave their money to the Company for investment although they received pass-books of the Company, which was carrying on a business that was in the nature of a banking business. The contract, which is inscribed on the front of the pass-book and signed by the customer and the Company, was as follows:

Statement

"Dominion Trust Company

"Savings Deposit Department.

"DOMINION TRUST COMPANY hereinafter called 'Trust Company' hereby acknowledges to have received from the registered owner of this pass-book, as shewn by the books of the Trust Company and hereinafter called the 'Depositor,' the sums entered herein from time to time and initialed by the duly authorized officers of the Trust Company in trust for investment on account of the depositor upon the following agreement, viz.:

"1. That the said sums shall be invested in or loaned upon such securities as the Trust Company shall deem safe and advantageous to be taken in the name of the Trust Company, but to be held by the Trust Company as trustee for the depositor.

MURPHY, J. (At Chambers)

1918

Dec. 6.

IN RE DOMINION TRUST CO. AND U.S. FIDELITY CLAIM

"2. That the Trust Company shall guarantee the repayment of the above mentioned sums upon demand or upon fifteen days' notice at the option of the Trust Company, together with interest on the said sums at the rate of 4 per cent. per annum. Interest will not be allowed on deposits remaining less than one calendar month. Accrued interest will be added on the last days of March, June, September, and December, to all accounts open at those dates, computed on the minimum amount on deposit during each calendar month. The rate of interest payable to depositor by Trust Company to be subject to change or variation upon fifteen days' notice in writing to the depositor, such notice to be sufficient if sent by letter addressed to the address shewn by the books of the Trust Company.

"3. Deposits will be repaid only to the depositor in person, except in case of unavoidable absence, when the written order of the depositor, duly authenticated and accompanied by the depositor's pass-book, will suffice.

"4. That in consideration of such guarantee the interests and profits (if any) resulting from the investment or loaning of the said sums mentioned, over and above the rate of interest payable to the depositor by paragraph 2 shall be retained by the Trust Company as and for its own benefit as remuneration for such guarantee and management.

Statement

"5. Upon the payment of the sums hereinbefore mentioned and guaranteed interest the trust securities shall become the property of the Trust Company freed from the terms of the trust and without any formal assignment or release from the depositor, and this pass-book must be given up to the Company."

Heard by MURPHY, J. at Chambers in Vancouver on the 3rd of December, 1918.

Davis, K.C., for the application.
Sir C. H. Tupper, K.C., contra.

6th December, 1918.

MURPHY, J.: As to proof of the assignment from the Pacific Marine Insurance Co. to claimant, I think this is sufficiently furnished by the evidence of Wright, his position in relation to both companies being considered and it being shewn that apparently the document itself has been lost.

Judgment

The main contentions, on behalf of the liquidator, are two: First, that the power given by its memorandum of association to the Dominion Trust, Limited, to receive money on deposit was to empower it to carry on a business judicially determined to be banking, and banking being exclusively within the jurisdiction of the Dominion Parliament by virtue of the British North America Act, such authorization by the Province is *ultra vires;* second, that there is no privity between the Dominion

Trust Company and claimant. As to the first question, it is pointed out that there is no Dominion legislation prohibiting the carrying on of that branch of banking which consists in accepting money on deposit, paying interest thereon, and allowing the customer to issue cheques against such deposit, further than that the use of the word "Bank," except under Dominion authority, is forbidden. No direct authority is cited in support of the *ultra vires* argument, although said branch of banking was extensively carried on in Canada, at any rate up to the time the use of the word "Bank" in connection therewith was prohibited. If such construction of the British North America Act is correct, it seems to follow that a Province cannot authorize a Provincial company to discount a bill of exchange, since that is, in one view, a banking operation. Since shipping is likewise exclusively within the legislative ambit of the Dominion, it would likewise follow that no Province could authorize a Provincial company to engage in the operation of steamboats or other craft within the Province, and so on with regard to all subjects placed under the exclusive jurisdiction of the Dominion by virtue of section 91 of the British North America Act where Dominion legislation regulating same exists. In the absence of authority, I decline, as a judge of first instance, to place a construction on that statute which would have disastrous results on the business of numerous Provincial companies.

Judgment

As to privity, it is urged that the sections of Cap. 89, B.C. Stats. 1913, creating same are *ultra vires,* as constituting an unauthorized interference with the affairs of a Dominion company. Section 14 of Cap. 89, Can. Stats. 1912, however, expressly makes the acquisition by the Dominion Trust Company of the assets of the Dominion Trust Company, Limited, conditional upon the creation of this very privity. Chapter 89, B.C. Stats. 1913, was passed, as the preamble shews, on the petition of the Dominion Trust Company to carry out this acquisition and, therefore, the sections complained of are, I think, directly authorized by the Dominion legislation. Indeed, bearing in mind the respective legislative ambits of the Dominion, and of the Province, I can see no other way in which the proposed transfer could be carried out on the terms imposed

MURPHY, J.

1918

Dec. 6.

IN RE DOMINION TRUST CO. AND U.S. FIDELITY CLAIM

Judgment

by the Dominion. It follows that the applicant must be allowed to rank as a creditor in the Dominion Trust Company liquidation.

Re Mrs. Reid's case. To my mind, the sole question arising herein is, what was the legal relation existing between claimant and the Dominion Trust Company at the time the winding-up order was made? If it were that of debtor and creditor, then, under *In re Birkbeck Permanent Benefit Building Society* (1912), 81 L.J., Ch. 769, which went to the House of Lords *sub nom. Sinclair* v. *Brougham* (1914), 83 L.J., Ch. 465, claimant's case fails. If it were that of trustee and *cestui que trust,* then, since the Company's Dominion charter expressly authorizes such relation, claimant must succeed. The contract pasted in the front of claimant's pass-book is throughout, in my opinion, clearly within the Company's powers, as it is throughout a trustee and *cestuis que trust* contract. *Prima facie* this is, I think, on the evidence, the contract entered into. If so, the burden is on the liquidator to shew that the true relation was that of debtor anl creditor. I do not think the evidence adduced satisfies this onus. It is true the local premises of the Dominion Trust Company were fitted up largely as a bank's premises would be, but that fact of itself is of small consequence. It is likewise true that when the money was deposited claimant was given a cheque-book and was authorized to draw, and in fact did draw, against the deposit just as she would do if she were dealing with a bank. But why should not a trustee, authorized, as was the Dominion Trust Company, to hold money on deposit pending investment, and to pay interest on same, agree with its *cestui que trust* that pending such investment the *cestui que trust* might withdraw such sums as were desired? The fact that such withdrawals were made by utilizing cheque forms would be merely a matter of convenience. Further, why should the Company, having the powers it did have, not agree with its *cestui que trust* that even after investment such practice should continue, especially when the contract provides, as here, that the investments so made should forthwith *pro tanto* become the property of the Company? It is alleged that this contract is an elaborate fraud on the Company's charter, but I fail to find proof of this on the record even against the Company. There

is not a suggestion even, in the evidence, that such fraud, if perpetrated, was participated in by the claimant. As against the Company, it is urged that in fact no investments were ever made under the contract, and that the provision as to payment only to claimant personally, on production of the pass-book, was ignored. As to this last, the provision was one in favour of the Company, which it could clearly waive if it so desired. As to the first, it is not, in my opinion, established on the record that investments were not made. Even if it were, however, that might be attributed as readily to the negligence, or worse, of the Company's officials as to the deliberate fraud of the Company itself. What evidence there is, in the main, supports the contention that the pass-book contract was the real contract. It is true that claimant, in filing her claim, described herself as a depositor and referred to the Company as her banker. An explanation of the use of the word "banker" is given, but, in any event, it is clear, I think, that expressions used by her cannot be construed against her to the extent of making them outweigh the evidence of her husband, who carried out the transaction. Evidence was adduced that the claim was put in after consultation with the husband, but, even if he had seen the affidavit, it is doubtful that as a layman he would realize that in form it set up a claim based on debtor and creditor relation instead of one based on trustee and *cestui que trust* relation. In any event, what the true relation was depends on what actually occurred, and not on characterization of such occurences set out in the affidavit of claim. I hold the onus on the liquidator, to displace the written document as being the true contract, has not been satisfied.

Judgment

Then, it is contended that there was no authority from the proper officials for the insertion of this contract in the pass-book. I think this a matter of the internal economy of the Company, and, if so, the proven practice to insert this contract in all (with a very few exceptions during a short time after the Dominion Trust, Limited, business was taken over) of the pass-books would, in my opinion, be sufficient to enable claimant to rest on it on the "holding out" principle. But in addition, the evidence of Robb, coupled with the by-laws put in, does, in my opinion, establish the authorization. I, therefore, hold claim-

MURPHY, J. (At Chambers)

1918

Dec. 6.

IN RE DOMINION TRUST CO. AND U.S. FIDELITY CLAIM

ant is entitled to rank as a creditor in the liquidation of the Dominion Trust Company.

Re Mrs. Ramsay: For the same reasons that entitle Mrs. Reid to rank, I think Mrs. Ramsay is also entitled to rank. The direct evidence in her case, if credited, is much stronger—in fact is, I think, conclusive. I see no reason why I should hold it to be untrue. The main argument that I should was that Mrs. Ramsay had another account running for years and which was operated as a bank account and was actually allowed to be overdrawn on occasions, that the balance in this other account was included in her claim as filed, though abandoned on this appeal, and that her husband was a director of the Company. If her husband, who placed the funds she claims to rank for in this appeal in the Company's hands, knew, either by reason of his being a director or by reason of the method of operation of Mrs. Ramsay's account, that the Company was operating some of its deposit accounts illegally, as is alleged (which is, I understand it, the argument set up as a reason for discrediting his evidence), such knowledge would, it appears to me, be all the more reason why he should carefully see that, as regards the funds herein claimed for, the transaction was one within the Company's powers. If the argument means that this evidence is the result of after-acquired knowledge as to the law, that is sufficiently met, in my opinion, by the allegation on his part that this was money for his wife's protection in lieu of insurance, substantiated by the fact that neither principal nor interest was ever touched, and that in the Company's books the account bears the distinctive heading "Trust Account," a fact peculiar, so far as the evidence shews, to this account alone. It is true, of course, this may have been done merely to distinguish this account from the other so-called current account of Mrs. Ramsay. But what is contended for here is, that I should find Ramsay guilty of perjury, and that I cannot do on equivocal facts.

Judgment

Mrs. Ramsay's claim, as set up on appeal, must rank in the liquidation.

de SCHELKING v. CROMIE.

MORRISON, J. (At Chambers)

1918

Dec. 9.

DE SCHELKING v. CROMIE

Practice—Discovery—Libel based on paper writing—Contents—Source of information relative to—Discretion.

In an action for libel the plaintiff sought to compel the defendant to disclose, on discovery, the source of his information relative to the contents of the paper writing complained of:—

Held, that if there are grounds for the suggestion that the questions are not put *bona fide* for the purpose of the pending action but for use in an action brought by the plaintiff against another, to compel an answer would be oppressive and illegitimate and the application should be refused.

APPLICATION to compel the defendant, who is manager of the "Daily Sun" newspaper, to disclose the source of his information relative to the contents of a paper writing shewn by him to Mr. A. Bull, solicitor for the plaintiff at that time, Mr. Bull having interviewed him with a view to calling him as a witness in an action which the plaintiff contemplated bringing against one Zurbrick, on what the defendant alleges to be substantially the same grounds as those in the present action. Mr. Cromie refused either to disclose the contents of the writing or the name of his informant, claiming that what took place between himself and Mr. Bull is privileged, having occurred in his capacity as publisher of a newspaper to the plaintiff's solicitor, and that he was actuated by a sense of duty in so doing. Heard by MORRISON, J. at Chambers in Vancouver on the 9th of December, 1918.

Statement

McPhillips, K.C., for the application.
F. R. Anderson, contra.

MORRISON, J.: [After stating the facts as set out in statement.] The plaintiff has disclosed what he alleges the contents of the writing to be, *viz.*:

Judgment

"(a) Eugene de Schelking while in the diplomatic service of the former Imperial Russian Government and when first Secretary to the Russian Embassy in Berlin embezzled or stole from his superior officer, Count Osten-Sacken, the sum of seventy-two thousand (72,000) Roubles, and as

MORRISON, J. (At Chambers)

1918

Dec. 9.

DE SCHELKING v. CROMIE

a consequence thereof was dismissed from the diplomatic service of the said Imperial Russian Government.

"(b) Eugene de Schelking was and is a German agent in the employ of the Government of Germany and that the plaintiff's mission to Canada and the United States is to spread insidious propaganda in the interests of the German Government with a view to an early peace between the German Government and England and the Allies of England."

As to whether I shall order the defendant to answer the questions put to him or not, is a question of judicial discretion and practice. Discovery is not *ex debito justitiæ*. Of course, the discretion must be exercised judicially. The suggestion is that the questions are not put *bona fide* for the purposes of the pending action, but are made for the purposes of the other action brought by the plaintiff against Mr. Zurbrick. Then, as Lord Collins, Master of the Rolls, has said in *White & Co.* v. *Credit Reform Association and Credit Index, Limited* (1905), 1 K.B. 653 at p. 659, if there are grounds for such suggestion, to compel an answer would be oppressive and illegitimate. I think the circumstances here afford grounds for such a suggestion. Although there is no absolute rule on the subject, yet it seems to me a sound course to follow that, as a matter of discretion in actions of libel against newspapers, as such in the ordinary sense, which are published in the interests of the general public and which take upon themselves full responsibility for what they publish, they ought not to be compelled to disclose the names of their contributors or informants, except under special circumstances. This is founded upon considerations of policy: *Hays* v. *Weiland* (1918), 43 D.L.R. 137 at p. 139. I, therefore, think that the incidents of this application, as disclosed by the material filed, justifies me in exercising this discretion against Mr. *McPhillips's* submission. Application refused.

Judgment

Application refused.

HANNA v. COSTERTON.

COURT OF APPEAL

1918

Dec. 16.

HANNA v. COSTERTON

War Relief Act — Order dispensing with restrictions — Local judge of Supreme Court—Jurisdiction—Injunction—B.C. Stats. 1916, Cap. 74; 1917, Cap. 74.

A County Court judge as Local Judge of the Supreme Court has no jurisdiction to make an order dispensing with the restrictions of the War Relief Act (MARTIN, J.A. dissenting).

APPEAL by defendant from the order of HUNTER, C.J.B.C. of the 27th of February, 1918, granting an injunction to restrain the defendant from disposing of certain goods and chattels on the plaintiff's lands near Vernon, B.C., that were seized under a distress warrant. The facts were that the plaintiff had purchased the lands in question from one Cairns in June, 1915, and gave Cairns a second mortgage on the property in payment of the balance due on the purchase price. The mortgage was subsequently assigned by Cairns to the defendant. By a clause in the mortgage the plaintiff agreed to attorn and become tenant to the mortgagee at a rental equivalent to the interest payable under the mortgage. The rent being in arrears the defendant distrained. The plaintiff, who had enlisted on the 31st of October, 1916, and served as a gunner in the 5th Regiment, Canadian Garrison Artillery, until the 20th of July, 1917, then applied to SWANSON, Co. J. as local judge of the Supreme Court for relief under the War Relief Act, and an order was made dispensing with the restrictions under the War Relief Act, from which order no appeal was taken. This action was then brought for an injunction to restrain the defendant from selling the goods and chattels seized under the distress warrant, and an order was made granting the injunction, notwithstanding the order by SWANSON, Co. J. dispensing with the restrictions under the War Relief Act.

Statement

The appeal was argued at Vancouver on the 6th and 23rd of May, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER and EBERTS, JJ.A.

COURT OF APPEAL

1918

Dec. 16.

HANNA v. COSTERTON

Reid, K.C., for appellant: There are the following points to decide: (1) Did SWANSON, Co. J., as a local judge of the Supreme Court, have power to make the order under section 13 of the War Relief Act? (2) Was the seizure made for rent of a premises used as a residence under section 4 of the Act? (3) Were the goods seized held by the plaintiff for the benefit of another under section 8 of the Act? (4) Was the defendant a mortgagee who had the right to collect rent under section 9 as amended by section 7 of the 1917 Act? (5) Does section 11 of the Act apply to the plaintiff who became an owner after the 4th of August, 1914? On the question of the jurisdiction of the local judge *Royal Trust Co.* v. *Liquidator of Austin Hotel Co.* [*post* p. 353] can be distinguished, as it was a case under the Bills of Sale Act (B.C. Stats. 1914, Cap. 5, Sec. 2): see sections 15, 16, and section 16 of the Supreme Court Act (R.S.B.C. 1911, Cap. 58); also Rules of the Supreme Court of British Columbia, p. 173; *Re Hall Mining and Smelting Co.* (1905), 11 B.C. 492; *Brigman* v. *McKenzie* (1897), 6 B.C. 56; *Wakefield* v. *Turner* (1898), *ib.* 216; *Tate* v. *Hennessey* (1900), 7 B.C. 262; *Postill* v. *Traves* (1897), 5 B.C. 374; *City of Slocan* v. *Canadian Pacific Ry. Co.* (1908), 14 B.C. 112. I contend the premises are actually used as a residence and the Act does not apply, the distress is therefore regular: see 6 C.L.T. 313; *Hobbs* v. *The Ontario Loan and Debenture Company* (1890), 18 S.C.R. 483 at p. 492; *Ex parte Jackson* (1880), 14 Ch. D. 725. As to the relation of landlord and tenant see *Imperial Loan & Investment Co.* v. *Clement* (1897), 11 Man. L.R. 428; *Independent Lumber Co.* v. *David* (1911), 19 W.L.R. 387; Clarke's Landlord and Tenant, p. 215. The property was in fact held by the plaintiff in trust for his father. I contend, under section 9 of the Act as amended by section 7 of the 1917 Act, we have the right to collect the rents irrespective of the Act.

Argument

McPhillips, K.C., for respondent: I contend there is no appeal. The County Court judge had no jurisdiction and the order made was on a summons in Chambers, and there is no summary procedure provided for: see *Sellon* v. *Keane* (1917), 24 B.C. 238; *St. John and Quebec R. Co.* v. *Bull* (1913), 14 D.L.R. 190. The local judge of the Supreme Court cannot

make a final order in a Supreme Court action: see *Re Kootenay Brewing Co.* (1898), 7 B.C. 131; *Wakefield* v. *Turner* (1898), 6 B.C. 216; *Brigman* v. *McKenzie* (1897), *ib.* 56. The words "a judge of the Supreme Court" in section 13 of the Act must be considered as *"persona designata"* and the local judge has no jurisdiction: *Bell & Flett* v. *Mitchell* (1900), 7 B.C. 100 at p. 102.

Reid, in reply.

Cur. adv. vult.

16th December, 1918.

MACDONALD, C.J.A.: The appeal involves, *inter alia,* the question of the powers of Local Judges of the Supreme Court. Section 15 of the Supreme Court Act declares that the judges of the several County Courts shall be judges of the Supreme Court for the purpose of their jurisdiction in actions in that Court, and may be styled "Local Judges" of the Supreme Court, with power to do such things in respect of cases and actions in the Supreme Court as they are by statute or rules of Court in that behalf from time to time empowered to do.

Whether the Provincial Legislature had jurisdiction to so enact may be open to grave doubt, but that question is not before us for decision.

Granting, then, for the purpose of this case that section 15 was *intra vires,* what powers did that section purport to confer on local judges? As I read it, only such powers as are conferred by some other statute or rule of Court. The section itself purports only to create the tribunal. Its powers are to be sought in the statutes and Rules of Court. There is no statute or rule in this behalf other than the order in council of the 16th of June, 1906, which is headed: "Powers of Local Judges of the Supreme Court." It declares that "The judge of every County Court in all actions brought in his County" shall have the powers of a Supreme Court Judge in Chambers, save the exception set forth in the order.

MACDONALD, C.J.A.

Passing over the inaptitude of this language which purports to confer the jurisdiction therein mentioned upon the several County Court judges, *qua* County Court judges—not *qua* judges of the Supreme Court, and assuming for the purpose of this

COURT OF APPEAL

1918

Dec. 16.

HANNA v. COSTERTON

case that the order in council is to be read as complimentary to section 15 of the Supreme Court Act, then it is only in actions in the Supreme Court that the local judge is given jurisdiction.

The interpretation clause of the Supreme Court Act defines action to be "A civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court." The War Relief Act empowers a "judge of the Supreme Court" to dispense with the restrictions therein contained, and it is with the assumption of this power by a local judge that this case has to do.

Shortly, the facts are these: the appellant is the assignee of a second mortgage on respondent's lands. By a clause in the mortgage the respondent agreed to attorn and become tenant to the mortgagee (now the appellant) at a rental equivalent to the interest reserved by the mortgage. The rent being in arrears, the appellant distrained, notwithstanding that the respondent was within the protection of the War Relief Act. The respondent then made application to SWANSON, Co. J., as local judge, for relief. It does not appear what form the application took, but the order made upon it is intituled in the Supreme Court and "in the Matter of the War Relief Act and of the Moratorium Act" (which latter has no application to the facts) and "In the Matter of an Application thereunder by Stephen Preston Hanna," the respondent herein. It is hardly necessary to point out that the procedure, even if the judge had jurisdiction, was ill-conceived.

MACDONALD, C.J.A.

If the respondent could make out his case his remedy was by injunction to restrain the appellant from invading his rights under the War Relief Act. What happened was that the respondent got nothing by his application, but on the other hand an order was made dispensing with the restrictions of the War Relief Act, although no formal motion for such relief was before the local judge.

The respondent then brought this action for an injunction to restrain the appellant, a course which he ought, had he been rightly advised, to have taken in the first place; but before commencing this action, and up to the present time, no step was taken to get rid of the order of the local judge, which order was duly passed and entered in the Supreme Court. At the trial,

HUNTER, C.J.B.C. made the order for an injunction, ignoring the order of the local judge. The appeal is from the injunction order. The respondent's counsel argued in support of the order appealed from that as the proceeding in which the order of the local judge was made was not a proceeding in an action, the local judge had no jurisdiction. I think this contention is well founded. The point was also taken that even if jurisdiction was wanting, the order must be set aside before an order inconsistent with it could be made. In other words, while it stood it worked an estoppel.

Stress was laid on the fact that the order having been entered had become a record of the Supreme Court, and on the authority of *Brigman* v. *McKenzie* (1897), 6 B.C. 56, must therefore be first set aside. I have examined a number of authorities, including *In re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137; *Macfarlane* v. *Leclaire* (1862), 15 Moore, P.C. 181; *Wood* v. *Grand Trunk Railway Company* (1866), 16 U.C.C.P. 275; and *Brigman* v. *McKenzie, supra,* and the more recent case of *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809, where in it was held that the judgment of the Ontario Court of Appeal, affirming a finding of the Court of Revision in its decision that property of the railway company was assessable, was no estoppel in an action by the railway company for a declaration that such property was not assessable. Their Lordships at p. 815 said:

MACDONALD, C.J.A.

> "The order of the Court of Appeal of June 28, 1902, was not, therefore, the decision of a Court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel."

If this is in conflict with *Brigman* v. *McKenzie*, it must, of course, prevail.

I would therefore dismiss the appeal.

MARTIN, J.A.: This appeal should be allowed for the reasons given in the case of *Royal Trust Co.* v. *Liquidator of Austin Hotel Co.* [*post* p. 353], wherein judgment is being delivered today. The order of His Honour Judge SWANSON sitting as a local judge of the Supreme Court, has not been appealed from, and therefore it should not have been ignored by the learned trial judge as a nullity, and as it stands the matter is *res judicata* and the action should be dismissed.

MARTIN, J.A.

COURT OF APPEAL

1918

Dec. 16.

HANNA v. COSTERTON

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

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Cochrane & Ladner.*
Solicitors for respondent: *Heggie & DeBeck.*

MORRISON, J. (At Chambers)

1918

Dec. 13.

BARKER v. JUNG

BARKER v. JUNG.

Practice—Motion for judgment—Court motion—Wording of motion—Rule 559, Form 18, Appendix B.

Motion for judgment must be by way of notice of motion to the Court in the form set out in the Appendix to the Supreme Court Rules.

Statement

APPLICATION by plaintiff for judgment on a notice of motion in the following words: "Take notice that an application will be made on behalf of the plaintiff, before the presiding judge in Chambers, at the Court House, Vancouver, B.C., on Monday, the 18th day of November, A.D. 1918, at the hour of 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard for an order for judgment," etc. There was indorsed on the back "notice of motion." Heard by MORRISON, J. at Chambers in Vancouver on the 13th of December, 1918.

Argument

Earle, K.C., for the application.

G. L. MacInnes, contra, took the preliminary objection that under marginal rule 559 plaintiff must apply by way of notice of motion to the Court, and the notice must comply with Form 18, Appendix "B" to the rules.

Judgment

MORRISON, J.: Objection sustained. The rule is specific, and the form in which a notice of motion must be given is plainly set out in the appendix. In applications of this kind both the rule and the form must be adhered to.

Application refused.

THE ROYAL TRUST COMPANY v. LIQUIDATOR OF THE AUSTIN HOTEL COMPANY, LIMITED.

COURT OF APPEAL

1918

Dec. 16.

ROYAL TRUST CO. v. LIQUIDATOR OF AUSTIN HOTEL CO.

Statutes—Interpretation—"Any judge of the Supreme Court"—"Persona designata"—Local judge of Supreme Court—Jurisdiction—R.S.B.C. 1911, Cap. 20, Sec. 21—B.C. Stats. 1914, Cap. 5, Sec. 2; 1915, Cap. 10, Sec. 3.

The words "any judge of the Supreme Court" in section 2 of the Bills of Sale Act Amendment Act, 1914, apply to a judge of the Supreme Court *persona designata*, and a local judge of the Supreme Court has no jurisdiction to make an order extending the time for registration of a chattel mortgage under said Act (MARTIN and MCPHILLIPS, JJ.A. dissenting).

The Canadian Pacific Railway Company v. *The Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606 followed.

APPEAL from an order of HUNTER, C.J.B.C. of the 27th of February, 1918, on the application of the liquidator of the Austin Hotel Company, Limited, to vary the certificate of the district registrar settling the list of creditors of said Company. A chattel mortgage was executed by the Austin Hotel Company, Limited, to Albert Austin on the 8th of June, 1916. An order was made by CALDER, Co. J. as a local judge of the Supreme Court at Ashcroft on the 8th of July following, extending the time for registration of the chattel mortgage with the registrar of joint-stock companies until the 18th of July, and on the 22nd of July, a further extension was granted by said judge until the 1st of August, the chattel mortgage being then duly registered. Upon the Austin Hotel Company, Limited, being wound up, the district registrar by his certificate placed the Royal Trust Company, as executor of the estate of Alfred Austin, deceased, on the list of creditors as a secured creditor. On the application of the liquidator of the said Company in liquidation, the learned Chief Justice varied the district registrar's certificate in so far as the claim of the Royal Trust Company as executor aforesaid was concerned by placing the Company on the list of creditors as an ordinary creditor only, holding that the orders of the 8th and 22nd of July, 1916, made

Statement

COURT OF APPEAL

1918

Dec. 16.

by the local judge of the Supreme Court at Ashcroft, extending the time for filing the chattel mortgage, were invalid as the local judge of the Supreme Court had no jurisdiction to make the order. The Royal Trust Company appealed.

ROYAL TRUST CO. v. LIQUIDATOR OF AUSTIN HOTEL CO.

The appeal was argued at Vancouver on the 24th of April, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Davis, K.C., for appellant: The whole question is whether section 21 of the Bills of Sale Act as amended by section 2 of Cap. 5, B.C. Stats. 1914, and section 3 of Cap. 10, B.C. Stats. 1915, gives power to a County Court judge as a local judge of the Supreme Court to make the orders in question. The only decision on the question is *Re Hall Mining and Smelting Co.* (1905), 11 B.C. 492. This was an application in a similar matter, when it was held to be a "matter in and before the Court" under section 26 of the Supreme Court Act of 1904, which is similar to section 15 of the present Act (R.S.B.C. 1911, Cap. 58). The word "any" in the section, I contend, includes a local judge of the Supreme Court.

Baird, for respondent: A local judge of the Supreme Court only has such jurisdiction as is given by statute or the Rules of Court. Section 15 of the Supreme Court Act, of itself, gives no authority; it merely directs where the authority may be obtained. The section under which *Re Hall Mining and Smelting Co.* (1905), 11 B.C. 492, was decided, specifically says "judge in Chambers." In the other cases, "County Court judge" is specially mentioned, but it is not here. The learned Chief Justice held he was *persona designata* under the Act.

Davis, in reply.

Cur. adv. vult.

16th December, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: My reasons for judgment in *Hanna* v. *Costerton,* just handed down [*ante* p. 347], apply to this case also, on the assumption that the judge mentioned in the Bills of Sale Act in question in this appeal is not a *persona designata.* But in my opinion he is such. I think the same construction must be given to the statute in question here as was given in *The*

Canadian Pacific Railway Company v. *The Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606 by the statute therein in question. The Court was there considering the construction of that section of the Railway Act which conferred power upon judges of the Superior Courts of Quebec to make certain specified orders in connection with the carrying out of the Act. What Patterson, J.A. said in that case, at pp. 618-9, is peculiarly applicable to the statute in question here:

"All these functions may be exercised by any judge of any of the Courts embraced by the definition of the expression 'superior courts.' They are functions which from their nature and object must be intended to be exercised in a summary manner and not liable to the delay incident to the appeals from court to court."

Taschereau, J.A. said, p. 611:

"Under the Railway Act, the judge and not the court has exclusive jurisdiction in the matters now in contestation."

MACDONALD, C.J.A.

It does not appear to me that there can be any warrant for putting a construction on the expression "a judge of the Supreme Court" which would include a "local judge of the Supreme Court." I think the description of the judge is used in its well known and accepted sense, and cannot be accurately applied to a local officer who may have some of the powers exercisable by a Supreme Court judge in Chambers. To hold that a local judge is within the designation would result in this, that he could exercise the powers conferred not only in his own county but in any part of the Province as fully as could be done in the premises by a Supreme Court judge.

I therefore think the appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This appeal raises the question of the jurisdiction of the County Court judges as local judges of the Supreme Court, and arises out of the fact that Chief Justice HUNTER has ignored as wholly null and void ((1918), 1 W.W.R. 794), and in effect set aside two orders extending the time for registering a chattel mortgage made by His Honour Judge CALDER, the local judge of the Supreme Court for the county of Cariboo, and has in consequence placed the appellant upon the list of unsecured creditors on the ground that its mortgage was invalid as not being registered in due time, which would be the case if said two orders can be regarded as a nullity. But it is clear, upon the express decision of the Full Court

COURT OF APPEAL

1918

Dec. 16.

ROYAL TRUST CO. v. LIQUIDATOR OF AUSTIN HOTEL CO.

in *Brigman* v. *McKenzie* (1897), 6 B.C. 56, that such orders cannot be so regarded but must be appealed from, if no other course is provided for their correction, Mr. Justice DRAKE, who pronounced the leading judgment, saying:

"The order in this case purports and on its face appears to be an order of the Supreme Court, and is so entered on the records of the Court. It was made by a local judge of this Court, whose jurisdiction is of a limited nature, and who was not authorized to hear trials set down for hearing in the Supreme Court. The contention is that having been made in excess of jurisdiction, it is a nullity, and does not require any proceedings to be taken to cancel or remove it. This is not the case. However bad or imperfect an order may be, when it once is passed and entered by a proper officer, it becomes a part of the Court records, and must be set aside by a Court of competent jurisdiction."

That case was even stronger than this, because there the learned local judge essayed to sit and act as the Supreme Court itself by holding a trial (not merely sitting in Chambers as in the case at bar), something he clearly had no power to do since the amendment to the Supreme Court Act passed on May 8th, 1897, Cap. 8, Sec. 17, two days after the unanimous decision of the Full Court in *Postill* v. *Traves* (1897), 5 B.C. 374, holding on the statute and rules then existing that local judges within their territorial jurisdiction as County Court judges had all the powers of Supreme Court judges. As Mr. Justice MCCREIGHT put it, Chief Justice DAVIE concurring, pp. 376-7 (5 B.C.):

MARTIN, J.A.

"The substitution of the words 'within his territorial jurisdiction' for those 'in all actions brought in his County and by a Supreme Court Judge sitting at Chambers' cannot be mistaken, for it shews that his Supreme Court jurisdiction is no longer limited to actions brought in his county and Chamber applications subject to exceptions, but that Judge BOLE, whilst within his territorial jurisdiction, has the powers and jurisdiction of a Supreme Court Judge. If he had been sitting within the county of New Westminster, there could then be no doubt as to his jurisdiction in the matter in question. And I think subsequent legislation leaves no doubt that he has the same jurisdiction in the county of Vancouver as in that of New Westminster."

And at p. 377:

"I think Judge BOLE, sitting in Vancouver as a Local Judge of the Supreme Court, could exercise jurisdiction in an action domiciled in Yale, as a Supreme Court Judge could have done."

And Mr. Justice DRAKE said, at p. 378:

"If a Supreme Court Judge has that power, then the Local Judge of this district is equally clothed with it. . . . . I think that the only mode of taking exception to an order of Mr. BOLE as Local Judge of the Supreme

Court is by appealing to the Full Court, and not to a single Judge; in this view Mr. Justice WALKEM was right in refusing to make the order asked for."

These orders here are not objected to as being in any way invalid or irregular for want of form in their entry or sealing or other respect, and so must be assumed to be regular, as they appear to be, and as the originals, to which I have referred, shew. Such being the case, the two authorities cited shew that the learned judge below was not justified in treating them as nullities, and we, in accordance with our well-established practice and general rule, in that behalf, are bound by them, unless some later change has been made by statute or decision of a higher Court which is binding on us. The only decision of that nature which has been put forward is that of their Lordships of the Privy Council in *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809; 73 L.J., P.C. 120; but, with all due respect, that has no bearing whatever upon the question before us, because it was a decision in a tax case upon the special statutory powers of a municipal Court of Revision, and also, necessarily, from the Court of Appeal nominated specially to hear appeals from said municipal court, which Court of Appeal could have no jurisdiction over the subject-matter if it were *ex juris* below, and therefore its jurisdiction stood upon the same statutory foundation as the Court below. This is indeed pointed out in the judgment, p. 815 ((1904), A.C.):

MARTIN, J.A.

"It appears to their Lordships that the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity. The order of the Court of Appeal of June 28, 1902, was not, therefore, the decision of a Court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel."

There is no resemblance between such a situation, *i.e.*, the order of a mere municipal court of revision with a strictly limited statutory jurisdiction and the order before us of a local judge of a Supreme Court with original and plenary powers.

The following oft-cited observations of Lord Chancellor Hals-

COURT OF APPEAL

1918

Dec. 16.

ROYAL TRUST CO. v. LIQUIDATOR OF AUSTIN HOTEL CO.

bury in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506; 70 L.J., P.C. 76, are in point:

"There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

There are, it is true, certain and, happily, very exceptional cases where an order of a Court of original and concurrent jurisdiction may be ignored as a nullity, such as, in *The "Leonor"* (1917), 3 W.W.R. 861, which was one of an invasion of a co-ordinate jurisdiction during a hearing, but the case at bar is not of that Prussianized complexion.

It follows that, in my opinion, this appeal should be allowed, because, with all due respect, the learned judge below should have followed the course adopted by Mr. Justice WALKEM and approved by the Full Court in *Postill* v. *Traves, supra,* and treated the order of the local judge as valid till discharged on appeal in the ordinary way, and therefore this appeal should be allowed.

MARTIN, J.A.

This renders it, strictly speaking, unnecessary from my point of view to discuss the other questions raised, but I think it proper to say that I have had the benefit of seeing the judgment of my brother MCPHILLIPS, and am of opinion that for the reasons therein given, and others which could be advanced if necessary, the learned local judge had jurisdiction to make the orders in question. I shall only add the case of *In re Reliance Gold Mining and Milling Co.* (1908), 13 B.C. 482, under section 82 (as it should be reported, not 89) of the then Land Registry Act, 1906, Cap. 23, as an illustration of the well-recognized practice and custom in the exercise of that jurisdiction to which he refers. The further question of a judge being *persona designata* (if that is an appropriate term to apply to the present situation, and, strictly, it is not) came up before us in another form this term (on December 4 and 5).

in *Chandler* v. *City of Vancouver,* and I am considering it in the judgment I am preparing therein.

But I do think it desirable to state, as it is a fundamental and constitutional matter, that I entertain no doubt about the power of the Legislature of the Province to enact section 15 of the Supreme Court Act, R.S.B.C. 1911, Cap. 58. Under section 92, subsection 14, of The British North America Act, said Legislature "may exclusively make laws in relation to . . . . .".

"(14.) The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

Under these wide powers of constitution and organization it is clear that the Legislature may declare that the Supreme Court may be composed (*i.e.,* constituted) of such judges as it shall see fit, and if, *e.g.,* it saw fit in its next session to enact that this Court on or after January 1st next, should be constituted with seven judges, instead of the present five, and that the same should consist of the five existing Justices of Appeal and the senior *puisne* judge of the Supreme Court of the Province and the senior County Court judge of the Province, what possible constitutional objection could be raised to such an enactment?

And further, it is, *e.g.,* just as much entitled to say, on the one hand, that a newly "re-organized" Court shall be composed of certain occupants of other existing Courts, as it is to say on the other that none of the present occupants of the Bench shall sit on it, and that it should be constituted by the selection of individuals from the Bar only. The occupants of the said respective existing offices would continue to be appointed from time to time as vacancies occurred by the Governor-General under section 96 of the British North America Act, but the power to constitute an office to which judicial duties are attached and the power to appoint an occupant to perform those duties are entirely different things, which cannot be constitutionally confused. The said Provincial legislation does not pertain to or aim at the selection or nomination of individuals to fill offices, but the apportionment of duties to the otherwise (*i.e.,* Federally) appointed occupants of these offices; in other words, the

MARTIN, J.A.

COURT OF APPEAL

1918

Dec. 16.

ROYAL TRUST CO. v. LIQUIDATOR OF AUSTIN HOTEL CO.

Legislature is not personal but official. The Full Court in *Postill* v. *Traves, supra,* had no doubt about the matter, as appear by the citations hereinbefore given.

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

MCPHILLIPS, J.A.: In my opinion the appeal should prevail. In a Province so vast as British Columbia it is to be expected that there will be found legislation admitting of the exercise of powers locally by local judges of the Supreme Court, which at other points would be exercised by judges of the Supreme Court, *i.e.,* Victoria Judicial District and Vancouver Judicial District, at which points all the judges of the Supreme Court reside. Therefore one naturally looks for enabling powers and in the Supreme Court Act (Cap. 58, R.S.B.C., 1911) is to be found section 15, which reads as follows:

"Judges of the several County Courts shall be Judges of the Court for the purposes of their jurisdiction in actions in the Court, and in the exercise of such jurisdiction may be styled 'Local Judges of the Supreme Court of British Columbia,' and shall in all causes and matters in the Court have, subject to Rules of Court, power and authority to do and perform all such acts and transact all such business, in respect of causes and matters in and before the Court, as they are by Statute or Rules of Court in that behalf from time to time empowered to do and perform: Provided that this section shall not apply to the Victoria Judicial District or the Vancouver Judicial District."

MCPHILLIPS, J.A.

The section as above set forth was in the same terms when *Re Hall Mining and Smelting Co.* (1905), 11 B.C. 492, was decided, and in that case my brother MARTIN (then being a judge of the Supreme Court) said, at p. 493:

"For the guidance of the profession and of the Land Registrar in the future, I draw attention to the fact that the local judge has jurisdiction over this application; the statute is clear on the point, for this is undoubtedly a 'matter in and before the Court' within his jurisdiction as provided by section 26 of the Supreme Court Act."

This decision was given in 1905, and to this date has not been disagreed with, and it is reasonable to suppose, in fact it was stated at the bar, has been acted upon by the legal profession for now some 12 or 13 years, and no doubt hundreds of applications were made and granted extending the time for the registration of mortgage securities in this long *interim* of time, and particularly where money has to be often sought abroad and there is of necessity long delay in the final completion of

the securities, and the Legislature, recognizing this, made the following provision in the Bills of Sale Act (Cap. 32, R.S.B.C. 1897, Sec. 10):

"It shall be lawful for any Judge of the Supreme Court, upon application made to him for that purpose within the period hereinbefore provided for the registration of any bill of sale, supported by affidavit setting forth the facts on which such application is based, to make an order extending the time for registration for such further period as to the said Judge shall appear expedient or just, provided that such further period shall not exceed the space of two months. On the granting of any such extension of time, an office copy of the order granting such extension shall be annexed to the bill of sale or copy thereof, as the case may be, and registered therewith; and the registration of such bill of sale or copy, and copy order, within the extended period granted by such order, shall have the like effect as if such bill of sale or copy thereof had been registered within the time limited by this Act therefor."

And in the Bills of Sale Act (Cap. 8, B.C. Stats. 1905) we find section 11, which reads as follows:

"Within one month from the date of execution of any bill of sale any Judge of the Supreme Court, on being satisfied by affidavit that the omission to register a bill of sale within the time prescribed by this Act, or to file the affidavit of *bona fides*, as required by section 7, subsection (8), or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence or occupation, or by extending the time for such registration, on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct. An office copy of any order made as aforesaid shall be annexed to the bill of sale or any copy thereof, as the case may be, and registered therewith."

MCPHILLIPS, J.A.

And in the present Bills of Sale Act (Cap. 20, R.S.B.C. 1911), section 21, as re-enacted by section 2 of Cap. 5 of 1914, reads as follows:

"Any Judge of the Supreme Court, on being satisfied by affidavit that the omission to register a bill of sale within the time prescribed by this Act, or to file the affidavit of *bona fides*, as required by sections 13 or 14, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, or some other sufficient cause, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration, on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct; and in the case of an extension of time being granted such order will be without prejudice to the rights of any third party who has in the meantime acquired title to all or some of the same chattels, either by purchase and possession or by registration of a *bona fide* bill of sale thereof within the time limited for

COURT OF APPEAL

1918

Dec. 16.

ROYAL TRUST CO. v. LIQUIDATOR OF AUSTIN HOTEL CO.

registration by this Act. An office copy of any order made as aforesaid shall be annexed to the bill of sale or any copy thereof, as the case may be, and registered therewith."

And in the present Companies Act (Cap. 39, R.S.B.C. 1911) as amended by B.C. Stats 1916, Cap. 10, Sec. 5, we have section 103 reading as follows:

"A Judge of the Supreme Court, on being satisfied that the omission to register a mortgage within the time hereinbefore required, or that the omission or misstatement of any particular with respect to any such mortgage was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the Judge just and expedient, order that the time for registration be extended, without prejudice to the rights of parties acquired prior to the actual date of registration, or, as the case may be, that the omission or misstatement be rectified."

The learned Chief Justice of British Columbia has held that the order extending the time for registration was made without jurisdiction and is to be disregarded, and that the chattel mortgage not being registered in time, the Royal Trust Company, the appellant, cannot be deemed a secured creditor. Section 103 (Cap. 39, R.S.B.C. 1911) is in like terms to section 96 of the Companies (Consolidation) Act, 1908, Cap. 69 (Imperial), it being well known that a request went to all the Overseas Dominions from the Colonial Office that the company law throughout the Empire should be made to conform as nearly as possible to the Imperial legislation on the subject. So far as British Columbia was concerned, its legislation has been for years like in character. Palmer on Company Law, 10th Ed., deals with section 96, our section 103, at pp. 281-2.

MCPHILLIPS, J.A.

It will be seen that in the present case, the company being wound up, it is now too late for the appellant to obtain an order from a Supreme Court judge. Now under section 15 of the Supreme Court Act above quoted (Cap. 58, R.S.B.C. 1911), the judges of the County Courts

"shall be judges of the Court [Supreme Court] for the purposes of their jurisdiction in actions in the Court, ... and shall in all causes and matters in the Court have, subject to Rules of Court, power and authority to do and perform all such acts and transact all such business in respect to causes and matters in and before the Court, as they are by Statute or Rules of Court in that behalf from time to time empowered to do and perform."

It then becomes necessary to see what the Rules of Court provide, and for the purpose of the inquiry on this appeal, it is only necessary to quote the following from the order in council of the 16th of June, 1906, under the heading "Powers of Local Judges of the Supreme Court":

"1. The Judge of every County Court in all actions brought in his county shall be and hereby is empowered and required to do all such things, and transact all such business, and exercise all such authority and jurisdiction in respect to the same as by virtue of any statute or custom or by the rules of practice of the Supreme Court are now done, transacted, or exercised by any Judge of the said Court, sitting at Chambers, save and except in respect of the matters following [and matters and proceedings are set out which admittedly are not "actions"].

"But nothing in this Rule contained shall, or shall be held to, limit the jurisdiction which the said County Court Judges have heretofore possessed or exercised by virtue of any statute or custom."

It will be noticed the rule reads,

"by virtue of any statute or custom or by the rules of practice of the Supreme Court are now done, transacted or exercised by any Judge of the said Court sitting at Chambers."

Certainly it has been the "custom" of the judges of the Supreme Court, as well as the local judges of the Supreme Court, to make the orders, such as the one impugned upon this appeal, in Chambers, extending over a long period of years. In my opinion the Rules of Court give even a wider jurisdiction than the statute to the local judges of the Supreme Court, when we have "custom" and "practice" introduced, and the Rules have the force of statute law.

MCPHILLIPS, J.A.

That the order made by CALDER, Co. J. was an order made by him as a local judge of the Supreme Court cannot be gainsaid. It so reads it was made in Chambers, where it could rightly be made. It still stands, it has not been set aside—only ignored—treated as a nullity, and that, with great respect to the learned Chief Justice of British Columbia, in my opinion, cannot be done. It has been used and is upon the register of mortgages with the registrar of joint-stock companies in compliance with the Companies Act, and gives validity to the registration of the mortgage.

To illustrate by analogy of reasoning and authority, that the order of CALDER, Co. J. was made in pursuance of Supreme Court powers conferred by statute and Rules of Court, it is only necessary to refer to the case of *Baker* v. *Ambrose* (1896),

COURT OF APPEAL

1918

Dec. 16.

ROYAL TRUST CO. v. LIQUIDATOR OF AUSTIN HOTEL CO.

65 L.J., Q.B. 589. There it was an affidavit made in pursuance of the Bills of Sale Act, 1878 (41 & 42 Vict., c. 31, Imperial), and it was held, although it was not made in an action, that Order XXXVIII., r. 16 (English Rules)' applied, and we have the same rule in this Province (Order XXXVIII., r. 16).

The section of the Bills of Sale Act (R.S.B.C. 1911, Cap. 20; B.C. Stats. 1912, Cap. 2), being section 21 as amended by the Bills of Sale Act Amendment Act, 1914, in force at the time the order impeached was made, reads as follows: [already set out].

The learned Chief Justice of British Columbia gave no written judgment, but the reporter in (1918), 1 W.W.R. 794 seems to have assumed, and possibly the learned Chief Justice, that the order was made under the Bills of Sale Act and section 21, but, with great respect, I think it was made under the provision as contained in the Companies Act (Sec. 103, Cap. 39, R.S.B.C. 1911), but possibly this is immaterial, as in the Bills of Sale Act we have the words "any judge of the Supreme Court," and in the Companies Act (Cap. 39, R.S.B.C. 1911) "a judge of the Supreme Court." Again reverting to the report of the decision in (1918), 1 W.W.R. 794, at p. 795 it is stated:

MCPHILLIPS, J.A.

"His Lordship held that the expression 'any Judge of the Supreme Court' constituted a Judge of the Supreme Court *persona designata* under the Bills of Sale Act, and that His Honour Judge Calder had no jurisdiction to make an order extending the time for registration as above mentioned. He therefore made an order varying the registrar's report in accordance with the terms of the liquidator's application."

Now, if it can be said that an affidavit made under the Bills of Sale Act is in Court and subject to the Rules of Court, and admittedly it is not in an action in the Court (Sec. 15, Supreme Court Act, Cap. 58, R.S.B.C. 1911, "in actions in the Court," but see also "in all causes and matters in the Court"), yet it may well be a matter in the Court, and if so, with great respect to the learned Chief Justice, there would be an error in holding that the expression "any judge of the Supreme Court" (or as in section 103 of the Companies Act, "a judge of the Supreme Court") constituted a judge of the Supreme Court *persona designata*. It is interesting to note the argument of Mr. Atkin,

K.C., counsel for the appellant, at p. 169 (now Mr. Justice Atkin) in *In re Bagley* (1910), 80 L.J., K.B. 168, and it is to be noted that the appeal failed. And see the language of Cozens-Hardy, M.R. at pp. 170-72.

It does not occur to me that the "matters relating to the registration of any instrument, whether under an Act of Parliament or otherwise" as contained in the Commissioners for Oaths Act, 1889, 52 Vict., Cap. 10, Sec. 1(2) (Imperial), makes any difference, words which I do not find in section 54 of the Evidence Act (Cap. 78, R.S.B.C. 1911), as the Master of the Rolls did not base his decision wholly upon this point, but as we see, upon Order XXXVIII., r. 16, as well. Then we have a decision of this Court upon the point which is conclusive, namely, *Braden* v. *Brown* (1917), 3 W.W.R. 906 (approving *Columbia Bithulithic* v. *Vancouver Lumber Co.* (1915), 21 B.C. 138, having reference to a chattel mortgage under the Bills of Sale Act, which is the present case: see the judgment of my brother MARTIN at length upon the point at pp. 144-8), it being held that (see head-note, p. 906) "Rule 309" (which is the County Court Rule, similar in its terms to Order XXXVIII., r. 16, of the Supreme Court Rules) "which provides that an affidavit shall not be sworn before the solicitor for the party on whose behalf it is to be used, applies to the affidavit required under section 19 of the Mechanics' Lien Act (*Columbia Bithulithic* v. *Vancouver Lumber Co.* [(1915), 21 B.C. 138]; 8 W.W.R. 132 followed)." Then if it be that the Rules of Court, whether Supreme or County, apply, how can it be said that "any judge of the Supreme Court" or "a judge of the Supreme Court" is *persona designata?* (The legislation in England being in like terms to that of British Columbia, it is to be observed that appeals from orders made have been taken, and no question of *persona designata* was given effect to.) If *persona designata* he would not, in exercising his authority, be subject to the provisions of the Supreme Court Act or the Rules thereof. *Braden* v. *Brown, supra,* rebuts any such contention, and is decisive upon the point. That being the situation, it is at once apparent that the jurisdiction is as judge of the Supreme Court, and that being the position, it follows that under section 15 of the Supreme Court Act (Cap. 58, R.S.B.C.

MCPHILLIPS, J.A.

COURT OF APPEAL
1918
Dec. 16.
ROYAL TRUST CO. v. LIQUIDATOR OF AUSTIN HOTEL CO.

1911—the Rules of Court and the Power of Local Judges of the Supreme Court—Rules of Supreme Court at p. 173), the local judges of the Supreme Court may exercise the jurisdiction, and CALDER, Co. J. was right in making the order which the learned Chief Justice of British Columbia has treated as a nullity. To further accentuate this conclusion, the order in council of June 16th, 1906 (p. 173, Rules of Supreme Court), cannot be confined to "actions." It is only necessary to refer to the language giving the excepted powers, "save and except in respect of the matters following," and the enumeration of these demonstrates many of them not "in . . . . . actions brought in his county."

I have endeavoured to indicate what, in my view, was the plain intention of the Legislature in conferring upon the local judges of the Supreme Court powers that are expressed to be by statute or Rules of Court conferred upon the judges of the Supreme Court, it being vital in the interests of the public that these powers should be capable of being exercised, especially in the remote parts of the Province, such as in the present case. In this connection I would refer to what Mr. Justice Anglin said in *Komnick System Sandstone Brick Co.* v. *B.C. Pressed Brick Co.* (1918), 2 W.W.R. 564 at p. 572, and applying the language there used by him to the view I have come to, that there was power in the local judge to make the order, as it is the application of the two well-known rules to the present case,

MCPHILLIPS, J.A.

> "One, known as 'The Golden Rule,' that 'in interpreting all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument,' and the other that 'remedial statutes should be construed liberally and so as to suppress the mischief and advance the remedy.'"

And whilst it is possible to say that what my brother MARTIN said in *Re Hall Mining and Smelting Co., supra,* was merely *obiter,* yet the special circumstances are to be considered, and we have "custom" and "practice" to consider, which unquestionably followed. I would refer to what Mr. Justice Anglin said in *Gagnon* v. *Lemay* (1918), 56 S.C.R. 365 at p. 374, dealing with conveyancing practice and "the wisdom of not overruling judicial decisions of some years' standing."

Further, there is what to my mind is an insuperable obstacle

to affirming the judgment of the learned Chief Justice of British Columbia. He has, with great respect, undertaken to ignore and treat as a nullity an order made by a local judge of the Supreme Court, which has not been moved against and is of record, as I assume, and I think I am entitled to assume, although there is no notation, as the order appears before us, of its entry; but no point was made as to this upon the argument, and it is a proper inference to draw that the order was duly and properly entered, and it certainly is of record in the books of the registrar of joint-stock companies. That order still standing cannot be treated as a nullity—only when set aside in the well known and usual manner (if it could be, my opinion, of course, being to the contrary) could it be ignored and the rectification of the register of mortgages in the office of the registrar of joint-stock companies be made. Failing that being done, the finding of the district registrar that the Royal Trust Company, the appellant, is entitled to security for its claim of $3,500 by virtue of a chattel mortgage as a secured creditor must, in my opinion, stand.

To support what I deem to be this insuperable objection to the maintenance of the judgment of the learned Chief Justice of British Columbia, I would refer to the language of Cozens-Hardy, M.R. in *In re Bagley, supra,* wherein he said, at p. 172:

"It suffices here to say that there is an order of the Court expressly and in terms giving Chapman the right to do that which the Bankruptcy Act, 1890, says entitles him to rank as a creditor within the meaning of section 4 of the principal Act. It is enough for the purposes of this appeal to say that that order has not been impeached and that on that ground alone the objection fails, because we could not go behind the order."

MCPHILLIPS, J.A.

Here we have the chattel mortgage registered—to all appearances duly registered—supported by an order of a local judge of the Supreme Court, and upon the register of mortgages as well in the office of the registrar of joint-stock companies, and even were the registration and the register of mortgages in error, so long as the registration is existent and supported by the order of the local judge of the Supreme Court unreversed, the Royal Trust Company, the appellant, remains a secured creditor.

In *Whiteman* v. *Sadler* (1910), A.C. 514; 79 L.J., K.B. 1050, the head-note in the Law Journal report, in part, reads as follows:

COURT OF APPEAL

1918

Dec. 16.

ROYAL TRUST CO. v. LIQUIDATOR OF AUSTIN HOTEL CO.

"A bill of sale taken in the registered name of a money-lender is not void although the name was improperly registered. So long as the name remains on the register, contracts in that name are not to be held void or the money-lender's action in making such contracts punishable by fine or imprisonment. Decision of the Court of Appeal (*ante*, p. 786; (1910), 1 K.B. 868) on this ground reversed."

In my opinion, the appeal should be allowed and the certificate of the district registrar, wherein he found that the Royal Trust Company, the appellant, was a secured creditor for its claim by virtue of the chattel mortgage, should stand. In the result, the order made by the learned Chief Justice of British Columbia under appeal should be set aside.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

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

Solicitors for appellant: *Davis & Company.*
Solicitor for respondent: *W. J. Baird.*

MACDONALD, J.

1918

Dec. 31.

DONALD v. JUKES

DONALD v. JUKES.

Guarantee—Assignment of—Debt overdue at time of assignment—Notice—Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. (25).

Executors and administrators—Administratrix sole beneficiary—Creditor of estate debtor to administratrix personally—Set-off—Solvency of estate—R.S.B.C. 1911, Cap. 4, Sec. 99.

In the case of an assignment of the rights under a guarantee to pay another's debt in the event of the primary debtor not paying the debt within a specified time, if the assignment is made after the debt is overdue, it is not necessary to notify the primary debtor of the assignment in order that the assignee may sue the guarantor as the guarantor has become a "debtor" within the meaning of section 2(25) of the Laws Declaratory Act.

The plaintiff who held an assignment of a debt from J. and of the rights under a guarantee by the defendant for the payment thereof, was administratrix of the estate of D. (her deceased husband). The defendant claimed the right of set-off against the plaintiff the sum

due upon a covenant in a mortgage given by D. which had been assigned by the mortgagee to J. If solvent the plaintiff became the sole beneficiary of the estate after the payment of debts. At the time administration was granted there appeared to be a large surplus but four years later the solvency of the estate was questionable. No declaration as to the solvency of the estate was filed under section 99 of the Administration Act.

Held, that the plaintiff, while a party to the action in her personal capacity is an appointee of the Court and there should be judgment directing her to file and pass her accounts as administratrix with the registrar within two months shewing outstanding liabilities and estimated value of the estate. She is entitled to judgment for the amount of her claim but all proceedings under the judgment are stayed pending the taking of and reporting upon the administration accounts and subsequent order as to set-off or otherwise.

ACTION brought by the assignee of the rights under an instrument containing a covenant by the defendant guaranteeing payment of the debt of another in the event of its not being paid by the debtor on a certain date. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 22nd of November, 1918. Statement

J. K. Macrae, for plaintiff.
Wilson, K.C., for defendant.

31st December, 1918.

MACDONALD, J.: By an indenture, dated the 11th of August, 1914, defendant covenanted with one Geoffrey Lloyd Edwards, as trustee of the real estate of James Charlton Donald, deceased, that he would, in the event of Arthur Ewart Jukes failing, on the 11th of August, 1915, to pay $1,526.71, advanced by Edwards to Arthur Ewart Jukes, pay such sum, together with interest at the rate of ten per cent. per annum. Default in payment occurred, and, on the 10th of February, 1916, Edwards assigned to the plaintiff the said indenture and the moneys thereby secured, together with all rights, benefits and covenants therein contained. Plaintiff seeks to avail herself of this assignment and hold the defendant liable upon his guaranty. It was contended that, while notice of the assignment had been given to the defendant, that this would not suffice to enable the plaintiff to bring this action, unless express notice had also been given to Arthur Ewart Jukes as primary debtor. Subsection (25) of section 2 of the Laws Declaratory Judgment

MACDONALD, J.
1918
Dec. 31.

DONALD v. JUKES

Act does away with the necessity of adding an assignor as a party, where express notice in writing of any absolute assignment of a debt, or any other legal chose in action, has been given "to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action." I think that, at the time, when the assignment was made, the defendant had become liable upon his covenant and he was thus a "debtor" from whom the assignor could demand and receive payment and, in order to sue the defendant, it was not essential that the primary debtor should also receive notice of the assignment. Defendant is thus, in my opinion, liable, unless equities exist of which he can take the benefit and which afford him a good defence. Plaintiff sought to strengthen her position in the action by contending, that she really advanced the moneys herself, and not Edwards, as trustee. This was, with a view of shewing that the indebtedness was personal and had no connection with the estate of her deceased husband. Such a conclusion would be contrary to the terms of the agreement under which it is sought to render the defendant liable. There is no suggestion that such a fact was brought to the attention of the defendant or his principal. Defendant is entitled to avail himself of any legal or equitable defence that could be raised by the primary debtor, if it were sought to hold him liable for the indebtedness, so that mutual mistake, even if applicable, would not likely have been successful, as a ground for reforming the document. Further, the agreement is in accordance with the correspondence relating to its preparation and execution. It would also appear, from the accounts of the defendant, filed as administratrix, that, prior to the agreement being entered into, $7,606.85 was disbursed on behalf of the estate in connection with property which included the lots referred to therein. This may be capable of explanation, but none was proffered. The recitals in the preamble to the assignment can, by themselves, in no way affect the defendant. I would have no difficulty, on this point, in deciding that the assignment only vested in the plaintiff, whatever rights were possessed by Edwards, as trustee, and did not give her any *status*, as having personally loaned the money, were it not that a portion of her examination for discovery was

Judgment

filed by the defendant, which rather supported such position. However, during the taking of evidence, and afterwards during the argument, an opportunity was afforded counsel for the plaintiff to amend the statement of claim, asking for reformation of the agreement, but he did not deem it advisable to take the benefit of such privilege. I think, that without amendment of the pleadings, and a clear issue being presented for consideration, that I would not be entitled to interfere with the plain reading of the agreement.

Whether the plaintiff is entitled to succeed on the basis, that she personally loaned the money, or only through whatever rights she possessed, under the assignment from Edwards, it is contended that the defendant may set off against the plaintiff, the amount due upon the covenant in a mortgage, dated the 17th of March, 1913, given by Donald, deceased, to the Pacific Mainland Mortgage Investment Co., Ltd., for $11,500. This mortgage became due, with interest, on the 11th of March, 1914. It was duly assigned on the 20th of September, 1918, by the Company to Arthur Ewart Jukes. In her application for letters of administration with the will annexed, plaintiff recognized this mortgage, as being a contingent liability of the estate, and it is still wholly unpaid. There was no evidence to shew, whether the real estate, covered by such mortgage, was good security for the indebtedness. Neither was there any information afforded, as to the nature of the trusteeship, held by Edwards, nor the powers he possessed. He was an employee of the London & British North America Company, Ltd., which had been appointed trustee and executor under the will of the late J. C. Donald. It transpired that, it could not exercise the powers, intended to be created by the will, so Mr. Edwards was placed in some position with respect to the Donald estate. His duties were not disclosed, but there is evidence, that he did not deem it necessary to give a close scrutiny to the accounts, as they were in the charge of some fellow-employee. It is evident, that there were divers interests to be considered in connection with the real estate. Doubtless, after the collapse of the boom in this Province, such property required careful attention in order to obtain satisfactory results. Under Order XVIII., r. 5,

Judgment

MACDONALD, J.

1918

Dec. 31.

DONALD v. JUKES

"Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator."

This claim, under the covenant in the mortgage, arises in connection with an estate, of which the plaintiff was administratrix, and which she was required to properly administer. The rights, which Edwards possessed, had also become vested in the plaintiff, and she was, at the same time, clothed with her responsibility as administratrix. If the Donald estate be solvent, then, she became a beneficiary after payment of the debts. Considering the large amount of money that came into her hands, and the apparent surplus shewn at the time when she was appointed administratrix, it is fair to presume that the debts of her husband would, within a reasonable time, have been satisfied. Difficulties, however, may have arisen to prevent such a determination. The duty of an administratrix, generally and particularly as to next of kin, is outlined by Kekewich, J. in *In re Jones. Christmas* v. *Jones* (1897), 2 Ch. 190 at p. 203:

"The administrator is not a trustee for them [next of kin] in the strict sense, but he has a duty towards them, namely, to pay the debts, clear the estate and hand over to the next of kin each his aliquot share of the estate. In other words, he is in the position of bailiff for them of their shares in the estate, and, when once ascertained, their claim against him is a legal claim, and he holds for the next of kin the amount of the claim. Therefore, if one of the next of kin owes the administrator money, and that next of kin sues him for the money he owes as administrator, the administrator can set off the debt owing to himself against the money coming to the next of kin, and can hold that money for the debt owing to him."

Judgment

If this be the position, that one of the next of kin is entitled to assume, surely a creditor, who has prior consideration, should be at least on an equal basis. The ground is taken, however, that whatever rights the defendant, or his principal, might have, under the mortgage, they can only be considered in administration proceedings and not in this action. In other words, that, as the plaintiff has not, as administratrix, admitted that the mortgage indebtedness is not only due, but payable from the estate, therefore, it cannot be the subject of set-off.

It is contended by defendant, that the position of the estate

is such, and plaintiff has so dealt with it, as to render her liable. When plaintiff applied for administration of her husband's estate, on the 7th of April, she fixed the value of the real estate at $112,670 and the personal estate at $44,172.18, making the total assets of the estate at $156,842.18. She properly did not include in this amount, the sum of $35,000 of life insurance payable directly to herself. She estimated the direct and contingent liabilities at $76,675.30, thus leaving an apparent surplus of $80,166.88. She stated, that the property of the deceased would pass to her alone, under the will, so she is the beneficiary of whatever surplus there may be in the estate, after payment of creditors. Over four years have elapsed since the plaintiff was granted administration and, under ordinary circumstances, all the creditors would have been satisfied in the meantime. It is asserted, probably upon sufficient grounds, that the real estate could not have been realized upon during this period, except at a great sacrifice. Whether this course would have wiped out the apparent surplus, it is impossible for me to determine. The delay may have enured to the benefit of the creditors or may eventually preserve a portion of the surplus of the estate to the plaintiff as sole beneficiary. If the latter result occurred, then, there should be no reason why the plaintiff should not, to the extent of the claim herein, reduce the amount of the mortgage indebtedness against the estate. If the estate be solvent, she alone is interested in having the debts paid off, so that the balance may be ascertained and become her absolute property. If the plaintiff be thus treated, in her position as administratrix, no difficulty arises through the assignment by the Mortgage Company to Arthur Ewart Jukes, having taken place subsequently to the notice of the assignment from Edwards to defendant, as the set-off is aimed directly against the plaintiff and not against her assignor. The question then arises, as to whether the estate was really solvent or not. If it be insolvent, then the statutory provisions should be applied and defendant might eventually only be entitled to set off a portion of the mortgage debt, after deducting the value of the real estate covered by the mortgage.

Judgment

It is then submitted, that the plaintiff has so mixed her own moneys with those of the estate, as to render her liable to pay

COURT OF APPEAL

1918

Dec. 31.

DONALD v. JUKES

the mortgage indebtedness, without any reduction through insolvency of the estate. I do not think I have sufficient facts before me to determine this point.

Then again, speaking in a general way, it seems to me that, in view of the fact that the plaintiff is the beneficiary of her husband's estate, it may make little or no difference, in the final outcome, whether she recovers the money secured by the agreement, either in her own right, through having personally loaned the money, or as assignee from Edwards, or as administratrix of her husband's estate. The ascertainment of the rights of the parties might be different, but the ultimate result would be the same. It would depend upon the solvency or otherwise of the estate. The pleadings may not clearly set forth this position, but I think the facts disclosed warrant me, up to the last moment, in allowing the defendant to avail himself of any legal or equitable defence that he may possess. I am required to take judicial notice of all equitable duties and liabilities appearing, even incidentally, in the course of a trial. If the estate be solvent, then, it would seem to be inequitable, that the defendant should be required to immediately make payment in full, under his guaranty, and be delayed for some time, in the recovery of an adequate amount of the mortgage, which his principal might, and should, assign to recoup him for his outlay. Why should the accounts not be speedily adjusted and a proper set-off obtained? Considering the time that has elapsed since administration was undertaken, and the fact that plaintiff has not availed herself of the provisions of section 99 of the Administration Act by filing a declaration as to the insolvency of the estate, I think I have a right to assume as against her that such estate is solvent. Acting on this assumption, it seems to me, on the same principles as were invoked by Sir George Jessel, M.R., in *Taylor* v. *Taylor* (1875), L.R. 20 Eq. 155 at p. 160, that, even though it would involve the taking of the accounts of the administratrix, still the defendant is entitled to have further inquiry to determine whether the set-off claimed should be allowed. Such a procedure is not sought nor outlined by the pleadings. Should I, on that account, be precluded from giving necessary directions, in order that the final judgment should not be "contrary to the very right and justice of the case?"

Judgment

I am referred to authorities as being at variance with a conclusion, that such a right of set-off exists, or that such a course should be pursued. In *Newell* v. *National Provincial Bank of England* (1876), 1 C.P.D. 496, it was held that the defendants could not, against an action by an administrator, avail themselves of a defence either by way of set-off or counterclaim, of a debt due to them from an intestate, which did not become due until after the intestate's death. This followed the authority of *Rees* v. *Watts* (1855), 11 Ex. 410; 25 L.J., Ex. 30. Archibald, J., at pp. 503-4, applied the latter case as follows:

"As the claim in respect of the £1,000 promissory note did not mature in the lifetime of the maker (the intestate), it cannot be set off against a debt due to the deceased in his lifetime: both debts must be due in the same right. . . . . It comes, therefore, to this: the defence is not available as a set-off; and, if relied on as a counterclaim, we are bound to restrain the defendants from taking any further proceedings in the action. The plaintiff will consequently be entitled to judgment and execution. . . . . Defendants will be at liberty to prove in the administration suit for the amount due to them for principal and interest on the promissory note."

Unless this authority be distinguishable, on the facts, from the present case, I would, of course, follow it. Here, however, the difference is, that it may be contended that the plaintiff's claim arose after the death of deceased and is due under the same right, as that asserted against her by the defendant, through his principal. The Donald estate advanced to A. E. Jukes an amount of money, and a sum that it is submitted will set off, and even overtop this loan, and of which the defendant can avail himself, may be payable by such estate to A. E. Jukes, so that the case of *Rees* v. *Watts, supra,* is not in point.

Judgment

In *Macdonald* v. *Carington* (1878), 4 C.P.D. 28, Denman, J., at p. 36, while entertaining an opinion that the defendant was not at liberty to join a claim against the plaintiff as executrix with a claim against the plaintiff in her personal character, expressed himself as follows:

"I must also say that even supposing I am wrong, and that in certain cases it would be possible to join a counterclaim against the plaintiff personally with a counterclaim against him in an executorial capacity, we ought to jealously guard against its being done in such a way as to embarrass and inconvenience the fair trial of the action; and it appears to me that such joinder would be inconvenient and undesirable in the interests of the respective parties in this particular case. Independently of a question suggested by my Brother Lindley as to the existence of

COURT OF APPEAL

1918

Dec. 31.

DONALD v. JUKES

deficiency of assets, I think that a counterclaim drawn so as to be embarrassing ought not to stand in such form."

Lindley, J., at p. 37, refers to the threefold description of the defence. There being two claims against the plaintiff in her individual character and a third against her

"as representing the estate of the person who entered into a covenant for the option to purchase."

He was of the opinion, that such claims should not be mixed together and that it would be inconvenient, adding that,

"the claim is by the plaintiff in her individual capacity, and the counterclaim is against her in both her individual capacity and her executorial capacity. In this view it is obvious that, assuming the latter cause of action lies, it is not directly or indirectly a defence to her claim. If she happened to be sole legatee, and there were no debts, it might possibly be a defence; but as it stands it is none, and, therefore, were it allowed, and she succeeded in the action, there would be a judgment in her favour on her cause of action and, perhaps, a judgment against her in a totally different capacity, which would require to be worked out in a different way."

While this case supports the plaintiff's contention to a certain extent, still it is not a clear authority in her favour. It is based upon the inconvenience that may result through the joinder of such causes of action. At the same time it rather admits, than denies, the right of a party to set off claims against a plaintiff in both an individual and executorial capacity, where such plaintiff is sole beneficiary.

Judgment

Jones v. *Mossop* (1844), 3 Hare 568, on the contrary, seems, at first sight, to support the defendant's position. The facts are sufficiently similar to those here present, to enable the case to be of some assistance in arriving at a conclusion. While the debts, there proposed to be set off against each other, were originally due in different rights, still, this difficulty was overcome, through the right to recover under the bond in question, and the benefits accruing therefrom, having both become vested in the administrator. He was not only entitled to take proceedings to recover, but was also, as a next of kin, entitled to receive payment of the bond. There would not, under such circumstances, by allowing the set-off, be any violation of the principle that "one man's money shall not be applied to pay another man's debt." In Halsbury's Laws of England, Vol. 14, p. 329, however, the deduction to be drawn from this case is referred to as follows:

"This equitable exception is not, however, to be extended to a case in which administration accounts require to be taken in order to shew that the representative is the beneficial owner of the debt."

Ex parte Morier. In re Willis, Percival & Co. (1879), 12 Ch. D. 491, is the authority for this proposition. Does this case so affect the defendant's position, as to destroy any assistance he might otherwise obtain, from the decision in *Jones* v. *Mossop?* I think it is distinguishable. James, L.J., at p. 496, refers to the good luck of the plaintiff in *Jones* v. *Mossop* in obtaining an equitable set-off. He bases this result upon the fact that, legally and equitably, the absolute property in the bond had become vested in the defendant. It would appear that the turning point, and the reason why the *Ex parte Morier* case did not follow the previous decision in *Bailey* v. *Finch* (1871), L.R. 7 Q.B. 34 was, that the money in question in the bank, was to the joint credit of two executors, one of whom was not before the Court, though making admissions. Then, there was no evidence to prove, that the amount was a net residue of the estate, due to one of such executors, so it could not be brought within the ordinary principle "of a debt due from a man and a debt due to the trustee of that man . . ." It required that "the net balance (due to the son as residuary legatee) must be ascertained, so as to make it a trust fund." Cotton, L.J., after mentioning, that the Court should not, unless it could find that there is some rule or principle enabling it to do so, allow a set-off, also refers to the fact, that the bank accounts were not all in the same name, and thus the same rights could not be dealt with by way of set-off. He then discusses and explains *Bailey* v. *Finch, supra,* and emphasizes the position more clearly, along the lines I have indicated. Brett, L.J., in language that James, L.J. terms "a code," expressed himself as follows:

Judgment

"My view is this, that, the account standing in the names of the brother and sister, the case could not have been brought within the rules of equitable set-off or mutual credit, unless the brother was so much the person solely beneficially interested that a Court of Equity, without any terms or any further inquiry, would have obliged the sister to transfer the account into her brother's name alone."

Thus, I think I am justified in expressing an opinion, that the result of the decision in this case is only, that the set-off will

COURT OF APPEAL

1918

Dec. 31.

DONALD v. JUKES

not be allowed, where a taking of accounts is necessary between persons, not parties to the litigation, in order to shew that the representative of a deceased person is the beneficial owner of a certain fund.

Under these circumstances, how can I follow the principle enunciated in *Peterkin* v. *MacFarlane et al.* (1878), 4 A.R. 25 at p. 44: To do justice in the particular case where there is discretion, is above all other considerations? Any necessary amendment, consistent with the evidence, should not prejudice the plaintiff and is allowed. I think the decree in *Taylor* v. *Taylor, supra,* might to a certain extent be adopted. A. E. Jukes, as a creditor, might apply by way of originating summons for the taking of the administration accounts, but there should be no necessity for this separate proceeding. Plaintiff, while a party to this action in her personal capacity, is an appointee of the Court. There will be judgment directing plaintiff to file and pass her accounts as administratrix with the registrar within two months. She should shew not only the outstanding liabilities of the estate, but also give particulars of the assets and her estimated value of same. She is entitled to judgment for the sum of $1,930.34 and interest from the 7th of October, 1918, but all proceedings under such judgment are stayed pending the taking of, and report upon, the administration accounts and subsequent order as to set-off or otherwise. The order for judgment should contain provisions, giving liberty to apply and other matters. Meantime all costs are reserved.

Judgment

Order accordingly.

BARRON v. KELLY *ET AL.*

MORRISON, J. (At Chambers)

1918

Sept. 30.

BARRON *v.* KELLY

Practice—Judgment of Supreme Court—Costs—Execution—Stay—Jurisdiction—Set-off.

The plaintiff's action for rescission of an agreement for the sale of land and damages for deceit was dismissed on the trial and in the Court of Appeal. The Supreme Court of Canada allowed the appeal as to damages and ordered a reference as to the amount to the Master in British Columbia, and that there be a set-off between the said damages as found by the Master and the moneys payable on the agreement for sale. It was further ordered that the defendants pay the costs of the appeal and of the two Courts below. On application for stay of execution pending the reference:—

Held, that as the plaintiff is entitled to her costs unconditionally under the judgment, the application for stay must be refused.

APPLICATION by defendants for stay of execution, heard by MORRISON, J. at Chambers in Vancouver on the 30th of September, 1918. Plaintiff's husband (now deceased) brought action against the defendants for rescission of an agreement for sale of land and damages for deceit. On the trial the action was dismissed. An appeal to the Court of Appeal was dismissed and on further appeal the Supreme Court of Canada reversed the decision of the Court of Appeal. The judgment of the Supreme Court of Canada reads as follows:

Statement

"1. That the plaintiff's claim for rescission of the agreement for sale and the return of the amount paid thereunder referred to in the statement of claim be dismissed."

"2. That the plaintiff is entitled to recover damages as in an action for deceit from the defendants with respect to the matters alleged in the statement of claim and that it be referred to the Master of the Supreme Court of British Columbia to enquire and report as to the amount of the said damages."

"3. That there be a set-off between the said damages so found by the Master and the moneys payable by the plaintiff to the defendant under the said agreement for sale and that the balance found due by the said Master, whether to the plaintiff or the defendant, be paid forthwith after confirmation of the said Master's report.

"4. That the costs of the said reference and the further directions be reserved.

"And this Court did further order and adjudge that the said respondent should and do pay to the said appellant the costs incurred by the said

MORRISON, J. (At Chambers)

1918

appellant as well in the Court of Appeal for the Province of British Columbia and at the trial before the Honourable Mr. Justice CLEMENT, as in this Court."

Sept. 30.

BARRON v. KELLY

F. R. Anderson, for the application: There should be a stay of execution until the reference before the registrar has been held. Plaintiff's financial standing is such that if it were found on the reference that there be money due the defendants if stay of execution be not granted, they probably would not be able to recover. The costs should be set off, and should therefore abide the result of the reference.

Argument

Reid, K.C., contra: The plaintiff had an unconditional order of the Supreme Court of Canada for costs and should not be deprived of her right to execution. A judge of the Supreme Court has no jurisdiction to stay: see *Merchants Bank* v. *Houston and Ward* (1902), 9 B.C. 158.

MORRISON, J.: The plaintiff being entitled to her costs unconditionally, pursuant to the judgment of the Supreme Court of Canada, stay of execution pending the outcome of the reference as to damages is refused: see *Merchants Bank* v. *Houston and Ward* (1902), 9 B.C. 158.

Judgment

Application refused.

MORRISON, J. (At Chambers)

1918

ENDERSBY v. THE CONSOLIDATED MINING & SMELTING CO. OF CANADA, LIMITED.

Oct. 3.

Practice — Costs — Taxation — Witness fees — Witnesses present but not called—Rule 1002(29).

ENDERSBY v. CONSOLIDATED MINING AND SMELTING CO.

The Court will not review the allowance of a witness's expenses on the ground that they were incurred through over-caution or mistake under marginal rule 1002(29) if on proper consideration they have been allowed by the taxing officer.

Oliver v. *Robins* (1894), 64 L.J., Ch. 203 followed.

Statement

APPLICATION by defendant to review the taxation of plaintiff's costs. The plaintiff brought an action against the

defendant for damages by reason of the fumes from its smelter ruining his crops. The plaintiff succeeded on the trial with a jury. On the trial the plaintiff subpœnæd 19 witnesses to give evidence as to damages. After hearing 13 witnesses the trial judge questioned counsel as to the necessity of calling any more witnesses on this aspect of the case, whereupon counsel did not call the remaining six witnesses, who were in attendance. Upon taxation, the taxing officer allowed the fees to the six witnesses in attendance who were not called. Heard by MORRISON, J. at Chambers in Vancouver on the 3rd of October, 1918.

Armour, for the application: The plaintiff had been over-cautious in subpœnaing so many witnesses on the one issue as to damages under r. 1002 (29). The taxing officer should not allow the costs of the six witnesses not called. Argument

D. Donaghy, contra: It is in the sole discretion of the taxing officer whether fees of said witnesses should be allowed: see Widdifield on Costs, 2nd Ed., 237 and cases there cited.

MORRISON, J.: "The Court will not review the allowance of a witness's expenses on the ground that they were incurred through over-caution or mistake, under Order LXV, rule 27, sub-rule (29), if on proper consideration they have been allowed by the taxing officer . . . . The final decision lies with the taxing officer": see *Oliver* v. *Robins* (1894), 64 L.J., Ch. 203. The test is whether the witnesses were "necessary," at the time they were subpœnæd, and not whether they were "necessary" having regard to ultimate event that is at the trial: *Bartlett* v. *Higgins* (1901), 2 K.B. 230. This is so particularly where there is a jury. Taxation upheld. Judgment

Application refused.

COURT OF APPEAL

1918

NOV. 5.

GIANNINI v. COOPER.

GIANNINI v. COOPER.

Practice—County Court—Jurisdiction—Question first raised on appeal—Power to transfer to Supreme Court—Costs—R.S.B.C. 1911, Cap. 53, Secs. 40 (2), (10), and 72—County Court Rules, Order IV., r. 13.

In the case of an appeal from the County Court, if it appears there was no jurisdiction in the Court below to hear the case and that it should have been transferred to the Supreme Court under Order IV., r. 13, of the County Court Rules, the Court of Appeal will not dismiss the appeal, but will make the order that should have been made below.

As the appellant did not raise the question of jurisdiction in the Court below, no order was made as to the costs of the appeal.

APPEAL from the decision of RUGGLES, Co. J., of the 16th of April, 1918, in an action for rescission of an agreement for the sale of land. The defendant, who owned certain farm lands consisting of 115 acres, that he held at a valuation of $4,500, sold same to the plaintiff, and in consideration therefor accepted a deed for a lot in Vancouver, $500 in cash, and a mortgage for $300 on the lands sold. The plaintiff claimed that the defendant and his agent had represented that 45 acres of this land was cleared and ready for cultivation and that it was first-class agricultural land. The ground for rescission was fraudulent misrepresentation in that only a very small portion of the lands was cleared and the soil unfit for agricultural purposes. The trial judge gave judgment for rescission, for cancellation of the mortgage, and for the recovery by the plaintiff of $547 from the defendant. The defendant appealed.

Statement

The appeal was argued at Victoria on the 10th of June, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

J. H. Senkler, K.C., for appellant: The learned County Court judge ordered rescission of a sale of land valued at $4,500 and for payment by the defendant to the plaintiff of the sum of $547. This is, I contend, beyond the jurisdiction of the Court: see County Courts Act, Sec. 40, Subsecs. (4) and (12); *Gran-*

Argument

ger v. *Brydon-Jack* (1918), 25 B.C. 531; *Parsons Produce Co.* v. *Given* (1896), 5 B.C. 58; *B.C. Board of Trade* v. *Tupper & Peters* (1901), 8 B.C. 291; *Sunderland* v. *Glover* (1915), 1 K.B. 393. Objection to the jurisdiction was not raised in the Court below.

Kappele, for respondent: The Court has discretion to refuse this order: see *Prangnell* v. *Prangnell* (1893), 62 L.J., Q.B. 346. In any case, the Court may transfer the proceedings to the High Court: see *Sunderland* v. *Glover* (1915), 1 K.B. 393. As the point was not raised in the Court below, they should pay the costs. Argument

Cur. adv. vult.

5th November, 1918.

MACDONALD, C.J.A.: At the close of the argument we decided that the amount involved in the action was beyond the equitable jurisdiction of the County Court, but reserved the question as to whether or not we should order the transfer of the action to the Supreme Court. We also reserved the question of costs. By County Court Order IV., r. 13, the trial judge is given power to transfer to the Supreme Court a cause when the subject-matter of the action is beyond the jurisdiction of his Court. The order, therefore, which should have been made below was not made.

MACDONALD, C.J.A.

Two courses are open to us—to dismiss the action, or to order its transfer to the Supreme Court for trial. I think the latter course should be adopted. The saving of expense to litigants should be effectuated whenever the circumstances will admit of it. This is a case which, in my opinion, not only admits of it, but demands it. The fact that objection to the jurisdiction of the Court below was not taken before the learned trial judge affects only the question of costs. As to the costs, I would give none in this Court. The appellant was to blame for not raising the question of jurisdiction on the first opportunity. Had it been raised below, this appeal would, I am sure, have been avoided.

As to the costs of the action, they should abide the result of the trial, or any disposition thereof which shall be made at or after the trial.

COURT OF APPEAL

1918

Nov. 5.

GIANNINI v. COOPER

MARTIN, J.A.: At the hearing we decided that the objection taken before us, though not below, that the County Court had no jurisdiction to entertain this action, for cancellation of an agreement for sale, should prevail (under section 40 (4) of the County Courts Act, Cap. 53, R.S.B.C. 1911), because the value of the land admittedly exceeded the limit of $2,500, but we reserved the question of the transfer of the action under section 72, which provides that "if during the progress of any action, cause or matter it shall be made to appear to the judge that the subject-matter exceeds in amount the limit of the jurisdiction of the County Court, he shall direct the said action, cause, or matter to be transferred to the Supreme Court."

The expression "If it shall be made to appear to the judge" is a peculiar one, and it is difficult to know what it really means. If it is to be taken as meaning that the judge's attention must be actually drawn to the fact that there is an excess in value which ousts his jurisdiction, then that condition precedent to the transfer has not been satisfied here. But if it is to be read as synonymous with "if it appears to the judge," or "if it appears" (which is the same thing, because it is "to the judge" as the controlling power that sooner or later the "appearance" must be manifested, whether he is mentioned or not), which is the usual expression respecting developments during a trial, the difficulty is overcome. In my opinion, we are justified in giving the words the usual and more apt meaning, which, as applied to the case at bar, means that during the trial certain important facts were put in evidence that in a legal sense made it appear upon the record that the jurisdiction was being exceeded, and, therefore, the fact of the lack of jurisdiction did "during the progress of the action . . . . appear," even though, strangely enough, I may say with respect, it escaped the attention of judge and counsel, in view of the reported cases of *Parsons' Produce Co.* v. *Given* (1896), 5 B.C. 58; and *B.C. Board of Trade* v. *Tupper & Peters* (1901), 8 B.C. 291. The case of *Sunderland* v. *Glover* (1915), 1 K.B. 393; 84 L.J., K.B. 266, shews what the duty of the County judge is where his attention is challenged to the question of jurisdiction, and if there were any doubt about that fact, this case would have to go back to him to decide it, but as it is admitted that the juris-

MARTIN, J.A.

diction was lacking, as now "appears," and did in fact appear below, there is no obstacle in the way of our now making the order for transfer to the Supreme Court which he should have made.

As to the costs of this appeal, the appellant succeeds on a point not taken below and, therefore, he is not entitled to them, according to the settled practice of this Court, and so neither party should have an order in his favour for costs. The costs of the abortive trial should abide the result of the second trial.

GALLIHER, J.A.: At the hearing before us we held that the learned trial judge had no jurisdiction to hear the case when it appeared in evidence that the subject-matter of the action exceeded the limit in point of amount to which the jurisdiction of the Court was limited, but reserved the question as to whether we should order that the cause be transferred to the Supreme Court. On consideration, I think we should make the order which the County Court judge should have made, and which he had jurisdiction to make under Order IV., r. 13 of the County Court Rules. The order, therefore, will go. As the point was not raised until the case was set down for hearing on appeal, I would allow no costs of appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am in entire agreement with the reasons for judgment of my brother MARTIN herein. I would also allow the appeal.

MCPHILLIPS, J.A.

EBERTS, J.A.: I agree.

EBERTS, J.A.

Action transferred to Supreme Court.

Solicitors for appellant: *Senkler & Van Horne.*
Solicitor for respondent: *A. J. Kappele.*

MORRISON, J. (At Chambers)

de SCHELKING v. ZURBRICK.

1918

Oct. 17.

Practice—Security for costs—Foreigner—Action by—Temporary residence—Rule 981a.

DE SCHELKING v. ZURBRICK

When the Court is satisfied that a plaintiff, who is a temporary resident, will be present at the trial, an application for security for costs under marginal rule 981a will be refused.

Michiels v. *The Empire Palace Limited* (1892), 66 L.T. 132 followed.

APPLICATION by defendant for security for costs on the ground that the plaintiff is only temporarily resident within the jurisdiction. The plaintiff, who is a Russian, was doing diplomatic work for the Russian Government and was sent to Japan and subsequently to the United States. On his way to the United States *via* Vancouver, the United States immigration authorities stopped him. Owing to certain correspondence which arose from this, the plaintiff brought action against the defendant, a United States immigration officer, for libel. Heard by MORRISON, J. at Chambers in Vancouver on the 17th of October, 1918.

Statement

L. J. Ladner, for the application: The plaintiff's material must shew that he intends to reside permanently or for the duration of the trial. He might at any time return to Russia or France, where he has a residence.

McPhillips, K.C., contra: The material submitted comes directly under the case of *Michiels* v. *The Empire Palace Limited* (1892), 66 L.T. 132, where security was refused. The plaintiff had brought an action for libel against defendant, and the sole object was to have said action tried as soon and as speedily as possible, so as to clear certain allegations made against plaintiff's character. The plaintiff cannot return to Russia as he is not a Bolshiviki, and said Government would be liable to kill him and his family.

Argument

MORRISON, J.: The material satisfies me that the plaintiff will be present at the trial. I should therefore follow the case of *Michiels* v. *The Empire Palace Limited* (1892), 66 L.T. 132. Application for security refused.

Judgment

Application refused.

YAMASHITA v. HUDSON BAY INSURANCE CO.

MORRISON, J. (At Chambers)

1918

Oct. 29.

YAMASHITA v. HUDSON BAY INSURANCE CO.

Practice — Discovery — Corporation — One officer examined — Subsequent application to examine "agent"—Scope of term "agent"—Marginal rule 370c(2).

An agent of a company is included in the words "officer or servant" in marginal rule 370c (2), and may, on application, be examined for discovery.

APPLICATION to examine for discovery an agent of the defendant Company under marginal rule 370c(2). The plaintiff issued a writ against the defendant Company on an insurance policy and examined an officer of said Company for discovery, but the examination disclosed that he knew nothing of the transaction, the policy having been written by an agent who is now sought to be examined. Heard by MORRISON, J. at Chambers in Vancouver on the 29th of October, 1918.

Statement

Saunders, for the application, referred to *Dawson* v. *London Street R.W. Co.* (1898), 18 Pr. 223; *Hartnett* v. *Canada Mutual Aid Association* (1888), 12 Pr. 401.

Armour, contra: An agent does not come under the above rule. An agent is neither an officer nor a servant.

Argument

MORRISON, J.: This is an application for leave to examine the local agent of the Hudson Bay Insurance Co., who wrote up the policy in question, by way of discovery under marginal rule 370c(2):

"After the examination of an officer or servant of a corporation, a party shall not be at liberty to examine any other officer or servant without an order of the Court or Judge."

The objection is raised that an "agent" is not liable, under this rule, to be examined; that, in the meaning of the rule "agent" is not synonymous with "officer or servant." There is no definition of these words in the rules and, therefore, the literal and popular extended meaning should be given them: *The Queen* v. *Local Government Board* (1874), L.R. 9 Q.B. 148 at p. 151, *per* Blackburn, J. Murray's New Dictionary

Judgment

MORRISON, J. (At Chambers)
1918
Oct. 29.

YAMASHITA v. HUDSON BAY INSURANCE CO.

defines "officer" as one to whom a charge is committed, or who performs a duty, service or function; an agent. The same dictionary defines "agent" as one who produces an effect; the efficient cause. And as was the case in *Hartnett* v. *Canada Mutual Aid Association* (1888), 12 Pr. 401; and *Dawson* v. *London Street R.W. Co.* (1898), 18 Pr. 223, the examination can do the defendant no harm, for the examination can be used at the trial only if the trial judge so orders: sub-rule (1); *Lilja* v. *Granby Consolidated Mining, &c., Co.* (1916), 23 B.C. 147 at p. 151.

Application granted.

MORRISON, J. (At Chambers)
1918
Oct. 4.

BLUE FUNNEL MOTOR LINE COMPANY *ET AL.* v. CITY OF VANCOUVER AND BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. (No. 2).

BLUE FUNNEL MOTOR LINE CO. v. CITY OF VANCOUVER

Practice—Motion—Notice—Short leave for service—Indorsement on notice—Particulars required—Marginal rules 704 and 734.

When the time for return of a motion after service is curtailed by special leave, an indorsement on the notice must contain both the date upon which leave is given and upon which the motion is made returnable.

APPLICATION for an injunction restraining the City from proceeding with certain prosecutions, heard by MORRISON, J. at Chambers in Vancouver on the 4th of October, 1918. Special leave was given by GREGORY, J. on the 3rd of October, 1918, making application returnable on the 4th of October, 1918, under marginal rule 734. The notice was indorsed as follows: "Special leave for 4th Oct. '18. F. B. Gregory, J." The notice itself read:

Statement

"Take notice that by special leave of the Honourable Mr. Justice Gregory a motion will be made by counsel on behalf of the plaintiff before the judge who may be presiding in this Court at the Court House in the City of Vancouver, B.C., on Friday, the 4th of October, A.D. 1918," etc.

At the foot the notice of motion was dated Oct. 3rd, 1918.

The plaintiff served the defendant City of Vancouver with a copy of the notice on the 3rd of October, 1918, indorsed as above, and a copy of the writ of summons; he also served the defendant British Columbia Electric Railway Co. with a copy of notice and writ on the same day. No leave had been obtained to serve the writ with the notice of motion, nor had the copy served on the British Columbia Electric Railway Co. any indorsement of the short leave.

Cassidy, K.C., for the application.

Harper, for the City, raised two preliminary objections: (1) That the special leave indorsement was defective; and the indorsement must shew the date on which it was given and date returnable: see *Dawson* v. *Beeson* (1882), 22 Ch. D. 504 at p. 510; 48 L.T. 407 at p. 408; *Overton & Co.* v. *Burn Lowe, and Sons* (1896), 74 L.T. 776; *C.P.R.* v. *V.W. & Y. Ry. Co.* (1903), 10 B.C. 228 and 230; and (2), plaintiff must obtain leave to serve the writ with the notice: see marginal rule 704.

Argument

McPhillips, K.C., for British Columbia Electric Railway Co.: The copy of motion served on me shewed no special leave; the indorsement was left off. Plaintiff must comply with marginal rule 704.

Cassidy, contra: The special leave indorsation is a sufficient compliance with the rules and cases. The indorsement "special leave for 4th Oct. '18. F. B. Gregory, J." shewed the date returnable and the motion at the foot being dated October 3rd, 1918, shewed the date it was granted.

MORRISON, J.: I sustain the objection. When by special leave "time" is curtailed the indorsement on the notice of motion must shew the date leave is given as well as the date upon which it is made returnable.

Judgment

Objection sustained.

COURT OF APPEAL

1918

Nov. 19.

REX v. DELIP SINGH

REX v. DELIP SINGH.

Criminal law—Indecent assault—Attempt to commit—Evidence, sufficiency of—Criminal Code, Secs. 72 and 203.

The accused was charged with an attempt to commit buggery. The evidence for the Crown was given by the boy upon whom the alleged attempt was made, the boy's father, and two detectives. The accused had invited the boy to take rides with him, and owing to his actions the boy became suspicious of the accused's purpose and told his father, who informed the police. At the instigation of the police the boy made an appointment with the accused and took him to his father's stable. The two detectives were in the loft. The accused proposed they should commit the offence charged, and paid the boy fifteen cents. They both took off their coats and accused spread a blanket on the floor, telling the boy what to do. Accused then unbuttoned his trousers and put his arm around the boy. The detectives then rushed in and, seizing the accused, found on examination that his physical condition suggested the offence.

Held, that there was evidence of acts which established an attempt to commit the offence within the meaning of section 72 of the Criminal Code.

CRIMINAL APPEAL by way of case stated from a conviction by CAYLEY, Co. J., of the 24th of October, 1918. The accused was charged with the crime of attempting to commit buggery under section 203 of the Criminal Code. The case stated was as follows:

"The defendant, who is a Hindu, delivers sawdust at Hastings Mill, where also a young boy, 15 years old, named Travis, was also employed by the father, trucking. The defendant had once or twice invited the boy to take a ride with him. The boy became suspicious of the defendant's purpose in inviting him to take a ride with him, and told his father of the circumstances. The father went to the police and informed them of his and the boy's suspicions, whereupon the police told the boy to appear to consent to the defendant's invitation and they would keep watch. On Saturday, July 20th last, the defendant made an appointment with the boy to meet him. They met at the corner of Dunlevy and Union Streets at 8 in the evening. The defendant wanted the boy to go to Marine Drive with him. Instead they went to the boy's father's stable

Statement

on Dunlevy Street. They entered the stable and the defendant closed the door, which latches, and cannot be opened from the outside except by passing the hand through the window and lifting the latch from the inside. They went to the back of the stable. Upstairs in the loft the police had two detectives keeping watch. Arrived at an empty stall in the back, the boy watered the horses, when the defendant asked him if he wanted to earn some money. The boy asked "How?" The defendant answered in language which was a plain statement that the money was to be earned by joining in an act of sodomy. The defendant then gave the boy 15 cents. Both took off their coats and hung them up. The defendant spread a blanket on the floor and told the boy how he was to place himself. The defendant then unbuttoned his (the defendant's own) trousers and put his arm around the boy. The detectives at this moment rushed in and seized the defendant, whose trousers were unbuttoned, as mentioned. The officer felt his privates and stated that the man had an erection.

"The boy's evidence was given under oath, and at the conclusion of the Crown's case, counsel for the accused moved for a dismissal on two grounds: (1) That the boy, Travis, was an accomplice whose evidence required corroboration, and the same had not been sufficiently corroborated; (2) that the evidence of the boy, Travis, even if given full credence, did not establish the offence charged, but merely shewed a preparation for the commission of the actual offence of buggery.

Statement

"I reserved judgment and later on handed down judgment in writing, a copy of which is made part of this case, and which reads as follows: [After stating the facts as above, the learned judge continued.]

"On these facts, counsel for the defendant argued that up to this point the defendant had only made 'preparations,' but had not made an 'attempt' to commit the crime of sodomy. Counsel cited the folowing authorities: *Rex* v. *Snyder* (1915), 24 Can. Cr. Cas. 101; *Rex* v. *Sands* (1915), 25 Can. Cr. Cas. 116; *Rex* v. *Brousseau* (1916), 28 Can. Cr. Cas. 435; *Rex* v. *Menary* (1911), 18 O.W.R. 379, and Russell on Crimes, 7th Ed., Vol. 1, pp. 142 and 977. Counsel also argued as to want of corroboration of the boy's evidence, the police evidence not being sufficient.

COURT OF APPEAL

1918

Nov. 19.

REX v. DELIP SINGH

On this point I had no difficulty in holding that the corroboration was sufficient, but I reserved decision on the question raised on the motion to dismiss as to whether the evidence was sufficient to establish an 'attempt' or merely shewed 'preparation.'

"Section 72 of the Code declares that:

"'Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such an offence or not.'

"Here the defendant takes the boy into an empty stall at the rear of a closed stable, proposes an unnatural act to him, gives him money, unbuttons his trousers and takes hold of the boy. There is the 'intent' required by the statute, expressed in language to the boy and corroborated by the police finding the sexual organ as they have described it. There are a series of acts, of which unbuttoning his own trousers and laying hold of the boy are the most pronounced, all of which are acts 'for the purpose of accomplishing his object.' I find nothing in the cases cited to disturb my view that an 'attempt' was made within the meaning and words of the section quoted. In *Rex* v. *Snyder, supra*, it was held that 'a conviction for an attempt' (to assist a public enemy to proceed to join the enemy) 'is not sustainable where there was no incitement by the accused and the enemy alien had no intention of leaving Canada and no knowledge of the purpose of their being brought to the accused.' But here there was 'incitement' by the accused, and the boy had 'knowledge' of the accused's purpose. In *Rex v. Sands, supra*, the main element, the 'purpose' with which the police went to the accused's house was not the purpose indicated by the Code, but for another purpose. In the present case the 'purpose' for which the accused resorted to the boy was present and avowed. In *Rex* v. *Brousseau, supra,* the matter under consideration was whether a request by a municipal councillor for money from a municipal contractor, not acceded to, was an offence within section 161 of the Code, and the decision only affected the interpretation of section 161, and is not an authority in the interpretation of section 72 as I see it. The case of *Rex* v. *Menary, supra,* more nearly approaches the present one. This was a case of a charge of indecent assault upon a girl over 14 years of age. It came up by way of case reserved.

Statement

"'The learned judge asks whether he was right in directing the jury that if they could not find the prisoner guilty of having committed an indecent assault they might if they believed the evidence for the Crown find him guilty of an attempt to commit that offence':
(Magee, J.A. at p. 383).

"The jury did not find the accused guilty of indecent assault, but did find him guilty of an attempt to commit an indecent assault. But says Moss, C.J.O. at p. 380:

"'If the jury believed the evidence the offence [*i.e.*, indecent assault] was committed. If they did not there was nothing left whereon they could base a finding of an attempt.'

"Meredith, J.A.: 'Never heard before of such a charge as an attempt to assault.' He also says (p. 382):

"'He [the prisoner] plainly intended to have sexual intercourse with the girl, but there is no sort of evidence that he intended much less attempted, to have such intercourse against her will.'

"Magee, J.A. says (p. 384): 'The learned judge's question hardly raises the actual point involved.' Again he says:

"'The direction to the jury was misleading in giving them to understand that the prisoner might be convicted of an attempt to assault indecently if the prisoner intended to have sexual intercourse without full instruction that such intention must be to have such intercourse without her consent.'

"The accused was discharged accordingly.

"This case differs from the present in two essential particulars. First, as to 'consent,' whether the girl 'consented' was a vital factor. In the present case it is no factor whether the boy 'consented' or not. Second, the jury had acquitted the prisoner on the charge of assault and there was nothing left to found an attempt on. Either he assaulted her against her consent or he did not, and they found he did not. The remarks of Meredith, J.A. appeal to me on this point. It seems to me that the facts which would sustain an 'attempt' constitute an 'assault.' In the present case this element is wanting. No jury has found a self-contradictory verdict. In the way the *Menary* case came up before the Appeal Court it is evident that the judges thought the trial judge had not sufficiently instructed, if he did not mislead, the jury.

Statement

"The motion is dismissed, it being my holding that even disregarding the evidence on the point of the prisoner putting his arm around the boy, the rest of his actions constitute an attempt within the meaning of section 72.

COURT OF APPEAL

1918

Nov. 19.

REX v. DELIP SINGH

Statement

"The evidence for the defence was given by Mrs. Amer Chand and the accused. Mrs. Chand's evidence was that she kept a store and that the boy, Travis, called at her store on the day the offence was alleged to have been committed, between six and seven in the evening, and asked for the accused, and that she had known the accused two years and his reputation was good. The accused, on his own behalf, denied that he had on previous occasions asked the boy to ride with him; that he had closed the door of the stable; that he had put a blanket on the floor; that he had given the boy 15 cents; that he had taken hold of the boy; that the policemen, or either of them, had taken hold of his privates; that he had accused the police at the time of unbuttoning his pants. The explanation given of his actions was that he had gone to the stable to inspect a horse, as he wished to buy one, and while there had been seized by a call of nature, and that he wished to defecate in the stable. In answer to a question he replied that being arrested before he had obeyed the call of nature, he had not obeyed the call until the following day.

"My conclusion, on hearing the accused, was that he was not telling the truth, and that he was simply making up a story, while the boy's evidence I accepted as true throughout. I have reserved for the Court of Appeal the following questions:

"(1) Was I right in finding that the evidence of the prosecution proved that an attempt had been made by the accused as charged?

"(2) Was I right in finding that the evidence of the boy, Travis, was sufficiently corroborated?"

The appeal was argued at Vancouver on the 19th of November, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Harper, for the accused: The charge is under section 203 of the Code, and section 72 gives the definition of what constitutes an "attempt." They set a trap for this man, but my submission is the evidence does not disclose an attempt. As to police encouraging crime when the crime has not been committed see *Amsden* v. *Rogers* (1916), 30 D.L.R. 534. On the question of what constitutes an attempt see *Rex* v. *Pailleur* (1909), 20 O.L.R. 207 at p. 212; *Rex* v. *Robinson* (1915), 2 K.B. 342 at p. 348; *Reg.* v. *Eagleton* (1855), 6 Cox, C.C. 559 at p. 571;

Rex v. *Lloyd* (1836), 7 Car. & P. 318; *Rex* v. *Cole* (1902), 3 O.L.R. 389; *Reg.* v. *Roberts* (1855), 25 L.J., M.C. 17; *Reg.* v. *Boulton* (1871), 12 Cox, C.C. 87; *Rex* v. *Snyder* (1915), 24 Can. Cr. Cas. 101 at p. 109. In this case he had not made any final step; it must be the last act that is required for the commission of the offence: see *Reg.* v. *Ransford* (1874), 13 Cox, C.C. 9. He solicited, but that does not apply. He must be accused of soliciting.

Wood, for the Crown, was not called upon.

MACDONALD, C.J.A.: I think the appeal must be dismissed. The accused was convicted under section 203 of the Criminal Code. The question of whether an act done or omitted, with intent to commit an offence, is or is not only preparation for the commission of that offence and too remote to constitute an attempt to commit it is a question of law. We have to decide whether, on the evidence which came before the Court below, an inference might be drawn that the accused did attempt the offence in question.

I base my decision practically entirely upon the evidence of the boy Travis. Travis, upon whom the offence, or the attempt, alleged is found by the judge to have been committed, was in the box and was asked this question by Mr. *Wood,* counsel for the Crown:

MACDONALD, C.J.A.

"After unbuttoning his pants what occurred? He grabbed hold of me and was going to lay me down on the rug, and when he grabbed hold of me I said 'ouch.'"

And in answer to another question, he said this:

"I said when he grabbed hold of me, I said 'ouch,' and the detectives came in and grabbed him."

That shews what appears to have been the last act in this occurrence; the placing of the blanket upon the floor, the taking off of the coat and the unbuttoning of the pants had all taken place before, and this was the last act. Now then, the question is whether what the prisoner did at that time, just before the detectives came and stopped him, is within the subsection. Was what I have just read evidence of an attempt to commit, or was it merely preparation for the commission of the offence? I am perfectly clear that it was an attempt. It would hardly be possible to imagine a clearer case, a case where the act was

COURT OF APPEAL

1918

Nov. 19.

REX v. DELIP SINGH

more approximate to the crime which was about to be committed than this evidence shews. I do not think there is a question at all that the preparation had gone on before and that this was the last act which the accused was permitted to do before he was stopped.

MARTIN, J.A.

MARTIN, J.A.: I am of opinion that the facts set out here in the evidence of this boy alone are not too remote to constitute an attempt, in the words of the statute, to commit the offence. I have only to add to the facts referred to by the Chief Justice the significant one that the man, "after putting the blanket on the floor, laid down himself, and was pulling me down to him."

GALLIHER, J.A.

GALLIHER, J.A.: I think we should answer both questions in the stated case in the affirmative.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same opinion. The *mens rea* was present here. The preparation had gone on, and after the preparation there were acts which establish an attempt to commit the offence, that is, sufficient evidence was adduced at the trial upon which it can be said that there was no error in law in saying that the evidence supported an attempt, and if that is the case, his Honour in the Court below was correct; that is, I am of opinion that his Honour did not err in law, and that there was sufficient evidence of an attempt under the Criminal Code.

EBERTS, J.A.

EBERTS, J.A.: I agree with the remarks of the learned Chief Justice.

Appeal dismissed.

SEATTLE CONSTRUCTION AND DRY DOCK COMPANY v. GRANT SMITH & CO. & McDONNELL, LIMITED.

CLEMENT, J.

1918

Jan. 14.

COURT OF APPEAL

Nov. 5.

SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO.

Contract—Dry dock—Lease of—Covenant to insure—Insurance not obtained owing to method of user—Covenant to return—Loss of dry dock—Liability.

Under the terms of lease of a dry dock the lessee agreed to use it for making concrete caissons or cribs used in the construction of a breakwater and ocean pier; the lessee also covenanted to have it insured for the benefit of the lessor in some company or companies satisfactory to the lessor for not less than $75,000 against both marine and fire risks and to return it in good condition, less wear and tear, at the end of the term. The use of the dry dock for the making of concrete cribs was in the nature of an experiment and by reason of the method of user no insurance could be obtained although its seaworthiness was demonstrated by weathering a gale while being taken from Seattle to Esquimalt. After the completion of the cribs and when lowering the dry dock to float them off, the dry dock overturned and became a total wreck. It was held by the trial judge that the plaintiff was entitled to recover for breach of covenant to insure and rent to date of the issue of the writ.

Held, on appeal, that the proper construction to be placed upon the covenant to insure was that it was a covenant to indemnify against loss with the medium of an insurance against loss as a security, and irrespective of the amount of insurance agréed upon, the lessee is only liable for actual loss.

Per McPHILLIPS, J.A.: The loss of the dry dock is not a loss that could be characterized as a "marine risk," and there could not be damages for this default, but action is maintainable for the loss of the dry dock on the covenant to re-deliver.

APPEAL from the decision of CLEMENT, J. in an action for damages for the loss of a dry dock, tried by him at Vancouver on the 18th to the 31st of October, the 1st to the 15th and the 22nd of November, the 18th and 20th of December, 1917, and the 2nd and 3rd of January, 1918. On the 20th of May, 1914, the plaintiff Company leased a dry dock to the defendant for two years at a yearly rental of $15,000, the lessee agreeing to insure against marine and fire risks for not less than $75,000. The defendant being engaged on a contract for the construction

Statement

CLEMENT, J.

1918

Jan. 14.

COURT OF APPEAL

Nov. 5.

SEATTLE CONSTRUCTION AND DRY DOCK CO. *v.* GRANT SMITH & CO.

Statement

of piers at the outer wharf in Victoria, took the dry dock from Seattle to Esquimalt Harbour, and there proceeded to construct on the floor of the dry dock two concrete caissons or cribs that were to be used in connection with the construction of the piers. The cribs were completed and while the dry dock was being lowered in order to allow the caissons to float off, it overturned and sank. The plaintiff claimed $150,000 damages for the loss of the dry dock or in the alternative $75,000 for breach of contract to insure the dry dock, and $25,000 for rent. The defendant claimed that through the fraudulent misrepresentations of the plaintiff, who knew the dry dock was not fit for the work contemplated, it was induced to lease the dry dock for the construction of the cribs, and they counterclaimed for the amount of their losses owing to the sinking of the dry dock. The particulars relevant to the issue are sufficiently set out in the judgments on appeal.

E. P. Davis, K.C., and *Armour*, for plaintiff.
S. S. Taylor, K.C., and *Ernest Miller*, for defendant.

14th January, 1918.

CLEMENT, J.

CLEMENT, J.: In my opinion the charge of fraud made against Mr. J. V. Paterson entirely fails. The evidence as to what took place at the two interviews in Seattle between Mr. Paterson and Mr. Bassett (at one of which Mr. Marshall was present) is not as clear as it might be. Mr. Bassett's recollection of the discussion is confused; he gives figures as to the weight of the proposed caissons which vary materially and he talked short tons to a man who apparently would take to mean long tons. Mr. Marshall is, I think, clearly mistaken in saying that Mr. Paterson made the statement that the dock in question had had a ship load of 8,000 tons on her not three weeks before. Mr. Bassett mentions no time and puts it at 6,000 tons; and the witness Gavin says she had carried 6,000 tons during Heffernan's time. But apart from these discrepancies, I have no hesitation in saying that Mr. Paterson's statements about the dock, her capacity and the likelihood of her doing the proposed work were the honest statements of beliefs actually entertained by him at the time and, in fact, strongly adhered to at this trial. Mr. Paterson is a domineering, impatient man, prepared to instruct

counsel as to the proper methods of examination and to usurp the functions of the Court in ruling upon questions of relevancy and prolixity; but that while sometimes very irritating did not lead me to any inference of untruthfulness. On the other hand, the attitude of the defendant Company was that of a man who thinks that if (to use a slang phrase) he throws enough mud some of it will stick. I should add, in view of the state of the notes of the evidence before me, that Mr. Paterson is inflicted with an impediment in his speech, and any hesitation or stammering on his part was not due to lack of clearness or decision in his testimony. Rogers's evidence I entirely discredit.

Fraud negatived, there is in my opinion no answer to the plaintiff's action on the covenant to insure. The covenant is absolute, but, in my view, there is no room on the facts here for the application of the doctrine of impossibility of performance. The underlying principle upon which that doctrine rests, namely, an implied condition or term of the contract, has been recently expounded in two cases in the House of Lords: *Horlach* v. *Beal* (1916), A.C. 486; and *F. A. Tamplin S.S. Co.* v. *Anglo-Mexican Petroleum Co.* (1916), 85 L.J., K.B. 1389. The event which happened here was, I think, a marine risk within the meaning of the covenant. The plaintiff therefore is entitled to recover $75,000 for breach of the covenant to insure for that amount.

CLEMENT, J.

As to the rent: I can only allow the rent overdue on the day the writ issued. I make the amount to be $12,000, but this may be spoken to if the parties differ.

Judgment accordingly for the plaintiff for $87,000 with costs.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 15th to the 22nd of May, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

S. S. Taylor, K.C. (*Ernest Miller*, with him), for appellant: One of the issues was negligence on our part in putting on a superstructure and putting the cribs too far apart, but it was not argued at the trial. The learned judge gave judgment on the issue that the dock was not insured and also for rent for

Argument

CLEMENT, J.

1918

Jan. 14.

COURT OF APPEAL

Nov. 5.

SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO.

$10,000. The points to be considered are: (1) Insurance; (2) rent; (3) the issue of fraud raised by us in defence. On the question of insurance we say, (1) that the defendant covenanted to insure against a marine risk but we say this was not a marine risk; (2) it was impossible to get the insurance, every reasonable attempt having been made to obtain the same; (3) the insurance clause was waived by the plaintiff. To be a marine risk it must be a marine adventure and not an internal vice. The dry dock was 24 years old, and we had to put in new bracing and new floors. The idea of building cribs on a dry dock was new. If a boat founders when not seaworthy, or its boiler blows up it is not a marine risk. Such a risk is distinguished from internal vice: see Arnould on Marine Insurance, 8th Ed., pp. 1, 2 and 1017 to 1024; *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, & Co.* (1887), 12 App. Cas. 484 at p. 489; *Wilson, Sons & Co.* v. *Owners of Cargo per the "Xantho," ib.* 503 at p. 509. As to the *causa proxima* in connection with marine insurance see *Becker, Gray and Company* v. *London Assurance Corporation* (1918), A.C. 101 at pp. 112 to 116; *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society, ib.* 350 at pp. 365-6; *Stott (Baltic) Steamers, Limited* v. *Marten* (1916), 1 A.C. 304 at pp. 307-8; *Ballantyne* v. *Mackinnon* (1896), 2 Q.B. 455 at p. 460; *Boyd* v. *Dubois* (1811), 3 Camp. 133. On the question of inherent vice see *Ballantyne* v. *Mackinnon, supra,* at pp. 459 to 461; *Fawcus* v. *Sarsfield* (1856), 6 El. & Bl. 192 at pp. 200 to 205; *Dudgeon* v. *Pembroke* (1874), L.R. 9 Q.B. 581 at pp. 596-7. Lord Halsbury says, "marine risks" and "perils of the sea" are one and the same thing: see *Creeden & Avery, Ltd.* v. *North China Insurance Co.* (1917), 24 B.C. 335; *E. D. Sassoon & Co.* v. *Western Assurance Company* (1912), A.C. 561; *Merchants' Trading Co.* v. *Universal Marine Co.* (1870), 2 Asp. M.C. 431(n), cited in *Dudgeon* v. *Pembroke, supra,* at p. 596. On the question of seaworthiness being admitted see *Cantiere Meccanico Brindisino* v. *Janson* (1912), 3 K.B. 452; Arnould on Marine Insurance, 9th Ed., 872. No one could recommend the dock for insurance as she was defective in design and weak in construction. In lowering the dry dock after the caissons were completed they had to jig

Argument

it down, which shews it was defective as it should have gone down evenly. On the question of fraud the concealment of facts by Paterson (the plaintiff Company's manager) amount to fraud. As to what his duty was see *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925 at p. 954; *Schneider* v. *Heath* (1813), 3 Camp. 506; *Shepherd* v. *Kain* (1821), 5 B. & Ald. 240; *Robson* v. *Roy* (1917), 2 W.W.R. 995 at pp. 997-8; *S. Pearson & Son, Limited* v. *Dublin Corporation* (1907), A.C. 351 at pp. 353 and 356. When Paterson asked us to admit the dry dock was fit for the work, a duty was cast on him to give us all the information he had: see *Campbell* v. *Rickards* (1833), 5 B. & Ad. 840; Halsbury's Laws of England, Vol. 20, pp. 688 to 690; *Derry* v. *Peek* (1889), 14 App. Cas. 337 at p. 374; *Arnison* v. *Smith* (1889), 41 Ch. D. 348 at pp. 372-3; *Barron* v. *Kelly* (1917), 24 B.C. 283; *Shepherd* v. *Pybus* (1842), 3 Man. & G. 868 at pp. 878-882; *Hart* v. *Swaine* (1877), 7 Ch. D. 42 at pp. 46-7. As to inducing parties to enter contract by making representations that are untrue see *Bannerman* v. *White* (1861), 10 C.B.N.S. 844; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1 at pp. 13-14. He knew the dock would not function with the load we had on her. They must prove negligence before they can receive rent after the accident: see *Reynolds* v. *Roxburgh* (1886), 10 Ont. 649 at pp. 655 to 659. As to liability for rent under a lease after destruction of property see *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 at p. 838; *Chamberlen* v. *Trenouth* (1874), 23 U.C.C.P. 497; *Boswell* v. *Sutherland* (1881), 32 U.C.C.P. 131; (1883), 8 A.R. 233.

Argument

Davis, K.C., for respondent: I will take up the fraud charge as it is the only question that arises in the case. For years this was the only dock on the coast and a former owner made very large profits. Then other docks came in. Their evidence was, it was dangerous in lowering and would upset, but there never was a case where it upset before. This is not an action of misrepresentation, but an action of deceit, fraud pure and simple. The question is fully dealt with in *Derry* v. *Peek* (1889), 14 App. Cas. 337. They say first that Paterson said the dredge was fit for the work for which it was leased when he knew it was unfit. Secondly, that the seaworthy clause in the agreement

CLEMENT, J.

1918

Jan. 14.

COURT OF APPEAL

Nov. 5.

SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO.

was put in by Paterson; and thirdly, he purposely kept the dry dock from being docked for repairs. If there was deceit, all the other witnesses as to the state of the dry dock must have been in the deceit. We admit Paterson said it was fit for the work, but he thought it was. The evidence shews that the difficulty of obtaining insurance was entirely due to the superstructure put on the dry dock by the defendant, and not owing to the fact that it was not put in dry dock. The covenant to obtain insurance was an absolute one, and we say it was not impossible to obtain it. As to the impossible rule see *Blackburn Bobbin Company* v. *T. W. Allen & Sons* (1918), 1 K.B. 540; 34 T.L.R. 266 at p. 268. In the case of an ordinary bailee for hire *Reynolds* v. *Roxburgh* (1886), 10 Ont. 649, is different, as in this case there is the additional element of a covenant to return in as good shape as it was at delivery. The covenant is put in as additional security: see *Grant* v. *Armour* (1894), 25 Ont. 7; *Carr* v. *Berg* (1917), 24 B.C. 422. As to "marine risk" and the words "peril of the sea" we can argue that what happened was a "peril of the sea": see *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518 at pp. 519 to 524; *Wilson, Sons & Co.* v. *Owners of Cargo per the "Xantho," ib.* 503. "Perils of the sea" is a highly technical expression. "Marine risk" is not in any dictionary. The question is whether it falls within a risk connected with the sea: see *Yuill & Co.* v. *Robson* (1908), 1 K.B. 270; *Enlayde, Limited* v. *Roberts* (1917), 1 Ch. 109. The cases shew that in order to recover it is not necessary for us to prove negligence: see Beal on Bailments, pp. 109-10; *Anglin* v. *Henderson and Colpoys* (1861), 21 U.C.Q.B. 27. This is a case where the amendment to the pleadings should be allowed: see *Stilliway* v. *Corporation of City of Toronto* (1890), 20 Ont. 98; *Gough* v. *Bench* (1884), 6 Ont. 699; *Tildesley* v. *Harper* (1878), 10 Ch. D. 393; *Laird* v. *Briggs* (1881), 19 Ch. D. 22 at p. 29; *Ecklin* v. *Little* (1890), 6 T.L.R. 366; *Strong* v. *Canadian Pacific Ry. Co.* (1915), 22 B.C. 224.

Argument

Armour, on the same side: There must be no misrepresentation or concealment on the obtaining of a marine policy: see Arnould on Marine Insurance, 9th Ed., p. 43, par. 30; p. 843, par. 686; and p. 845, par. 688. On the question of the credi-

bility of witnesses see *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Re Wagstaff; Wagstaff* v. *Jalland* (1907), 98 L.T. 149. It is our contention that this is a case where the trial judge should be followed: see *Montgomerie & Co., Limited* v. *Wallace-James* (1904), A.C. 73 at p. 83; *Camsusa* v. *Coigdarripe* (1904), 11 B.C. 177. The onus is on them and they did not discharge it. When there is a superstructure on a dry dock and there is a list the centre of gravity raises very rapidly, and they have not shewn why the accident happened. He only gave us rent up to time of issue of writ. We are not required to prove negligence. On the question of breach of covenant to return dry dock see *Lister* v. *Lane and Nesham* (1893), 62 L.J., Q.B. 583; *Schroder* v. *Ward* (1863), 13 C.B. (N.S.) 410.

Miller, in reply: While it might not be fraud to apply for $34,500 insurance it would be to apply for $75,000 in the face of Paterson's affidavit. On the question of failure to disclose and necessity of giving full information see Arnould on Marine Insurance, p. 760, pars. 591-2; *Thames and Mersey Marine Insurance Company* v. *"Gunford" Ship Company* (1911), A.C. 529; *William Pickersgill & Sons, Limited* v. *London and Provincial Marine and General Insurance Company, Limited* (1912), 3 K.B. 614. On marine risks in harbours see *Bailey* v. *Cates* (1904), 11 B.C. 62; 35 S.C.R. 293. As to rent, where article bailed is destroyed the rent is at an end: see Beal on Bailments, pp. 229-30.

Argument

Cur. adv. vult.

5th November, 1918.

MACDONALD, C.J.A.: I concur in the judgment of Mr. Justice GALLIHER.

MACDONALD, C.J.A.

MARTIN, J.A.: I am of opinion this appeal should be allowed to the extent of reducing the judgment in the manner suggested by my learned brothers.

MARTIN, J.A.

GALLIHER, J.A.: After a complete review of the evidence and eliminating the evidence of Rogers (which I think I must in view of what has been stated by the learned trial judge), I am unable to find fraud. I wish to add, however, that there must have been something apparent to the learned trial judge,

GALLIHER, J.A.

CLEMENT, J.

1918

Jan. 14.

COURT OF APPEAL

Nov. 5.

SEATTLE CONSTRUCTION AND DRY DOCK CO. *v.* GRANT SMITH & CO.

GALLIHER, J.A.

who saw Rogers and heard his testimony, other than what one gathers by reading it, which led to his being "entirely discredited."

The evidence to establish fraud should be clear and convincing, and I cannot say that this is so. What I think must be deduced from the evidence is that, apart from the survey reports upon the dry dock by Logan, Gibbs, Fowler and Walker, and the report by the dockmaster Hollywood, and the plan prepared by Jaynes when it was proposed to change from steam to electricity in operating, Paterson's knowledge of the structure must be taken to be that of one who had from time to time seen the dock in operation and who knew in a general way of the nature of the work being performed by it and the ships that were being handled thereon and their approximate tonnage, but who had made no inspection of the structure and was not in a position, apart from what I have stated, to more than in a general way express his opinion as to its fitness. It is complained of that at the time the lease was entered into Paterson did not disclose the nature of the reports I have above referred to to Bassett, who was acting for the defendant in the negotiations. Speaking of Logan's report, and that of Fowler, Gibbs, and Walker, I do not think the production of those reports would have influenced Bassett against the entering into the lease on behalf of his company, perhaps the contrary, and as to the report of Hollywood, its significance is in the fact that the dock when it broke away from its moorings, just previously to its being taken over to the plaintiff's quarters from the Heffernan works, was badly strained and leaking, and were it not for the fact that, in my view of the evidence, the damage suffered in the accident by straining (and taking into consideration the false bottom that was put in by Bassett himself and which remained intact after the sinking) was not the cause of the dock sinking, more stress might be laid upon the non-disclosure of that fact than we would be warranted under the circumstances in doing.

It is true that in the survey reports the dock was ordered into dry dock for the purpose of ascertaining the extent of the damages and for overhauling and repairing, and in this connection Mr. *Taylor* made the contention that Paterson never

really intended that it should go into dry dock. I think that contention is not for a moment maintainable when one reads the correspondence which passed between Paterson, the Commandant of the Navy Yard, and the defendant, and if Paterson's efforts to have the dock dry-docked were genuine, there could be no sinister object in his withholding the Hollywood report, as in the dry dock the defendant would have an opportunity of examining and ascertaining the exact nature of the damage suffered (and were to be informed and were from time to time kept in touch with the efforts made to dry-dock the structure).

After repeated postponements it became apparent that the dock could not be handled by the Naval authorities for some considerable time, and Paterson suggested that if the defendant could not wait, that by making repairs such as Bassett afterwards did, the dock could be operated safely, in his opinion, for two years. In his evidence Paterson says that was his honest opinion then, and still is. I do not regard this as a warranty but as an opinion based on his general knowledge of the dry dock before referred to by me. Moreover, the lease is in writing and contains no warranty, and this is merely a subsequent verbal statement. This is not that clear class of evidence upon which fraud or misrepresentation can be based, or the withholding of facts can be said to be material, especially in the light of the subsequent events which happened. I think when it was found that the structure could not be dry-docked, Paterson honestly believed that with the repairs suggested the dock would be found capable of handling the work for which it was required, and so gave his opinion. It is, I think, also worthy of note, that Bassett did not at any time after the wreck and up till action brought, and after he had acquired knowledge of the breaking adrift in Seattle, lay any claim to that in any way bringing about the accident in sinking, although in the meantime he had an examination made of the wreck. Such being my view, I think we may now come to the covenant to insure contained in the lease, and with regard to that it is objected that it is not a marine risk. I am inclined to the view that this is not in the strict sense in its entirety a marine risk (although I have not fully considered and do not decide the

CLEMENT, J.
1918
Jan. 14.
COURT OF APPEAL
Nov. 5.
SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO.
GALLIHER, J.A.

point, not thinking it necessary). While the parties call it in the lease a marine risk, it is abundantly clear that their minds met as to the nature of the risk that would be incurred and would be insured against, *viz.*: the risk incurred in erecting the caissons upon the dock and lowering the dock so as to float those caissons off, coupled with other risks incidental to a marine risk, such as the action of wind and waves. That is what the parties were dealing with, and if they chose to call that a marine risk, that is a form of words only. Now, as to how that would affect the insurance companies, it is equally clear that the applications to them were understood by them to be for a risk such as I have before described, and there is no suggestion throughout that it would be refused on account of the nature of the work, and apparently all the agents desired to be assured of was that the dock was capable of performing the functions which they knew it was intended to perform. The defendant covenanted to insure the dry dock, and I am unable to find that they could not have obtained that insurance. That they made honest efforts to obtain same is beyond dispute, but up to the time of the wreck, although negotiations were still pending, they had been unable to do so, due chiefly to the attitude of Logan, I think, who, to use his own expression, "threw the monkey-wrench into the machinery," upon a view, which I must say, in the light of the expert evidence, was based upon wrong premises. I am inclined to think, however, that whether it was impossible or not to secure this insurance, that feature does not really enter into the question so as to be of moment.

When one looks at the covenant to insure, which is as follows:

"The lessee agrees to have said dry dock insured for the benefit of said lessor in some company or companies satisfactory to the lessor, in the sum of not less than seventy-five thousand ($75,000.00) dollars, against both marine and fire risks, and to pay the premiums on such insurance and keep the same in full force during the term of this lease or of any extension thereof,"

I think the proper construction to be placed thereon is that it was a covenant to indemnify against loss, with the medium of an insurance against loss as security; and if this view be a correct one, then it is not a question of a valued policy (whatever effect that might have) but of indemnity for actual loss.

This brings us to a consideration of the value of the dry dock itself. The appraisers in stock-taking valued it at $34,500, and while I quite admit that in such circumstances depreciations are allowed for and the real value might be more than that fixed in this case, we have much other evidence on the point. Paterson himself swears in his sworn statement for customs purposes that the value is $34,500 and his attempted explanation of that, to say the least, is far from convincing. Upon the evidence I doubt very much if the dock was worth this figure. It was a dock some 23 years old, and was before the improvements made upon it by Bassett as to its bottom, in a partially rotten and leaky condition. I certainly would not go beyond the valuation placed upon it by Paterson himself, and had the evidence not been so contradictory on the point of value, I should be inclined to value it at considerably less. Paterson cannot complain if he recovers his own valuation. I agree with the learned trial judge as to the amounts of rents allowed for.

The appeal should be allowed with costs, and the judgment below reduced by $40,500.

McPHILLIPS, J.A.: This appeal was argued at great length and the evidence is certainly most voluminous, yet I do not view the case as one that is at all complicated or intricate when viewed as I venture to think it should be viewed. The action has reference to the hire of a chattel, the instrument shewing the contract of hiring, being in the form of a lease, and the material paragraphs are in the following terms:

"2. The lessee will take delivery of said dry dock at the plant of said lessor in Seattle, Washington, and for the purpose of this lease, the seaworthiness of said dry dock, and its fitness for the work contemplated by said lessee, are hereby admitted by the lessee.

"3. The lessee agrees to have said dry dock insured for the benefit of said lessor in some company or companies satisfactory to the lessor, in the sum of not less than seventy-five thousand ($75,000.00) dollars, against both marine and fire risks, and to pay the premiums on such insurance and keep the same in full force during the term of this lease, or of any extensions thereof.

"4. Said dry dock shall be used by the lessee in its construction work on caissons and other similar work, at or near Victoria, British Columbia. Said dry dock shall not be used by said lessee, nor shall such use be permitted by it, in dry docking for ship repair work, or other similar work in

CLEMENT, J.

1918

Jan. 14.

COURT OF APPEAL

Nov. 5.

SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO.

competition to the business of the lessor or other companies engaged in similar business.

"6. The lessee further covenants to re-deliver said dry dock to said lessor at its plant in Seattle, Washington, upon the termination of this lease, in as good condition as the same was in at the time of its delivery to said lessee hereunder, except for natural wear and tear.

"7. In the event said lessee makes default in the payment of said rent, or any part thereof, as the same becomes due and payable under the terms hereof, or makes default in any of the other covenants or obligations of the lessee hereunder, then said lessor shall have the right to retake possession of said dry dock and terminate this lease, but without prejudice to its right to recover from said lessee rentals for the entire term, and all damages, sustained by the lessor by such breach or breaches of the covenants of the lessee herein."

The dry dock was not a registered ship. The dry dock, as the lease shews, was not to be used "in dry-docking for ship-repair work," etc. The appellant leased the dry dock for use in carrying on certain contract work with the Government of Canada in the outer harbour of the City of Victoria in connection with large improvements there being carried out by the Government of Canada, consisting of a breakwater and a series of ocean piers, the immediate work to be done and with which work the dry dock was to be used was "construction work on caissons." It will, therefore, be seen that the usual and customary work for which the dry dock was constructed was departed from, and the evidence shews that the proposed use to which the dry dock was to be put was a scheme of use worked out by Bassett, the manager for the appellant in the construction of the piers. It was, it would appear, a novel scheme and one of Bassett's own devising. In his evidence upon this point we find him saying in answer to questions put to him by counsel for the respondent as follows:

MCPHILLIPS, J.A.

"Whose scheme was it to build these pontoons, or casings, or cribs, whatever you call them, on the dry docks? It was mine.

"Had you had any experience of that before? No, sir, these cribs, I think this is the first ones that were ever built—pioneer."

Therefore it is at once apparent that the use to which the dry dock was to be put was not the normal or customary work for which it was constructed and used, and it would be unquestionably largely one of experiment. It is true that the respondent knew generally (but only generally—not specifically) the use to which the dry dock was to be put, *i.e.*, the respondent was unaware of the specific manner of use. The dry dock was

brought from Seattle to Esquimalt Harbour (and through a gale), a voyage of some 80 miles up Puget Sound into the Straits and into the Royal Roads, and from there into Esquimalt Harbour. In transit it was insured against marine risk, but no insurance was ever placed in compliance with clause 3 of the lease, either marine or fire insurance. The evidence shews, I think, conclusively that no insurance could be obtained owing to the method of user of the dry dock. Captain Logan, a salvage association surveyor, and Lloyd's representative for the entire Pacific Coast (London Salvage Association), a gentleman of undoubted standing and high professional knowledge and experience, having made an adverse report, it was impossible to effect the insurance. The respondent became aware of this, and it was tentatively suggested by the respondent that a bond be procured instead, but it was never procured. It will be seen that delivery of the dry dock was to be taken at Seattle, and "for the purpose" of the lease the "seaworthiness" of the dry dock and "its fitness for the work contemplated" by the appellant was "admitted" by the appellant. This fitness must in an especial manner be said to be more in the knowledge of the appellant than it could be in the respondent, unacquainted as it would be with the detail of the manner of use. The "seaworthiness" was demonstrated in the "dry dock" weathering the gale and its arrival in apparent good order at Esquimalt Harbour. The dry dock was known to be not a new or modern dry dock—it was, in fact, 25 years old, and had for years been used successfully in the docking of ships. The appellant did a certain amount of work on the dry dock; replanked it, and there was overhead construction placed on it with a travelling crane; in fact, it is in evidence that a very considerable weight was put on the dry dock which would reasonably affect its stability and submit it to a great strain, different from that use for which it was originally constructed. The caissons were built upon the dock and were completed some two weeks before the accident took place, and considerable leakage took place, yet it cannot be gainsaid that there is evidence which goes to shew that the manner of use of the dock could not be said to be negligent. Still, it was a novel use, and its effect could not be said to be other than problematical, nor can it be said to be a matter

CLEMENT, J.

1918

Jan. 14.

COURT OF APPEAL

Nov. 5.

SEATTLE CONSTRUCTION AND DRY DOCK CO. *v.* GRANT SMITH & CO.

of wonderment that the dry dock, put to such different use to what it was originally constructed for, that that happened which did happen, namely, the dry dock in the end listed to port and collapsed and became a total loss, breaking up to such an extent that apparently it was out of the question to attempt salvage. The appellant laid fraud in the case, and evidence was led to support this, and it was not found by the learned trial judge, and I entirely agree with the learned judge. The attempted case of fraud was built upon many points of evidence. It was said that the respondent knew through its officers that the dry dock was not well and sufficiently constructed; that the plans shewed this; that this was unknown to the appellant, yet we have inspection and work done on the dry dock by the appellant, its standing a gale, and apparently delivered in good order. Further, it had done its work for long years, but necessarily the years of user have had the natural effect, also being subject in these waters to the toredo. It cannot be said that the samples exhibited in Court though, taken from out of the water long after the accident, could be said to be authentic evidence of its condition at the time of the accident, it cannot be said upon the evidence, in my opinion, that the proximate cause of the accident was because of any defect or withheld information as to the known condition of the dry dock, present to the minds of officers of the respondent; rather, in my opinion, the accident was due to the unusual use to which the dry dock was subjected, and the undue strain put upon it—strain not in navigation, but in the peculiar manner of use. Some stress was laid upon the fact that the dry dock had been subjected to some strain before it was leased to the appellant, a fact not made known to the appellant, and that it had been ordered into dry dock by the underwriters then holding the marine risk thereon, but owing to difficulties in getting docking facilities this was never done. Viewing all the evidence upon this point, I cannot see that it has any relevancy in the way I look at the whole case. Seaworthiness and fitness for the work was admitted, and this, in the absence of fraud, is, in my opinion, conclusive. The dry dock established "seaworthiness" after its delivery to the appellant, and its fitness for the work as well as the seaworthiness

MCPHILLIPS, J.A.

were risks the appellant took, and contracted themselves out of any right of action in respect thereof.

The learned trial judge entered judgment for the respondent upon the failure to place the insurance covenanted to be placed in pursuance of clause 3 of the lease, *viz.*: "$75,000 against both marine and fire risks." I am of the opinion that the loss of the dry dock was not a loss which could be characterized as a "marine risk" (of course "fire risk" does not enter into the question), and, therefore, the proximate cause of the loss not being a marine risk there could not be damages for this default. As to what constitutes a marine risk there has been much variance of authority, but the point can be said to be now fairly well settled, as the following cases shew: *Wilson, Sons & Co.* v. *Owners of Cargo per the "Xantho"* (1887), 12 App. Cas. 503 at p. 509; *E. D. Sassoon & Co.* v. *Western Assurance Company* (1912), A.C. 561; *Koebel* v. *Saunders* (1864), 33 L.J., C.P. 310; *Greenshields, Cowie & Co.* v. *Stephens, & Sons, Limited* (1908), A.C. 431 at p. 435; *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518; *Inchmaree Case, Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser & Co., ib.* 484; and see *Creeden & Avery, Ltd.* v. *North China Insurance Company,* 24 B.C. 335 at pp. 338-46; (1917), 3 W.W.R. 33 at pp. 34 to 42, where my brother MARTIN and I collected and discussed the cases.

MCPHILLIPS, J.A.

It is a matter for remark that the appellant failing in getting insurance, it was then, if at all, that it might have been open for the appellant to have taken the stand and to have elected to rescind the lease upon the ground that it had been imposed upon and induced to enter into the lease by fraud, *i.e.*, that the failure to place insurance was because of unseaworthiness and unfitness for the work, to which the dry dock was being put, but this course was not adopted and it is too late now to ask for rescission (*Glasgow and South Western Railway* v. *Boyd & Forrest* (1915), A.C. 526).

With impossibility to place the insurance, that, in my opinion, would not relieve the appellant from liability if the loss was a loss that the insurance would, if placed, have covered. This point of law has been much canvassed of late, following upon

CLEMENT, J.

1918

JAN. 14.

COURT OF APPEAL

NOV. 5.

SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO.

the principle laid down in the well-known case of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826. I would content myself in referring only to the very recent case of *Blackburn Bobbin Company* v. *T. W. Allen & Sons* (1918), 1 K.B. 540; 34 T.L.R. 266, 508, and I am clear upon it that if it was pertinent to the present case and the loss could be said to be one that would have been covered by the requirement for insurance as contained in the lease, then the appellant would have been liable for its failure to place the insurance and could not be excused upon the ground of impossibility.

The reports which are in evidence as to the condition of the dry dock have not been displaced, in my opinion, and the reports were made by men of capacity and long experience, and there is no warrant for the contention that the statements were not honestly believed in. The dry dock was not built by nor for the respondent, but was built for other well-known people, who had successful experience with it, and there was nothing to lead to the belief that there was, as alleged on the part of the appellant, any "inherent vice" in construction.

I therefore arrive at the conclusion, with great respect, that the learned trial judge erred in entering judgment for the respondent upon the ground that because of the failure to place the insurance the respondent was entitled to judgment for damages to the extent of the insurance covenanted to be placed, *viz.*: $75,000, in that the loss would not have been within the category of a marine risk if placed, and no recovery could have been had under a policy insuring against marine risk, but I am of the opinion that there is a good cause of action established upon the evidence adduced at the trial and within the statement of claim for the total loss of the dry dock and the inability upon the part of the appellant to return the dry dock in pursuance of the terms of the lease. As to the rent, it cannot be allowed for a longer period than up to the time of the commencement of action, the respondent then electing to have the damages assessed as of that date (the action was brought before the expiry of the demise). Two cases in Ontario treat of the principle of law applicable to the present case, and may be usefully referred to—*Reynolds* v. *Roxburgh* (1886), 10 Ont. 649, and *Grant* v.

MCPHILLIPS, J.A.

Armour (1894), 25 Ont. 7. The head-note of the latter case reads as follows:

"Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although in consequence of unforeseen causes the performance has become unexpectedly burdensome or even impossible.

"The defendants hired the plaintiff's scow and pile driver, at a named price per day, they to be responsible for damage thereto, except to the engine, and ordinary wear and tear, until returned to the plaintiff. While in the defendants' custody, by reason of a storm of unusual force, the scow and pile driver were driven from their moorings and damaged:—*Held*, that the defendants were liable for the damages thus sustained, and for the rent during the period of repair. *Taylor* v. *Caldwell* [(1863)], 3 B. & S. 826 followed. *Harvey* v. *Murray* [(1884)], 136 Mass. 377 approved."

Even were the action maintainable upon the ground that the breach was the failure to place the insurance, the damages could have only been, apart from the rent, the value of the dry dock now a total loss. There was no contract for a valued policy, and the value upon all the facts and surrounding circumstances, in my opinion, could not reasonably upon the evidence as adduced at the trial be placed higher than the value sworn to by Mr. Paterson, the president of the plaintiff Company (the respondent), and that was $34,500 (see *Carreras (Limited)* v. *Cunard Steamship Company (Limited)* (1917), 34 T.L.R. 41, and note that that also was a case of "the value shewn in the customs entries"). To that amount would be added the rent as allowed by the learned trial judge. (Fry, L.J. in *Joyner* v. *Weeks* (1891), 60 L.J., Q.B. 510 at p. 517: "As a general rule I conceive that where a cause of action vests, the damages are to be ascertained according to the rights of the parties at the time when the cause of action vested.")

MCPHILLIPS, J.A.

I would, therefore, allow the appeal to the extent indicated. It follows that the appellant can recover nothing upon the counterclaim.

EBERTS, J.A.: I agree with GALLIHER, J.A.

EBERTS, J.A.

Appeal allowed in part.

Solicitors for appellant: *Mackay & Miller.*
Solicitor for respondent: *D. G. Marshall.*

COURT OF APPEAL

1918

Nov. 28.

SEATTLE CONSTRUCTION AND DRY DOCK COMPANY v. GRANT SMITH & CO. & McDONNELL, LIMITED. (No. 2.)

Execution—Security deposited—Stay—Amount of judgment reduced on appeal—Leave to appeal to Privy Council—Subsequent application to withdraw portion of security.

SEATTLE CONSTRUCTION AND DRY DOCK CO. *v.* GRANT SMITH & CO.

A certified cheque for $90,000 was deposited for stay of execution on a judgment for $85,000 which, on appeal, was reduced to $44,500. The plaintiff then obtained leave to appeal to the Privy Council and the defendant subsequently applied to the Court of Appeal to withdraw the $90,000 cheque and substitute therefor a certified cheque for $50,000 as security for the judgment so reduced.

Held, that the application must be refused as it should have been made at the time of the application for leave to appeal.

Per MCPHILLIPS, J.A.: Giving leave to appeal to the Privy Council constitutes a bar to any further proceedings in this Court.

MOTION to the Court of Appeal for an order that the defendant be allowed to withdraw its certified cheque for $90,000 that was paid into Court as security for the judgment obtained by the plaintiff on the trial, and that said cheque be substituted by a cheque for $50,000 in view of the judgment of the Court of Appeal. The plaintiff Company on the 14th of January, 1918, obtained judgment for $85,000 and costs, and on the 31st of January following the defendant obtained an order for stay of execution save as to costs upon payment into Court of a certified cheque for $90,000. The costs were then taxed and paid on the usual undertaking in case of appeal. On appeal the Court of Appeal by judgment dated the 5th of November, 1918, reduced the amount payable under said judgment to $44,500. On the 18th of November, 1918, leave was granted the plaintiff to appeal to the Privy Council. Subsequently defendant's solicitors endeavoured by negotiation to be allowed to withdraw the $90,000 cheque and substitute one for $50,000, but the plaintiff's solicitors refused to give their assent.

Statement

The motion was heard at Vancouver on the 28th of November, 1918, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

S. S. Taylor, K.C., for the motion: They are entitled to security for the amount of the present judgment and no more. We should not be compelled to leave in Court a large sum not now required for the purposes for which it was deposited.

Davis, K.C., contra: It is too late now; the application should have been made before leave to appeal to the Privy Council was granted. There can be no further proceedings here.

Taylor, in reply.

MACDONALD, C.J.A.: I think the application must be dismissed. It seems to me the practice is perfectly clear. If there had been no appeal to the Privy Council, the ordinary practice would be this, that the plaintiff would tax his costs, and get the amount of his judgment out of Court and the balance would go to the defendant. There would be no question of coming to this Court to anticipate that by getting an order that an estimated amount only should be left in Court, that is to say, enough to cover the judgment, and the balance be paid out in the way suggested. Would it make any difference that there is an appeal to the Privy Council? I think not. There is a proviso in the order in council contained in section 6, for staying execution in the Court below pending appeal to the Privy Council and to provide for the taking of security for the judgment debt. The application must be made at the time of the application for leave to appeal, but it was not made in this case, and so far as that is concerned, it is out of the question.

MACDONALD, C.J.A.

Mr. *Taylor* may find himself in a somewhat difficult position, but that cannot make any difference. For instance, had the costs been taxed the amount of the judgment debt and costs would be paid out of the moneys in Court, and he would have got the balance, that is to say, $40,000, and then when he applied for leave to appeal to the Privy Council, in that case, he would have no security to give. If there had been no money in Court at all he would have to come to this Court to ask, under rule 6, to have execution stayed upon giving security for the amount of the judgment of this Court. The practice seems perfectly clear that moneys which are paid into the Court below must be subject to the rights of the parties to those moneys.

COURT OF APPEAL

1918

Nov. 28.

SEATTLE CONSTRUCTION AND DRY DOCK CO. *v.* GRANT SMITH & CO.

MARTIN, J.A.: The money that is paid into Court is not paid into the registrar of this Court, but into the Court below. The result of that is somewhat peculiar. I think in the circumstances we should not make any order in this matter. There has been an affidavit filed by Mr. *Davis* shewing that his clients are amply sufficient financially to meet any demands made upon them in this action. Strictly, the proper course for the plaintiff Company to take was to apply to pay out and the defendant Company would have simply to pay that or what is found due and keep the balance in their own pockets. I do not see that it is possible for us to accede to the motion.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: When an appeal is brought to the Privy Council the giving of leave for the appeal should constitute a bar to any further proceedings in this Court, save such steps as may be necessary to perfect the appeal.

In *Larsen* v. *Nelson & Fort Sheppard Railway* (unreported upon this point) Mr. Justice MCCREIGHT, speaking for the Court when giving leave to appeal to the Privy Council, said that if a stay of execution was to be directed and the judgment carried into effect—there it was the setting aside of the registered mechanic's lien—good and sufficient security should be entered into; also see *Davies* v. *McMillan* (1893), 3 B.C. 35. A stay of execution has not been asked for here. I must say that, in my opinion, we have no jurisdiction at all to make any such order as is asked for.

EBERTS, J.A.

EBERTS, J.A.: This application was not made at the proper time. After the application is made for leave to appeal to the Privy Council a similar application should then be made to the Privy Council for stay of execution, if execution is intended to be issued, the appellant giving security such as the Court sees fit.

Motion refused.

REX v. WONG JOE. (No. 2.)

MORRISON, J.

1918

Oct. 25.

REX v. WONG JOE

Certiorari—Information—Warrant not issued—Arrest—Trial and conviction—No objection raised on hearing—Waiver.

On an information being laid before a magistrate, an officer without a warrant arrested the accused who was subsequently tried without objection and convicted. On an application for a writ of *certiorari*:—*Held*, that the conviction must be sustained as neglect to raise objection at the hearing amounted to waiver.

MOTION by accused for a writ of *certiorari* on the ground that no warrant was issued and that the conviction was therefore bad. Heard by MORRISON, J. in Vancouver on the 25th of October, 1918. An information was sworn out before a magistrate, and without a warrant an officer arrested accused, who was tried and convicted. Statement

E. A. Lucas, for the motion.

Wood, for the Crown, *contra*: The accused appeared before the magistrate, with counsel, and pleaded not guilty. No objection was taken that a warrant did not issue. This amounts to waiver: see *Reg.* v. *Shaw* (1865), 34 L.J., M.C. 169; 10 Cox, C.C. 66; *Reg.* v. *Hughes* (1879), 48 L.J., M.C. 151; 4 Q.B.D. 614; *Dixon* v. *Wells* (1890), 59 L.J., M.C. 116; *Reg.* v. *Clarke* (1891), 20 Ont. 642; *Ex parte Sonier* (1896), 2 Can. Cr. Cas. 121. In any event, the defect, if any, appears to be covered by section 1130 of the Code. Argument

MORRISON, J.: The objection had been waived. The conviction is sustained. Judgment

Conviction sustained.

HUNTER, C.J.B.C.

1917

Nov. 29.

COURT OF APPEAL

1918

Nov. 5.

MASON v. CITY OF VICTORIA

MASON *ET AL.* v. THE CORPORATION OF THE CITY OF VICTORIA.

Statute, construction of—Municipal works—Taxation—By-law for certain local improvements — Work partially done — By-law not to complete work—Further by-law providing for assessment—Based on repealed Act—Validity—B.C. Stats. 1914, Cap. 52, Sec. 133; 1916, Cap. 44, Sec. 25; and Cap. 45, Sec. 10—City by-laws Nos. 1147, 1868 and 1925.

The Victoria City Council passed by-law No. 1147, authorizing certain local improvements, in 1911. In 1915, the Council passed by-law No. 1868, under section 133 of the Municipal Act (B.C. Stats. 1914, Cap. 52), reciting that the work authorized had been carried out in part and that the Council deemed it inadvisable to complete the said work, and enacted that an assessment be made on the lands benefited by the works so far completed. In September, 1916, the Council, acting under said section 133, passed by-law No. 1925, which, after reciting what had previously been done, levied and fixed the assessment necessary to provide for the proportion of the cost of the work to be borne by the owners of the property immediately to be benefited and the City respectively, and the by-law received the sanction of the Lieutenant-Governor in Council. On the 31st of May, 1916, section 133 was amended by section 25 of the Municipal Act Amendment Act, 1916, its operation being thereby confined to drains, and on the same day section 10 of the Local Improvement Act Amendment Act, 1916, was passed, providing that the Council may provide, under certain conditions, that work undertaken and carried out in part shall not be completed, a condition being that if the special assessment roll with respect to the work undertaken has not been made and confirmed (and this had not been done), the Council may pass a by-law amending the by-law authorizing the construction of the work in so far as it relates to the extent of the work. In an action for a declaration that by-law No. 1925 is illegal and void:—

Held, on appeal, affirming the decision of HUNTER, C.J.B.C. (GALLIHER, J.A. dissenting), that owing to the repeal of section 133, the Council had no jurisdiction to pass by-law No. 1925, and that the proper course was to have amended by-law No. 1147, to effect the necessary change under section 10 of the Local Improvement Act Amendment Act, 1916, which at the time conferred the sole power for such an assessment.

Statement

APPEAL from the decision of HUNTER, C.J.B.C., in an action by the owners of lot 42, on Amphion Street, in the City

of Victoria, for a declaration that by-law No. 1925, of the City by-laws, is illegal and void and that the plaintiffs' land is not legally assessed by said by-law. Tried at Victoria on the 20th and 26th to 29th of November, 1917. On the 8th of December, 1911, the City passed by-law No. 1147, for the general improvement of Amphion Street, between Gonzales Avenue and Oak Bay Avenue, providing specifically for paving the road, sidewalks, drains, water mains, and the removal of poles where necessary. The work was proceeded with, and after the sidewalks, drains, lateral connections with drains and surface drains were completed, by-law No. 1868 was passed on the 20th of December, 1915, providing that the work of local improvement set forth in by-law No. 1147 be not further proceeded with and that an assessment be made upon the lands benefited by the works completed for the amount expended. By-law No. 1925 was passed on the 18th of September, 1916, and provided for the borrowing of money for payment of the work completed on Amphion Street, for the issuing of debentures, and for the raising of taxes for the payment of the debentures in ten annual payments. The by-law recited that "the work had been constructed in part (on Amphion Street) and the assessment made hereunder had been done in conformity with section 133 of the Municipal Act." Section 133 of the Municipal Act (B.C. Stats. 1914, Cap. 52) was on the 31st of May, 1916, amended by section 25 of the Municipal Act Amendment Act, 1916, its operation being confined to drainage works, and section 44A of the Local Improvement Act (B.C. Stats. 1913, Cap. 49) as enacted by section 10 of Cap. 45, B.C. Stats. 1916, passed on the same day, provided that in the case of a work undertaken under the Act, if the work had been constructed or carried out in part and the Council deem it inadvisable or impracticable to complete the work as undertaken, the Council may provide, under certain conditions, that the work as undertaken shall not be completed, one of the conditions being that where construction has been begun, there must be a by-law passed to amend the by-law which originally authorized the construction of the work in so far as it relates to the extent of such work, and for all purposes thereafter the work undertaken be as set forth in the amending by-law.

Statement

HUNTER, C.J.B.C.

1917

Nov. 29.

COURT OF APPEAL

1918

Nov. 5.

MASON v. CITY OF VICTORIA

McDiarmid, for plaintiffs.
R. W. Hannington, for defendant.

HUNTER, C.J.B.C.: This case presents this singularity, that all of the gentlemen engaged, including the plaintiff, were at one time or other solicitors for the Corporation; and therefore I may safely take it for granted that no point of importance has been overlooked. In fact, I may freely confess that I am under a sense of obligation to both the learned counsel engaged for the lucid and intelligent argument that has been presented.

A great many points have been raised by Mr. *McDiarmid* in attacking the validity of the proceedings. A number of the items which apparently, from the evidence, have been included in the total lump charge of six thousand and odd dollars, such as grading charges, removal of the poles, the question of the water laterals, the question of the inclusion of the old work, and the charge for the meter boxes, as well as the charge for the surface drain, which of itself would amount apparently to some sixteen hundred odd dollars, and the further question as to whether the whole of lot 55 ought to have been included in the assessment—these and numerous other points have been raised; but in view of the conclusion to which I have come, I do not think it is necessary to deal with any of them. A point which has been raised, and which I think is fatal to the City's action, is that the by-law which creates the special assessment, No. 1925, purports to have been passed under section 133 of the Municipal Act, whereas at the time of the passage of the by-law No. 1925 that section of the Municipal Act had been changed, and a provision substituted known as 44A, passed by the amending law of 1916.

Statement

It is, of course, a well-established principle with regard to the interpretation of statutes, that a repealed law is understood to have been repealed for all purposes, except so far as may be stated in the new statute, or by reason of some rule of law, as, for example, the rule relating to matters of procedure pending at the time of repeal. Mr. *Hannington* urged strongly that there is substantially no distinction between the new law and the old law. I am unable to take that view of it. I think that under the old scheme, speaking generally, it was possible for

the City, during the time of cricis in matters of finance, to come to the conclusion and make a declaration that they deemed it inadvisable to further proceed with the work undertaken, and that they could pass a by-law to that effect and make an interim assessment. I think the object of the new law was to require certainty. Section 44A specially provides that the Council may, "on the following conditions," provide that the work undertaken shall not be completed. One of these conditions, in connection with a case where construction has been begun—which is this case—is that there must be a by-law passed to amend the by-law which originally authorized the construction of the work, in so far as it relates to the extent of the work; and then it goes on to enact that for all purposes after that, the work undertaken shall be as set forth in the amending by-law. I think the object of that legislation was to introduce certainty and finality, so that lot owners and parties interested in sales, and persons who are contemplating the purchase of property, will know finally and definitely what is the extent of the obligations in connection with the property. At all events, whether that is so or not, there is, in my opinion, an express statement by the Legislature that that is what has to be done.

Now the by-law impugned, No. 1925, purports, on the face of it, to have been passed under the repealed law; it does not anywhere in terms establish definitely the extent of the work; all that appears is that by-law No. 1868 recites that the Council has deemed it inadvisable to proceed with the work. Notwithstanding that declaration of the Council, there is nothing, so far as I can see, if the old law is still in force *pro hoc vice,* to prevent the Council at some future time going on with the balance of the work, without any new petition or by-law. That obviously, I think, is an undesirable state of affairs. There should be finality in connection with matters of this sort, leaving any further work to be initiated in the usual way.

There is the defect in the by-law that it does not affirmatively declare the extent of the work, so that everybody will know exactly where he stands. The Court is, of course, loath to upset proceedings of this kind, which are thought to be for the public benefit, undertaken by a governmental body such as a municipality. And an objection of this kind savours perhaps of the

HUNTER, C.J.B.C.
1917
Nov. 29.

technical; but I think I would be treading on slippery ground if I undertook to work out in some way or other some way of supporting this by-law 1925 as being in accordance with the requirements of section 44A.

COURT OF APPEAL
1918
Nov. 5.

MASON v. CITY OF VICTORIA

I may say, also, that any counsel or solicitor who has been engaged by the City in connection with these matters is not at all to be blamed for having made any slip, if it can be called a slip, in connection with a matter of this sort, by reason of this welter of legislation, which I should think would take not one Philadelphia lawyer, but a dozen, to unravel. I will say, too, that I think that it was natural for the plaintiff to resort to any technicality that he could in order to resist payment, because, as far as I can see, after having the advantage of a view, the work was a disappointment, to this extent at any rate, that notwithstanding the fact that some sixteen hundred dollars had been spent upon constructing this surface drain, it seems to be of no value as the street now stands, by reason of the absence of gutters and catch-basins. It has been a work without result, so far at any rate. Not only that, but the sidewalks have been left exposed to overflow of water from the adjoining lots, and the higher unfinished street, and placed on such a grade that a larger amount of rock will have to be taken out of the roadway than would have otherwise been necessary. The City has also left alongside the sidewalk large masses of rock which were blasted out of the sewer and drain, which make it impossible for a vehicle to approach the sidewalk in a number of places.

HUNTER, C.J.B.C.

But, fortunately for all concerned in this case, it seems to me that no responsibility or censure can rightly be laid to any of the present City officials in connection with the matter, because the work was commenced by persons who are not now in office, and who have not been before the Court.

I think the plaintiffs are entitled to succeed, and it follows that the counterclaim should be dismissed.

From this decision the defendant appealed. The appeal was argued at Victoria on the 12th, 13th, 14th and 17th of June, 1918, before MARTIN, GALLIHER and EBERTS, JJ.A.

Argument

R. W. Hannington, for appellant: The by-law in question is attacked on a number of grounds: (1) It is based on a section

that was repealed when passed; (2) failure to assess all lots reported to be benefited by the work; (3) a surface drain was improperly included in the assessment; (4) that it drains other lots than those assessed; (5) Mason is charged with a water connection not in the preliminary report; (6) the charge in assessment for back interest is excessive; and (7) debenture discount is improperly included in the assessment. The assessment was made and confirmed, without objection from Mr. Mason until after the time for appealing had expired, and then by-law No. 1925 was passed. Section 44A of the Local Improvement Act, as enacted by section 10, B.C. Stats. 1916, Cap. 45, is the later procedure. Under subsections (*b*) and (*c*) of section 13, and sections 16 and 17 of the Interpretation Act, the procedure carried out can be supported. Section 44A does not apply to this case: see *Bourke* v. *Nutt* (1894), 1 Q.B. 725; 63 L.J., Q.B. 497; Maxwell on Statutes, 5th Ed., 348; *Midland Railway Co.* v. *Pye* (1861), 10 C.B. (N.S.) 179; Halsbury's Laws of England, Vol. 27, p. 159, par. 305. On the question of whether we have the right to continue under section 133 see *Key* v. *Goodwin* (1830), 8 L.J., C.P. (O.S.) 212; *Lemm* v. *Mitchell* (1912), 81 L.J., P.C. 173; *Watson* v. *Winch* (1916), 85 L.J., K.B. 537. Respondent relied on *Surtees* v. *Ellison* (1829), 7 L.J., K.B. (O.S.) 335, but they did not have the Interpretation Act in England then. If this is correct, we were not bound to resort to section 44A, and the Court of Revision had complete jurisdiction over the assessment. Mason was given notice under section 33 of the Local Improvement Act. He lived on the street and saw the work going on. His conduct bars him from this action. There was no objection to by-law No. 1147. He was the only one on the street to object. Mr. Mason submitted himself to the jurisdiction of the Court of Revision and is bound: see *Pelly* v. *City of Chilliwack* (1916), 23 B.C. 97; *City of Port Coquitlam* v. *Langan* (1917), 2 W.W.R. 208; *Hislop* v. *City of Stratford* (1917), 34 D.L.R. 31. On the finality of the Court of Revision see *Canadian Land Co.* v. *Municipality of Dysart* (1885), 12 A.R. 80; *London Mutual Insurance Co.* v. *City of London* (1887), 15 A.R. 629; *Confederation Life* v. *Toronto* (1895), 22 A.R. 166; *Re White and Corporation of Sandwich East* (1882), 1

Argument

HUNTER, C.J.B.C.

1917

Nov. 29.

COURT OF APPEAL

1918

Nov. 5.

MASON v. CITY OF VICTORIA

Argument

Ont. 530; *Niagara Falls Suspension Bridge Co.* v. *Gardner* (1869), 29 U.C.Q.B. 194; *Nicholls* v. *Cumming* (1877), 1 S.C.R. 395. He is precluded by estoppel by failing to exercise his right in time. He took no appeal from the revision, and we have collected from eight out of 14 that are taxed: *Wilson* v. *Delta Corporation* (1913), A.C. 181; *Toronto City* v. *Russell* (1908), 78 L.J., P.C. 1; *The Township of McKillop* v. *The Township of Logan* (1899), 29 S.C.R. 702. It is not the policy of the Court to pronounce a judgment that is ineffective: see *In re McKay* (1917), 3 W.W.R. 447; *Cartwright* v. *City of Toronto* (1914), 50 S.C.R. 215 at p. 219. On the question of interpretation of statutes respecting taxation see *Municipality of Bifrost* v. *Houghton* (1918), 1 W.W.R. 797. As to the Court exercising discretion see *In re Huson and the Township of South Norwich* (1892), 19 A.R. 343 at pp. 350-2.

McDiarmid, for respondents: We are not attacking the first two by-laws. The first by-law (No. 1147) sets out the work to be done, and in the by-law we are attacking (No. 1925) there were excessive charges for work not included in the first by-law. Any work done that was left out of the first by-law and the report upon which it was based is not a work of local improvement: see *Arbuthnot* v. *Victoria* (1910), 15 B.C. 209. The lack of a specification of a surface drain is an indication that a surface drain was not to be built, but the assessment included cost of surface drain. The Court of Revision has exceeded its jurisdiction, and I can attack the by-law in this Court because of the defect that exists in the assessment of the area that was benefited by the report. The assessment includes $945 improperly included. On the question of waiver, the case is concerning the validity of by-law No. 1925. If they had properly proceeded under the statute in force, *i.e.*, 44A (B.C. Stats. 1916, Cap. 45, Sec. 10), they would have amended by-law No. 1147 instead of passing No. 1925.

Hannington, in reply.

Cur. adv. vult.

5th November, 1918.

MARTIN, J.A.

MARTIN, J.A.: This case, raising some very perplexing questions, has occasioned me much thought, and it is not easy to

arrive at a satisfactory decision, though we derived much assistance from the arguments of counsel, who are specially versed in the subject-matter.

The view taken by the learned judge below was, briefly, that the amendment introduced by the Local Improvement Act Amendment Act, 1916, Cap. 45, Sec. 10, governed the situation, and I find myself unable, after a prolonged investigation of the statutes and authorities, to say that this is incorrect, though, with respect, I do not agree entirely with his reasons. I confess my opinion is not as strong as I should wish, for Mr. *Hannington* submitted an almost convincing argument on behalf of the City, based upon sections 13, 16 and 17 of the Interpretation Act, R.S.B.C. 1911, Cap. 1. Section 10 enables the Council to escape the consequences of a failure to "complete the work as undertaken" on certain conditions, which provide for substitution of a part of the work for the whole, as planned by the original by-law, to be effected by means of an amendment of the original by-law, "authorizing the construction of the work"; in other words, a completion by partial instead of entire performance, and I am unable to see how this fundamental feature is "consistent" with the "old law or regulation" under the Interpretation Act, Sec. 13(*b*), or how the "new provisions" under section 10 "can be adapted to the old law or regulations" under section 13(*c*) in this grave respect as to "the extent of such work." If I am right in this, it is necessary that the original by-law, No. 1147, of December 12th, 1911, should have been amended to effect the necessary substitution. I regard section 133 as giving a power of interim assessment on a work which has only been "carried out in part" and still remains to be completed, while section 10 confers the sole power of an assessment which is final as and for a completed work, such power, however, to be exercised on specified "conditions." There cannot be any real consistency or adaptability between the cases of one final and one (or more) interim combined with one final assessments. I think that after the passage of section 10 the power to impose an interim assessment was gone. Though by-law No. 1868, of December 27th, 1915, may fairly be regarded as still standing as an "act done," under the Interpretation Act, Sec. 17(*a*), so far as it goes, yet it does

HUNTER, C.J.B.C.

1917

Nov. 29.

not stand in the way of an amendment under section 10. By-law No. 1925 becomes, in this view, ineffective and therefore invalid, and cannot support the proceedings objected to.

It follows that the appeal should be dismissed.

COURT OF APPEAL

1918

Nov. 29.

MASON v. CITY OF VICTORIA

GALLIHER, J.A.: Under the provisions of by-law No. 1147, passed by the Municipal Council of the Corporation of the City of Victoria, and entitled Local Improvement Authorization By-law, No. 354, the grading, paving and draining of Amphion Street from Oak Bay Avenue to Gonzales Avenue, in said City, and the construction of permanent sidewalks of concrete on both sides of the street, with curbs, gutters, and lateral connection to sewers, surface drains and water mains, and the removal of poles, if necessary, was authorized.

Subsequently, and on the 27th of December, 1915, the said Municipal Council, under the provisions of section 133 of Cap. 52, B.C. Stats. 1914, passed a by-law, numbered 1868, and entitled Partial Assessment Authorization By-law No. 354, wherein it was recited that the work which had been authorized had been completed and carried out in part and that the said Council deemed it inadvisable to complete the said work and proposed to cause an assessment to be made on the lands benefited by the works so carried out in part, and enacted that such assessment be made, and that when such assessment should be made it should be submitted to the Lieutenant-Governor in Council for approval. Subsequently, and on the 25th of September, 1916, the said Council passed a by-law, No. 1925, and after reciting the different steps that had previously been taken, levied and fixed the assessment necessary to provide for the proportion of the costs of the work to be borne by the owners of the property immediately to be benefited and the City respectively, and such by-law was submitted to the Lieutenant-Governor in Council and received his sanction. It is this latter by-law which is attacked here, and firstly on the ground of jurisdiction.

GALLIHER, J.A.

The Legislature of British Columbia, by Cap. 45 of 1916, passed an Act entitled An Act to Amend the Local Improvement Act (Cap. 49 of 1913), and which received sanction and became

law on the 31st of May, 1916, wherein the following amendment was made:

"10. The following is added to said chapter 49 as section 44A:—

"44A. In the case of a work undertaken under this Act or under the local improvement provisions formerly incorporated in the Municipal Act, if the work has been constructed or carried out in part and the Council shall deem it inadvisable or impracticable to complete the work as undertaken, the Council may provide under the following conditions that the work as undertaken shall not be completed:—

"(1) If the special assessment roll with respect to the work undertaken has not been made and confirmed as provided by this Act, the Council may pass a by-law amending the by-law authorizing the construction of the work in so far as it relates to the extent of such work, and for all purposes thereafter the work undertaken shall be as set forth in the amending by-law. . . . ."

It is admitted that the said Council, in passing by-law No. 1925, proceeded under section 133 of Cap. 52 of the Act of 1914, and not under the Act as amended in 1916, and which was then in force, and it is submitted they had no jurisdiction so to do and that the by-law falls and all subsequent proceedings with it. No objection is taken to the jurisdiction of the Council, nor to the method of procedure or the steps taken up to and including the passing of by-law No. 1868. Assuming then, as I think we must, that all steps taken were legally and properly taken up to the time of the passing of by-law No. 1868, this by-law (which is not attacked) authorized and directed an assessment to be levied for the portion of the work already completed and the preparation and certification of the assessment roll, and the passing of by-law 1925 was a carrying out of what had been already legally and properly authorized after determination by the Council not to proceed with the entire work to completion. Although by-law 1868 does not in express words state that it amends by-law 1147, it does, both in its recitals and in its enacting clauses, in effect amend it in the manner indicated in the amending Act of 1916, and this amendment took place prior to the passing of that Act.

GALLIHER, J.A.

I cannot see in any way how the plaintiffs are prejudiced. The proceedings under the 1916 amendment would have been similar, and they had the added protection of the necessity of obtaining the consent of the Lieutenant-Governor in Council, which did not pertain under the 1916 amendments. In effect,

HUNTER, C.J.B.C.
1917
Nov. 29.
COURT OF APPEAL
1918
Nov. 5.
MASON v. CITY OF VICTORIA

all steps had been taken authorizing the assessment. The Council had previously determined not to proceed with the work and embodied their determination in the form of a by-law, and what was afterwards done was the carrying out of that authorization. The learned Chief Justice laid great stress upon the fact that the object of the 1916 amendment, section 44A, was to give finality to such proceedings. The words used in that section are "the Council may provide under the following conditions that the work as undertaken shall not be completed." In the recital in by-law 1868 the words are "the said Council has deemed it inadvisable to complete the said work," but in the enacting clause these words are used: "The said work of local improvement set forth in said by-law 1147 shall not be further proceeded with." I think the phrases used in the recital and in the enacting clause of the by-law were treated as synonymous terms by the Council, but if that be not so, there is, as I view it, more finality in the expression "shall not be further proceeded with" than in the expression "shall not be completed," as in the latter the Council might proceed further with the work short of completion and still be within the term. In this case, the special assessment roll with respect to the work undertaken had not been made and confirmed, so that it would be necessary under the 1916 Act to pass a by-law amending the by-law authorizing the construction of the work, as set out in subsection (1) of 44A. I think by-law 1868 is, in effect, such an amending by-law, and being legally and properly passed before the enactment of 44A, brought matters to such a state that the passing of by-law No. 1925 may be considered as the machinery for carrying into effect the provisions of the original by-law as amended.

GALLIHER, J.A.

Mr. *McDiarmid* argued with great force a number of objections which I do not deal with specifically by reason of the fact that the by-law, not being moved against, no objection taken against it at the Court of Revision, and no appeal from that Court, are, in my view, met by the provisions of the statute and the cases cited to us by Mr. *Hannington,* among which are *Foster* v. *Township of St. Joseph* (1917), 39 O.L.R. 525; 37 D.L.R. 283, and *Hislop* v. *City of Stratford* (1917), 34 D.L.R. 31, both decisions of the Court of Appeal for Ontario.

HUNTER, C.J.B.C.

1917

Nov. 29.

COURT OF APPEAL

1918

Nov. 5.

MASON v. CITY OF VICTORIA

It might not be out of place to state here that I am duly appreciative of the care exercised by both counsel in the preparation of their case and the assistance they rendered the Court in argument.

The appeal, I think, should be allowed, and the defendant should have judgment on its counterclaim, with costs.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitor for appellant: *R. W. Hannington.*
Solicitor for respondents: *F. A. McDiarmid.*

DAVID GIBB & CO. v. NORTHERN CONSTRUCTION COMPANY LIMITED AND CARTER-HALLS-ALDINGER COMPANY LIMITED.

COURT OF APPEAL

1918

Oct. 1.

DAVID GIBB & CO. v. NORTHERN CONSTRUCTION COMPANY

Sale of goods—Note or memorandum—Sufficiency of—Signatures—Stamped names—Trial—Finding of jury—Supplementing—Agreement to get bonds for performance of contract—Whether to be treated as a part of the contract on suspensory condition.

In a vendor's action for damages for refusal by vendee to accept goods sold over $50 in value, the plaintiffs produced as a memorandum, signed by vendee's agent, a document which consisted of a printed form with the name of one of vendees appearing in print at the head and also at the foot in the place for signature. The evidence was that one Cummings who was admittedly agent for both defendants in the transaction, had filled up in writing the printed form with the terms of the contract, that the names of both defendants appeared, the one printed and the other written under it at the head and in the place for signature with the word "and" written between them. The jury found that the word "and" was so written by Cummings. The jury refused to find by whom the name of the vendee, "N.C.Co., Ltd." was stamped under the other vendee's name or whether the names of the vendees as occurring in the document were intended to operate as the "signature of the said companies."

The evidence was that either Cummings or someone in defendant's office had added the stamped signature of "N.C.Co., Ltd."; that Cummings

COURT OF APPEAL

1918

Oct. 1.

DAVID GIBB & CO. v. NORTHERN CONSTRUCTION COMPANY

had written the word "and" between the names in both places and had then handed the document to vendors, saying "there is your contract," and had told them to get bonds for its performance which it was understood throughout would have to be done.

The trial judge, on motion for judgment, drawing all inferences not inconsistent with the findings of the jury, held that there was a verbal contract, supported by a sufficient note or memorandum thereof, and he entered judgment for the plaintiff.

Held, on appeal (*per* MACDONALD, C.J.A.), that, on the evidence, it was a term of the verbal contract that the plaintiffs should furnish security for its performance, and that since the document put forward as a memorandum did not set forth that term, it was insufficient; that what Cummings meant in saying "there is your contract" should have been decided by the jury and question 8 answered; that if Cummings meant the document as a written contract and not as a memorandum thereof, the non-inclusion of the term in the bonds was immaterial; that there should be a new trial.

Per GALLIHER and EBERTS, JJ.A.: That question 8 should have been answered and there should be a new trial.

Per MCPHILLIPS, J.A.: (1) The jury having failed to find by whom the name of defendant N. C. Co., Ltd., was stamped on the document, and whether the printed and stamped names of both defendants were intended as signatures and authorized execution thereof, the action should be dismissed, it being incompetent for the trial judge to supplement the answers of the jury by making those findings. (2) That, on the evidence, there was no concluded contract, and upon this ground as well the action should be dismissed.

Statement

APPEAL by defendants from the decision of MURPHY, J. of the 27th of November, 1917, in an action tried with a jury for damages for breach of contract by the defendants, the vendees, in refusing to carry out contract of sale by plaintiffs to them of certain cut stone. A verbal contract between the parties was made on the 8th of August, 1916, one Cummings acting as defendants' agent in the transaction. The plaintiffs, at the suggestion of Cummings, then went to a bonding company to procure bonds for the performance by plaintiffs. The bonding company requested evidence in writing of the terms of the contract to be furnished in the names of the defendants. Cummings had in his possession at defendants' offices a printed form of contract which had been used in making the bargain as containing the conditions, etc., agreed on. It was a blank form suitable for use when parties themselves executed under their hands and seals. It was printed for Carter-Halls-Aldinger Company Limited, with their name printed at the beginning as

contractors with a blank for names of sub-contractors. The name Carter-Halls-Aldinger Company Limited was also printed in the place for signature, with the words "president"..... "director".....and the application was signed, sealed and delivered. Cummings, for the purpose of satisfying the demand for a memorandum, by means of a rubber stamp impressed the name "Northern Construction Company, Limited," above the printed name "Carter-Halls-Aldinger Company, Limited," occurring both at the beginning and in the place for signatures, and in longhand wrote the word "and" between the names. He then filled in the blanks in the form with the amount and description of the stone sold, price, etc., and other particulars of the contract, leaving the printed conditions, which were those agreed on verbally, standing. He then handed the document to the plaintiffs. The statement of claim put the contract in the alternative as a contract in writing signed by the defendants by their agent Cummings and as a verbal contract made between plaintiffs and defendants acting through their agent Cummings and supported by the document referred to, treated as a note or memorandum thereof sufficient to satisfy section 11 of the Sale of Goods Act. At the trial, defendants' counsel asked Cummings whether in filling in the form and affixing the names he intended to make and sign for defendants a contract. Plaintiffs' counsel objected that as the plaintiffs' case as proved was a verbal contract, supported by a document, the form and circumstances or delivery of which made it in law a sufficient memorandum, the intention of Cummings and whether he meant the names of defendants therein as signatures was immaterial, the trial judge ruled, that upon the issue of whether there was a written contract signed by defendants the question was right and the evidence material. Plaintiffs' counsel then withdrew from the statement of claim all allegations of written contract. The trial judge nevertheless admitted the evidence and put the following questions to the jury:

Statement

"(1) Was there a contract made between the plaintiffs and defendants for the furnishing of Saturna Island stone? Yes.

"(2) If so, name the parties between whom such contract was made? Plaintiffs and defendants.

"(3) When was such contract made? Eighth August, 1916.

"(4) Was such contract broken? Yes.

COURT OF APPEAL

1918

Oct. 1.

DAVID GIBB & CO. v. NORTHERN CONSTRUCTION COMPANY

"(5) Damages? $4,000.

"(6) When and by whom was the name Northern Construction Co., Limited, stamped upon Exhibit 3, on the face and at the end? [No answer.]

"(7) When was the word "and" written between the names of the defendant Companies in Exhibit 3 by Mr. Cummings? Eighth August, 1916.

"(8) Were the names of the defendant Companies as occurring in Exhibit 3 intended to operate as the signature of the said Companies? [No answer.]"

The appeal was argued at Vancouver on the 1st, 2nd, 3rd and 6th of May, 1918, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Reid, K.C., for appellants: There was no sufficient memorandum to satisfy the statute. The jury could not properly find there was a contract on the evidence. As to the signature to the memorandum see *Hubert* v. *Treherne* (1842), 3 Man. & G. 743 at p. 751; *Hubert* v. *Turner* (1842), 11 L.J., C.P. 78. Circumstances under which the document was made and handed over shew that it was not a memorandum intended to evidence a completed verbal contract, but merely to indicate to the bonding company what the contract would be when formally executed by defendant Companies: see Benjamin on Sales, 5th Ed., 263; *Koksilah Quarry Co.* v. *The Queen* (1897), 5 B.C. 525 and 600; *Sievewright* v. *Archibald* (1851), 17 Q.B. 103. If there was a verbal contract it was a term of it that a bond for its performance should be obtained, and the document contained no mention of this term and is therefore not a memorandum of the verbal contract in evidence and found by the jury: *Pym* v. *Campbell* (1856), 6 El. & Bl. 370; 25 L.J., Q.B. 277; *Goss* v. *Nugent* (1833), 5 B. & Ad. 58; 2 N. & M. 28; 2 L.J., K.B. 127. As to the effect of the jury refusing to answer the questions see *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43.

Argument

Cassidy, K.C., for respondents: The series of facts which make up a transaction are *res gestæ*: see *Faund* v. *Wallace* (1876), 35 L.T. 361. On the question of the sufficiency of the signature to the document see Halsbury's Laws of England, Vol. 7, p. 376, par. 776; *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q.B.D. 314. It is entirely for

the Court to say whether the memorandum is sufficient. Section 11 of the Sale of Goods Act (R.S.B.C. 1911, Cap. 203) is the same as section 17 of the Statute of Frauds, and on the question of signature see *Coles* v. *Trecothick* (1804), 9 Ves. 234 at p. 249; *Durrell* v. *Evans* (1862), 1 H. & C. 174; *John Griffiths Cycle Corporation, Limited* v. *Humber & Co., Limited* (1899), 2 Q.B. 414; *Koksilah Quarry Co.* v. *The Queen* (1897), 5 B.C. 525 and 600; *Dewar* v. *Mintoft* (1912), 2 K.B. 373; *Evans* v. *Hoare* (1892), 1 Q.B. 593. It has been held that a printed name will operate as a signature. This point was not taken until after verdict, and therefore too late to have effect: see *Graham and Sons* v. *Mayor, &c., of Huddersfield* (1895), 12 T.L.R. 36. He said, "There is your contract, go and get your bond." I contend the bond is collateral to the contract. On the question not being raised at the trial see *Eyre* v. *The Highway Board of the New Forest Union* (1892), 8 T.L.R. 648; *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (1896), A.C. 257 at p. 260; *Connecticut Mutual Life Insurance Co. of Hertford* v. *Moore* (1881), 6 App. Cas. 644; *Scott* v. *B.C. Milling Co.* (1894), 3 B.C. 221; (1895), 24 S.C.R. 702. In order to satisfy the statute, you require only a note or memorandum in writing of the bargain signed by the party to be charged: see *Sarl* v. *Bourdillon* (1856), 26 L.J., C.P. 78; *Egerton* v. *Mathews* (1805), 6 East 307; *Laythoarp* v. *Bryant* (1836), 2 Bing. (N.C.) 735; *Marshall* v. *Lynn* (1840), 6 M. & W. 109; *Gibson* v. *Holland* (1865), L.R. 1 C.P. 1; *McCaul* v. *Strauss & Co.* (1883), 1 C. & E. 106; Chalmers's Sale of Goods, 7th Ed., p. 23. The plaintiff was unfairly treated and taken by surprise in the defendants being allowed to set up in reduction of damages that there was not sufficient stone on Saturna Island to fill the contract. The defendants were not entitled to raise this question at all: see *Couturier* v. *Hastie* (1856), 5 H.L. Cas. 673; *Scott* v. *Sampson* (1882), 51 L.J., Q.B. 380; *Mangena* v. *Wright* (1909), 78 L.J., K.B. 879. We set up that we were ready and willing to deliver the stone. They did not plead to that. This evidence as to lack of stone is therefore inadmissible. The cases on the question of the sufficiency of the denial in the defence are *Hogg* v. *Farrell* (1895), 6 B.C. 387; *Page* v. *Page*

Argument

COURT OF APPEAL

1918

Oct. 1.

DAVID GIBB & CO. v. NORTHERN CONSTRUCTION COMPANY

(1915), 22 B.C. 185; *Merchants' Bank of Canada* v. *Bush* (1917), 24 B.C. 521. As to plea of being "ready and willing to carry out the contract" see *Cuckson* v. *Stones* (1858), 28 L.J., Q.B. 25; *Boyd* v. *Lett* (1845), 1 C.B. 222; *Jackson* v. *Allaway* (1844), 6 Man. & G. 942; *Isherwood* v. *Whitmore* (1842), 10 M. & W. 757. A denial in the form given in the defence is not sufficient, as this evidence is outside of the question of damages.

Reid, in reply.

Cur. adv. vult.

1st October, 1918.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think there must be a new trial. The jury's answers are incomplete. Their finding that a contract was entered into between the parties on the 8th of August may refer to a verbal contract, of which evidence was given. That verbal contract included a term that the plaintiffs should furnish security for the due performance of their obligations. A verbal contract is not enforceable in the absence of a memorandum in writing. The memorandum in writing which is relied upon is the document which is put forward alternatively as a written contract and a memorandum in writing of a verbal contract. This document was handed to the plaintiffs by Cummings, who, it is admitted, was agent for both defendants, but the question is, was it handed to the plaintiffs as the signed contract, or as only the proposed contract to be formally executed when the security aforesaid should have been perfected? When Cummings said "There is your contract," what did he mean? That was a question of fact to be decided by the jury, and question No. 8, the answer to which would have decided it, was left unanswered. Had the document been delivered as the signed contract, then evidence of some omitted stipulation could not have been given in this action as framed. On the other hand, if it can be relied on merely as evidence of the verbal agreement, it does not contain all the terms of it.

GALLIHER, J.A.

GALLIHER, J.A.: I am, though not without some hesitation, concurring in the granting of a new trial owing to the failure of the jury to answer the eighth question.

McPHILLIPS, J.A.: This appeal involves the determination as to whether, upon the facts as led at the trial, a contract has been established within the meaning of section 11, subsection (1) of the Sale of Goods Act, R.S.B.C. 1911, Cap. 203 (the Sale of Goods Act, 1893, Imperial, is in like terms: see section 4 and subsections thereto). The jury has failed to find as a fact whether the writing which is claimed to be a sufficient memorandum in writing of the contract was made and effectively signed. Two questions were put to the jury, which were not answered, which went to the question of fact whether there was a signature within the statute (being Nos. 6 and 8), and in the absence of any answer or finding of the jury upon this crucial point, the learned trial judge has undertaken to find the question of fact. With great respect to the learned trial judge, this was without his jurisdiction. The tribunal, the constitutional tribunal in the case, was the jury. Mr. Justice Duff, in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 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 O. 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.

Very recently, in fact, in February of this year (1918), the Court of Appeal in England had the same point up for consideration in *Winterbotham, Gurney & Co.* v. *Sibthorp & Cox* (1918), 87 L.J., K.B. 527. See *per* Swinfen Eady, L.J. (now the Master of the Rolls) at pp. 528 and 529.

Now the situation in the present case is this: unless it is a case in which it is right and proper to enter judgment, there

COURT OF APPEAL

1918

Oct. 1.

DAVID GIBB & CO. v. NORTHERN CONSTRUCTION COMPANY

must be a new trial. In my opinion, but with great respect to contrary opinion, the case is one in which judgment should be entered for the defendants and the action dismissed, that is, it is a case in which this Court is entitled to so decide: see Mr. Justice Duff in the *McPhee* case at p. 53, "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," and Swinfen Eady, L.J. in the *Winterbotham* case at p. 529:

"But where the evidence is such that only one conclusion can properly be drawn, then in my opinon this Court is bound to draw that conclusion, and to enter judgment accordingly."

We find this statement in Chalmers's Sale of Goods, 7th Ed., 23-4, under the heading "Formalities of the Contract":

"Signature is the writing of a person's name on a document for the purpose of authenticating it. If the name appears in an unusual place it is a question of fact whether it was intended as a signature. (*Johnson* v. *Dodgson* (1837), 2 M. & W. 653 at p. 659; *Caton* v. *Caton* (1867), L.R. 2 H.L. 127). Signature by mark, initials, or stamp is sufficient. (Benjamin on Sale, 4th Ed., p. 232.) The signature to a telegram form suffices (*Godwin* v. *Francis* (1870), L.R. 5 C.P. 295); so too does the signature of an agent in his own name, for then evidence is admissible to charge the principal though not to discharge the agent. (*White* v. *Proctor* (1811), 4 Taunt. 209; *cf. Newell* v. *Radford* (1867), L.R. 3 C.P. 52. The authority of the agent is to be determined according to the ordinary rules of agency; but it seems that one party cannot be the agent of the other to sign for him. *Sharman* v. *Brandt* (1871), L.R. 6 Q.B. 720, Ex. Ch.; *cf. Farebrother* v. *Simmons* (1822) 5 B. & Ald. 333. A letter written by an agent which refers to and recognizes an unsigned document containing the terms of the contract, may satisfy the statute. *John Griffiths Cycle Co.* v. *Humber & Co.* (1899), 2 Q.B. 414, C.A. (reversed on another point (1901), W.N. p. 110, H.L.), decided on s. 4. It is obvious that a person may be an agent to sign, though he may not have authority to settle the terms of the contract between the parties. The two questions are distinct."

MCPHILLIPS, J.A.

The learned counsel for the respondents, in his able but very ingenious argument, did not contend that the rubber-stamped document was a duly executed contract with all the formalities that are required when corporations are parties, but that it was a sufficient "memorandum in writing of the contract" to satisfy section 11, subsection (1) of the Sale of Goods Act (Cap. 203, R.S.B.C. 1911). The alleged sufficiency of signature to the document in writing is in the following form, the word "and" between the names of the two Companies (the names of the

Companies being rubber-stamped thereon) being inserted in the handwriting of Cummings, the agent for both Companies:

"IN WITNESS WHEREOF the parties hereto have caused these presents to be executed.

"NORTHERN CONSTRUCTION CO. LIMITED

"In the presence of and

"CARTER-HALLS-ALDINGER CO. LIMITED

"Witness .....(Seal)

"President and General Manager.

.....

"Secretary-Treasurer.

"Sub-.....(Seal)

"(Contractor)

"Witness..... .....(Seal)"

It is patent to me that there is no signature here. The very writing importing the requirement that execution thereof shall be in the one case by the president and general manager, with the seal of the Company, and in the other to be by the secretary-treasurer, with the seal of the Company, all of which is absent. Then there was evidence which I think was conclusive that there should be a bond before contract, and that was admittedly not existent at the time. Upon this question the learned trial judge, in the concluding part of his very careful judgment, said:

"Plaintiffs admit they were asked, and agreed, to put up a bond insuring the due performance on their part of the contract. Defendants urge that this agreement is one of the terms of the contract and, as it is not mentioned in the sub-contract of the 8th of August, 1916, the contention is that the sub-contract does not comply with this requirement of the section. The plaintiffs in reply say: 1st, that while it is true that under section 4 of the Statute of Frauds the whole agreement must be in writing the decisions shew a distinction between that section and the old section 17 of the Statute of Frauds, now section 11, subsection (1) of the Sale of Goods Act. The distinction set up is that the section is complied with if the writing states all that was to be done by the person to be charged even though this does not include all the terms: *Sarl* v. *Bourdillon* (1856), 26 L.J., C.P. 78; *Egerton* v. *Mathews* (1805), 6 East 307. It is not denied that in these cases apparently, the judgments do put forward this principle as at least one of the *rationes decidendi*. I am asked, however, to disregard them because of a statement in Benjamin on Sales, 5th Ed., 247, to the effect that the substitution of the word 'contract' in said subsection (1) of section 11 of the Sale of Goods Act for the word 'bargain,' appearing in the 17th section of the Statute of Frauds, has rendered *Sarl* v. *Bourdillon* of only historical interest. It is also pointed out that this case is commented upon in *Mahalen* v. *Dublin and Chapelizod Distillery Co.* (1877), I.R. 11 C.L. 83 at p. 91. In view of the opinion hereinafter expressed, I do not feel called upon to decide this question. The plaintiffs next say, the bond provision was not a term of the contract but a stipula-

MCPHILLIPS, J.A.

COURT OF APPEAL

1918

Oct. 1.

DAVID GIBB & Co. v. NORTHERN CONSTRUCTION COMPANY

MCPHILLIPS, J.A.

tion forming the basis of the contract, breach of which would entitle the defendants, at their option, to be discharged from their liabilities under the contract and being such stipulation in contradistinction to being a term of the contract it does not come within the words of said section 11 and *Wallis* v. *Littell* (1861), 11 C.B. (N.S.) 369, and *Lindley* v. *Lacey* (1864), 34 L.J., C.P. 7, are relied upon. The defendants say the bond provision was an integral part of the contract, that is that, putting it in the most favourable light for plaintiffs, it operates as a defeasance and consequently its omission from Exhibit 3 is a fatal defect on the principle of *Pym* v. *Campbell* (1856), 25 L.J., Q.B. 277, coupled with *Goss* v. *Nugent* (1833), 5 B. & Ad. 58. The case of *Wallis* v. *Littell, supra*, shews that this is a question of fact. The jury, in my opinion, have not passed upon it and, as stated, I think I have the power and ought to do so since the point was first brought clearly forward on the motion for judgment. The jury's verdict, I think, means simply that a contract for the sale of Saturna Island stone was made between plaintiffs and defendants on August 8th, 1916. But whilst the contract was thereby found to be actually in existence, the verdict makes no finding as to whether the bond provision operated as a suspension or as a defeasance of such actually existing contract. That it might be either one or the other, depending on what view of the facts is taken, is, I think established as a proposition of law by the cases above cited. My view of the evidence is, that the bond provision was suspensive. It was, I believe, common ground between the parties before August 8th, 1916, that a bond would be required if the contract were made and in that event such contract so made would only be operative, at the option of defendants, if the bond was actually put up. This being the state of affairs between the parties on August 8th, 1916, the jury finds on that day the contract was made. My view is that on August 8th, 1916, accepting, as I am bound to, the jury's verdict, there was no discussion about the bond matter until after the contract was completed. The reason was that both parties were already at one that the operation of any contract made would be suspended until the bond was put up. When the contract was concluded, Cummings, in effect, said to plaintiffs: 'Now hasten to procure the bond the putting up of which will as we have all along both understood bring the contract we have just made into operation.' For these reasons, I am of opinion that the sub-contract of the 8th of August, 1916, satisfies the requirements of the statute. There will be judgment for plaintiffs for the amount of the verdict."

In my opinion, quite apart from the insufficiency of signature under the Sale of Goods Act and its requirements, upon the evidence (which I do not think it necessary to canvass in detail, considering the view at which I have arrived), there was no concluded contract, and in this connection it is instructive to read what Lord Loreburn said in *Love and Stewart (Limited)* v. *S. Instone and Co. (Limited)* (1917), as reported in 33 T.L.R. 475 at p. 476.

Again, and with great respect, the learned trial judge was in error in assuming to pass upon this further question of fact, which, if an essential fact to be found, was the province of the jury, not that of the learned judge. It is instructive upon this point to note what Lord Moulton said in *Rickards* v. *Lothian* (1913), A.C. 263 at p. 274:

"This is an issue of fact in which the burden is upon the plaintiff, and he has obtained no finding from the jury in support of it. It is perhaps irrelevant to consider who is responsible for this omission, because it is for the plaintiff to see that the questions necessary to enable him to support his case are asked of the jury."

The judgment of Maule, J. in *Hubert* v. *Turner* (1842), 4 Scott (N.R.) 486 at pp. 507-9, is most apposite to the facts of this case, and indicates in apt language, when the facts are considered in this case, that there was not "some note or memorandum in writing of the contract . . . . signed by the party to be charged, or his agent in that behalf." I would particularly refer to that portion of the judgment at p. 508, which reads:

"Applying one's common sense to the matter, it is impossible not to see, not only that this instrument does not purport to be signed, but that it does purport to be intended to be signed by the contracting parties."

I do not propose to set forth here in detail a reference to the numerous cases referred to in the able arguments delivered by counsel on behalf of the respective parties to this appeal, but it has been established to my satisfaction that the judgment appealed from, with great respect to the learned trial judge, is clearly wrong and cannot be upheld. Even were I wrong in my view that the case is a proper one for judgment for the defendants, and dismissal of the action, then at best, all that could be directed would be a new trial. Further, if that even should not be the necessary result, the evidence shews that the respondents contracted recklessly, undertaking to supply stone of which there is no evidence whatever that it was in place and capable of being quarried and delivered, so that if it can be said that there was a contract, the damages are excessive, in fact, no damages whatever have been proved, and upon this phase of matters, all that could be done by this Court would be to direct that for the breach thereof nominal damages only be allowed. Lord Atkinson, in *United Shoe Manufacturing Co. of Canada* v. *Brunet* (1909), 78 L.J., P.C. 101, said at p. 107:

MCPHILLIPS, J.A.

COURT OF APPEAL

1918

Oct. 1.

DAVID GIBB & CO. v. NORTHERN CONSTRUCTION COMPANY

"As the respondents have broken their contract, the appellants must, despite the finding of the jury that they sustained no damage, be entitled to nominal damages, but to nothing more."

In my opinion, the appeal should be allowed and the judgment of the Court below set aside and the action dismissed.

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

New trial ordered, McPhillips, J.A. dissenting.

Solicitors for appellants: *Bowser, Reid, Wallbridge, Douglas & Gibson.*

Solicitor for respondents: *T. J. Baillie.*

MACDONALD, J. (At Chambers)

1919

Jan. 13.

PAULSON v. CANADIAN PACIFIC RAILWAY COMPANY.

Costs—Taxation—Railway defendant—Passes issued to witnesses—Regular fares not chargeable on taxation.

PAULSON v. CANADIAN PACIFIC RY. CO.

Where a railway company issues passes to witnesses required on the trial of an action, the regular fares covered by the passes are not chargeable against an unsuccessful party.

Statement

APPLICATION by defendant for review of taxation. Defendant issued passes to several witnesses on its behalf for transportation to the place of trial. Upon taxation before the registrar, he refused to allow the amount of railway fares that would have been charged, but for the passes. It was submitted that the issue of passes was a matter of convenience to the Railway Company, and the regular fare should be taxed as a proper disbursement. Heard by MACDONALD, J. at Chambers in Vancouver on the 13th of January, 1919.

McMullen, for the application.

M. A. Macdonald, K.C., contra.

Judgment

MACDONALD, J.: The registrar was right in not allowing the fares as a disbursement.

THE STANDARD BANK OF CANADA v. SHUEN WAH.

MURPHY, J.

1919

Jan. 13.

Courts—Trial—Civil action—Crime involved—Judgment pending criminal proceeding.

A civil action where a crime is involved may be proceeded with in a case where a criminal prosecution has actually been carried through and decision is under advisement.

STANDARD BANK OF CANADA v. SHUEN WAH

ACTION for the recovery of $1,800, being an over-payment by a teller of the plaintiff Bank to the defendant. The teller found a shortage in his cash, and on checking up concluded that in cashing certain cheques presented by the defendant he had overpaid him in the above sum. The plaintiff laid a criminal charge against defendant, but before decision was given commenced civil proceedings. The magistrate withheld decision on the criminal charge pending decision in this action. The defence was raised that immediately the evidence disclosed a criminal offence on the part of the defendant which had not been prosecuted to a conviction or acquittal, the plaintiff should not have been allowed to proceed with the action, but should have been nonsuited. Tried by MURPHY, J. at Vancouver on the 20th of December, 1918.

Statement

F. G. T. Lucas, for plaintiff.
J. A. Russell, for defendant.

13th January, 1919.

MURPHY, J.: I accept the evidence for the plaintiff as true. I was particularly impressed with the demeanour in the witness-box of Davidson, the chief witness for plaintiff.

As to the contention that a civil action cannot be taken, when crime is involved, until there is a criminal prosecution, section 13 of the Criminal Code would be an answer if not *ultra vires.* I do not deem it necessary to decide whether it is or not, for a criminal prosecution has actually been carried through in this matter and the decision is under advisement. Further, what is disclosed here is not a felony at common law: Halsbury's Laws of England, Vol. 9, p. 631. Finally, there seems much

Judgment

MURPHY, J.

1919

Jan. 13.

STANDARD BANK OF CANADA v. SHUEN WAH

doubt that the principle invoked is really law at the present time, as evidenced by the opinion of the Royal Commissioners who drafted the English Draft Criminal Code. See notes to section 13, Crankshaw's Criminal Code, 4th Ed., p. 21.

There will be judgment for plaintiff, with costs, including costs of motion to strike out paragraph 5 reserved to trial judge.

Judgment for plaintiff.

MACDONALD, J.

1919

Jan. 9.

WESTERN FUEL CO. v. RAINY RIVER PULP & PAPER CO.

WESTERN FUEL CO. v. RAINY RIVER PULP & PAPER COMPANY.

Sale of goods—Coal—Used for specific purpose—Knowledge of by vendor—Implied warranty—Selection by purchaser—Mixing grades—R.S.B.C. 1911, Cap. 203, Sec. 22(1).

The defendant purchased from the plaintiff three consignments of coal, the first being lump coal, the second steam lump coal and the third washed slack coal. The first consignment after it became the property of the defendant was lost at sea but the balance was received and used in mixture by the defendant for steaming purposes. On plaintiff suing for purchase price the defendant counterclaimed in damages on an implied warranty for fitness. The Court found the plaintiff was aware that the coal was intended for steaming purposes, that the defendant made its own selection of grades (the lump coal being superior and the slack coal inferior in quality) and that owing to the loss of the first consignment the mixture was depreciated in quality and failed to fulfil the purpose intended.

Held, that while the plaintiff knew the purpose for which the coal was intended it was reasonably fit for that purpose if properly used and owing to the defendant's improper use of the coal by mixing the different grades together the implied warranty that might otherwise have existed and rendered the plaintiff liable was in the circumstances inoperative.

Statement

ACTION for the purchase price of coal sold by the plaintiff to the defendant. The defendant counterclaimed for damages for breach of an implied warranty of fitness. The facts are stated

fully in the reasons for judgment. Tried by MACDONALD, J. at Nanaimo on the 19th of December, 1918.

C. W. Craig, and *Yarwood,* for plaintiff.

M. A. Macdonald, K.C., for defendant.

9th January, 1919.

MACDONALD, J.: On March 20th, 1918, defendant purchased from plaintiff 204 tons of lump coal at $6 per ton, amounting to $1,224. Then on March 26th, there was a further purchase of 151 tons of steam lump coal at $6 per ton, and 150 tons of washed slack coal at $4 per ton, which amounted to $1,506, thus making the total purchase $2,730. The first consignment of coal, after it became the property of the defendant, was lost at sea, but it received and used the balance. It thus became liable to pay $2,730, unless it can excuse payment and recover damages on account of the quality of the coal delivered. Defendant not only disputes liability, but seeks to recover, by way of counterclaim, in addition, a large amount for damages. There was an amendment allowed at the trial, which savoured of an allegation of an express warranty by plaintiff, as to the quality of the coal. It was, however, clearly understood that such a ground of complaint was not being allowed the defendant, at that stage of the proceedings. The whole question then to be determined is, whether there was an implied warranty, on the part of the plaintiff, coupled with a breach thereof. Defendant relies upon the exception, referred to in subsection (1) of section 22 of the Sale of Goods Act, as follows:

Judgment

"22. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

There was some reference to the application of subsection (2) of said section 22, as being also a ground of defence, but I

MACDONALD, J.

1919

Jan. 9.

WESTERN FUEL CO. v. RAINY RIVER PULP & PAPER CO.

do not think the facts of the case, support any contention under such subsection, nor assist the defendant.

Was there, then, an implied warranty as to the quality or fitness of the coal for any particular purpose? This involves consideration of the provisions of the subsection. In the first place, it was necessary for the defendant to shew, that the plaintiff, or its agent authorized to sell, knew of the particular purpose for which the coal was required. I allowed the letter of such agent to be given in evidence, not as proof of its contents, but as coming within the purview of *Poulton* v. *Lattimore* (1829), 9 B. & C. 259. I am quite satisfied, that from the previous dealings between the parties, as well as the discussion with its local agent at Vancouver, the plaintiff was well aware that the coal was intended to be used, not simply for ordinary heating, but was sold as "steam coal." That the object in view was, through the use of this coal, to create steam in connection with the pulp mill, operated by the defendant at Port Mellen, B.C. See as to evidence admissible to prove implied warranty, *Gillespie Brothers & Co.* v. *Cheney, Eggar & Co.* (1896), 2 Q.B. 59. The difficulty is, that the plaintiff had different grades of coal for sale and, in giving the order, the defendant made its own selection of the grades, that it thought would be suitable for its purposes. It purchased 355 tons of lump coal, which is a superior grade, and only 150 tons of washed slack coal, which is an inferior quality. If all the coal thus ordered had been mixed and used together by the defendant, there would have been practically two-thirds of lump coal and one-third of slack coal in the mixture. Through the loss of the first consignment, it resulted in the mixture being depreciated in quality, so that there was 50 per cent. of lump coal and 50 per cent. of slack coal, used together by the defendant for steaming purposes. Bearing in mind, that the plaintiff was bound by the knowledge actually possessed by its agent—if not from its previous sales—then, if it had simply sold, for steaming purposes, a certain quantity of coal, I think there would be an implied warranty, that such commodity was reasonably fit for the purpose intended. Defendant could successfully contend, that it relied upon the skill or judgment of the plaintiff in

Judgment

selecting the coal that would be suitable, but when the defendant made a choice of a higher and also a lower class of coal, it exercised its own judgment, as to whether these grades could, when mixed together and with the appliances they had in hand, effectually create the heat necessary for generating steam. It might be contended, that if the order for the lump coal, or slack coal, had been given, and filled, separately, then, it involved an implied warranty, as to its fitness, for the particular purpose intended. Even if it were held, that the plaintiff was required to supply either lump or slack coal, that would be fit for steaming purposes, then, would such a warranty apply to these two grades sold together? Could it be fairly argued, that considering the manner of shipment, and that the two qualities of coal were not kept separate, such a warranty, as to each grade, would apply as well to the whole consignment? I do not think such a conclusion should be reached, in view of the manner of shipment and subsequent use of the coal. The main ground, more fully taken by the plaintiff, upon the question of implied warranty and attendant breach thereof, was, that the defendant, having these two grades of coal available, did not use them in a proper manner; so that if the necessary steam was not produced, it was not on account of a defect in the coal, but through its wrongful user. Plaintiff contends, that it supplied the article, which it undertook to furnish. Was the coal then rendered unfit, by the defendant, for the intended purpose, either by the two grades being mixed and used together or, if the slack were used separately, by not being properly "fired"? The analysis of the coal shewed, that neither grades came up to the British Thermal Unit standard. If it had not been for the evidence of Swanton, defendant's engineer, who had 30 years' experience, I would have laid great stress upon this fact, but he frankly admitted that his complaint lay with the slack coal and not the lump coal. He said he could have broken up the lump coal and obtained a satisfactory result. If he had pursued this course, he would have been obtaining what is known as "the run of the mine." Evidence for the plaintiff shewed that it was using the slack coal separately and obtaining a pressure of steam that would have answered the purposes of the defendant. If this evidence be accepted (and I can see no

Judgment

MACDONALD, J.
1919
Jan. 9.
WESTERN FUEL CO. v. RAINY RIVER PULP & PAPER CO.

reason why it should be discredited); then, I have to consider why the defendant could not obtain equally satisfactory results, by using the lump and slack coal together. It was stated emphatically, by one of the plaintiff's witnesses, who asserted that he had years of experience, that you could not properly use lump coal and slack coal together in the same furnace and obtain the requisite amount of heat. It was further suggested, that the air supplied, as a draught for the furnace, was insufficient, but I think, while this may have been the situation during the previous fall, that it had been remedied. It comes back then for me to determine, whether the ground thus taken by the plaintiff, that slack coal should be used separately from lump coal and fed with great care, if proper results are to be obtained, is correct. It was even stated, that hand-firing was ineffective and that slack coal should be fed into the furnace automatically, by proper appliances for that purpose. The reasons given by Maltby, sales manager of the plaintiff, why you cannot use lump and slack coal together in a furnace, appeal to me. I have not been assisted by any evidence to the contrary, nor, aside from the analysis of the coal, has there been any independent evidence, as to the fitness or otherwise of the coal. I think that the defendant required coal at the time and in good faith, complained as to the poor results obtained from the use of the coal delivered. At the same time, upon the evidence, while holding that the plaintiff knew the purpose for which the coal was intended, I have come to the conclusion, that it was reasonably fit for that purpose, if properly used by the defendant. The improper usage consisted, in mixing and using the different grades of coal together and thus nullifying their effect for heating purposes, so the implied warranty that might otherwise have existed, and rendered the plaintiff liable, did not attach or was, under such circumstances, inoperative. The counterclaim for damages is thus dismissed and the plaintiff is entitled to judgment for the sum of $2,730, with interest and costs.

Judgment

Judgment for plaintiff.

RE LAND REGISTRY ACT, AND BLANCHARD AND MORGAN.

MACDONALD, J. (At Chambers)

1919

Jan. 9.

RE LAND REGISTRY ACT, AND BLANCHARD AND MORGAN

Will, construction of—Realty—Bequest—Use before sale—Registration.

A testator by will dated the 10th of June, 1913, bequeathed to B. and M. in equal shares certain property in Victoria. The will also contained the words "B. to have full use of house and land to reside in or let as he thinks fit until the year 1917, when the property must be sold at latest or earlier if the amount of not less than $8,000 can be realized." Testator was killed on the torpedoing of the Lusitania, May 7th, 1915. On appeal from the refusal of the Registrar-General of Titles to register B. and M. as the absolute owners of the property:—

Held, that the provision as to the use of the house and land neither contracts nor limits the previous portion of the will and the applicants should be registered as absolute owners.

APPEAL from the refusal of the Registrar-General of Titles to register the east half of lot 19, map 180, Lake Hill Estate, Victoria, in the names of the applicants as the absolute owners thereof under the will of Emma Wylie, deceased. The facts are set out fully in the reasons for judgment. Argued before MACDONALD, J. at Chambers in Victoria on the 20th of December, 1918. Statement

Harold B. Robertson, for applicants.

Registrar-General of Titles, in person, *contra*.

9th January, 1919.

MACDONALD, J.: By her will, dated the 10th of June, 1913, Emma Wylie "bequeathed" to her friend and manager, Edward Norris Blanchard, and to her niece, Annie Mabel Morgan, in equal shares, property, described as the east half of lot nineteen (19), map 180, Lake Hill Estate, Victoria, B.C. Mrs. Wylie was killed on the torpedoing of the "Lusitania" on the 7th of May, 1915. Her will was duly probated and an application was made to register Mr. Blanchard and Miss Morgan as absolute owners of the property. The Registrar-General has refused the application in such form, and would only allow registration Judgment

MACDONALD, J. (At Chambers)

1919

Jan. 9.

RE LAND REGISTRY ACT, AND BLANCHARD AND MORGAN

with the reservation, that the property was held by such parties in trust. It is sought to reverse his decision in this respect. The ground taken by the Registrar is, that the following words in the will, removed, what might otherwise have been, an absolute disposition of the property in favour of the parties, *viz.*, "Edward Norris Blanchard to have full use of house and land to reside in or let as he thinks fit until the year 1917, when the property must be sold at latest or earlier if the amount of not less than eight thousand ($8,000) dollars can be realized." This is a peculiar proviso, and seems to indicate that the testatrix was satisfied, that she would die before the year 1917. Otherwise it would be ineffective. It is difficult to determine, what either she or the conveyancer had in mind, in thus controlling the use of the property. It may have been simply a precaution limiting the occupation of Mr. Blanchard and thus benefiting Miss Morgan. It is contended, however, that the result is, that the parties are only trustees of the property. It is pointed out, that at the close of the will, any residue is to be divided amongst the great nieces and nephews of the testatrix who are alive at her death. She appointed P. Morgan and Edward Norris Blanchard as her executors.

Judgment

In construing the will, I am required to consider its entire contents, so as to give it full effect. I should also endeavour, if possible, to carry out the intention of the testatrix. In taking this course, I must bear in mind that the nature of the will must be interpreted "according to its proper acceptation, or with as near an approach to that acceptation, as the context of the instrument, and the state of the circumstances existing at the time of its execution will admit of." Mrs. Wylie seems to have been possessed of various stocks and shares, and the gross value of her estate was fixed at £6,535. She gave various specific legacies and, even after these had been paid, there would be considerable residue of her personalty to be divided amongst her great nieces and nephews. I can assume that the testatrix had some good reason in referring, in the commencement of her will, to her manager and her niece. Did she intend, by thus singling them out for her first consideration, to simply name them as trustees, for her great nieces and nephews? This would seem unlikely and would not be a mark of favour, but

rather the contrary. It would be imposing a responsibility on two persons, one of whom was resident in England. Then again, as indicating her desire to give property to one of these parties, I find the succeeding clause in the will reads as follows:

"In addition to the above property I bequeath the sum of two hundred pounds (£200) to Edward Norris Blanchard and the use of furniture, horses, rigs and stock until he sells all, the money from sale of furniture, horses, rigs and stock to go to my estate."

The ordinary plain reading of this bequest would indicate that the testatrix entertained the belief that she had already, by her will, bequeathed property to Mr. Blanchard and was making him an additional gift, with the use of some property until it was disposed of. A further strong point, in favour of the conclusion that Mrs. Wylie gave the land absolutely, and not to be held in trust, arises not only from the wording of the will, but from the fact, that if Miss Morgan, her niece, were simply to be a trustee, she would obtain no benefit whatever under the will. One trustee resident in the Province would, if so intended, have been sufficient, and the mention of Miss Morgan's name would be without any apparent aim or object, unless she was to become really possessed of part of the property of the testatrix. She would not even be in as good a position as the great nieces, who were to share in a division of what would be, irrespective of the real estate, a substantial residue of the estate. So I do not think the provision, as to the use of the house and land, which is the sole basis for the contention as to trusteeship, controls or limits the previous portion of the will. In my opinion, Mrs. Wylie intended to give the property in question to Mr. Blanchard and Miss Morgan in equal shares absolutely. In coming to a conclusion, as to the interpretation of this portion of the will, I have followed the principle, referred to by Buckley, J. in *Kirby-Smith* v. *Parnell* (1903), 72 L.J., Ch. 468 at p. 470 as follows: "I ought to read the whole will in order to gather from it the testator's intention." I have endeavoured not to speculate on what the testatrix might have intended to do, but endeavoured to carry out her intention, as far as the words of the will will permit. I have sought to ascertain "what she wished by interpreting what she said": see Rolfe, B. in *Grover* v. *Burningham* (1850), 5 Ex. 184 at

Judgment

MACDONALD, J. (At Chambers)

1919

Jan. 9.

RE LAND REGISTRY ACT, AND BLANCHARD AND MORGAN

pp. 193-4. There should be an order directing the Registrar to register the property absolutely in the name of the applicants without any limitation.

Application granted.

COURT OF APPEAL

1919

Jan. 15.

REX v. FONG SOON

REX v. FONG SOON.

Statute, construction of—Chinese Immigration Act—Chinaman resident in Canada—Visits United States—Neglects to register under section 20 of Act—Returns after short stay—Convicted under section 27—Statement of case—Manner of—R.S.C. 1906, Cap. 95, Secs. 20, 21, 27; Can. Stats. 1908, Cap. 14, Sec. 5.

Accused, a Chinaman, was regularly admitted into Canada in 1901, where he resided continuously until the 1st of May, 1918, when he went to Blaine in the State of Washington, U.S.A., without giving notice of his intention to leave Canada, as required by section 20 of the Chinese Immigration Act. He returned to Canada on the 21st of May following, when he was charged and convicted (under section 5 of the 1908 Amendment of said Act) of landing in Canada without payment of the tax payable under said Act.

Held (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that the conviction cannot be sustained. The term "landing" in Canada in section 5 of the 1908 amendment to the Act has relation to the original act of landing and does not apply to the re-entering of a certificated Chinese resident of Canada after a temporary absence on a visit to an adjacent city in the United States.

Per MARTIN, J.A.: It is not necessary that a transcript of all the evidence be sent up with the stated case. In special cases where some of the evidence is necessary it should be confined to that portion of it which is relevant to the points in question.

Per MCPHILLIPS, J.A.: If it is the intention of Parliament to cover a case as here established the language should be clear and unambiguous. The provisions of sections 20 and 21 are only directory in their nature and not extensive enough in their terms to destroy the certificate held.

Statement

APPEAL by way of case stated from a conviction by HOWAY, Co. J., under section 5 of the Chinese Immigration Act Amendment Act, 1908, the accused having been convicted of having "landed in Canada without payment of the tax payable under

the Act." The facts are set out fully in the case stated, which is as follows:

"1. The defendant, Fong Soon, was tried before me at the City of New Westminster, on the 16th of October, 1918, exercising criminal jurisdiction under the provisions of Part XVIII., of the Criminal Code relating to speedy trial of indictable offences, for that he, on or about the 21st of May, 1918, being a person of Chinese origin, did land in Canada, without payment of the tax payable under the Chinese Immigration Act and amending Acts, contrary to the form of the statute in such case made and provided and against the peace of our Lord the King, his Crown and dignity.

"2. The defendant was regularly admitted into Canada on the 12th of August, 1901, having complied with section 6 of the Chinese Immigration Act, 63 & 64 Vict., 1900, and having received a certificate under section 13 of the same Act, and resided in Canada from that date, until about the 1st of May, 1918, when he went to Blaine, Washington, U.S.A., where he remained until the 21st of May, 1918, when he returned to Canada and was arrested on the 21st day of May, 1918, and was charged with the offences hereinbefore set out.

"3. The accused did not give notice of his intention to leave Canada as required by section 20 of the Chinese Immigration Act, 3 Edw. VII., chapter 8.

"4. It was contended by counsel for the defence that the accused was not guilty of an infraction of section 27 of the Chinese Immigration Act as amended by section 5, chapter 14, 7 & 8 Edw. VII., but having acquired domicil in Canada, he was at liberty to leave and return to Canada at will. Statement

"5. I convicted the accused under section 27 of the Act as amended aforesaid, and fined him $100.

"6. Upon application of counsel for the accused, I reserve the following questions for the opinion of the Court of Appeal:

"(1) Did the accused having been regularly admitted into Canada on the 12th of August, 1901, and remaining in Canada until on or about the 1st of May, 1918, when without complying with section 20 of the Chinese Immigration Act, he went to the United States at Blaine, Washington, and returned therefrom on or about the 21st of May, 1918, commit an offence under section 27 of the Chinese Immigration Act as amended by section 5, chapter 14, 7 & 8 Edw. VII.?

"(2) Should the accused have been charged with an offence under section 30 of the Chinese Immigration Act, instead of section 27 aforesaid?

"(3) Attached hereto is a transcript of the evidence taken at the trial, together with my reasons for judgment."

The appeal was argued at Vancouver on the 10th of December, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

R. L. Maitland, for appellant: Having paid the tax once there is nothing in the Act to compel him to pay it again. Having paid the tax, section 27 does not apply to him. Under section Argument

COURT OF APPEAL

1919

Jan. 15.

REX v. FONG SOON

21 the tax is only payable again when he is away for more than one year. He was in Canada for seventeen years and obtained a domicil here: see *In re Margaret Murphy* (1910), 15 B.C. 401. The statute must expressly state we have to pay twice; it cannot be inferred.

Argument

Reid, K.C., for respondent: The *Murphy* case does not apply. The effect of his argument would be to repeal sections 20 and 21 of the Chinese Immigration Act. If he goes out without reporting as required by the Act, he must pay when he comes back. If authority is given expressly it excludes the doing of the act under other circumstances: see *North Stafford Steel, &c., Co.* v. *Ward* (1868), L.R. 3 Ex. 172 at p. 177; *Blackburn* v. *Flavelle* (1881), 6 App. Cas. 628 at pp. 634-5.

Maitland, in reply.

15th January, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The accused, a person of Chinese origin, who had previously been duly admitted into Canada, went to the State of Washington, and returned after an absence of three weeks. He came overland, not by ship. He was convicted under section 27 (*a*) of Cap. 95, R.S.C. 1906, being the Chinese Immigration Act, as amended by section 5, Cap. 14, 7 & 8 Edw. VII., of the offence therein specified. He had not availed himself of the privilege granted by section 20 of the principal Act.

If on the true construction of the said Act as so amended it ought to be held that the accused on his return from the State of Washington landed in Canada, then I think he was rightly convicted. The section is a penal one, and must be strictly construed, and the words "lands in Canada" are open, I think, to the interpretations respectively of "lands in Canada from a ship" and "arrives in Canada by any other means of conveyance." The word "lands" is used popularly in many senses, and among others in the sense of "arrives." This will be seen by consulting any standard dictionary. No doubt it must clearly appear in a case of this kind that Parliament meant in section 27 that "lands" should include enters or arrives in Canada from a place outside Canada, before the accused can be properly convicted of having landed in Canada without complying with the Act.

Now, looking at the whole Act and considering its object, I have come to the conclusion that "lands" is not to be restricted in its meaning to the landing from a ship, but includes entering in any other way. The Act is clearly aimed at the restriction of Chinese immigration into Canada by any means of conveyance. Section 24, for instance, is direction against every "master or conductor of any vessel or vehicle who lands or allows to be landed," etc. There "lands" includes departure from a train, as well as from a ship.

Then as to the effect of sections 20 and 21 of the Act. Section 20 enables the person desiring to depart temporarily from Canada to register, and having done so, to return to Canada within a year, exempt from the exactions provided for in the Act. The meaning and intent of these sections are not doubtful, and they afford ample protection to a person in the situation of the accused, desiring to leave Canada for a period less than one year. To limit the meaning of "lands" to entry by water would be to create an anomaly under sections 20 and 21 clearly not intended by Parliament. I would therefore answer the first question in the affirmative.

MACDONALD, C.J.A.

As to the second question, the accused being already convicted under said section 27, it is purely academic and ought not to have been submitted. I would therefore make no answer to it, even if my answer to the first question did not make it unnecessary to do so.

MARTIN, J.A.: This is an appeal from a conviction under section 27 of the Chinese Immigration Act, R.S.C. 1906, Cap. 95, as amended by section 5 of Cap. 14 of 1908, whereby the appellant was convicted of having "landed in Canada without payment of the tax payable under" that statute. The appellant is a Chinaman, who originally "entered Canada" from China, on the 12th of August, 1901, and paid the tax of $500 and received the proper certificate that "he had been permitted to land and enter" (section 8), and continued to reside in Canada till on or about May 1st, 1918, when he went to the United States for about three weeks on a visit and returned to Canada: he did not give notice of his intention to leave and return, and become registered as required by section 20.

MARTIN, J.A.

COURT OF APPEAL

1919

Jan. 15.

REX v. FONG SOON

In my opinion, the conviction cannot be sustained, because I do not regard the leaving of Canada and the return thereto by one of Chinese origin, who has already duly landed in or entered Canada, as a new and distinct "landing" in the proper sense of the word as used in the statute, and though the immigrant may later so conduct himself by infringing the statute that he will have (apart from any possible penalty under section 30, as to which I express no opinion) to pay another tax of equal amount upon "returning" to Canada after an absence of 12 months, under section 21, "in the same manner as in the case of a first arrival"; yet there is nothing in the Act which says that he in other respects loses the pecuniary or other benefit of his original "landing." On the face of it and in ordinary parlance, it is quite inappropriate to describe, *e.g.*, the return of a certificated Chinese resident of Canada from a visit to an adjacent city in the United States for a few days, as a "landing" in Canada; in such cases the proper word is "returning," and it is so used in section 21, under the significant heading "Re-entry." "Landing" means "first arrival" as used in section 21, and the fact that it is therein provided that a re-entry after 12 months' absence shall be treated "in the same manner as in the face of a first arrival," *i.e.*, landing, goes to mark the distinction that must still be observed in other cases between the original landing and a subsequent re-entry. It is not out of place, I think, to say that in the construction of this Chinese Immigration Act there should not be overlooked the existence in Canada of a considerable and ever-increasing number of Canadian-born Chinese who are natural-born British subjects, as pointed out in my judgment in *Re Coal Mines Regulation Act* (1904), 10 B.C. 408: *cf.* also section 7 of the said Act.

MARTIN, J.A.

In my opinion, therefore, the first question should be answered in the negative.

The second question, asking "should the accused have been charged with an offence under section 30," is not a proper question, and should not have been reserved or submitted to this Court, and ought therefore to be ignored: it is not for us to give advice. The third question is not indeed a question at all, but simply a statement that "(3) attached hereto is a transcript

of the evidence taken at the trial, together with my reasons for judgment."

I take this opportunity to renew the observations we made last term upon the irregular and inaccurate manner in which cases are stated for our consideration and the practice that it has been sought to introduce of needlessly and expensively sending up a transcript of all the evidence taken, as in the case at bar, where it was not even, and could not properly have been referred to. This Court

"is bound by the facts as they are certified to us by the Court below, and cannot go beyond them (save as provided by subsections (2) and (3) of section 1017 . . . . .), even though the result is that they may 'state you out of Court'":

Rex v. *Angelo* (1914), 19 B.C. 261 at p. 269, 5 W.W.R. 1303, 27 W.L.R. 108, 22 Can. Cr. Cas. 304; *Rex* v. *Riley* (1916), 23 B.C. 192, (1917), 1 W.W.R. 325, 26 Can. Cr. Cas. 402; and *Rex* v. *De Mesquito* (1915), 21 B.C. 524 at p. 526, 9 W.W.R. 113, 32 W.L.R. 368, 24 Can. Cr. Cas. 407. So even in special cases where it is necessary to send up a transcript of some of the evidence, it should be confined to that portion of it which is relevant to the point in question, *e.g.,* Was there any evidence on which the conviction could be founded? or upon which a confession should be admitted as in *De Mesquito's* case, *supra*? In the statutory rules promulgated by the former Court of Crown Cases Reserved (after it was established in 1848), which rules are to be found in Temple & Mew's Criminal Appeal Cases, 1852, Vol. 1, Appendix p. vii., it is laid down:

MARTIN, J.A.

"That every case transmitted for the consideration of this Court briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted; if the question turn upon the indictment or upon any count thereof, then the case must set forth the indictment or the particular count."

In the same volume, be it noted, are many excellent precedents of cases stated by various tribunals.

Though I have no doubt about the answer that should be given to the question stated, yet if there be any then our judgment should go in accordance with the high authority cited by me in *Rex* v. *Smith* (1916), 23 B.C. 197 at p. 201; (1917), 1 W.W.R. 553; 26 Can. Cr. Cas. 398, which led me to say that an accused

COURT OF APPEAL

1919

Jan. 15.

"is entitled to the benefit of any reasonable doubt as to the law from the hands of the Court just as much as he is entitled to it as to the facts from the hands of a jury. People ought not to be sent to gaol upon reasonable doubt, but upon reasonable certainty."

And *cf. Morin* v. *Reg.* (1890), 18 S.C.R. 407 at p. 426.

REX
v.
FONG SOON

GALLIHER, J.A.: The appellant Fong Soon, being a person of Chinese origin, entered Canada in 1901 and duly paid the head-tax imposed by the Chinese Immigration Act then in force. In May, 1918, he went to Blaine, in the State of Washington, one of the United States of America, without complying with the provisions of section 20 of the Chinese Immigration Act, being chapter 95 of the Revised Statutes of Canada, 1906. After remaining in Blaine for less than a month he re-entered Canada. By chapter 14 of the Statutes of Canada, 1908, section 27 of the Consolidated Act of 1906 was repealed by section 5 and a new section 27 substituted therefor. Fong Soon was arrested under this latter section and convicted by HOWAY, Co. J. and fined $100. The matter comes before us by way of a case stated and the short point is, Was he properly convicted under said amended section 27? It is urged that the appellant should have been charged under section 30 for having violated the provisions of section 20 in that he did not report out upon leaving Canada. In my view the leaving of Canada without reporting out under section 20 does not constitute an offence. Sections 20 and 21 must be read together, and when so read, I construe them as enabling and not penal sections. The effect of registering under section 20 is that providing he returns to Canada within twelve months he is entitled to free entry under section 21. The effect of his not so registering is that he becomes subject to the provisions of section 27. I would answer the first question in the affirmative, and the second question in the negative.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The stated case from HOWAY, Co. J. reads as follows: [already set out in statement].

The conviction, as stated, was made under section 27 of the Chinese Immigration Act, Cap. 14, 7 & 8 Edw. VII., an amendment to the Chinese Immigration Act, Cap. 95, R.S.C. 1906. It was attempted by counsel for the Crown, but in my

MCPHILLIPS, J.A.

opinion, with deference, ineffectually attempted, to justify the conviction under section 27, subsection (*a*). The gravamen of the charge was laid really and founded upon the fact that the accused went out of Canada without complying with sections 20 and 21, which make provision for re-entry after leaving Canada. The first cogent observation that can be made to this submission is this—that the Court is well entitled to take judicial notice of the fact that it would have been futile for the accused to have given any notice in pursuance of those sections of the Act, as the United States inhibits the entry of all Chinese, and it is fair to assume that in accordance with true international relations the Canadian authorities would not have given any heed to any such notice, received any fee or made any entry in connection therewith. This being the situation, it only the more is impressed upon one that sections 20 and 21 have relation to Chinese returning to their own country. It is true they may go elsewhere out of Canada to any country that will admit them, but in practice the departure from Canada may be said to be invariably to China. In my opinion, this is a directory provision and does not go the length of depriving the regularly admitted Chinese of the *status* acquired by due compliance with the Act, which is the admitted position of the accused. Further, he has been a resident of Canada now for 17 years. It is indeed a great invasion of right and would affront one in the application of the rule of natural justice, the preservation of true international relations and the observance of international law to affect this acquired *status,* unless there is intractable statute law in the way of according the right of re-entry to Canada in the circumstances present in this case. I do not find any such statute law or that the accused has been rightly convicted and subject to a fine and liable to deportation. The accused has not contravened section 27, subsection (*a*), by going into the United States, a country to which he was not entitled to go, and in returning therefrom he does not land or attempt to land in Canada without payment of the tax payable under the Act. Within the purview of the statute, he 17 years

MCPHILLIPS, J.A.

COURT OF APPEAL

1919

Jan. 15.

REX v. FONG SOON

ago, landed in Canada and complied with the then existing statute law and fulfilled all the requirements of the law, and was granted the certificate which is *prima facie* evidence that he complied with the requirements of the Act, and there has been no contestation or adjudication of any invalidity in this certificate (see section 8, Cap. 95, R.S.C. 1906).

It is clear and plain that the landing or the attempt to land in Canada without payment of the tax, referred to in section 27, subsection (*a*), above quoted, has relation to the original act of landing, and as to that, the accused regularly landed, paid the tax, and was in due course granted the certificate called for and to which he was entitled under the Act.

If it was the intention of Parliament to cover a case such as the facts here establish, the language should be clear and unambiguous. The most that the learned counsel for the Crown could submit was that as provisions were made for re-entry (sections 20 and 21, Cap. 95, R.S.C. 1906), non-compliance therewith inferentially resulted in the deprivation of right to re-enter, provisions which, in my opinion, are only directory in their nature and not extensive enough in their terms to destroy the certificate held. The accused regularly landed in Canada and was rightly entitled to be in Canada, and when this certificate has added thereto 17 years of residence in Canada, an isolated and perhaps inadvertent act of departure from Canada, without giving a notice thereof, futile in any case, should not be held to be a forfeiture of the rights acquired, save, as previously stated, there is found intractable statute law so declaring (see *Duke of Newcastle* v. *Morris* (1869), 40 L.J., Bk. 4, the Lord Chancellor at p. 10). It is not the province of the Court to legislate, and where Parliament has halted in so legislating, the *hiatus* is not to be supplied by the Court. I would answer the first question in the negative. I express no opinion with respect to the second question. It is not a necessary question or one, with all deference to the learned judge, which can rightly be submitted. The stated case is to be confined to questions of law

MCPHILLIPS, J.A.

affecting the conviction, not relative to any other information or charge which might have been capable of being laid.

The conviction should, in my opinion, be quashed.

EBERTS, J.A. would allow the appeal.

Appeal allowed and conviction quashed, Macdonald, C.J.A. and Galliher, J.A. dissenting.

COURT OF APPEAL

1919

Jan. 15.

REX v. FONG SOON

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

IN RE NOWELL AND CARLSON.

MACDONALD, J. (At Chambers)

1919

Jan. 15.

IN RE NOWELL AND CARLSON

Court—Inferior—Jurisdiction—Must be disclosed on face of proceedings—Prohibition—Waiver—Laches.

On the question of jurisdiction the rule is that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so; and nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged.

Where the want of jurisdiction is apparent on the face of the proceedings, waiver or acquiescence cannot create jurisdiction; nor can laches operate to defeat the right of prohibition.

APPLICATION for an order that a writ of prohibition do issue to the judge of the County Court at New Westminster restraining further proceedings in such Court "holden at Chilliwack" in an action for the recovery of certain moneys loaned the defendant, and for a sum due on the sale of certain houses. The grounds for the application were that no jurisdiction was shewn to exist in such Court by the plaint and particulars of claim. Heard by MACDONALD, J. at Chambers in Vancouver on the 13th of January, 1919.

Statement

A. M. Whiteside, for the application.
J. R. Grant, contra.

MACDONALD, J. (At Chambers)

1919

Jan. 15.

IN RE NOWELL AND CARLSON

15th January, 1919.

MACDONALD, J.: Defendant applies for an order, directing the issuance of a writ of prohibition to the judge of the County of Westminster, restraining further proceedings in such Court, "holden at Chilliwack," on the ground, that no jurisdiction was shewn to exist in such Court by the summons, plaint or particulars of claim herein. The claim consisted of money, alleged to have been loaned by the plaintiff to the defendant, in the year 1909, amounting to $310, and the sum of $201 due on the sale of horses. Then, after charging interest and giving certain credits, the balance claimed to be due was $422.47. Defendant, on being served, did not enter any dispute note, and judgment was entered against him in June, 1914. Execution was issued in 1915. Then, a further execution was issued on the 27th of November, 1918, and this apparently provoked the application now launched by the defendant. The particulars of claim did not state, where the money was loaned or the horses were sold, but the plaintiff is described as "of Chilliwack, B.C.," and the defendant as "of Princeton, B.C." It was contended, that the jurisdiction of the Court was thus not apparent on the face of the proceedings, but counsel for the plaintiff, on the contrary, submitted that the plaint was properly entered in the County Court of Westminster, as being "within the territorial limits in which the cause of action or suit wholly or in part arose." In other words, that it was a reasonable intendment, to be derived from the particulars, that the money was loaned and property sold at Chilliwack, or that payment should be made and breach thereof had occurred at that place. Can I assume such an allegation in the County Court? I think not. I do not think the facts here are distinguishable from those presented in *Camosun Commercial Co.* v. *Garetson & Bloster* (1914), 20 B.C. 448, where MURPHY, J. followed the case of *Beaton* v. *Sjolander* (1903), 9 B.C. 439, and held, even after judgment and execution, that prohibition should issue to the County Court. I do not think that jurisdiction is apparent on the face of the proceedings, and with such a condition existing, as to an inferior Court it should not be inferred. The *status* of a County Court in this respect was laid down in *Peacock* v. *Bell and Kendal* (1667), 1 Saund. 73 at p. 74 (and notes), as follows:

Judgment

"That nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged."

These expressions were approved of by Baron Parke in *Cosset* v. *Howard* (1847), 10 Q.B. 411 at pp. 453-4.

In this case I would readily follow the *dictum* of Cameron, J. in *In re English* v. *Mulholland* (1882), 9 Pr. 145 at p. 149, that nothing "can be inferred to oust a Court of jurisdiction, where in any aspect of the case it can have jurisdiction," but the difficulty is that here it cannot apply, as jurisdiction is not apparent, so that even by inference it could not be ousted. Thus prohibition should issue, unless its issuance is discretionary, or the right to apply has been destroyed by waiver. In *Broad* v. *Perkins* (1888), 21 Q.B.D. 533, the right of the Court to exercise a discretion, as to granting prohibition was considered. Lopes, L.J., in *Farquharson* v. *Morgan* (1894), 1 Q.B. 552 at p. 559, discusses this latter case, as well as that of *Mayor, &c., of London* v. *Cox* (1866), L.R. 2 H.L. 239, and says:

"The result of the authorities appears to me to be this: that the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that, where the absence or excess of jurisdiction is not apparent on the face of the proceedings, it is discretionary with the Court to decide whether the party applying has not by laches or misconduct lost his right to the writ to which, under other circumstances, he would be entitled. The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings, is explained by Lord Denman in *Bodenham* v. *Ricketts* [(1836)], 6 N. & M. 170 to be for the sake of the public, lest 'the case might become a precedent if allowed to stand without impeachment,' and, I will add for myself, because it is a want of jurisdiction of which the Court is informed by the proceedings before it, and which the judge should have observed, and of which he himself should have taken notice."

Judgment

So I do not think I have any discretion, in the matter of granting prohibition in this case.

There was no submission to the jurisdiction by the defendant after service of process, and in an inferior Court, with its powers limited territorially and otherwise, jurisdiction, in my opinion, could not be created by a waiver or acquiescence, where its absence is apparent on the face of the proceedings, unless there was a statutory provision to that effect, of which advan-

MACDONALD, J. (At Chambers)

1919

Jan. 15.

IN RE NOWELL AND CARLSON

tage could and had been taken. Such a position is not disclosed in this case.

Then, it is submitted that delay or laches should operate, on the same principle as waiver, and deprive the defendant of the right, he might otherwise possess, to prohibition. This ground would also appear, upon authorities, not to be tenable where the lack of jurisdiction is apparent on the face of the proceedings: see Boyd, C. in *Re Brazill* v. *Johns* (1893), 24 Ont. 209 at p. 213:

> "The right existing, it is optional with the defendant to apply at the outset of the Division Court proceedings, or he may wait till the latest stage and apply so long as there is anything to prohibit."

Compare other cases cited in Bicknell and Seager's Division Courts Act, 3rd Ed., 69. It is pointed out, that should the plaintiff be prevented from further proceeding upon his judgment and compelled to sue again, he might lose his claim on account of the debt being outlawed. This would be regrettable, but should not affect my decision. There has been unreasonable and unexplainable delay on the part of the defendant, still, in view of the authorities, I feel that, I should, adopting the language of Lopes, L.J. in *Farquharson* v. *Morgan, supra,* say that "most reluctantly I am compelled to hold that the writ of prohibition must issue."

Judgment

Application granted.

IN RE C. OWEN, DECEASED.

MACDONALD, J. (At Chambers)

1919

Jan. 14.

IN RE OWEN, DECEASED

Administration—Directions for will given by deceased—Not signed owing to weakness—Applicants for administration mentioned as executors in directions—R.S.B.C. 1911, Cap. 4, Sec. 12.

Deceased, a Syrian, after returning from active service started a tea and coffee shop. Subsequently being taken ill he gave power of attorney to E. and M., fellow countrymen, to transact his business. Shortly before his death he requested that a will be drawn leaving his estate to his mother in Asia Minor and appointing E. and M. his executors. When the will was ready for signature he was too weak to sign and died intestate. He also had certain moneys in a bank at the time of his death. On application by E. and M. for letters of administration under section 12 of the Administration Act:—

Held, that E. and M. should be appointed administrators for the purpose of selling deceased's business only, and that as to the balance of the estate the mother should be consulted.

APPLICATION to invoke section 12 of the Administration Act. Deceased, a Syrian by birth, joined the Canadian Army in 1915, and went overseas. On his return he started a tea and coffee shop, which at his death was a going concern. He also left a sum of $2,000 in the bank. When the deceased was taken sick he gave a power of attorney to K. E. and K. M. Rahy, fellow-countrymen, to carry on and transact his business. Shortly before his death, he requested a will to be drawn, leaving his estate to his mother, who resides in Beyrant, Asia Minor, and appointing K. E. and K. M. Rahy executors, but by the time the will was drawn and submitted to him for signature he was too weak to sign, and died intestate. Heard by MACDONALD, J. at Chambers in Vancouver on the 14th of January, 1919.

Statement

Killam, for K. E. and K. M. Rahy: Under section 12 of the Administration Act, letters of administration should issue. It was the intention of the deceased to appoint these men executors, as shewn by the will he requested to be drawn.

Argument

McTaggart, for Official Administrator: Under section 41 of

MACDONALD, J. (At Chambers)

1919

Jan. 14.

IN RE OWEN, DECEASED

Judgment

the Administration Act, in such a case as this it was compulsory for the Official Administrator to apply for administration, but section 12 gives the Court discretionary powers.

MACDONALD, J.: This is an application in which I have power to make such an order as asked for, invoking section 12 of the Administration Act, which reads:

"Where a person dies intestate as to his personal estate, or leaves a will affecting personal estate but without having appointed an executor willing and competent to take probate; or where the executor at the time of the death of such person resides out of his Province, and it appears to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased or of other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part thereof, other than the person who but for this section would have been entitled to a grant of administration, it shall be lawful for the Court, in its discretion, to appoint such person as it shall think fit to be such administrator, upon his giving such security as the Court shall direct; and every such administration may be limited, or upon condition or otherwise, as the Court shall think fit."

But for the present I consider it advisable to appoint the Rahys administrators to the extent only, of selling the business of the deceased, with which they are familiar. As to the balance of the estate, I think the mother should be consulted.

Order accordingly.

CHANDLER v. THE CITY OF VANCOUVER.

COURT OF APPEAL

1919

Jan. 15.

CHANDLER v. CITY OF VANCOUVER

Municipal law—By-law—Application to quash—Judge—Persona designata —B.C. Stats. 1900, Cap. 54, Sec. 127.

Section 127 of the Vancouver Incorporation Act provides that "In case a ratepayer or any person interested in a by-law, or order or resolution of the Council applies to any judge of the Supreme Court . . . . . the judge after at least ten days' service on the corporation of a rule to shew cause in this behalf, may quash the by-law, order or resolution," etc.

Held (MARTIN, J.A. dissenting), that the term "judge" in the statute is *persona designata* and only the judge who issued the rule *nisi* can hear the application on its return.

APPEAL from the order of GREGORY, J., of the 2nd of August, 1918, dismissing the rule to shew cause why by-law No. 1329 of the City of Vancouver should not be quashed. By an amendment to its charter in 1918, the City was empowered to prohibit automobiles and other vehicles operating on any or all of its streets for the purpose of conveying passengers and receiving any sum of money, award, gift or voluntary contribution in return for such carrying. The City Council then passed a by-law prohibiting the operation of "jitneys" plying on the City streets for the purpose of carrying passengers. At the instance of the applicant Chandler, a rule *nisi* was issued by MORRISON, J., who ordered suspension of the operation of the by-law for time sufficient for the application to quash to be heard. Subsequently an application was made to MORRISON, J. by special leave, to extend the time. Counsel for the City took the objection that under section 127 of the City charter "the judge" was *persona designata* and the rule was improper, having been issued out of the Supreme Court. The learned judge granted the extension and held that he was not *persona designata*. The motion to quash came on for hearing by GREGORY, J. on the 2nd of August, 1918, when he held there was no jurisdiction and dismissed the motion with costs, following *Doyle* v. *Dufferin* (1892), 8 Man. L.R. 294. From this decision the applicant appealed.

Statement

COURT OF APPEAL

1919

Jan. 15.

CHANDLER v. CITY OF VANCOUVER

The appeal was argued at Vancouver on the 4th and 5th of December, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Cassidy, K.C., for appellant: My submission is the judge was *judex designatis.* The objection on which they succeeded was, that under the section it must be the same judge, following *Doyle* v. *Dufferin* (1892), 8 Man. L.R. 294. The Manitoba Act says "a judge" and our Act "any judge." If there was any question as to jurisdiction, the proper course was to adjourn for hearing before the proper judge.

Harper, for respondent: Where a person wrongfully invokes a jurisdiction, it must be dismissed out of the Court. Section 132, providing for an appeal, shews the judge was *persona designata.* On questions of *persona designata* see *Re Pacquette* (1886), 11 Pr. 463; *Re Young* (1891), 14 Pr. 303. Where he is improperly before the Court there is power to dismiss: see *Canadian Northern Ontario Rway. Co.* v. *Smith* (1914), 50 S.C.R. 476 at p. 481; *St. Hilaire* v. *Lambert* (1909), 42 S.C.R. 264; *The Canadian Pacific Railway Company* v. *The Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606; *Re Township of Ashfield and County of Huron* (1917), 36 D.L.R. 785; *City of Slocan* v. *Canadian Pacific Ry. Co.* (1908), 14 B.C. 112.

Argument

Cassidy, in reply: There was no jurisdiction to entertain costs: see *Arthur* v. *Nelson* (1898), 6 B.C. 323. You have to go to the Court for the issue of a rule: see *Doe d. Stevens* v. *Lord* (1838), 6 D.P.C. 256. Mr. Justice MORRISON held that he was not *persona designata*: see also *Sheppard* v. *Sheppard* (1908), 13 B.C. 486 at p. 489; Biggar's Municipal Manual, 11th Ed., 376; *Bentham* v. *Hoyle* (1878), 3 Q.B.D. 289 at p. 292; *Fraser* v. *Municipality of Stormont, &c.* (1853), 10 U.C.Q.B. 286; *Doe dem. Atkinson* v. *McLeod* (1852), 8 U.C.Q.B. 345; *In re Thompson and The Corporation of Bedford, &c.* (1862), 21 U.C.Q.B. 545.

Cur. adv. vult.

15th January, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Pursuant to section 127 of the Vancouver Incorporation Act, 1900, MORRISON, J., on the appli-

cation of the appellant (Chandler), made an order calling upon the respondent (the City of Vancouver) to shew cause why the said by-law should not be quashed for illegality. The by-law is one affecting the operation of "jitneys" in the streets of the City of Vancouver. The order was made returnable on the 19th of July, 1918, and on that date was moved absolute before GREGORY, J., who enlarged the motion, after objection taken on behalf of the respondent to the learned judge's jurisdiction to deal with the matter, but without prejudice to the said objection. The matter came on again for argument before the same learned judge on the 2nd of August, when the said objection was renewed, it being contended on behalf of the respondent that MORRISON, J., who made the order *nisi,* was acting *persona designata* under said section 127, and that therefore no other judge had jurisdiction in relation to it. GREGORY, J. adopted this view of the law and dismissed the motion and set aside the order *nisi,* with costs to be paid by the appellant to the respondent. From that order this appeal was taken.

Section 127 provides that any person interested may apply to "any judge of the Supreme Court," and on production of certain specified evidence the judge, "after at least ten days' service on the corporation of a rule to shew cause," may quash the by-law for illegality. There are two conflicting opinions upon the construction of this section. The one expressed by MORRISON, J. on an application made to him, between the date of the rule *nisi* and its return date, to stay proceedings under the by-law: he held that the judge mentioned in the said section acts judicially and not *persona designata.* This conflicts, of course, with the view held by GREGORY, J. when he subsequently dealt with the matter, as above stated. In my opinion, this case cannot be distinguished from *Doyle* v. *Dufferin* (1892), 8 Man. L.R. 294. The section there under construction is, so far as it affects the question before the Court, the same as our section 127. The Manitoba section uses the words "summons or rule to shew cause," while ours uses the words "rule to shew cause" only. This is a distinction without a difference.

MACDONALD, C.J.A.

In the argument before us, much stress was laid upon this expression "rule to shew cause." It was contended that the use

COURT OF APPEAL

1919

Jan. 15.

CHANDLER v. CITY OF VANCOUVER

MACDONALD, C.J.A.

of these words indicated that the proceedings were to be taken in Court; that a "rule to shew cause" has had for a long time a well-defined signification in legal proceedings and hence an intention on the part of the Legislature ought to be inferred to make the proceeding under said section 127 a judicial one. On the argument, I was much struck with the force of that contention, because in construing statutes one has to look at the whole Act when construing a particular section, to find whether or not the section must be modified by reference to the whole where either of two constructions is open for adoption. It would not follow that because the Supreme Court of Canada came to the conclusion, as that Court did in *The Canadian Pacific Railway Company* v. *The Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606, that on the construction of the Act there in question the expression "judge" must be read as meaning judge *persona designata*, that a like construction should be given to the statute here in question. The use, therefore, of the words "rule to shew cause" might have a very intimate bearing upon the question. I find, however, that the same Court, in *St. Hilaire* v. *Lambert* (1909), 42 S.C.R. 264, on a motion to quash an appeal from the Supreme Court of Alberta, had to construe words of similar import. The appeal was from an order made under section 57 of the Liquor Licence Ordinance in force in that Province. That ordinance gave power to a judge to cancel a liquor licence on an application made by "originating summons." It was argued that the use of the words "originating summons" indicated that the Legislature intended the proceedings to be judicial proceedings, because an originating summons was process provided for by the Rules of Court made under the Judicature Ordinance. This contention, however, was not acceded to. The Chief Justice, announcing the decision of the Court, said:

> "The majority of the Court are of opinion that this case comes within the principle decided in *The Canadian Pacific Railway Company* v. *The Little Seminary of Ste. Therese* [(1889)], 16 S.C.R. 606, and that we are without jurisdiction."

There remains to consider the propriety of the order dismissing the motion and setting the rule *nisi* aside. It was suggested that the proper disposition of the matter by GREGORY, J. would have been to adjourn it before MORRISON, J. I do not

agree with this. The proceedings were wrongly taken in the Supreme Court. It was, therefore, I think, the duty of GREGORY, J. to dispose of the matter before him in the only way in which, in my opinion, he could have properly disposed of it, that is to say, by dismissing the motion and setting the rule aside. Had the matter been adjourned to be heard by MORRISON, J., I think that learned judge could only have dealt with the matter in the way I have suggested. He could not then have treated the proceedings as proceedings before him *persona designata*. The proceedings being in Court, and wrongly in Court, the only course, in my opinion, open to the learned judge was the one he pursued.

The appeal should, therefore, be dismissed with costs.

MARTIN, J.A.: Under section 127 of the Vancouver Incorporation Act, 1900, Cap. 54, the applicant, on July 4th, 1918, applied to Mr. Justice MORRISON, a judge of the Supreme Court, who directed a rule *nisi* to issue out of that Court in the ordinary way, intituled therein, sealed with its seal, and signed by its registrar, "By the Court," in the usual way that rules, judgments and orders of the Court, as distinguished from Chambers, are issued. The rule called upon the City of Vancouver to shew cause against it on July 19th following, and in the meantime, and till the application was disposed of, ordered "That all proceedings to put the said by-law into force be and the same are hereby stayed." An application by special leave was made to Mr. Justice MORRISON to extend the time, and upon that application, his jurisdiction to act as the Court was objected to on the ground that he was *persona designata,* but he delivered, on July 13th, a written judgment (reported in (1918), 3 W.W.R. 53) overruling that objection and holding that he was "acting judicially and not conducting an inquiry"; in other words, that the matter was within the Court, which, under section 5 of the Supreme Court Act, R.S.B.C. 1911, Cap. 58, is properly constituted when "held before the Chief Justice or before any one or more of the Judges of the Court for the time being."

On the return day of the rule, the 19th, Mr. Justice GREGORY was hearing Court motions in Vancouver, where, as in Vic-

COURT OF APPEAL

1919

Jan. 15.

CHANDLER v. CITY OF VANCOUVER

toria, the Court sits continuously (save in vacation) under section 44 of the Supreme Court Act, and this was a motion which, under rule 948(*b*) and (*d*), the Court could hear in vacation. The rule was called on for hearing in the usual way, but was adjourned till the 26th, with all objections reserved, and on that day objection was taken to the jurisdiction of the Court by the respondent, and the applicant applied to leave the matter referred to Mr. Justice MORRISON, and, after argument, judgment was reserved till August 2nd, when Mr. Justice GREGORY decided that the Court had no jurisdiction to hear the rule, dismissed the motion, and declared that "the rule *nisi* be and the same is hereby vacated and discharged and the application to refer the matter to the Honourable Mr. Justice MORRISON is refused." (See (1918), 3 W.W.R. 53.)

Upon that argument the prior decision of Mr. Justice MORRISON upon the identical question of jurisdiction was relied upon before Mr. Justice GREGORY as binding upon him, but he declined to follow his learned brother, and exception was taken to that unusual course before us, and we expressed our opinion that, with all respect, the salutary rule of *stare decisis* should have been adhered to. See on the point *Cowan* v. *The St. Alice* (1915), 21 B.C. 540; 8 W.W.R. 1256; 32 W.L.R. 17; *Sheppard* v. *Sheppard* (1908), 13 B.C. 486 at pp. 488, 492; (1908), A.C. 573 at p. 579; and *Jordan* v. *McMillan* (1901), 8 B.C. 27 at p. 28, wherein the Full Court pointed out "the wildest uncertainty on the administration of justice" that would follow the failure to adhere to said rule. This case, with all due respect, is a regrettable illustration of the unfortunate consequences resulting from a departure from it, because if the learned judge appealed from had followed the decision he was bound by, the matter would have come up squarely before us for consideration, whereas it is complicated owing to his intervention and much extra expense and difficulty have been created. The result of this conflict of authority between the two judges is that if the latter is right in his view that the use of the caption, the seal, and the signature of the registrar of the Supreme Court did not bring the rule into that Court, then it, in any event, divested of these unnecessary appendages (which would be regarded as mere surplusage, as was the signature of the

MARTIN, J.A.

Crown counsel in *Rex* v. *Jim Goon* (1916), 22 B.C. 381; 10 W.W.R. 24; 33 W.L.R. 761; 25 Can. Cr. Cas. 415) would still stand outside the Court as a special statutory proceeding which must sooner or later, as a matter of justice and right, be adjudicated upon by the special tribunal that issued it, despite any intervening delay in its functions arising from misconception, arrest or otherwise. If the view is correct that it never was legally in the Court, it follows that it was always and is now in the special statutory tribunal, for in law there is no place for the suspension of the coffin of Mohammed between two jurisdictions. Another result of that view, of practical importance, is that the documents and proceedings should not have been filed in the Court registry, and no law stamps are payable thereon.

In support of the judgment below, much reliance was placed by the respondent on the decision of the Manitoba Full Court in *Doyle* v. *Dufferin* (1892), 8 Man. L.R. 294. That case, however, is founded on a statute which differs essentially from this before us in two particulars: (1) It directs specifically that the application must be made to "a judge . . . . sitting in Chambers," which excludes the Court; and (2) "A summons or rule to shew cause" is authorized, whereas our Act only authorizes the latter. In the *Doyle* case, *supra,* a summons was resorted to and not a rule *nisi,* which latter is, as will be shewn, inapplicable to proceedings in Chambers, there being a fundamental distinction between the two things which must be borne in mind. The *Doyle* case, *supra,* therefore, in accordance with the rule laid down by the House of Lords in *Quinn* v. *Leathem* (1901), A.C. 495, should be restricted to its peculiar facts: it is, in my opinion, a fallacious, as well as a dangerous, thing to seek to extract a general principle from a special Act and apply it to another Act with dissimilar language. The same remarks apply to the decision of the Supreme Court of Canada in *St. Hilaire* v. *Lambert* (1909), 42 S.C.R. 264, which was on a peculiar section in the Alberta Liquor Licence Ordinance (C.O.N.W.T. 1905, Cap. 89, Sec. 57), providing that upon a sworn complaint that a licence has been obtained by fraud, the judge for the judicial district of the Supreme Court "may by means of an originating summons investigate and summarily

MARTIN, J.A.

COURT OF APPEAL

1919

Jan. 15.

CHANDLER v. CITY OF VANCOUVER

MARTIN, J.A.

hear and dispose of the complaint and may direct the cancellation of the licence," etc.

That unusual and positive language, employed in a peculiar subject-matter wholly foreign to Courts of Justice, was, I assume, in the absence of any reasons given, held to express the clear intention to establish a special and summary tribunal, and in such relation the use of the words "originating summons" has obviously no technical meaning and is equivalent to a summons originating from that tribunal. Furthermore, even an originating summons in the strict sense is returnable and heard in Chambers in England, and in this Province at least (Rules 737b and c), and not in Court, as rules *nisi* were and are. As Mr. Justice Taschereau put it in a somewhat similar case under the Railway Act, which in the *St. Hilaire* case, *supra,* followed *The Canadian Pacific Railway Company* v. *The Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606:

> "The so-called judgment rendered in the first instance was merely an order by a judge in Chambers. . . . . A judge in Chambers does not constitute a Court."

And at pp. 618-9 Mr. Justice Patterson, with whom Mr. Justice Gwynne concurred, laid stress upon the fact that the functions imposed by the statute in question upon the judge were "functions which from their nature and object must be intended to be exercised in a summary manner and not liable to the delay incident to the appeals from Court to Court. From these considerations, as well as from the language of the statute, it is plain that the judge acts as *persona designata* and does not represent the Court to which he is attached."

But in the case at bar this important element of appeal is provided for by section 132, which declares that "any decision or order of a judge upon any such application shall be subject to appeal to the Full Court of the Supreme Court."

This decision was followed by that in *Canadian Northern Ontario Rway. Co.* v. *Smith* (1914), 50 S.C.R. 476, also one on the Railway Act, but it is to be noted that these decisions on that Federal Act stand on a distinct plane because, as pointed out on p. 477 of that last cited, a judge is exercising a "special, peculiar and distinct" Federal jurisdiction under a Federal statute which "provides all necessary materials for the full and complete exercise of such jurisdiction in a very special manner,

wholly independent of, and distinct from, and at variance with, the jurisdiction and procedure of the Court to which he belongs," or, as it was put in *Valin* v. *Langlois* (1879), 3 S.C.R. 1, "These judges and courts were merely utilized outside their respective jurisdictions to deal with this purely Dominion matter."

In the case at bar, as will be seen, there is, on the contrary, nothing in the prescribed procedure which has not for a very long period formed part of the ordinary machinery of the Court.

No suggestion was made in the *St. Hilaire* case, *supra,* that the prior decision of the same Court in *North British Canadian Investment Co.* v. *Trustees of St. John School District No. 16, N.W.T.* (1904), 35 S.C.R. 461, was not to be regarded as a binding decision (as it must be—*Cowan* v. *The St. Alice, supra*), and that case is strongly in the appellant's favour, and not only has not been impugned, but with *The City of Halifax* v. *Reeves* (1894), 23 S.C.R. 340, was cited with approval in *Turgeon* v. *St. Charles* (1913), 48 S.C.R. 473 at p. 477, also to the same effect. In the *North British* case, *supra,* the statute, the Land Titles Act, 1894, Cap. 28 (Can.), Sec. 97, only contained the bald provision in respect to tax sales that upon the purchasers producing "a transfer of the land . . . . with a judge's order confirming the sale . . . . the registrar shall . . . . register the transferee as absolute owner . . . ."; nevertheless, despite the objection raised that the judge was acting outside of any proceeding in the Court and was "simply *persona designata,* a particular official considered a fitting one to inquire into the regularity of the sale and the propriety of giving effect to it" (35 S.C.R. at p. 474), it was held that it was a matter originating in a Court of superior jurisdiction. Now this case at bar is clearly much stronger than that one.

MARTIN, J.A.

In my opinion the sole empowering by section 127 of the issuance of a rule to shew cause (*i.e.,* a rule *nisi*) is a matter of prime significance in the determination of the question before us. As already stated, that method of procedure is (save in certain exceptional circumstances not relevant) restricted to applications to the Court, and in the days when the Court sat *in banco* had to be moved by counsel in term on certain specified days, and the Court was formerly so strict on the point that

COURT OF APPEAL

1919

Jan. 15.

CHANDLER v. CITY OF VANCOUVER

after it had granted to counsel a rule *nisi* at the end of term, it would not allow it to be made returnable in Chambers—*Fall* v. *Fall* (1833), 2 D.P.C. 88; *Arthur* v. *Marshall* (1844), 2 D. & L. 376. There was an exception in cases in interpleader, in respect to which it was held in Trinity Term (1835), *Beames* v. *Cross*, 4 D.P.C. 122, that though a motion for a rule *nisi* under the Interpleader Act "cannot originate at Chambers," yet the Court could direct that it should be disposed of there. The whole practice under the former Common Law Procedure Act, 1854, will be found in Archbold's Queen's Bench Practice (1866), Vol. II., p. 1578, and in Lush's Practice (1865), Vol. II., p. 942, where it is stated:

"Cause is shewn in general on some day after that mentioned in the rule, but unless the rule is enlarged it must be brought on on a day in the same term."

But the matter is perhaps best illustrated by the still older practice before the Common Law Procedure Act, 1854, which is thus lucidly set out in that storehouse of legal knowledge, Tidd's Practice of the K.B. and C.P. (1828), 9th Ed., Vol. 1, p. 478, wherein, under the caption "Motions and Rules in general," it is said:

"The usual modes of applying to the Court are by motion, or petition."

MARTIN, J.A.

A motion is an application to the Court, by counsel in the King's Bench, or a serjeant in the Common Pleas, for a rule or order; which is either granted or refused; and if granted, is either a rule absolute in the first instance, or only to shew cause, or, as it is commonly called, a rule *nisi*, that is, unless cause be shewn to the contrary, which is afterwards, on a subsequent motion, made absolute or discharged. To use the words of an elegant writer (Wynne) on the law and constitution of England:

"The application to a Court by counsel is called a motion; and the order made by a Court on any motion, when drawn into form by the officer, is called a rule."

And at p. 490 the learned author says:

"There are other motions and rules, not necessarily connected with any suit; such as to set aside an annuity, and deliver up the securities to be cancelled," etc.

And at p. 509 the then comparatively new practice of summons before a judge is thus introduced:

"Analogous to the proceedings in Court, by motion and rule, is the practice by summons and order at a judge's chambers."

From early time in the history of municipal legislation in Upper Canada (which is the foundation for ours) it has been the practice to resort to rules *nisi* to quash by-laws—*cf. In re de la Haye* v. *Gore of Toronto* (1852), 2 U.C.C.P. 317; *In re Conger* (1852), 8 U.C.Q.B. 349; *Fraser* v. *Municipality of Stormont, &c.* (1853), 10 U.C.Q.B. 286; and *In re Thompson and the Corporation of Bedford, &c.* (1862), 21 U.C.Q.B. 545, and the section now before us should be construed in that light. The expression "rule to shew cause" is what Coke calls, in his Commentary upon Littleton, 19th Ed., 1832, Vol. 1, preface xxxix, a "vocable of art, apt and significant to express the true sense of the law," and in the present connection it ought to, and does in my opinion, retain its primary meaning as an application to the Court. It is to be noted that the section in question does not say that the judge applied to shall issue the rule or name any one else to do so, but simply provides that "after at least ten days' service on the corporation of a rule to shew cause," the judge may quash the by-law. Who, then, is to issue the rule, and where is it to issue from when the applicant moves for it upon production of the necessary documents? The statute clearly assumes that the appropriate and usual machinery should be resorted to, and bearing in mind the history of legal procedure and practice, the natural and obvious thing to do would be for the judge applied to (who, as has been seen, can himself constitute the Supreme Court) to direct the registrar to issue a rule out of that Court in the ordinary way, which is precisely what was done here. I may say, as one who has practised under the old system, as well as the new, that is what I should have done as a matter of course. He, the judge, would regard the statute as authorizing the invocation of the assistance of that tribunal alone whence such specified process could properly issue, *i.e.*, the Supreme Court. There is no such thing as a rule *nisi* known to the inferior Courts in this Province, and orders *nisi* are of quite a different nature. I am of the opinion that the word "judge" is used in section 127 in the broad way as constituting the Court, as he is referred to in section 44 of the Supreme Court Act, which says that "One of the judges of the Court shall, except in vacations and holidays, sit in Vic-

MARTIN, J.A.

COURT OF APPEAL

1919

Jan. 15.

CHANDLER v. CITY OF VANCOUVER

toria and Vancouver daily . . . . for the transaction of all such business as may be lawfully brought before him."

I think the application for this rule is part of that "business" which he is directed to transact. Would there be any doubt about it if the section had said that a "writ of summons" should issue instead of a "rule to shew cause"? But the one procedure is just as well defined to the trained lawyer as the other.

I attach no importance to the repeated use of the words "the judge" in section 127. Once the matter is in Court that is simply the usual way of referring to "the judge" who happens to be transacting business, and is so used in section 44. The use of the expression judge is not even as used by judges themselves a hard and fast one. Vice-Chancellor Hall, for example, in *Stigand* v. *Stigand* (1882), 19 Ch. D. 460; 51 L.J., Ch. 446, refers to the distinction between "the practice to apply to the judge in Court" and in Chambers. So I am of the opinion here, having regard to the special nature of the specified procedure, the legal history of the matter, and, as the Supreme Court of Canada said in *The Canadian Pacific Railway Company* v. *The Little Seminary of Ste. Therese, supra,* to the language of the statute, and the right of appeal conferred, that directing the issuance of the rule in question "the judge represents the Court to which he is attached," and therefore the rule *nisi* was validly issued and should have been heard and disposed of in the ordinary way of Court motions by the learned judge appealed from. It follows that, in my opinion, the appeal should be allowed.

MARTIN, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the learned judge, Mr. Justice GREGORY, arrived at the right conclusion.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Bird, Macdonald & Earle.*
Solicitor for respondent: *E. F. Jones.*

FLETCHER *ET AL.* v. WADE.

COURT OF APPEAL

1919

Jan. 15.

FLETCHER v. WADE

Municipal law—Assessment—Court of Revision—Mandamus—Compelling Court to re-hear—Remedy by appeal—B.C. Stats. 1914, Cap. 52.

On motion by a ratepayer for a writ of *mandamus* to compel a Court of Revision to hear an assessment appeal, if it appears that the Court of Revision did hear and adjudicate upon the complaint, the Court cannot review its proceedings by way of inquiry into the correctness of its conclusions. A *mandamus* to a Court of Revision will only lie, if at all, when it is made to appear that said Court has not heard and determined the complaint.

APPEAL by the members of the Court of Revision of the Municipality of Point Grey from the order of GREGORY, J. of the 19th of July, 1918, granting a writ of *mandamus* ordering said Court to hear the appeal of F. C. Wade from the assessment of his properties within the Municipality for the year 1918. The facts bearing on the complaint were that when the appeal came up for hearing Mr. Wade, who was present, desiring to examine witnesses, asked for a stenographer, and on one being provided, he proceeded to examine the assessor. After the examination had proceeded for some time, he asked that the assessor be sworn. This the Court refused to do, and after the examination had proceeded further, the Court being in doubt as to Mr. Wade's right to examine the assessor, and as to whether he should be sworn, adjourned the hearing for four days in order to obtain advice in the matter. At the sitting following the adjournment, no stenographer being present, Mr. Wade again asked for a stenographer. This the Court refused to provide. Mr. Wade then stated there was no use of his going on with the examination of witnesses, as he would not have the evidence for use on any proceeding he saw fit to take after the Court had given its decision. Mr. Wade then stated his case and was asked to retire. After he had gone, the Court proceeded to ask the assessor certain questions and subsequently decided to reduce the assessment in part, and made a change in the classification of some of the land from "wild land" to "improved land."

Statement

COURT OF APPEAL

1919

Jan. 15.

FLETCHER v. WADE

The appeal was argued at Vancouver on the 20th and 21st of November, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Martin, K.C. (*G. G. McGeer,* with him), for appellants: The notice of motion asks for a *mandamus* and then proceeds to say it was not properly heard, but does not say what the *mandamus,* if used, is for. Wade has three grounds of objection: first, that they refused to furnish a stenographer; second, they refused to allow the assessor to answer certain questions; and third, the Court examined the assessor when Wade was gone. There is no provision for a stenographer in the statute. As to the second objection, there is no material before the Court as to the facts, and the law is that it must be very clear what happened before a *mandamus* will issue. As to the third objection, the assessor is in the nature of an assistant to the Court, and they refer to him for assistance in their deliberations. The fact of Mr. Wade leaving the Court does not affect their privileges as to this. There must be a clear denial of right: see *In re Charleson Assessment* (1915), 21 B.C. 281. There are two grounds on which the Court will not issue a *mandamus*: first, if there is another remedy: see *In re Charleson Assessment, supra*; *In re Marter and Gravenhurst* (1889), 18 Ont. 243; and secondly, the Court of Revision is now closed, *i.e.*, *functus officio*: see *In re McKay and the City of Vancouver* (1917), 24 B.C. 298; *Sisters of Charity of Providence* v. *City of Vancouver* (1910), 44 S.C.R. 29 at p. 35.

Davis, K.C., for respondent: The evidence was taken after Wade had left and it is impossible for him to say what it was. The Court admits the examination took place but are careful not to say what it was. All we can do is to establish that evidence was taken behind our back. They would neither refuse nor allow Wade's application for adjournment. This is more a case of fact than of law. The law is, if a Court does not hear a case they can be enjoined. We say, first, evidence was taken behind our back, and secondly, it was not sworn evidence. The witness must be sworn: see *Wood* v. *Gold* (1894), 3 B.C. 281; Halsbury's Laws of England, Vol. 13, p. 590, par. 801. On the question of the composition of the Court having changed see

Prudhomme v. *Licence Commissioners of Prince Rupert* (1911), 16 B.C. 487. The question of cash values was not considered by the Court and Wade was not allowed to ask questions as to value.

Martin, in reply.

Cur. adv. vult.

15th January, 1919.

MACDONALD, C.J.A.: The question for decision is, Did the Court of Revision hear and adjudicate upon the respondent's complaint? The learned judge from whose decision this appeal is taken thought not, and made an order *nisi* that a prerogative writ of *mandamus* should issue to the members of the Court of Revision for the Municipality of Point Grey, directing them to hear and adjudicate upon the said complaint. I think the order ought not to stand.

The Court of Revision is a judicial body and this Court cannot review its proceedings in the sense of inquiring into the correctness of the Court's conclusions. If *mandamus* will lie at all to a Court of Revision (which in the result I do not need to determine) it will only lie when it is made to appear that the Court has not heard and determined the complaint: when it has either expressly or virtually declined jurisdiction. If the Court of Revision in good faith entertained the respondent's appeal and adjudicated upon it, there can be no inquiry here as to the correctness of its decision. We cannot sit as a Court of Appeal to review its proceedings.

In *The Queen* v. *Dayman* (1857), 26 L.J., M.C. 128 at p. 131 Lord Campbell, C.J. said:

"Now, how could we have granted a *mandamus* to a magistrate to hear and determine a matter which he has already determined on issue joined by the parties? The Court of Queen's Bench does not sit, like the Roman Patricians, to give advice, but to decide and determine matters in controversy. The Court cannot express an opinion which one person might adopt out of deference to them, and another refuse to be bound by and overrule."

Again, in *Ex parte Lewis* (1888), 21 Q.B.D. 191 at p. 195, Wills, J. said:

"But this was a mistake on the part of the learned magistrate, for nothing can be clearer or more settled than that if the justices have really and *bona fide* exercised their discretion, and brought their minds to bear upon the question whether they ought to grant the summons or not, this

COURT OF APPEAL

1919

Jan. 15.

FLETCHER v. WADE

Court is not a Court of Appeal from the justices, and has no jurisdiction to compel them to exercise their judgment in a particular way."

And he refers to *Reg.* v. *Admason* (1875), 1 Q.B.D. 201, where the Court thought the justices had virtually refused to act upon the evidence submitted to them and had refused the summons on extraneous grounds. He also refers to *Reg.* v. *Ingham* (1849), 14 Q.B. 396.

Mere irregularity in the proceedings does not entitle the Court to direct a writ of *mandamus* to issue against justices: *Reg.* v. *Justices of Yorkshire; Ex parte Gill* (1885), 53 L.T. 728, where Smith, J. said:

"I know of no case where a *mandamus* to justices to hear and determine a case has been granted on the ground that they have not heard all the evidence tendered before them."

On the facts it is clear to me that the Court of Revision entertained the complaint. That complaint was that the assessment of the complainant's lands was at an over-valuation. Mr. Wade, who appeared in person, attempted to examine the Municipality's assessor. The Court objected and an adjournment was taken to consider the matter. On the adjourned hearing the Court withdrew the objection and assented to the assessor being sworn and examined by Mr. Wade. He was not sworn owing to failure to find a Testament, but the matter did not go off on that circumstance. Objection was also taken to the lack of a stenographer. Mr. Wade's counsel before us, however, conceded that no point could be founded upon that. There was some doubt in Mr. Wade's mind when he withdrew from the room as to whether his application for a further adjournment would be considered or not. He was told, however, by the chairman of the Court that his case would be considered "from every angle." After Mr. Wade's retirement the Court continued the examination of the assessor and subsequently came to their decision to reduce Mr. Wade's assessment in part and to make some adjustments in respect of the classification of his lands. Members of the Court have made affidavits and have been cross-examined upon them in these proceedings, and it appears from their evidence that they did consider the question of the actual value of Mr. Wade's lands. Their evidence upon this is not quite as definite as one could have desired, but the

MACDONALD, C.J.A.

onus of proof is upon Mr. Wade to shew that the conduct of the members of the Court of Revision amounted virtually to a refusal or neglect to hear and adjudicate upon his complaint. From the evidence aforesaid I have come to the conclusion that the Court did hear and adjudicate upon the complaint. It is not suggested that the members of the Court of Revision acted in bad faith, and as, in my opinion, they did not decline jurisdiction the order directing the writ of *mandamus* to issue should not have been made and it ought to be set aside.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: I agree in the reasons for judgment of the Chief Justice.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree that the appeal should be allowed.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Wismer, McGeer & Johnson.*
Solicitor for respondent: *M. A. Macdonald.*

COURT OF APPEAL

1919

Jan. 15.

BELL v. QUAGLIOTTI

BELL v. QUAGLIOTTI.

Lease—Monthly rent—Agent—Reduction of rent by, owing to financial depression—Subject to lessor raising rent on conditions improving—Agent later increases rent to amount in lease—Power.

The plaintiff, who lived in England, gave a fifteen-year lease of a property in Victoria to the defendant at a monthly rental of $500 a month. After two years the plaintiff's agents, acting under power of attorney, reduced the rent owing to financial depression, to $100 a month, accepting the same as payment in full of all rent under the lease for the particular month in which it was paid but reserving to the plaintiff the right as soon as conditions improved to demand a higher rent not exceeding the amount reserved in the lease. After accepting $100 a month for nine months the agents gave the defendant notice that the plaintiff would thereafter expect payment of rent in full in accordance with the terms of the lease. Upon two months' rent not being paid plaintiff sued and obtained judgment for the rent in full and for possession of the property.

Held, on appeal, that the arrangement between the plaintiff's agent and the defendant was a gratuitous one which could be terminated by the agent and did not require an adjudication by the plaintiff personally as to whether conditions had improved or otherwise.

APPEAL from the decision of GREGORY, J. (reported 25 B.C. 460) in an action to recover possession of a premises known as the Variety Theatre in Victoria, and $1,200 arrears of rent. The premises in question were leased by the plaintiff to the Island Amusement Company from the 1st of October, 1913, for 15 years, at a rental of $500 per month for the first year, and $600 a month for the four following years, the rent for the balance of the term to be on a percentage basis of the assessed value of the property. On the 7th of April, 1914, the Island Amusement Company assigned the said lease to the defendant Quagliotti. Owing to financial depression there was great falling off in receipts at the theatre and the plaintiff's agents in Victoria accepted $100 as rent for the month ending the 30th of June, 1917, and in accepting same by letter they stated it was accepted by them as agents for Mrs. Bell without prejudice to her rights under the lease. A letter followed from Quag-

Statement

liotti's solicitors, explaining that their understanding of the arrangement was that during the present financial depression and until such time as business improved, Mrs. Bell would accept a ground rent of $100 a month in full payment of all rent due under the lease for the particular month for which the rent was paid, reserving to herself the right, as soon as things improved, to demand a higher rent, not exceeding the rent reserved in the lease. This understanding was confirmed by the plaintiff's agents. On January 31st, 1918, the plaintiff's solicitor notified Quagliotti's solicitors that the $100 monthly arrangement was no longer acceptable to Mrs. Bell and that on and after the first of March she would expect the rent to be paid in accordance with the terms of the lease. On the rent due on the 1st of March and 1st of April following not being paid, this action was commenced.

Statement

The appeal was argued at Vancouver on the 5th of November, 1918, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Maclean, K.C., for appellant: Mrs. Bell agreed to accept $100 a month until times improved, she to be the sole judge. Suddenly the rent is raised to the maximum by the agent. My contention is, first, that she would not delegate this authority, and secondly, she did not delegate. The $100 a month arrangement is still in force and continues until the plaintiff personally demands higher rent. No one but she can exercise the discretion: see Halsbury's Laws of England, Vol. 1, p. 148, par. 328.

Argument

Luxton, K.C., and *Alexis Martin*, for respondent: At the time plaintiff's solicitors put an end to the $100 arrangement, the defendant Quagliotti was about to enter into a sub-lease of the premises whereby he was to receive a profit of $1,800 a year.

Cur. adv. vult.

15th January, 1919.

MACDONALD, C.J.A.: I agree in the result arrived at by the learned trial judge. The arrangement between the respondent's agents and the appellant was a gratuitous one. The correspondence shews clearly enough what the respondent's agents meant

MACDONALD, C.J.A.

COURT OF APPEAL

1919

Jan. 15.

BELL v. QUAGLIOTTI

and what the appellant understood the transaction to be. Even if the concession made to the appellant could be regarded as an agreement in law, and could only be put an end to by notice, which in my opinion it was not, I do not think it entitled the appellant to claim an adjudication by the respondent herself as to whether times had improved or otherwise. The reduction in the rent was continued at her will, and her will was effectively declared by her agents.

I would dismiss the appeal.

GALLIHER, J.A.: Mr. *Maclean* has argued two points before us. First, Did the determination of events by Mrs. Bell's agent constitute a determination by Mrs. Bell? Second, If not, was there any consideration for the making of the agreement to reduce the rent to $100 per month? The three letters (Swinerton & Musgrave to Courtney & Elliott, 27th June, 1917; Courtney & Elliott to Swinerton & Musgrave, 28th June, 1917; and Swinerton & Musgrave to Courtney & Elliott, 9th July, 1917) are said to constitute an agreement between the parties. The evidence shews that the monthly rent reserved under the lease had from time to time at the request of Quagliotti been reduced owing to the financial falling off of receipts in the enterprise, until it was finally reduced to $100 per month without prejudice to Mrs. Bell's rights under the existing lease. As I interpret the letters above referred to, they amount to an understanding (rather than a fixed agreement) that so long as Mrs. Bell shall continue to accept payment at the rate of $100 per month, then she shall have no further claim for those months under the lease for which she has accepted $100, but that at any time when in her opinion the business improves (and by this I take it the business being carried on by Quagliotti under the lease is meant), Mrs. Bell being the judge of improvement, she could upon notice, or perhaps even upon refusal to accept the $100, revert to and demand the rent payable under the lease.

GALLIHER, J.A.

It is urged that Mrs. Bell, and Mrs. Bell in person, only could determine as to the improvement in business, and that she did not do so, but when we look at all the circumstances I think that contention cannot be maintained. The business

was in the hands of her solicitor and agent here, she residing in England, all arrangements were made on her behalf by her solicitor and agent, the solicitor holding her power of attorney. These persons were in touch with business conditions here, and Mrs. Bell, except on their advice and instructions, could not be. The arrangements for rent reductions were made by them, and the so-called agreement embodied in the letters referred to was their act as agents for Mrs. Bell. It seems to me, under these circumstances, that it would be drawing the line too fine to say that Mrs. Bell only in person could declare the event. I think that event is sufficiently declared by Mr. Langley in his letter of the 31st of January, 1918, to the Island Amusement Company and Quagliotti.

GALLIHER, J.A.

I would dismiss the appeal.

MCPHILLIPS, J.A.

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

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Courtney & Elliott.*
Solicitor for respondent: *W. H. Langley.*

MACDONALD, J. (At Chambers)

1919

Jan. 17.

BUSCOMBE SECURITIES CO. v. HORI WINDEBANK AND QUATSINO TRADING CO.

BUSCOMBE SECURITIES COMPANY, LIMITED v. HORI WINDEBANK AND QUATSINO TRADING COMPANY, LIMITED. (No. 2).

Practice—No proceedings for one year—Notice to proceed—Must be served on other party—Marginal rules 973 and 1015.

On an application to consolidate two actions, in the first of which no proceeding was taken for one year, the defendant having entered an appearance to the second action but not to the first, it must be shewn that the notice to proceed under marginal rule 973 was not only filed but served on the opposite party.

APPLICATION to consolidate two actions, heard by MACDONALD, J. at Chambers in Vancouver on the 17th of January, 1919. The first action was commenced in 1916, and defendant entered no appearance. The second action in 1918; to which defendant entered an appearance. In the first action, there was no proceeding taken for one year and under an order of MORRISON, J. (reported *ante* p. 323) it was held that plaintiff had to give one month's notice before plaintiff could proceed with summons to consolidate. The plaintiff then gave the one month's notice by filing same under Order LXVII., r. 4. Objection was taken by defendant that "filing" of notice under Order LXVII., r. 4, is not sufficient: *Provincial Bank* v. *Phelan* (1909), 2 I.R. 698.

Statement

Armour, K.C., for the application.
Darling, contra.

MACDONALD, J.: Notice should be served, not simply filed in the registry, especially as defendant was represented by a solicitor, following *Provincial Bank* v. *Phelan* (1909), 2 I.R. 698 in preference to *Morison* v. *Telfer* (1906), W.N. 31.

Judgment

Application dismissed.

DAWSON v. THE PARADISE MINE AND THE CANADIAN PACIFIC RAILWAY COMPANY.

COURT OF APPEAL

1919

Jan. 20.

DAWSON v. PARADISE MINE

Negligence—Damages—Loading and unloading material of poisonous nature on unguarded track—Straying cattle poisoned—Liability—Parties—Amendment—Must be made at trial—R.S.C. 1906, Cap. 37, Sec. 294; Can. Stats. 1910, Cap. 50, Sec. 8.

The defendant Company in the course of its business loaded lead ore on cars of a railway company and at other times unloaded oats from cars at the same spot, the right of way not being enclosed. In the course of these operations particles of lead ore were allowed to drop on the right of way and a certain amount of oats fell in the unloading. The plaintiff's cows which were allowed to run at large, strayed on the right of way, and eating the oats mixed with the lead ore, they died from lead poisoning. The defendant Company was held liable in an action for damages for negligence.

Held, on appeal, that the evidence did not disclose any duty on the defendant's part towards the plaintiff and the appeal should be allowed.

Per MACDONALD, C.J.A.: If a mistake is made as to the parties in an action, the proper amendment should be made at the trial. A judge cannot constitute an amendment by mere undertakings of counsel.

APPEAL from the decision of THOMPSON, Co. J., of the 13th of June, 1918, in an action for damages for the loss of three cows, valued at $600, the cows having died from the effects of lead poisoning caused by the animals eating grain mixed with dust that had fallen from lead ores while in process of transportation. The plaintiff resides in Athalmer, British Columbia, about three-quarters of a mile from the Canadian Pacific Railway station. She owned three cows which were allowed to run at large. They wandered on the right of way of the Canadian Pacific Railway and while on the right of way found oats near the track which was mixed with lead ore. They ate this mixture and died of lead poisoning. The right of way was not enclosed. On this part of the right of way the defendant the Paradise Mine was accustomed to load its ore, composed of silver and lead. Pieces of ore would fall on the right of way and in time there was an accumulation of small particles of lead ore. The same Company through its servants were accustomed to unload oats at the same place, small quantities of which

Statement

COURT OF APPEAL

1919

Jan. 20.

DAWSON v. PARADISE MINE

Statement

fell on the right of way and became mixed with the lead ore. On the trial counsel argued that the Paradise Mine was not the proper name for one of the defendants, the actual owners of the mine being R. R. Bruce and the Estate of the late James Hammond, and it was agreed that the Invermere Contracting Company should be added as a party defendant, but as the proper names of defendants were not known to counsel it was agreed the original style of cause should stand and counsel for the defendants undertook that the real owners of the Paradise Mine (which is not an incorporated company but owned by private individuals) and the Invermere Contracting Company should be bound by the judgment. The trial judge dismissed the action as against the Canadian Pacific Railway and gave judgment against the owners of the Paradise Mine, holding that under the law of the Province the cattle were not trespassers and were killed by the negligence of said defendant, that even if they were trespassers the Company should have exercised towards them the care which must be exercised towards even trespassers, and that having the poisonous mixture constituted a trap towards which the animals should naturally be drawn, thereby causing their death. The defendant, the Paradise Mine appealed.

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

Spreull, for appellant: The Railway is exempt under section 294 of the Railway Act. The Paradise Mine not being an incorporated company, leave to amend was granted to allow owners to be added as parties, but it was agreed that the case should stand.

Argument

[MACDONALD, C.J.A.: If there is any question of a mistake or a misdescription of the appellant Company, the proper amendment should have been made at the trial. We are apparently dealing with a company which was not before the trial Court at all, except by a sort of understanding between counsel. We are dealing with another alleged entity that does not exist at all. I think it should be understood that judges cannot constitute amendments in this way, by mere undertakings of counsel.]

The cattle were trespassing and there is no duty to a trespasser. It is the duty of the owner to keep in his cattle: see *Doble* v. *Canadian Northern Ry. Co.* (1916), 19 Can. Ry. Cas. 312; *Kruse* v. *Romanowski* (1910), 3 Sask. L.R. 274. There is a certain duty to trespassers: see Halsbury's Laws of England, Vol. 21, p. 382; *Cooke* v. *Midland Great Western Railway of Ireland* (1909), A.C. 229. In the case of a trespasser having to go some distance see *Malone* v. *Laskey* (1907), 2 K.B. 141.

M. A. Macdonald, K.C., for respondent: The case turns on whether the defendant owes a duty to the plaintiff's stock. It was handling poisonous material and should take care. Cattle by custom roam, and they were attracted by the oats. No question of trespass arises: see *Hinrich* v. *Canadian Pacific Ry. Co.* (1913), 18 B.C. 518.

Argument

MACDONALD, C.J.A.: I think the appeal should be allowed. No duty on the defendant's part toward the plaintiff has, in my opinion, been made out. And, of course, if there was no duty there could be no wrong by the defendant to the plaintiff. The proposition advanced by the plaintiff is that a customer of the Railway Company loading lead ores, of which a certain small quantity falls upon the ground during loading of the cars, and subsequently unloading grain from cars at the same place, which entailed the dropping of some of it amongst the ore lying on the ground, renders himself liable for damages to the owner of cows which stray upon the premises of the Railway Company, and in eating of the grain also swallow particles of the lead ore, and die. Such evidence alone is insufficient to create liability.

MACDONALD, C.J.A.

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

GALLIHER, J.A.

EBERTS, J.A.: I would also allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitor for appellant: *George J. Spreull.*
Solicitor for respondent: *A. B. Macdonald.*

CLEMENT, J.

1918

Nov. 25.

COURT OF APPEAL

1919

April 1.

BROOKS-SCANLON-O'BRIEN CO. LTD. v. BOSTON INSURANCE CO.

BROOKS-SCANLON-O'BRIEN COMPANY LIMITED v. BOSTON INSURANCE COMPANY.

Marine insurance—Application—"Promissory representation"—Effect on policy.

While the plaintiff's agent was negotiating with the defendant's agent for insuring steel rails and fittings to be taken on a scow in tow of a tug belonging to independent parties, the insurance agent asked whether the scow was to be towed singly or in tandem with other scows, intimating that in the latter case the insurance would be higher. The plaintiff's agent then telephoned the master of the tug who informed him the scow was to be towed singly. He then advised the insurance agent that the scow was to be towed singly and arranged for insurance at the rate allowed for single towage. The scow was towed in tandem with two other scows and was lost.

Held, affirming the decision of CLEMENT, J. (MARTIN, J.A. dissenting), that the policy never attached and the plaintiff could not recover.

Per MACDONALD, C.J.A.: The interview, after the plaintiff's agent telephoned, was not merely an expression or expectation on belief but amounted to a representation known in marine insurance law as a "promissory representation" which though by word of mouth only, afforded an answer to the plaintiff's claim.

Statement

APPEAL from the decision of CLEMENT, J. and the verdict of a jury in an action tried at Vancouver on the 25th of November, 1918, for $2,500 on a marine-insurance policy subscribed by the defendant Company on a shipment of steel rails and fittings on a scow from Vancouver to Stillwater in tow of the tug "Progressive," which belonged to independent parties. The scow was a total loss. There were two defences: (1) The scow on which the steel was carried was unseaworthy; and (2) misrepresentation upon which the policy was issued. The jury found the scow was seaworthy. The evidence was that the plaintiff's agent (one Kilty) saw the defendant Company's agent in Vancouver (one Maitland) and said he wanted insurance on the steel. Maitland asked whether the scow was to be towed alone. Kilty did not know but at once telephoned the captain of the tugboat, who informed him the scow was to be towed alone. He then obtained the insurance on the under-

standing with the agent that the scow was to be towed alone. In fact two other scows were towed with the scow in question in tandem, when it was lost. The action was dismissed. The plaintiff appealed on the ground that the learned judge was wrong in holding that the policy never attached.

Davis, K.C., and *J. H. Lawson*, for plaintiff.
C. W. Craig, for defendant.

CLEMENT, J.: On the evidence it does not strike me it is a question of misrepresentation, but of the class of insurance they were buying. It is drawn to the attention of the man wanting insurance. "We have two classes of insurance," and he says, "I will take 'A.'" But the facts bring it within "B." I think the action will have to be dismissed with costs on that ground.

From this decision the plaintiff appealed. The appeal was argued at Victoria on the 16th of January, 1919, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Davis, K.C., for appellant: The defences set up were, first, that the scow was not seaworthy; and second, there was misrepresentation upon which the policy was issued, namely, the agent said the scow was being towed alone when in fact three scows were towed in tandem. The jury found the scow seaworthy, and the question is whether the statement that the scow was to be towed alone was such a misrepresentation of fact or positive statement of fact in the future which was in their control so as to make the policy void. The captain of the boat told the plaintiff's agent it was a single tow, which information was given the defendant's agent. There was no falsity about it. It was a case of insurance of cargo under representation not correct but innocent. They took two more scows but we knew nothing of it. On the question of authority see Eldridge on Marine Policies, 1907, p. 38; and on the question of control see *ib.*, p. 307; *Dennistoun* v. *Lillie* (1821), 3 Bli. 202 at p. 209; *Bowden* v. *Vaughan* (1808), 10 East 415. This amounts only to a representation of what was expected: see *Hubbard* v. *Glover* (1812), 3 Camp. 313; *Anderson* v. *Pacific Fire and Marine Insurance Co.* (1872), L.R. 7 C.P. 65. We have two

Argument

CLEMENT, J.

1918

Nov. 25.

COURT OF APPEAL

1919

April 1.

BROOKS-SCANLON-O'BRIEN CO. LTD. v. BOSTON INSURANCE CO.

arguments: first, a representation about a future event over which we have no control. Second, it would be necessary to take out a policy under the highest rate in order to have protection: see Arnould on Marine Insurance, 8th Ed., Vol. 1, p. 687, Sec. 548; *Brine* v. *Featherstone* (1813), 4 Taunt. 869. As to representations strictly promissory being complied with see *Bailey* v. *The Ocean Mutual Marine Ins. Co.* (1891), 19 S.C.R. 153; *Perry* v. *British America Fire and Life Assurance Company* (1848), 4 U.C.Q.B. 330; Halsbury's Laws of England, Vol. 17, p. 414, par. 811; *Fitzherbert* v. *Mather* (1785), 1 Term Rep. 12; Arnould on Marine Insurance, 8th Ed., Vol. 1, pp. 679-84, Secs. 541-4.

Argument

Craig, K.C., for respondent: There is a single-tow and tandem-tow insurance, the premium being much higher for tandem tow. The plaintiff's agent decided to take single tow after communicating with the captain of the boat, it being the cheaper, and the contract only covers single tow. The statement that it was a single tow comes within a description of the subject-matter of the insurance: see *The London Assurance Corporation* v. *The Great Northern Transit Company* (1899), 29 S.C.R. 577. This was not a statement of expectation, but a positive statement of fact material to the risk and vitiates the policy: see *Dennistoun* v. *Lillie* (1821), 3 Bli. 202; *Bailey* v. *The Ocean Mutual Marine Ins. Co.* (1891), 19 S.C.R. 153; *Cerri* v. *Ancient Order of Foresters* (1898), 25 A.R. 22.

Davis, in reply: There are not two different policies. There is only one policy but different rates according to whether it is a single or tandem tow.

Cur. adv. vult.

1st April, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff having a quantity of rails loaded on two scows, which the Kingcome Navigation Company were under contract with them to tow to their destination, applied to the defendant for a policy of marine insurance on the rails. Mr. Kilty, plaintiff's secretary, and Mr. Maitland, defendant's agent, met for the purpose of arranging the insurance. The latter called Kilty's attention to the fact that there was one rate of insurance when scows were to be towed singly

and another and higher rate when taken together. Kilty then, in the presence of Maitland, telephoned to Capt. McLennan of the said Navigation Company, and what then took place is, I think, fairly disclosed in the following extracts from the evidence. Maitland says that he understood that Kilty was telephoning to ascertain "the extra cost of towage going up single scows," and Kilty in his examination for discovery said:

"I enquired of him (Capt. McLennan) as to the rate of towing one or more than one scow, but eventually he agreed to handle this shipment as a single tow at the same rate."

The meaning of this is not in dispute between counsel, it being conceded that the scows were, according to this, to be towed singly without extra charge. On cross-examination at the trial Maitland was asked the question:

"And he (Kilty) came back after finishing the telephone conversation and said: 'Yes, they are going single scow,' didn't he?"

to which he answered:

"He told me they were going by single scow, yes."

Thereupon the policy was issued at the lower rate of insurance. The scows were not taken up singly and one was lost. The plaintiff sues in respect of said loss, and the defendant relies upon the representations aforesaid that the scows were to be towed singly, which representation was not fulfilled.

The plaintiff does not dispute the materiality of the statement as to the manner of towing, but they say there was no representation, but merely a statement by Kilty of what Capt. McLennan told him, which both parties equally relied upon.

The question is one of fact, one which a jury could be called upon to decide under proper direction from the Court. In this case it was decided by the learned judge himself, who held that the policy never attached and that there was, in the circumstances, no insurance at all of the rails on the lost scow. I agree with him in the result, but for a different reason. The inference I draw from the evidence and which I think does not conflict with that drawn by the learned judge, is that Kilty made a positive representation that the scows would be towed singly. In an ordinary transaction that representation would amount to a warranty, but in marine-insurance law it appears to be regarded as a promissory representation which may be relied upon notwithstanding that it was made by word of mouth

CLEMENT, J.

1918

Nov. 25.

COURT OF APPEAL

1919

April 1.

BROOKS-SCANLON-O'BRIEN CO. LTD. v. BOSTON INSURANCE CO.

and not included in the written contract. That such a parole promissory representation if made would be an answer to this action is not disputed by counsel for the plaintiff. They put their defence on this, that Kilty's words amounted to nothing more than a repetition of what Capt. McLennan had told him, and could in the circumstances amount only to an expression of expectation or belief. Plaintiff relies on *Bowden* v. *Vaughan* (1808), 10 East 415, and *Hubbard* v. *Glover* (1812), 3 Camp. 313, while defendant relies on *Bailey* v. *The Ocean Mutual Marine Ins. Co.* (1891), 19 S.C.R. 153. In cases of this sort, where the question is one of fact, decisions on other facts are only helps to a conclusion on the particular circumstances before the Court. The learned authors of Arnould on Marine Insurance, 8th Ed., in a foot-note at page 688 referring to *Hubbard* v. *Glover,* say:

> "It is submitted that, with the modern means of communication, a statement that there was a cargo ready would generally not be held to be a mere expression of belief."

In the case at bar the parties were in immediate communication with Capt. McLennan. Mr. Maitland was, I think, entitled to believe that Kilty was making a definite agreement with Capt. McLennan, about which there could be no question of mere expectation or belief. What was arranged was clearly within the control of Kilty and McLennan, and nothing but bad faith on the part of the latter could interfere with the carrying out of the arrangement. I think the true inference is that Kilty was willing to take the cheaper insurance on the strength of that arrangement, and I would not infer that he was in effect asking Maitland to take the risk of McLennan's breach of that arrangement. In the cases *supra* upon which plaintiff relies, the circumstances were very different to those of this case; in the nature of things insurers could only speak of the sailings of ships in distant seas from expectation and belief. Uncertainty as to the sailings of ships more than a century ago, before the days of modern liners, must have always been in the minds of insurance underwriters and brokers, and they could well be assumed to understand that representations of insurers no nearer the ships than themselves, as to dates of sailings or readiness of cargo were mere expectations.

MACDONALD, C.J.A.

The only difference of note between the facts of this case and *Bailey* v. *The Ocean Mutual Marine Ins. Co., supra,* is that here the insurer is not the owner of the ship, but is merely the owner of the cargo, while there, as appears from the report in the Court below (22 Nova Scotia Reports, p. 5), the insurers were the ship-owners. But in the view I take of the facts, Maitland had the right to assume from what passed at the telephone that Kilty had control and had by his arrangement with Capt. McLennan put an end to any doubt as to the manner in which the scows should be towed.

I would therefore dismiss the appeal.

MARTIN, J.A.: I regard the conversation between the insurance broker Maitland and Kilty, the plaintiff's agent, at the latter's office, as being in effect participated in by Captain McLennan, the master of the tug "Progressive" that was to tow the scows as an independent contractor, not under plaintiff's control, when he was telephoned to by Kilty "in front of" Maitland, to the same extent as if he had been present in the office, because Maitland heard what Kilty was saying and Kilty told him truthfully, it is admitted, what McLennan had said to him in response to the question as to whether the scows were going to be towed separately or together, *i.e.,* a single or a double tow, and McLennan answered that they were going as a single tow. In other words, he simply passed on to Maitland what McLennan had represented—nothing more or less. Kilty was led to make this inquiry by the fact that when Maitland came to his office about the insurance he told him that there were different rates on single and double tows, the premium being one-quarter of one per cent. higher on the double tow. In consequence of that representation by the master, Kilty paid the premium for a single tow.

MARTIN, J.A.

These facts, in my opinion, bring the case within the principle of *Bowden* v. *Vaughan* (1808), 10 East 415; 10 R.R. 340, where it was held that a representation as to the time of the ship's sailing made by the owner of goods on board must, from the nature of the thing, be considered only as a probable expectation, he having no control over the event. The statement was

CLEMENT, J.
1918
Nov. 25.
COURT OF APPEAL
1919
April 1.
BROOKS-SCANLON-O'BRIEN CO. LTD. v. BOSTON INSURANCE CO.

made on October 27th, 1807, that the ship, a Portuguese, "would sail in a few days" from Lisbon, but she did not sail till November 29th, and was captured by the French army, which had been marching on Lisbon, when still in the Tagus on the 30th. The materiality of the representation in war time was admitted, and the broker swore that "if it had been represented, that the ship was not to sail in less than a month the insurance could not have been effected" at all as the French army marching on Lisbon was daily expected there. I find myself unable to distinguish that case in principle from the present. It is, of course, quite different where the assured has control of his vessel and her equipment, *e.g.*, *Edwards* v. *Footner* (1808), 1 Camp. 530, and *Bailey* v. *The Ocean Mutual Marine Ins. Co.* (1891), 19 S.C.R. 153, wherein the distinction is pointed out at p. 155 between "a representation . . . . a mere matter of expectation or belief" and "a representation or affirmation of a positive fact."

MARTIN, J.A.

This is the case of a single tow as represented being in the minds of both men and then the lower rate of premium would follow as of course: it is not, in my opinion, with all due respect, really the case of two distinct classes of insurance, as on a sailing ship or a steamship, or a ship in commission or laid up, being offered and one selected, but of one class of policy with two different rates based upon varying circumstances.

Therefore, I think the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal. I take the same view as the learned trial judge that it is not a case of representation and does not fall within *Hubbard* v. *Glover* (1812), 3 Camp. 313. Maitland said, "After Kilty had telephoned the tug people he told me to insure them under single tow." He further said, "I did not pay particular attention to his conversation." I do not think this is really affected by the cross-examination of Mr. *Davis* or the examination for discovery put in. I do not regard what took place as being any different in effect to what would have been if Kilty had obtained all the facts from the tug people, and then have gone down and instructed Maitland to make out a risk for two single

tows. Surely the fact that Maitland was sitting there and heard the conversation at one end and understood that Kilty was satisfying himself as to what kind of a policy he wanted, cannot be deemed a representation on which he acted himself?

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *Craig & Parkes.*

CLEMENT, J.
1918
Nov. 25.
COURT OF APPEAL
1919
April 1.
BROOKS-SCANLON-O'BRIEN CO. LTD. v. BOSTON INSURANCE CO.

PRINCE RUPERT DEVELOPMENT SYNDICATE v. LUSTIG.

MACDONALD, J. (At Chambers)
1919
Jan. 17.
PRINCE RUPERT DEVELOPMENT SYNDICATE v. LUSTIG

Sale of land—Agreement for—Foreclosure and personal judgment—Vendor not entitled to both—Must elect.

A vendor under an agreement for sale cannot obtain both a personal judgment and foreclosure, but may elect which remedy he will pursue.

APPLICATION for an order *nisi* for foreclosure of an agreement for sale of land, heard by MACDONALD, J. at Chambers in Vancouver on the 17th of January, 1919.

E. A. Lucas, for the application.

MACDONALD, J.: In an action for specific performance of an agreement for sale, when counsel applies for an order *nisi,* he cannot obtain both personal judgment and foreclosure, but may elect which course he desires to pursue, foreclosure or personal judgment: see *Boydell* v. *Hames* (1915), 21 B.C. 171; *Hargreaves* v. *Security Investment Co.* (1914), 7 W.W.R. 1 approved in *Gale* v. *Powley* (1915), 22 B.C. 18, MARTIN, J.A. at p. 24.

Judgment

COURT OF APPEAL

1919

Feb. 11.

GRANGER v. BRYDON-JACK.

Sale of goods — Yacht — Payment deferred — Bill of sale acknowledging receipt of payment—Mortgage for amount of purchase price—Action for price of yacht—Liability.

GRANGER v. BRYDON-JACK

The plaintiff, the owner of a yacht, discussed with the defendant the purchase by him of an undivided four-fifths' interest for $2,000. The defendant could not pay this sum, but intimated that he owned a beneficial interest in a lot on Howe Street in Vancouver, that he intended to sell this interest, and that when he did so he would be in a position to make the purchase. The plaintiff claimed the defendant agreed in the first instance to purchase the four-fifths' interest and in the meantime pay 7 per cent. interest on the purchase price, and further agreed that upon perfecting his title he would give plaintiff a mortgage on the lot as security for the purchase price, thereby obtaining an extension of time for payment thereof. The defendant did not effect a sale of the lot, but about six months later, having perfected his title, executed and delivered a mortgage to the plaintiff on the lot for $2,000, subject to existing encumbrances and without containing any personal covenant, at the same time submitting to the plaintiff a draft agreement of sale of the four-fifths' interest in the yacht, which was ten days later returned to the defendant duly executed, and containing an acknowledgment of receipt of the purchase price. In an action for the purchase price of the four-fifths' interest in the yacht:—

Held (MARTIN, J.A. dissenting), that there was no concluded contract until the execution and delivery of the bill of sale and the consideration therein expressed was paid by the delivery of the mortgage. The plaintiff's remedies are therefore confined to the terms thereof, and the action as framed must be dismissed.

Statement

APPEAL by defendant from the decision of GRANT, Co. J. of the 13th of June, 1918, in an action for $1,000 due in respect of the purchase price of a four-fifths' interest in the yacht "Ailsa II." In June, 1913, the plaintiff, who was the owner of the yacht, being at the time on friendly terms with the defendant, entered into a discussion with him as to his purchasing a four-fifths' interest in the yacht for $2,000. The defendant intimated he could not pay this amount at once, but that he owned a beneficial interest in a lot on Howe Street in Vancouver that he intended to sell, and then he would be in a position to make the purchase. Plaintiff alleged that the

defendant agreed to purchase at once and pay interest on the purchase price at 7 per cent., and that on his obtaining proper title to the lot he would give the plaintiff a mortgage as security for the payment of the purchase price, in consideration for which the plaintiff agreed to extend the time for payment of said purchase price. In January, 1914, the defendant informed the plaintiff he had not been able to make a sale of the lot, but that he had perfected his title. On the 19th of January he executed and delivered a mortgage to the plaintiff on the lot for $2,000, subject to existing encumbrances, said mortgage not containing any personal covenant, and at the same time received from the plaintiff a bill of sale for a four-fifths' interest in the yacht in which the vendor acknowledges receipt of the purchase price. The defendant alleges that the whole transaction is set out in the two documents referred to, and that the mortgage was accepted as payment of the consideration set out in the bill of sale.

Statement

The appeal was argued at Vancouver on the 4th of December, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

E. M. N. Woods, for appellant: The trial judge gave judgment for goods sold and delivered. The facts are that a bill of sale was given for the four-fifths' interest, the consideration being $2,000, which was paid by giving a mortgage for $2,000 on a lot to which the defendant had title. This action is wrong in law. His remedy is confined to the terms of the mortgage: see Leake on Contracts, 6th Ed., 455. This was an agreement to give credit: see *Crawshaw* v. *Hornstedt* (1887), 3 T.L.R. 426; *Rabe* v. *Otto* (1903), 89 L.T. 562. This case comes to nearly being a barter: see *Harrison* v. *Luke* (1845), 14 M. & W. 139.

Argument

Reid, K.C., for respondent: We say the sale really took place a year before the mortgage was given, when the consideration was $2,000 for a four-fifths' interest in the yacht. The mortgage was subsequently given as security for the amount. The trial judge has so found. We are not bound to rely on the mortgage: see Fisher on Mortgages, 6th Ed., 415; *Yates* v. *Aston* (1843), 4 Q.B. 182. As to the right to go behind the

COURT OF APPEAL

1919

Feb. 11.

GRANGER v. BRYDON-JACK

statement in the instrument that the consideration was paid see *The Equitable Fire and Accident Office (Limited)* v. *The Ching Wo Hong* (1906), 23 T.L.R. 200 at p. 201. As to reasonable time for payment see *Johnson* v. *Dunn* (1905), 11 B.C. 372. On question of mortgage being collateral security see *Bagot* v. *Chapman* (1907), 2 Ch. 222 at p. 227.

Argument

Woods, in reply: The time is fixed for payment by the contract. Any implication from a written contract must be a necessary one: see *Hamlyn & Co.* v. *Wood & Co.* (1891), 2 Q.B. 488 at p. 491; *Lee* v. *Alexander* (1883), 8 App. Cas. 853 at p. 868.

Cur. adv. vult.

11th February, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A. would allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: Having regard to the findings of fact by the learned judge below, which, after careful consideration, I do not feel justified in disturbing, I am of opinion that the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the appeal should be allowed. The evidence shews that there were tentative dealings, negotiations, and terms of sale in a certain event, for the sale of a four-fifths' interest in the "Ailsa II.," the respondent being the vendor and the appellant the vendee, but it cannot be said that any concluded contract of sale really took place until January, 1914. Then all matters culminated in the bill of sale being executed of the four-fifths' interest, the bill of sale bearing date the 29th of January, 1914, and it is to be noticed that in a recital thereto that this language appears: "Whereas . . . . the grantor" (the respondent in this appeal) "is possessed of the goods and chattels hereinafter set forth . . . ." (being the "Ailsa II."), the consideration being $2,000. The consideration was paid by the giving of a mortgage by the appellant to the respondent, and the $2,000 charged upon lot 6, block 92, district lot 541, group 1, Vancouver District, a lot in the City of Vancouver, subject to two other mortgages thereon for $3,500 and $2,000. The Vancouver city lot is close in, and in what might be termed the business section

or apartment-house section of the city. The mortgage has a special condition or term therein which may be said to be a fixed term of the sale, and indicates that the sale was special in its nature, and the respondent's remedies may be well said to be confined to this term—not a sale generally of goods and chattels for the stated price of $2,000. This is supported by the evidence. It is clear that the appellant only entered into the purchase founded upon the special terms of a contract contained in and evidenced by the two documents, *viz.*: the bill of sale and the mortgage, which constituted the consideration moving from the appellant to the respondent. It was not a sale for $2,000, constituting a debt due by the appellant to the respondent for which the mortgage could be said to be collateral security. This was the contention of the respondent, but the evidence wholly fails to substantiate the correctness of any such finding. The special provision in the mortgage reads as follows:

"The principal to be paid out of the first proceeds of the sale of the equity of the mortgagee in the said land, the first payment of interest to be made on the 19th of January, 1915, interest thereafter to be paid annually on the 19th of January in each and every year."

It is clear that the consideration, *viz.*, the $2,000, was to be paid and paid only out of that which was accepted by the respondent as the purchase price—that is the mortgage. The evidence is incontrovertible that that was the consideration, and that only for the entry into the purchase by the appellant. It may be said that the transaction was peculiar in its making, but with that the Court has nothing to do. The Court does not make the contract—the parties to the sale do this—and it is the contract only which the Court can be called upon to enforce or give effect to, and the contract will be given effect to, save in cases of fraud, or where it may be against public policy or illegal. It is not permissible for either of the parties to later seek to alter or change that which was agreed to at the time of sale, and here we have an executed contract, and that executed contract only is capable of being invoked and insisted upon by the vendor.

MCPHILLIPS, J.A.

The documentary evidence is conclusive and is against the contention of the respondent, and with deference to the very able argument of counsel for the respondent, I cannot persuade

COURT OF APPEAL

1919

Feb. 11.

GRANGER v. BRYDON-JACK

myself that it is possible to contend otherwise. The judgment of Kennedy, J. (afterwards Lord Justice Kennedy) in *Rabe* v. *Otto* (1903), 89 L.T. 562, is a case much in point, and I apply the language of the learned judge to the facts of this case:

"In these circumstances I am of opinion that no action will lie in the present case."

(See *Harrison* v. *Luke* (1845), 14 M. & W. 139; see also Leake on Contracts, 6th Ed., 455: "A contract or debt may be incurred upon terms which limit the right of the creditors to payment out of a special fund.") *Yates* v. *Aston* (1843), 4 Q.B. 182, is distinguishable from the present case—(the mortgage we have before us was made in pursuance of the Short Forms of Mortgage Act). Further, this case is one that was held not to be, Lord Denman, C.J. saying at p. 196:

"The mortgage does not appear to have been taken in satisfaction, but as a security collateral to the contract raised by the request and the advance in consequence."

With deference to the learned counsel for the respondent, I cannot see the applicability of *The Equitable Fire and Accident Office (Limited)* v. *The Ching Wo Hong* (1906), 23 T.L.R. 200 at p. 201. If applicable at all, it is helpful to the appellant to this extent, that it is open to shew, as between the parties, what was the real transaction, and what the consideration really was. Further, here we have a concluded contract, and that must be given effect to, and I would refer to what Lord Davey said at p. 201:

MCPHILLIPS, J.A.

"What was handed to the respondents was the instrument with that clause in it [I would by way of analogy here say the mortgage with that clause in it] and that was notice to them, and made it part of the contract that there would be no liability until the premium was paid."

I would further, by way of analogy, say there would be no liability until the sale of "the equity of the mortgagee."

Bagot v. *Chapman* (1907), 2 Ch. 222 at p. 227 is distinguishable from the present case. Here it is not *simpliciter,* a mortgage without covenant. There is in the mortgage before us an express provision for the manner of payment of the principal secured by the mortgage. *Lee* v. *Alexander* (1883), 8 App. Cas. 853 at p. 868 is a case which well indicates the true course to be pursued when a deed follows "previous letters or missives which contained the terms of the agreement between the parties." It is the deed which must be looked at, and that

is what has to be looked at here. The bill of sale and mortgage are the executed contracts, but apart from them it is evident that the concluded contract is in complete agreement with all that previously took place, and this is always a matter of satisfaction to the Court, and the parties cannot complain if they are held to their contract. In this connection it is interesting to observe what the Lord Chancellor (Earl of Selborne) said at p. 868 in *Lee* v. *Alexander, supra*:

"And perhaps there is a great temptation to refer to that which satisfies you that the construction which you put upon an instrument is in accordance with the previous contract and intention of the parties. That temptation it is, however, not well to yield to, except when the documents can be legitimately referred to for the purpose of construction."

This appeal presents rather an unique and unusual transaction, yet, although such be the case, it cannot be insisted upon by the respondent that the transaction should now be viewed in other light than the facts disclose, and it is only the concluded contract that can be enforced. That the contract should be in unusual terms does not admit of those terms being set aside and usual terms supplied and given effect to. I cannot say that I have arrived at my conclusion without qualms of hesitancy. However, being of the opinion that it is the duty of the Court to interpret contracts, not make them, and not to supply terms that would in their nature be repugnant, the ends of justice impel me to allow this appeal.

MCPHILLIPS, J.A.

The action should be dismissed, with costs here and in the Court below to the appellant.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed, Martin, J.A. dissenting.

Solicitor for appellant: *E. M. N. Woods.*
Solicitor for respondent: *D. S. Wallbridge.*

COURT OF APPEAL
1919

April 1.

IN RE LAND REGISTRY ACT AND SCOTTISH TEMPERANCE LIFE ASSURANCE CO.

IN RE LAND REGISTRY ACT AND SCOTTISH TEMPERANCE LIFE ASSURANCE COMPANY.

Practice—Court of Appeal—Costs—District Registrar of Titles a party—Appellant—Crown Costs Act—Application of—R.S.B.C. 1911, Cap. 61—B.C. Stats. 1914, Cap. 43, Secs. 63 and 65.

A district registrar of titles is an officer of the Crown within the meaning of the Crown Costs Act, and the Court is prohibited from making any order or direction as to costs for or against him. This rule applies to cases where by statute the costs are to follow the event also on the dismissal of an appeal taken by him to the Court of Appeal.

In re Gardiner and District Registrar of Titles (1914), 19 B.C. 243 followed.

Statement

MOTION by the Registrar-General of Titles to the Court of Appeal for directions as to costs, the Registrar-General submitting that the order of the Court of Appeal in this matter of the 5th of June, 1917 (see 24 B.C. 232), was in error in directing that the costs should be taxed and paid by the district registrar.

The motion was heard at Victoria on the 7th of January, 1919, by MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Argument

The Registrar-General of Titles, for the motion: The district registrar is entitled to the protection of the Crown Costs Act. This is affirmed in *In re Gardiner and District Registrar of Titles* (1914), 19 B.C. 243.

Sir C. H. Tupper, K.C., contra: The *Gardiner* case can be distinguished, as section 114 of the Land Registry Act was amended after the Crown Costs Act was passed. I say that if the Crown or the District Registrar come into the Court of Appeal they are bound by the Court of Appeal Act. The Act gives the registrar access to the Courts of first instance and the Crown Costs Act deals with the Court below where there is discretion. My second point is the Crown is not concerned in this appeal: see *Mott* v. *Lockhart* (1883), 8 App. Cas. 568 at p. 572. Having come to this Court and after putting us to the burden of coming here they failed. They should be responsible for the costs: see

Thomas v. *Pritchard* (1903), 1 K.B. 209; *In re The Earl of Radnor's Will Trusts* (1890), 45 Ch. D. 402 at p. 423.

The Registrar-General, in reply.

Cur. adv. vult.

1st April, 1919.

MACDONALD, C.J.A.: Before the enactment of the Crown Costs Act, R.S.B.C. 1911, Cap. 61, which came into force in 1910, this Court had, I think, power subject to the provisions of the Court of Appeal Act to award costs of an appeal either to or against the Crown, its officers or servants, in cases in which by that Act a right of appeal was given, of which the Crown could take advantage. *Rex* v. *Woodhouse* (1906), 2 K.B. 501; *Thomas* v. *Pritchard* (1903), 1 K.B. 209. The jurisdiction of the Court over costs was complete, though the Act imposed certain obligations on the Court in the exercise of this jurisdiction. For instance, it was enacted that the costs of every appeal, with certain specified exceptions, shall follow the event unless the Court for good cause should otherwise order. To give effect to the right of the successful party, the Court, I think, must make an order or give a direction. The motion before us, founded on the Crown Costs Act, is made by the Registrar-General of Titles for an order to strike out that part of the minutes of judgment dismissing an appeal by him to the Court, which orders him to pay the costs of the appeal. The Crown Costs Act declares that:

"No Court or Judge shall have power to adjudge, order, or direct that the Crown, or any officer, servant, or agent of and acting for the Crown, shall pay or receive any costs in any cause, matter, or proceeding, except under the provisions of a statute which expressly authorizes the Court or Judge to pronounce a judgment or to make an order or direction as to costs in favour of or against the Crown."

The contention of counsel against the motion is that the Court of Appeal Act, not the Court, disposes of the costs when good cause is not found for ordering that they shall not follow the event, and that as the Crown Costs Act only prohibits the Court from making any order or direction as to costs, it does not apply at all to a case where costs are to follow the event. The argument is alluring but, in my opinion, unsound. I regard the enactment that costs shall follow the event as a direction (an

COURT OF APPEAL

1919

April 1.

IN RE LAND REGISTRY ACT AND SCOTTISH TEMPERANCE LIFE ASSURANCE CO.

imperative direction, it is true) that in the absence of good cause for otherwise ordering, the costs shall by the judgment be given to the party who has succeeded. Costs can in case of resistance be recovered only by execution, and execution can issue only on a judgment or order, not on the statute. The order or direction is necessary to give effect to the statutory rights and obligations of the parties.

Even if it were granted, as argued, that the taxing officer could tax the costs without any direction, what would that avail but to fix the amount? It therefore comes back in the end to this—that the formal judgment, the judgment of the Court, must contain the order for costs. The duty to give effect to the statute is to be discharged by the Court, not by the ministerial officers.

There are expressions in the many judgments dealing with the subject of "event" under the English rule which might be thought to bear on the subject of this motion, but in none of them, with the exceptions to be presently referred to, was the point now under consideration raised or considered. For example, in *Reid, Hewitt and Company* v. *Joseph* (1918), A.C. 717, the latest and most authoritative case on the meaning of "event," Viscount Haldane speaks of the statute as giving the costs "automatically," but it is evident in the result that that

MACDONALD, C.J.A.

expression was not used in a sense repugnant to the conclusion to which I have come. The judgment of their Lordships expressly directs to whom the costs in that case are to be paid. The Courts below having declined to give the party who had succeeded on one of the issues the costs of that issue in accordance with the rule, their Lordships ordered that the judgment of Bailhache, J. should be "varied by adding thereto a direction that the defendants do have the costs of the issue as to the quality of the goods."

The point before us was decided by this Court in *In re Gardiner and the District Registrar of Titles* (1914), 19 B.C. 243, where we held that because of the provisions of the Crown Costs Act the Court could not give costs to or against the registrar. The order to be made where costs are to follow the event has been considered by the Court of Appeal in England in

Hoyes v. *Tate* (1907), 1 K.B. 656, and by the same Court in *Ingram & Royle Ltd.* v. *Services Maritimes du Treport Ltd.* (1914), 3 K.B. 28, in the latter of which the form of judgment including costs is given. Mr. Justice Banks in *Bush* v. *Rogers* (1915), 1 K.B. 707 at p. 710 said:

"But, as I read the later case of *Ingram & Royle* v. *Services Maritimes du Treport Ltd.* (1914), 3 K.B. 28, the course taken by the taxing master in *Slatford* v. *Erlbach* (1912), 3 K.B. 155, was not approved, and the Court held that in every case whether tried by a jury or not the judgment should contain a direction as to what costs (if any) either party is entitled to."

The learned judge further says:

"I think that I have still power to do this [to define the issue], and accordingly I direct that the associate's certificate shall be amended so as to include a direction that the defendant is entitled to his costs (if any) on the issue as to the £50."

When an appeal is dismissed or allowed, as the case may be, and nothing is said in the reasons for judgment about costs, and there appears to be but one event or the several events are defined, the registrar will, as a matter of practice, incorporate in the judgment an order in respect to the costs, on the assumption that the Court meant that the parties should have their costs according to the event or the several events decided in the appeal. But the judgment entered is none the less the judgment of the Court and the terms as to costs are those ordered or directed by the Court.

MACDONALD, C.J.A.

The minutes of judgment in question here contain the order that the district registrar of titles, an officer of the Crown, shall pay the respondent's costs. That order is directly contrary to the provisions of the Crown Costs Act and cannot be allowed to be incorporated in the judgment.

There are cogent reasons for construing the Crown Costs Act as applying to this case and all other cases of the kind. That Act was passed with the manifest intention of relieving the Crown and its opponent from the payment of costs in litigation between them except under a statute expressly authorizing the same. On its face it makes no distinction between one class of actions and another, but if the construction contended for by the respondent's counsel be adopted, the result would be one rule for all actions in which costs are to follow the event and another rule for those where the costs are not to follow the event, an

COURT OF APPEAL

1919

April 1.

IN RE LAND REGISTRY ACT AND SCOTTISH TEMPERANCE LIFE ASSURANCE CO.

anomaly which, I think, was never intended to be brought about.

The submission that a district registrar is not an officer of the Crown cannot, in my opinion, be acceded to. I think he is an officer, servant or agent of the Crown within the meaning of those words in the Crown Costs Act. He is appointed to office by the representative of the Crown in the Province, namely, the Lieutenant-Governor, on the advice of his ministers, pursuant to the Constitution Act.

It follows there can be no costs of the appeal or of this motion.

MARTIN, J.A.

MARTIN, J.A.: Though I entertain some doubt about this question of costs, yet on a further consideration of the case of *In re Gardiner and District Registrar of Titles* (1914), 19 B.C. 243; 6 W.W.R. 407; 27 W.L.R. 536, I think the Registrar-General's contention is correct, that the point is covered by that decision, which being one of this Court is binding on us even though, it may be, that the question was not fully argued, or even considered, as was suggested.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in the reasons for judgment of the Chief Justice.

Motion granted.

BING KEE v. McKENZIE *ET AL.*

GREGORY, J.

1918

May 30.

COURT OF APPEAL

1919

April 1.

BING KEE v. McKENZIE

Real property—Sale—Agreement for sale and deed lost—Coal reservations alleged—Parol evidence of contents—Burden of proof.

In an action for a declaration as to the ownership of the under-surface rights in a property, where one of the title deeds is lost, the party who alleges that all that usually goes with a sale of land was not conveyed must prove the reservation.

The true inference to be drawn from the fact that during the negotiations for sale of land nothing was said about coal reservations is that there was no reservation of the coal.

Decision of GREGORY, J. reversed, MARTIN, J.A. dissenting.

APPEAL from the decision of GREGORY, J. in an action tried by him at Vancouver on the 29th and 30th of May, 1918, to establish the title to the under-surface rights in section 2 and the east 60 acres of section 3, range 7, Cranberry District, B.C., in all about 158 acres. The facts relevant to the issue are as follow: By virtue of the Settlement Act (B.C. Stats. 1884, Cap. 14) the Province granted to the Dominion a large block of land on Vancouver Island to aid in the construction of a railway from Esquimalt to Nanaimo (the land in question being within this block). On the Esquimalt and Nanaimo Railway Company (incorporated for the purpose) undertaking to build the railway the Dominion Government granted said block of land to the company by way of subsidy in 1887. There was expressly excluded from the area covered by said grant such portions thereof as were then held under Crown grant, agreement for sale or other alienation from the Crown, Indian reserves, land reserved for school purposes, settlements, and Naval and Military reserves. On the 24th of December, 1890, the Railway Company executed a conveyance of the lands in question to one Joseph Ganner, reserving thereout the coal and other minerals specified in the conveyance. Ganner died on the 26th of January, 1904. On the 13th of March, 1904, an agreement for sale of said lands was executed by McKenzie and Wilson, Ganner's executors, to the plaintiff and a deed executed

Statement

GREGORY, J.

1918

May 30.

COURT OF APPEAL

1919

April 1.

BING KEE v. MCKENZIE

in his favour and delivered one year later. On application for registration the plaintiff was registered in the Land Registry office as owner in fee of the lands in question on the 3rd of April, 1905. Certain persons who had settled within the block granted the railway, set up claims to the minerals as well as the surface of the lands upon which they had settled, and in 1904 the Vancouver Island Settlers' Rights Act was passed, under which a settler or his representatives, upon proving the claim, were entitled to a Crown grant of the fee simple in such land. The time within which a settler might apply for a Crown grant was extended by an amendment to the Settlers' Rights Act passed in 1917. In pursuance thereof Ganner's executors applied for a grant in fee simple for the lands in question, and a Crown grant was issued to them as trustees for Ganner's estate on the 15th of February, 1918. The agreement for sale and subsequent conveyance from Ganner's executors to Bing Kee were lost. The plaintiff claims that said documents contained no reservations except the railway right of way and that the executors of Ganner having subsequently acquired the under-surface rights in the lands in question said under-surface rights passed to him under the deed of the 13th of March, 1905.

Statement

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

GREGORY, J.: I really do not think that I can come to any different conclusion, however much I should consider this case. It seems to me it would be entirely wrong to feel satisfied that we had clear and cogent evidence as to the contents of the missing deed, and I think that is what I must have before giving effect to what the plaintiff asks for. Even if Mr. Wilson and Mr. McKenzie did say here in Court that there was no reservation clause in that document, I do not think that would be satisfactory. These men are untrained men. They do not pretend to have read the document or have any clear recollection of it, and it is just such an answer given by them on discovery as one would expect an untrained man to give. They did not recall anything. I want to say, so far as the telephone conversation is concerned, I accept unreservedly the story told by

GREGORY, J.

Mr. McKenzie, namely, that he did not say there was no reservation in the deed, but that he had no document to that effect. Mr. Wilson's evidence is not entirely satisfactory, but I am not prepared to say that it is entirely untrustworthy. I do not feel that his manner is convincing. If he had been dealing with something which we might have expected to be within his recollection and knowledge, it seems to me clear that his recollection is that there was no reservation. Both he and Mr. McKenzie are unskilled men and not competent to take in the full meaning of a deed by glancing through it or comparing their recollection of its appearance with the printed form produced in Court, the reservation might have been inserted in any and a number of ways, and I cannot draw the inference Mr. *McPhillips* asks me to, particularly when we have the conduct of the Land Registry office fully explained by the document Mr. *Mayers* put in, and His Honour Judge Young telling us that it was his duty to put that exception and reservation in and that he presumed he did his duty. He has no recollection of it. That seems to me to dispose of the case.

GREGORY, J.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 6th of December, 1918, before MACDONALD, C.J.A., MARTIN and EBERTS, JJ.A.

Davis, K.C., for appellant: The executors of the Ganner estate conveyed to Bing Kee on the 15th of March, 1905. Bing Kee claims the under-surface rights by virtue of that conveyance because as soon as the executors obtain a Crown grant of the property in fee, which includes the under-surface rights, by the doctrine of estoppel the under-surface rights go to him notwithstanding the fact that they did not have the under-surface rights when they conveyed to him. The agreement for sale and the conveyance from the executors to Bing Kee have both been lost. Only four persons have seen these documents. The question is, whether the under-surface rights are expressly excepted in the conveyance. The trial judge found the burden was on us, and that there was not sufficient proof that the under-surface rights were not excepted. We say, (a) he was wrong in putting the burden on us; and (b) he was

Argument

GREGORY, J.

1918

May 30.

COURT OF APPEAL

1919

April 1.

BING KEE v. MCKENZIE

wrong in finding there was not sufficient evidence to prove that the under-surface rights were not excepted in the conveyance. A certificate of absolute fee was issued to Bing Kee, the only exception being the railway right of way. Judge Young drew the document and there is evidence of something having been said to him as to it being an Esquimalt and Nanaimo title, and nothing said as to the coal. But notice to Young is not notice to Bing Kee: *Kettlewell* v. *Watson* (1882), 21 Ch. D. 685 at p. 707; *Wyllie* v. *Pollen* (1863), 32 L.J., Ch. 782 at p. 784; Halsbury's Laws of England, Vol. 1, p. 215, par. 456. Sale of land, in the absence of indication to the contrary, implies that the whole of the vendor's interest is sold: see Halsbury's Laws of England, Vol. 25, pp. 301-2; *In re St. Eugene Mining Co.* (1900), 7 B.C. 288; 1 M.M.C. 406. A straight deed was given unqualified and even if they had not the right to the coal there, having subsequently obtained it, the deed transfers the coal: see *Webb* v. *Austin* (1844), 7 Man. & G. 701 at p. 724; *Rowbotham* v. *Wilson* (1857), 8 El. & Bl. 123 at p. 143; *Turner et al.* v. *Curran et al.* (1891), 2 B.C. 51; Smith's Leading Cases, 12th Ed., Vol. 2, p. 775; Halsbury's Laws of England, Vol. 13, pp. 104 and 373; *In re Bridgwater's Settlement; Partridge* v. *Ward* (1910), 2 Ch. 342; *Re Hoffe's Estate Act, 1885* (1900), 82 L.T. 556.

Argument

Mayers, for respondent: There is a statutory provision against any settler disposing of what he did not have, and the trustees are estopped: see *American-Abell Engine and Thresher Co.* v. *McMillan* (1909), 42 S.C.R. 377; *Burns* v. *Johnson* (1917), 25 B.C. 35; (1918), 1 W.W.R. 180. As to the meaning of the words "legal representatives" see *Price* v. *Strange* (1820), 6 Madd. 159; *Wing* v. *Wing* (1876), 34 L.T. 941. It was the duty of Judge Young to put the exception in the deed. As to Wilson's evidence (one of four), all parties talked about the Esquimalt and Nanaimo deed. It is altogether a question of exception: see Phipson on Evidence, 5th Ed., 514; *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154. The principle applicable in case of a lost deed is the same as in the case of a will. As to what evidence will be accepted in case of a lost deed see *Mahood* v. *Mahood* (1874), Ir. R. 8 Eq. 359 at pp.

360-3. The evidence must be stringent and conclusive owing to the great danger in admitting parol evidence of a lost document: see *Lawless* v. *Queale* (1845), 8 Ir. L.R. 382 at p. 386; *Cutto* v. *Gilbert* (1854), 9 Moore, P.C. 131 at p. 140. I contend that even if the deed were here there would be no estoppel: see *Cuthbertson* v. *Irving* (1859), 4 H. & N. 742 at p. 754; *Webb* v. *Austin* (1844), 7 Man. & G. 701 at p. 724; *Heath* v. *Crealock* (1874), 10 Chy. App. 22 at p. 30; *Onward Building Society* v. *Smithson* (1893), 1 Ch. 1 at p. 13. Where an interest passes there is no estoppel: see *Strode* v. *Seaton* (1835), 2 C.M. & R. 728 at pp. 729-30; *Doe dem. Higginbotham* v. *Barton* (1840), 11 A. & E. 307 at p. 311; *Hobbs* v. *The Esquimalt and Nanaimo Railway Company* (1899), 29 S.C.R. 450; *In re St. Eugene Mining Co.* (1900), 7 B.C. 288; 1 M.M.C. 406. The cases of *Partridge* v. *Ward* (1910), 2 Ch. 342 and *Re Hoffe's Estate Act, 1885* (1900), 82 L.T. 556 were founded on a case that was overruled. As to notice a client receives through his solicitor see *Espin* v. *Pemberton* (1859), 3 De G. & J. 547 at p. 554; Bullen & Leake's Precedents of Pleadings, 6th Ed., 645, note (*l*); *Trevivan* v. *Lawrence* (1704), 6 Mod. 256. The state of the subject at the time of the execution should be inquired into: see *Duke of Devonshire* v. *Pattinson* (1887), 20 Q.B.D. 263 at p. 273; *Doe* v. *Burt* (1787), 1 Term Rep. 701; *Booth* v. *Alcock* (1873), 8 Chy. App. 663; Halsbury's Laws of England, Vol. 20, p. 549, par. 1393. Bing Kee was never intended to buy the coal rights, he intended to use the property for farming in partnership with another Chinaman. The Court will not force a trustee to carry out a contract under circumstances that amount to a breach of trust: see *Dunn* v. *Flood* (1885), 28 Ch. D. 586; *Ord* v. *Noel* (1820), 5 Madd. 438. The general words must be restricted to what the grantor had power to transfer: see *Oceanic Steam Navigation Co.* v. *Sutherberry* (1880), 50 L.J., Ch. 308 at p. 310. Estoppel by deed is a branch of the ordinary principles of estoppel: see Halsbury's Laws of England, Vol. 13, p. 315, pars. 509-511. There is no such thing as estoppel by something implied. On the question of costs of counterclaim see *Henman* v. *Berliner* (1918), 2 K.B. 236.

Argument

GREGORY, J.

1918

May 30.

COURT OF APPEAL

1919

April 1.

Davis, in reply: The costs must follow when the counterclaim is unnecessary. Ganner was a "settler." He was never a pre-emptor. He tried but failed in his efforts to become one: see Halsbury's Laws of England, Vol. 13, p. 373, par. 529 and *Edevain* v. *Cohen* (1889), 43 Ch. D. 187 referred to.

Cur. adv. vult.

1st April, 1919.

BING KEE v. MCKENZIE

MACDONALD, C.J.A.: The question in dispute between the parties is the coal and other minerals under section 2 and the east 60 acres of section 3, range 7, in the Cranberry District of Vancouver Island. These sections lie within the boundaries of the Esquimalt and Nanaimo Railway belt, a block of land conveyed to that Company in 1887 by the Crown, subject to certain exceptions in favour of settlers within the limits of said belt. One Joseph Ganner was one of such settlers, and in 1890 the Railway Company conveyed to him said two sections of land, reserving thereout the coal and other minerals. Ganner died in 1903, and the defendants are the executors of his will.

In February, 1904, the Vancouver Island Settlers' Rights Act, 1904, was passed by the Legislature, which enacted that upon proof of his claim by the settler "a Crown grant of the fee simple in such land (the land on which he had settled) shall be issued to him or his legal representatives." On the 13th of March, 1904, the defendants entered into an agreement of sale of the said two sections of land to the plaintiff, and this was followed a year later by a conveyance. The time having long expired within which settlers were entitled to apply for a grant under the said Settlers' Rights Act, the Legislature extended such time by an amendment to the Act passed in 1917, and the defendants thereupon applied for a grant of the said two sections of land under the provisions of the said Settlers' Rights Act, and obtained the same on the 15th of February, 1918. The plaintiff then brought this action for a declaration that he was entitled to the coal under said lands.

MACDONALD, C.J.A.

One difficulty is owing to the loss of the plaintiff's said agreement and conveyance. A proper foundation, however, was laid for secondary evidence of the contents of these instruments, and

evidence was given which failed to satisfy the learned trial judge that the plaintiff had satisfied the burden which he thought rested upon him to make good his claim. The contention of the defendants is that they conveyed the land to the plaintiff subject to the reservation of the coal and other minerals contained in the Railway Company's deed to Ganner. The plaintiff's contention is that there was no reservation whatever. The learned judge thought that the burden of proof that the deed contained no such reservation was upon the plaintiff and that he failed to satisfy it. The evidence upon the point is practically uncontradicted and the question to be decided is as to its sufficiency. The plaintiff and the defendant Wilson say that nothing whatever was said about the coal or other minerals at the time of the agreement of sale, or at any time before the completion of the transaction. The defendant McKenzie's evidence on discovery is to the same effect, but at the trial McKenzie says that he told Judge (then Mr.) Young, who prepared the agreement and deed, that "everything would be subject to the E. & N. deed." It is therefore established beyond dispute that during the negotiations, at all events, no direct reference was made to the coal and other minerals.

Mr. *Mayers,* for the defendants, strongly pressed the argument that because, as he submitted, neither the plaintiff nor the defendants had read the agreement and conveyance aforesaid, their evidence as to their contents was of no value. Judge Young, who was the only other witness to the contents of the instruments, had no recollection whatever in respect of them. I think Mr. *Mayers's* proposition was too broadly stated. The defendants executed the agreement and conveyance, and the legal presumption from that is that they knew and understood their contents. The only question in dispute as to the contents of these documents is whether or not they contained a reservation of the minerals. The sale of the land, the parcels, the price, and all other terms are not in dispute. But apart from the presumption that the person who signs a document knows and understands its contents and therefore would know whether it contained a particular term or not, and apart from the fact that neither the defendants nor anyone else was able to say

GREGORY, J.

1918

May 30.

COURT OF APPEAL

1919

April 1.

BING KEE v. MCKENZIE

that this instrument did contain such a reservation, we have the evidence of the defendants, the true inference from which, in my opinion, is that no such reservation was inserted in these instruments.

Defendant Wilson on discovery says that the agreement was "one of the ordinary printed affairs such as you have around here."

"Was there a clause in there about coal? No.

"It was just an ordinary agreement? Yes.

"So far as you know you never discussed coal with Bing Kee? No, never dreamed of such a thing."

With respect to the conveyance the same witness on discovery said:

"It was an ordinary conveyance.

"Your names and the name of Bing Kee? Yes.

"And a description of the land? Yes.

"And the price? Yes.

"No special form about it? No.

"No special clause about it? Not any, no.

"No special clause in it about the coal? No, coal was never mentioned in any shape or form.

"At any time? At any time."

It is proper here to mention that this witness did not come in contact with the plaintiff during the negotiations, and therefore this evidence must have reference to his meetings with Mr. Young, who was plaintiff's solicitor. The witness was then asked with respect to a certain conversation had some time before the trial between himself and McKenzie over the telephone, and to the question "You said to McKenzie was there any reservation of coal in the deed?" answered, "I asked if he knew whether any reservation was made and he said no, no reservation whatever." This last answer is contradicted by defendant McKenzie at the trial and to some extent by the witness himself in his evidence at the trial. McKenzie on discovery admits that an agreement was drawn up and when asked, "Do you recollect the contents of that document?" he answered, "Not particularly."

MACDONALD, C.J.A.

"Did you read it over? I don't think I did. I read the deed over and the agreement was supposed to be subject to the deed.

"What deed are you referring to now? The E. & N. deed with Mr Ganner.

"When you say you think there was a reservation there the only reason you had for saying that was because there was a reservation in the E. & N. deed? Yes.

"You do not speak about the recollection of what there was in the deed. No.

"And you never told Bing Kee you were not selling him the coal? It was understood.

"You never told him? No."

The evidence of these two witnesses, the defendants, at the trial is not altogether consistent with the above, but after a careful consideration of it all I accept the above wherever it conflicts with their evidence at the trial.

Where the evidence is as here of the sale of land, and one of the parties alleges that all that usually goes with such a sale was not conveyed, but that there was a reservation, I think he must prove it. But even if this be not the correct view of the matter, I think the evidence above referred to, coupled with the evidence of the plaintiff who was buying the land without any suggestion of a reservation of the coal or anything else that usually goes with the land, is sufficient to prove that neither in the agreement for sale nor in the deed itself was there any reservation of the coal and other minerals.

The true inference, in my opinion, to be drawn from the fact that nothing was said during the negotiations about the coal, is that there was no reservation of the coal. In argument the opposite construction was, by defendant's counsel, put upon the fact, but that construction will not bear consideration, otherwise the fact that nothing was said about timber, or building, would import that these, if there were any, were not to pass with the land. But even if the deed contained the proviso suggested and which the defendant McKenzie said he understood it was intended to contain, namely, that the conveyance was subject to the reservations mentioned in the Esquimalt and Nanaimo deed, or as it was put by defendant's counsel in his cross-examination of Judge Young, when he said: "In every conveyance I have seen where original lands from the Esquimalt and Nanaimo Railway were being conveyed, there is a clause attached to the end of the addendum, 'subject to the limitations and reservations contained in the grant to the Esquimalt and Nanaimo Railway Company,' " still, in my opinion, the plaintiff must succeed. When the defendants conveyed the lands to the plaintiff they were entitled to the benefit of the said Settlers' Rights Act. Their title to the coal under that Act was entirely

GREGORY, J.

1918

May 30.

COURT OF APPEAL

1919

April 1.

BING KEE v. MCKENZIE

MACDONALD, C.J.A.

GREGORY, J.

1918

May 30.

COURT OF APPEAL

1919

April 1.

BING KEE v. MCKENZIE

independent of their deed from the Esquimalt and Nanaimo Railway Company. The effect of the Act was to make the title of the Railway Company to the coal worthless. In order to succeed in this action the defendants would have to prove that the deed contained a reservation of the coal to which they were entitled under the Settlers' Rights Act, and no one suggests that any such reservation was in the deed or was ever thought of by the parties. When, therefore, the grant of the 15th of February, 1918, was made, it inured to the benefit of the plaintiff.

In my opinion, therefore, the appeal should be allowed and the plaintiff's right to the coal should be declared.

MARTIN, J.A.: In my opinion the learned judge has reached the right conclusion. Upon all the evidence regarding the reservation or exception of coal and certain other minerals from the sale to the plaintiff, I do not think it would be safe to hold that there was not in some form a clause inserted in the missing documents to cover that portion of the land which all parties, I am satisfied, intended only to deal with, *viz.*: the surface rights. The probabilities point so strongly to that conclusion that I feel I should not be justified in disturbing the view of the learned judge below. It is too much to ask that it should be presumed a lost deed was of such a form as to convey a class of property which the parties were in effect excluding from their bargain. Mr. Young I do not regard as a mere conveyancer—it is admitted in the evidence that he was the plaintiff's solicitor in the transaction—*Espin* v. *Pemberton* (1859), 3 De G. & J. 547; 28 L.J., Ch. 311, 5 Jur. (N.S.) 157.

MARTIN, J.A.

It was said by Lord Chancellor Loreburn, in *Brown* v. *Dean* (1910), A.C. 373 at p. 374; 79 L.J., K.B. 690:

> "When a litigant has obtained a judgment in a Court of justice, whether it be a county court, or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds."

And Lord Brougham said in the House of Lords in *Earl of Bandon* v. *Becher* (1835), 31 Cl. & F. 479 at p. 512:

> "I do not mean to say that this is a case free from doubt; but my doubts upon it are not so strong as to incline me to advise your Lordships to reverse the judgment of the Court below, for a Court of Appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong,"

which observation is most appropriate to this case.

It follows that the appeal should be dismissed.

EBERTS, J.A.: The appeal in this case is one from Mr. Justice GREGORY against a judgment delivered by him on the 30th of May, 1918. The action was brought by the plaintiff to establish his title to all mines, veins, seams and beds of coal and other minerals whatsoever on, in, under, or beneath section 2 and the east 60 acres of section 3, range 7, Cranberry District, in the Province of British Columbia; and for an injunction to restrain the defendant, The Granby Consolidated Mining, Smelting and Power Company, Limited, its agents and servants, from mining, digging, excavating, removing or otherwise interfering with the coal beneath the lands above described.

By an Act of the Legislature of the Province of British Columbia, being Cap. 14 of the Statutes of 1884, there was granted to the Dominion Government, save as therein excepted, a certain tract of land on Vancouver Island set out in section 3 of the said Act, and in which tract the lands in question are situate. The lands so granted were, on the 21st of April, 1887, conveyed by the Dominion Government to the Esquimalt and Nanaimo Railway Company. On the 24th of December, 1890, the Esquimalt and Nanaimo Railway Company conveyed to one Joseph Ganner the lands in question in this action, except the mines and minerals therein and thereunder. The said Ganner died on the 26th of January, 1904, and by his will appointed the defendants Wilson and McKenzie his executors and trustees. On the 13th of March, 1904, the defendants Wilson and McKenzie, as executors and trustees, agreed to sell and the plaintiff agreed to purchase the lands in question, and on the 13th of March, 1905, in pursuance of the agreement above recited the defendants Wilson and McKenzie conveyed them to the plaintiff in fee simple. On the 25th of March, 1905, the plaintiff caused an application under the registry laws then in force to be made to the Registrar-General of Titles in Victoria, and on the 3rd of April, 1905, he was registered as the owner of an "absolute fee" and a certificate of title was issued to him, a copy of which is set out in the appeal book herein. Section 23 of the Revised Statutes of British Columbia, 1911, Cap. 127, is as follows:

EBERTS, J.A.

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

GREGORY, J.
1918
May 30.
COURT OF APPEAL
1919
April 1.
BING KEE v. MCKENZIE

registered charges as appear existing thereon and to the rights of the Crown."

And by section 2, under the caption "Interpretation," "Absolute fee shall mean and shall comprise the legal ownership of an estate in fee simple."

From the 13th of March, 1905, to the 24th of January, 1918, the plaintiff remained the registered owner of an absolute fee in the said lands. On the 3rd of February, 1917, the plaintiff gave an option of purchase of said lands to the defendant Treat, saving and reserving thereout and therefrom, "all mines, veins, seams and beds of coal," etc., underneath the said lands, who in turn conveyed same to the defendants, the Granby Consolidated Mining, Smelting and Power Company, Limited, on the 6th of October, 1917.

By letters patent dated the 15th of February, 1918, His Majesty the King in right of the Province of British Columbia issued a Crown grant of the fee simple in the lands in dispute to the defendants McKenzie and Wilson, under section 3 of the Act known as the Vancouver Island Settlers' Rights Act, 1904, as amended by the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, who on the same day conveyed their interest to the defendant Treat, and who on the same day conveyed his estate therein to the Granby Consolidated Mining, Smelting and Power Company, Limited.

EBERTS, J.A.

The plaintiff's title deeds, namely, the agreement for sale of the 13th of March, 1904, between the defendants McKenzie and Wilson and himself, and the conveyance of the 13th of March, 1905, in pursuance of above agreement, have been lost, and the fact was proved at the trial. It is to be borne in mind that the plaintiff was from the 13th of March, 1905, up to the 6th of October, 1917, when he conveyed his surface rights to the defendant Treat, the registered owner of an absolute fee of the lands in question, and under section 23 of the Land Registry Act above set out, "shall be deemed *prima facie* to be the owner of the land described or referred to in the register." With great deference to the view of Mr. Justice GREGORY, who tried the case, I am of opinion the burden of proof was on the defendants who conveyed to the plaintiff the lands herein, to shew that in the agreement and conveyance or either there was a reservation of coal.

The production of a copy of the plaintiff's certificate of title, shewing no reservation of coal, made him the "registered owner of an absolute fee," and he shall be deemed to be *prima facie* the owner of the land described in the register for such an estate of freehold as he legally possesses therein, and by section 25 of the Land Registry Act every certificate of title shall be received in all Courts of justice in the Province of all particulars therein set forth.

The defendant Wilson says in his evidence on discovery:

"And you never had any talk with Bing Kee at all? Never a word of conversation with him."

"Wasn't there an agreement for sale of the land out at the time you made the sale? There was an ordinary agreement $250 down and $250 in twelve months, that kind of an arrangement."

"What agreement was it, what size? One of the ordinary printed affairs such as you have around here."

And in his examination at the trial he was asked by counsel for Bing Kee:

"I will read you questions 46 to 49 [meaning portions of his evidence on discovery]:

"And that was an ordinary agreement. One of those ordinary agreements.

"Without any special clause? No clause whatever.

"So far as you know you never discussed coal with Bing Kee? No, never dreamed of such a thing.

"Did you ever hear about the agreement afterwards? No."

And at another place in his cross-examination he says:

"Mr. Young had the papers ready for us to sign and we went in and signed it and that is all I can recollect. He may have read it to us and he may not.

"No special clause in it about coal? No, coal was never mentioned in any shape or form.

"At any time? At any time."

And in discovery in questions 62 to 74, inclusive, says:

"I mean the deed from you to Bing Kee? It was an ordinary conveyance.

"Did you read it? I just seen that it was a conveyance of the land so and so, I can't remember it all, it was years back.

"Is that all it contained? The ordinary conveyance.

"Your name, and the name of Bing Kee? Yes.

"And a description of the land? Yes.

"And the price? Yes.

"No special form about it? No.

"No special clauses in it? No.

"No special clause in it about the coal? No—coal was never mentioned in any shape or form.

"At any time? At any time.

"You discussed that with Mr. Smith at Nanaimo? Yes, he was at my house.

"And you called up Mr. McKenzie on the 'phone? Yes.

"And you said to McKenzie, 'Was there any reservation of the coal in

GREGORY, J.

1918

May 30.

COURT OF APPEAL

1919

April 1.

BING KEE v. MCKENZIE

the deed?' And he said, 'No'? I asked if he knew whether any reservation was made, and he said 'No,' no reservation whatever."

From this it will appear that Wilson's impression of the contents of the conveyance from McKenzie and himself to plaintiff contained no reservation of coal, and being asked:

"And you said to McKenzie 'Was there any reservation of the coal in the deed?' And he said 'No'? I asked him if he knew whether any reservation was made, and he said 'No,' no reservation whatever."

McKenzie in his evidence on discovery said:

"And you never told Bing Kee you were not selling him the coal? It was understood.

"You never told him? No."

It will be seen by the evidence of both defendants McKenzie and Wilson that in all the negotiations for the agreement and final sale of the land to plaintiff the question of coal was not considered, and their evidence as to any reservation of coal establishes this. Mr. Young, who prepared the agreement and deed between the parties, said in answer to the question:

"I understand you have no independent recollection of the contents of them [meaning the agreement and conveyance]? I have not."

The plaintiff, on the other hand, in his evidence said that in the course of his negotiations with the defendants nothing was said about coal.

EBERTS, J.A.

I am of opinion that the burden of proof was on the defendants, and such proof should be clear, cogent and certain, and fairly free from suspicion: *Mahood* v. *Mahood* (1874), Ir. R. 8 Eq. 359, which, in my opinion, they have not satisfied.

There is no suggestion in the evidence in any event that there was any reservation of any rights that may have been acquired by the defendants McKenzie and Wilson under the Vancouver Island Settlers' Rights Act, 1904, as trustees and executors under the will of Joseph Ganner. They have been given a grant of the land and minerals under this Vancouver Island Settlers' Rights Act, 1904, clearly shewing Ganner was a "settler" as defined in the Act.

In my opinion the plaintiff should succeed and be declared the owner of the coal rights underlying the area in question.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *McPhillips & Smith.*

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

IN RE GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED AND THE REGISTRAR-GENERAL OF TITLES.

MACDONALD, J.

1918

June 17.

COURT OF APPEAL

1919

April 1.

IN RE GRANBY CONSOLIDATED MINING, &C., CO. AND THE REGISTRAR-GENERAL OF TITLES

Real property—Crown grant—Prior lis pendens—Effect on registration of Crown grant—R.S.B.C. 1911, Cap. 127, Sec. 71—B.C. Stats. 1912, Cap. 15, Sec. 49; 1916, Cap. 32, Sec. 19.

Constitutional law—Disallowance of Act—Effect on Crown grant issued thereunder.

For the purposes of the Land Registry Act a *lis pendens* is a charge, and on application for registration of a Crown grant the Registrar-General of Titles is not justified in refusing to issue a certificate of title for an indefeasible fee by reason of the prior registration of a *lis pendens* (decision of MACDONALD, J. reversed).

Per MACDONALD, C.J.A.: The disallowance of the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917 (under the authority of the British North America Act, Secs. 56 and 90), which was signified in May, 1918, does not render null and void a Crown grant issued under the Act on the 15th of February, 1918, as the annulment thereof takes effect only from the date of its signification.

APPEAL from the order of MACDONALD, J. of the 17th of June, 1918, refusing to grant an order that the Registrar-General of Titles be directed to register the title of the Granby Consolidated Mining, Smelting and Power Company to section 2, and the east 60 acres of section 3, range 7, Cranberry District, B.C. Under the Settlement Act (B.C. Stats. 1884, Cap. 14) the Province granted to the Dominion a large block of land on Vancouver Island to aid in the construction of a railway from Esquimalt to Nanaimo. On the Esquimalt and Nanaimo Railway Company undertaking to build the railway the Dominion granted said block of land to the Company by way of subsidy in 1887, and the lands involved herein, being two small parcels aggregating 158 acres, are within the boundaries of said block. There were expressly excluded from the area covered by said grant such portions thereof as were then held under Cown grant, agreement for sale, or other alienation from the Crown, Indian reserves, land reserved for school purposes, settlements and

Statement

MACDONALD, J.

1918

June 17.

COURT OF APPEAL

1919

April 1.

IN RE GRANBY CONSOLIDATED MINING, &C., CO. AND THE REGISTRAR-GENERAL OF TITLES

Statement

Naval and Military reserves. On the 24th of December, 1890, the Railway Company executed a conveyance of the said two parcels to one Joseph Ganner, reserving thereout the coal and other minerals specified in the conveyance. In March, 1905, Ganner's executors conveyed the land to one Bing Kee. Certain persons who had settled within the block granted the railway, set up claims to the minerals as well as to the surface of the lands upon which they had settled, and in 1904 the Legislature passed the Vancouver Island Settlers' Rights Act, under which, upon a settler proving his claim, "a Crown grant of the fee simple in such land shall be issued to him or his legal representatives." The time within which a settler might apply for a Crown grant was extended by B.C. Stats. 1917, Cap. 71. In pursuance of said Acts, Charles Wilson and Angus D. McKenzie, executors and trustees of Joseph Ganner, deceased, applied to the Lieutenant-Governor in Council for a grant in fee simple of the two parcels of land aforesaid, and on the 15th of February, 1918, a Crown grant was issued to them as trustees for the Ganner estate for said lands. The Railway Company applied for and obtained registration of a *lis pendens* pursuant to section 71 of the Land Registry Act on the 19th of February, 1918, and Bing Kee subsequently registered a *lis pendens*. The executors, Wilson and McKenzie, conveyed the lands to one Treat on the 18th of February, 1918, and on the same day Treat conveyed to the Granby Consolidated Mining, Smelting and Power Company, which Company applied for registration of its title on the 22nd of May, 1918. The Registrar-General refused to register the title because of the said *lis pendens*.

Mayers, for the petition.

The Registrar-General, in person.

Harold B. Robertson, for Esquimalt and Nanaimo Railway Co.

17th June, 1918.

MACDONALD, J.

MACDONALD, J.: The Granby Consolidated Mining, Smelting and Power Company, Limited, being dissatisfied with the refusal of the Registrar-General to register certain conveyances affecting section 2 and east 60 acres, section 3, range 7, Cranberry 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 and 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 thus questioned, and the Registrar claims that such a cloud has been created upon the title, that he is justified in his refusal to register conveyances which would vest an indefeasible title in the applicant.

If I were to comply with the petition, I would, under section 116 (*a*) of the Land Registry Act, be required to declare that it has been proved to my satisfaction, upon investigation, "that the title of the person to whom a certificate of title is directed to issue is a good, safeholding 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.

MACDONALD, J.

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 subsection (*g*) of section 22 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 provides that "any person who shall have commenced an action 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*

MACDONALD, J.

1918

June 17.

COURT OF APPEAL

1919

April 1.

IN RE GRANBY CONSOLIDATED MINING, &C., CO. AND THE REGISTRAR-GENERAL OF TITLES

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., p. 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 difficulty, 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.

MACDONALD, J.

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 will not succeed, and thus that I can 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 difficult 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 a title: see MARTIN, J. in *Townend* v. *Graham* (1899), 6 B.C. 539 at p. 541:

"It is now settled that such *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.

MACDONALD, J.

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 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:

MACDONALD, J.

1918

June 17.

COURT OF APPEAL

1919

April 1.

IN RE GRANBY CONSOLIDATED MINING, &C., CO. AND THE REGISTRAR-GENERAL OF TITLES

"A registered *lis pendens* does not create a charge or lien on the property, nor does it excuse a purchaser from completing his contract. It merely puts him upon an inquiry into 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.

MACDONALD, J.

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.

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 to be affected with a *lis pendens*, there ought to be a close and continued prosecution."

In the view I have taken of the matter I have not deemed it necessary to deal with the application of the Esquimalt and 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, Smelting and Power 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.

From this decision the Granby Consolidated appealed. The appeal was argued at Vancouver on the 18th of November, 1918, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant: A certificate of *lis pendens* stands on its own footing and does not prevent registration. There is error in saying a *lis pendens* is not a charge. The only way to file a *lis pendens* is under Form D (B.C. Stats. 1912, Cap. 15, Sec. 49). The interests in the land indorsed on the certificate are those claimed as well as those established: see *Pearson* v. *O'Brien* (1912), 4 D.L.R. 413 at p. 423. The Registrar puts himself in the position of a reluctant purchaser upon whom the title is being enforced, and falls back on sections 14 and 116 of the Land Registry Act. The result would follow, if he is right, that where there is a charge registration would be refused. A good title means a good title within the Act: see Williams on Vendor and Purchaser, 2nd Ed., Vol. 1, pp. 165-7. On what would prevent specific performance of a contract to purchase see *Bull* v. *Hutchens* (1863), 32 Beav. 615 at p. 618; *Osbaldeston* v. *Askew* (1826), 1 Russ. 160; *Taylor* v. *Land Mortgage Bank of Victoria* (1886), 12 V.L.R. 748 at p. 755. It is the duty of the Court to decide the rights as between vendor and purchaser: see *Smith* v. *Colbourne* (1914), 2 Ch. 533 at pp. 541 and 544. The Registrar must satisfy himself

Argument

MACDONALD, J.

1918

June 17.

COURT OF APPEAL

1919

April 1.

IN RE GRANBY CONSOLIDATED MINING, &C., CO. AND THE REGISTRAR-GENERAL OF TITLES

he has a good safe-holding title and that is all: see *In re Ryan* (1914), 19 B.C. 165 at p. 170; *In re Land Registry Act and Shaw* (1915), 22 B.C. 116 at pp. 119 and 121. The effect of a *lis pendens* is to prevent a litigant from giving to others rights to property in dispute to the prejudice of the other litigant: see *Bellamy* v. *Sabine* (1857), 1 De G. & J. 566. That it is a charge is not questioned in *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215 at pp. 226-7.

Davis, K.C. (*Harold B. Robertson,* with him), for respondent (Esquimalt and Nanaimo Ry. Co.): He is entitled to an absolute title (which could not interfere with us), but the question is whether he is entitled to an indefeasible title. Where there is a *lis pendens* which shews lack of title, the Registrar is justified in refusing registration. If he gets an indefeasible title, we say our claim is gone and we have no claim against the insurance fund. I say, first, where there is a *lis pendens* outstanding it should be cleared off before a certificate is issued; second, in any case where it is a question of law it is a matter for the Registrar. This is not a title that could be forced on an unwilling purchaser, and the Registrar is justified in refusing registration: see Dart on Vendors and Purchasers, 7th Ed., Vol. 1, p. 92. If the matter is open to judicial consideration he has exercised his discretion and it should not be interfered with. Section 22 of the Land Registry Act shews the effect of an indefeasible title. A *lis pendens* is not in itself a charge. It is nothing more than a notice of a claim formally made in certain litigation before the Court, and upon being filed it is notice under the Act. The putting in of a *caveat* only results in a *lis pendens*. The statute contemplates that when a *lis pendens* is filed before application for registration, the *lis pendens* must be disposed of before a certificate is granted. Once an indefeasible title is issued we loose all rights we have under our *lis pendens*. Although a *lis pendens* may be registered as a charge, it is not a charge within the meaning of section 29 of the Act as re-enacted and amended (B.C. Stats. 1912, Cap. 15, Sec. 7; 1914, Cap. 43, Sec. 16; 1915, Cap. 33, Sec. 5; 1916, Cap. 32, Sec. 6), nor under the Interpretation Act. A charge is an estate. An indefeasible title is a good, safe-holding, marketable title in the form of which the Registrar

Argument

cannot issue title when a *lis pendens* is on file. Assuming a certificate is issued subject to the *lis pendens* and the action is dismissed on a technical ground, we would no longer have any title, and in case of disallowance of the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, our rights could not be revived.

The Registrar-General, in person, referred to *Syndicat Lyonnais du Klondyke* v. *McGrade* (1905), 36 S.C.R. 251; Thom's Canadian Torrens System, p. 159; *Bellamy* v. *Sabine* (1857), 1 De G. & J. 566.

Mayers, in reply.

Cur. adv. vult.

1st April, 1919.

MACDONALD, C.J.A.: This is in reality a contest between the appellants and the Esquimalt and Nanaimo Railway Company, who are parties to this appeal as respondents, although not appearing as such in the style of cause.

It may be useful to state briefly the facts leading up to the dispute between these parties. The Railway Company in 1887 received from the Crown a grant of a large block of land in Vancouver Island by way of subsidy in aid of the construction of their railway. The grant contained an exception or reservation in favour of a class of persons who may, for convenience, be designated "settlers." The lands involved herein, being two small parcels aggregating 158 acres, are within the boundaries of said block. The Railway Company in 1890 executed what purports to be a conveyance of the said two parcels to one Joseph Ganner, since deceased, reserving thereout the coal and other minerals specified in the conveyance, and Ganner's executor in March, 1905, conveyed the land to one Bing Kee. Settlers within the block set up claims to the minerals as well as to the surface of lands upon which they had settled, and the Legislature then passed the Vancouver Island Settlers' Rights Act, 1904, which enacted that upon proof of his claim by the settler, "A Crown grant of the fee simple in such land shall be issued to him or his legal representatives." The time within which the settler might apply for the grant was extended by B.C. Stats. 1917, Cap. 71. The executors of Ganner claiming

MACDONALD, J.
1918
June 17.
COURT OF APPEAL
1919
April 1.
IN RE GRANBY CONSOLIDATED MINING, &C., CO. AND THE REGISTRAR-GENERAL OF TITLES
MACDONALD, C.J.A.

to be entitled to the benefit of the said Act, applied to the Government within the extended time for a grant of the said two parcels of land. Their application was acceded to and a Crown grant was issued to them on the 15th of February, 1918. This grant in form is of the fee, the surface as well as the minerals; in effect, however, it is the execution by the Crown of a statutory power of transfer, when the title to the surface is already in the grantee, of the minerals from the Railway Company to the grantees; either that or it is founded on the assumption that neither the surface nor the minerals passed to the Railway Company by the grant of 1887.

The Railway Company dispute the validity of said grant of the 15th of February, and have commenced action against the executors to have it declared null and void. Bing Kee also has commenced an action to inforce what he claims to be his rights to the minerals. The Railway Company, on the 18th of February, 1918, applied for registration, in the Land Registry office, of a *lis pendens,* and on the day following obtained registration thereof pursuant to section 71 of the Land Registry Act; Bing Kee subsequently also registered a *lis pendens.* The executors conveyed the land to one Treat, appellant's agent, on the said 18th of February, and on the same day Treat conveyed it to the appellant, which on the 22nd of May of the same year applied to the respondent, the Registrar-General of Titles, for registration of its title under the said grant and conveyances. The Registrar has notified the said appellant that he declines to register its title because of said *lis pendens.* The question is, was he wrong?

An application by a person claiming to be registered in the register of indefeasible fees is to be granted by the Registrar only when the applicant has shewn a good, safe-holding, marketable title, and it is declared by section 22 of the said Land Registry Act that the certificate granted on registration of an indefeasible fee shall be good against all the world, subject only, *inter alia,* to any *lis pendens* registered since the date of the certificate. Section 71 of the said Act provides that

"Any person who shall have commenced an action . . . . . in respect of any land, may register a *lis pendens* against the same as a charge."

When a good title has been shewn by an applicant for regis-

tration in indefeasible fee, he is entitled to a certificate notwithstanding that the fee is burdened by registered charges. The certificate as issued bears indorsement of the charges affecting the title, the scheme of the Act, as I understand it, being to separate for the purposes of the Act the legal estate from all equitable interests or encumbrances. The one is the "fee," the other the "charge."

Now, apart from the Act, which enables a plaintiff to register a *lis pendens* as a charge, what is the character of a *lis pendens?* The *lis pendens* is the pending action. Before the enactment of 2 & 3 Vict., Cap. 11 (Imperial), a person taking a conveyance *pendente lite* of lands in dispute would take it subject to the rights of the litigants. It was not necessary that he should have notice of the litigation. The law imputed notice on the assumption that everybody ought to be aware of such causes pending in the Courts. This state of the law was modified by the 2 & 3 Vict., Cap. 11, which made registration as therein provided for, or express notice, essential if the grantee was to be bound by the result of pending litigation. Thus it will be seen that the plaintiff's protection in such a suit is the notice of it, formerly imputed, now either express or constructive. The nature and consequences of a *lis pendens* being well settled, what, then, did the Legislature mean by section 71, which permits registration of a *lis pendens* as a "charge?" I do not think it meant to provide for anything more than constructive notice of the *lis pendens.*

MACDONALD, C.J.A.

Now, the Registrar takes no exception to the title sought to be registered save that notices of *lis pendens* are on the register. The consequences following the registration of the *lis pendens* do not appear to me to be a question for consideration in this appeal. The sole question before us, as I see it, is this: Does registration of the *lis pendens* alone justify the Registrar's refusal to issue the certificate to the appellant? I think not. For the purposes of the Act a *lis pendens* is a "charge" on the fee. I cannot give effect to the submission of counsel that the registration of the *lis pendens* is in effect an injunction restraining the issue of the certificate of title. The Act provides by *caveat* a specific method of staying the Registrar's hand where it is desired to do so. I can, therefore, see no reason for

MACDONALD, J.

1918

June 17.

COURT OF APPEAL

1919

April 1.

IN RE GRANBY CONSOLIDATED MINING, &C., CO. AND THE REGISTRAR-GENERAL OF TITLES

treating the statutory charge created by the registration of a *lis pendens* differently to any other charge, as for example that created by the registration of an agreement for sale.

We have not the abstract of title under the Railway Company's grant before us. Whether that would disclose grounds for the Registrar's refusal is not open to us, and I therefore confine my opinion that the appeal should be allowed to this, that the grounds stated by the Registrar do not justify his refusal.

It was conceded by Mr. *Davis* that the granting of a certificate of absolute fee would be unobjectionable. This does not really affect the question before us at all, but it may be pointed out that as the appellant must register the Crown grant of the 15th of February as part, if not the root, of their title, section 15 of the Land Registry Act appears to prohibit its registration in the register of absolute fees.

The respondent, the Railway Company, also submitted that because of the disallowance of the said amending Act of 1917 by the Governor-General in Council, which disallowance was signified in May, 1918, the Crown grant of the 15th of Feb-

MACDONALD, C.J.A.

ruary was thereby rendered null and void, and all proceedings under it rendered ineffectual. I cannot agree with this submission. The Act in question was disallowed under authority of the British North America Act, sections 56 and 90, and the annulment of the Act takes effect only from the date of the signification thereof.

In accordance with our decision in *In re Land Registry Act and Scottish Temperance Life Assurance Co., ante,* p. 504, there can be no order in respect of costs either for or against the Registrar-General of Titles, but as between the appellant and the Railway Company, who are co-respondents, the costs should follow the event and should be paid by the said Railway Company to the appellant.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be allowed, because I think, after fully considering the various sections of our Land Registry Act (R.S.B.C. 1911, Cap. 127) governing this matter, which it is unnecessary to refer to in detail, that whatever may be said of the varying nature of a

lis pendens apart from said statutes (and it may, by conveyancers, be so viewed in different lights according to circumstances), it must under them be regarded as a "charge," for at least it is "a claim to or upon any real estate," under the definition of "charge" in section 2, and therefore the appellant is entitled as of right to have its title registered in the register of indefeasible fees, as prayed in its petition, despite the existence of a *lis pendens* prior to its application. During the argument I referred to the observation of Lord Justice Cairns in *In re Barned's Banking Co; Ex parte Thornton* (1867), 2 Chy. App. 171 at p. 178; 36 L.J., Ch. 190, on a *lis pendens*:

> "It is perfectly clear that it has always implied a claim of right, or a claim to charge some specific property."

So then if it is to be regarded as a charge, it is not, properly and technically speaking, a matter of "title" under section 16, though as a charge it is "a cloud on the title which a purchaser is entitled to have removed": *Townend* v. *Graham* (1899), 6 B.C. 539 at p. 541. The question turns upon the special language of our Land Registry Act, and should be answered in favour of the appellant.

MARTIN, J.A.

GALLIHER, J.A.: Apart from the statute, I incline to the view that the *lis pendens* filed in this action would not be a charge. It is the whole title that is attacked in the proceedings in so far as the right to coal and other minerals is concerned, a different thing to say a *lis pendens* under the Execution Act or a *lis pendens* filed in a suit claiming only a limited interest in the land, such as a life estate. The authority for registering the *lis pendens* here is to be found in section 71 of the Act, and the words are: "May register the *lis pendens* against the same as a charge." There is no other door of entry, and you cannot use this door for registration and then, when registered, say it is not a charge. For the purposes of registration you are bound by the statutory words. It would seem, therefore, that the Registrar under the statute should, in considering whether the applicant has a safe-holding and marketable title, in that respect disregard the *lis pendens* in the same way he would any other document about which there would be no dispute as

GALLIHER, J.A.

MACDONALD, J.
1918
June 17.

to its being a charge, and issue his certificate of indefeasible title subject to indorsement thereon of the *lis pendens*.

I would allow the appeal.

COURT OF APPEAL
1919
April 1.

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

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

Appeal allowed.

IN RE GRANBY CONSOLIDATED MINING, &C., CO. AND THE REGISTRAR-GENERAL OF TITLES

Solicitors for appellant: *Taylor, Mayers, Stockton & Smith.*
Solicitors for respondent (Esquimalt and Nanaimo Ry. Co.): *Barnard, Robertson, Heisterman & Tait.*

COURT OF APPEAL
1919
Feb. 11.

FRASER v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Collision—Street-car and automobile—Both parties responsible for accident—Ultimate negligence.

FRASER v. B.C. ELECTRIC RY. CO.

In an action for damages for personal injuries and the wreck of an automobile the plaintiff cannot recover where the accident was due to the negligence of both the plaintiff and the defendant and the defendant could not by the exercise of reasonable care after he became aware of the danger have avoided the accident (EBERTS, J.A. dissenting).

Statement

APPEAL from the decision of GREGORY, J. of the 29th of May, 1918, dismissing the plaintiff's action, tried without a jury, for damages for personal injuries and for the wreck of his automobile owing to a collision at the intersection of Commercial Drive and 12th Avenue in the City of Vancouver at about 8.30 in the evening of the 10th of January, 1918. The plaintiff was driving his automobile westerly along 12th Avenue. On approaching Commercial Drive, upon which is a double track street-car line, he slowed down to 10 or 12 miles an hour, and on reaching the curbed line of that street looked southerly and then northerly. Seeing no street-car and without taking

COURT OF APPEAL

1919

Feb. 11.

FRASER v. B.C. ELECTRIC RY. CO.

any further observation he proceeded to cross the road. After reaching the westerly track the back portion of his car was struck by a street-car coming from the south, the impact carrying the automobile about 34 yards and wrecking it. The plaintiff was rendered unconscious by the impact and suffered severe cuts and bruises but was not otherwise injured. There was a fall of snow on the road and the evidence was that the street-car was going at a rate of from 30 to 35 miles an hour.

The appeal was argued at Vancouver on the 5th of December, 1918, before MACDONALD, C.J.A., MCPHILLIPS and EBERTS, JJ.A.

Statement

S. S. Taylor, K.C., for appellant: The street-car was going at an excessive rate of speed and this was the real cause of the accident: *Toronto Railway* v. *King* (1908), A.C. 260. As to shewing reckless disregard as to speed see *Columbia Bitulithic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1 at pp. 13 and 32; *Great Central Railway* v. *Hewlett* (1916), 2 A.C. 511 at p. 525. The street-car was not only going at an excessive rate of speed, but the rate was so excessive as to render the defendant liable notwithstanding any possible negligence on the part of the plaintiff: *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719 at pp. 724-5; *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 423 at pp. 433 and 437. The street-car hit the back of the automobile so that with reasonable care as to speed the automobile would have crossed the track.

Argument

McPhillips, K.C., for respondent: The onus is on the plaintiff. The judge below finds against him and he must shew the judge was wrong. As to the duty of the motorman if he had seen the car see *The Halifax Electric Tramway Company* v. *Inglis* (1900), 30 S.C.R. 256 at p. 268 *et seq.*; *Gavin* v. *Kettle Valley Ry. Co.* (1918), 26 B.C. 30. Unless the *Loach* case makes us liable they cannot succeed: see also *Smith* v. *City of Regina* (1918), 42 D.L.R. 647.

Taylor, in reply, referred to *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155 at p. 1166.

Cur. adv. vult.

COURT OF APPEAL

1919

Feb. 11.

FRASER v. B.C. ELECTRIC RY. CO.

11th February, 1919.

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

MCPHILLIPS, J.A.: This appeal in a negligence action for personal injury to the appellant and damages to an automobile in consequence of a collision between the automobile and a tram-car of the respondent, is from a judgment of GREGORY, J. who heard the case without the intervention of a jury, entering judgment for the respondent and dismissing the action. No evidence was led on the part of the respondent and upon the facts adduced before the learned judge he was of the opinion that by reason of the contributory negligence of the appellant he could not succeed in the action. With this finding of the learned judge against him it is incumbent upon the appellant to shew that the judgment is wrong (*Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Re Wagstaff; Wagstaff* v. *Jalland* (1907), 98 L.T. 149). In *Union Bank of Canada* v. *McHugh* (1911), 44 S.C.R. 473, Anglin, J. at p. 492 said:

"The finding of a trial judge resting upon oral evidence 'is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons.' *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326."

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

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

MCPHILLIPS, J.A.

And in the later case of *McIlwee* v. *Foley Bros.* (1919), 1 W.W.R. 403 at p. 407 Lord Buckmaster said:

"It is unnecessary to repeat the warnings frequently given by learned judges, both here and in Canada, against displacing conclusions of disputed fact determined by a tribunal before whom the witnesses have been heard and by whom their testimony has been weighed and judged, and did the question depend solely on the decision between rival evidence the case would be free from difficulty."

This case cannot be said to really present "rival evidence" save that in the evidence as presented by the plaintiff (appellant) there may be said to be some variance between the plaintiff's evidence and some of the witnesses called to support his case as to whether the plaintiff under the circumstances, if

he looked, should have seen the tram-car and avoided the accident. It is clear upon the evidence as led on the part of the plaintiff, no evidence, as has been stated, being given on the part of the defendant (respondent), that there was a clear view and the plaintiff was proceeding slowly in his automobile, so that if he looked he would have seen the tram-car, and if looking and seeing the tram-car, he attempted to cross in front of the car it was reckless conduct upon his part, and if he did not look the attempt to cross at the point where the accident took place (admitted to be a dangerous point at the foot of an incline known to the plaintiff) it was reckless conduct, and he was the author of his own injury and the injury to his automobile. The learned judge in his reasons for judgment said:

"The plaintiff did say his memory failed him at a certain point. I think it must have failed him a little before that, if he was at the point he said he was when he looked up the street, namely, the curbed line of Commercial Drive, then he must have seen the car. That is the point where the ladies say they saw him and he must have seen the car. The car had just then passed 13th Avenue, and they felt that there must be a collision. Now if he did not look he was unquestionably guilty of contributory negligence, and being guilty of contributory negligence cannot recover. I am inclined to think that he did not look. If he did look then he must certainly have seen the car if the evidence of the two ladies is to be believed, and then he had no right to proceed at 10 miles an hour and cross the track. In either case he is guilty of contributory negligence and therefore is not entitled to judgment. There will be judgment for the defendant. I may say that I regret it very much, but I cannot help it."

The learned counsel for the defendant (respondent), in moving at the close of the case for the plaintiff for a nonsuit, or that the action should be dismissed, said:

"For the purpose of my argument I admit the negligence. I say he had no business in running in front of a street-car going at 35 miles an hour."

Unquestionably the tram-car was travelling at a high speed, but all the greater reason for the plaintiff to refrain from any attempt to cross the track under the circumstances, either known to him or which ought reasonably to have been known to him. It would appear, upon all the facts, that the plaintiff accepted or took upon himself the risk to cross in front of the tram-car, and the inevitable happening was the result. The automobile was struck by the tram-car before it (the automobile) had fully cleared the track. Can it be reasonably said that the plaintiff exercised reasonable care in view of all the circumstances? The

COURT OF APPEAL

1919

Feb. 11.

FRASER v. B.C. ELECTRIC RY. CO.

evidence is overwhelming that the wrongful conduct of the plaintiff was the *causa causans* of the accident, and if there was negligence on the part of the defendant, that cannot avail upon the special facts of this case. The plaintiff placed himself in his automobile at a point of inevitable accident, and nothing was possible, at the moment, to obviate the occurrence. There can be but one conclusion. The language of Mr. Justice Duff in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53 is peculiarly applicable to the facts of the present case, that is, "the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence," and that view was arrived at by the learned trial judge.

In my opinion, if the present case had been tried with the intervention of a jury, it would have been proper to have nonsuited or have withdrawn it from the jury. It cannot really be said that the defendant was the effective cause of the collision. Upon the facts, the plaintiff himself established a case of inevitable accident (see *Fawkes* v. *Poulson and Son* (1892), 8 T.L.R. 725), consequent upon his own action in heedlessly placing himself in the way of a tram-car travelling at high speed upon fixed rails, incapable of being diverted in its course. The present case may be well described as one which, upon the undisputed facts, demonstrates that the accident occurred and was directly caused by the plaintiff's own negligence, even if there be facts shewing some negligence on the defendant's part. In *Skelton* v. *The London and North Western Railway Company* (1867), 36 L.J., C.P. 249, Bovill, C.J. at p. 252 used language particularly applicable to the facts of the present case:

MCPHILLIPS, J.A.

"I asked during the argument whether there was evidence that he had exercised any caution at all, and it is clear that there was no evidence that he had done so."

And at page 253:

"According to the plaintiff's case, the place was a dangerous one"

(and that is the evidence in the present case. The learned counsel for the plaintiff, upon the argument of this appeal at this bar saying, as I take it from my notes, "nearly got caught here before, but at that time was going too fast and that a dangerous crossing"),

"and yet the deceased went along without ever looking, even when he had the opportunity of doing so. It is only when the injury is caused by the

negligence of the railway company that the action lies against them, and therefore, assuming that the ring was up and that there was negligence in this respect on the part of the company, it appears that the accident did not arise from that, but from the deceased going along without looking to see what was on the line . . . . . If reasonable care had been used by the deceased, the accident would not have occurred, and therefore the nonsuit was right."

And Willes, J. said in the same case at p. 253:

"Of course one cannot exclude from the inquiry as to the negligence of A., the question whether B. did not put himself into a danger which would not have happened to a person using reasonable care."

And Montague Smith, J. at pp. 254-5 said:

"I think that the state of the gate was not sufficient to absolve a passenger from taking due care, that is to say, to look out, when he might have an opportunity of seeing whether the line was clear or not. It seems that the deceased in this case did not look out when he might have done so, and that it was his own act which produced the accident. I think, therefore, the nonsuit was right, and that this rule should be discharged."

It may be said that *Allen* v. *North Metropolitan Tramways Company* (1888), 4 T.L.R. 561 is conclusive against the plaintiff, the facts being so analagous. There, Lord Justice Lindley said:

"There was some evidence that the car was going fast, and there was evidence that the plaintiff did not hear the car coming, owing, perhaps to the ground being covered with snow. It was clear from those facts that the plaintiff had only himself to blame for the accident. In the first place, the Court could hardly go to the length of saying that there was no evidence of negligence in the driver of the car, though that evidence was of the slightest possible character. On the other hand, there was clear evidence that the plaintiff's conduct caused the accident. He walked into the tram-car, when, if he had looked, he must have seen it. Then, even though the plaintiff was negligent, could the driver have avoided the accident by the exercise of reasonable care? They could find no evidence that the driver could have avoided the accident. The appeal must therefore be allowed, and judgment must be entered for the defendants."

MCPHILLIPS, J.A.

(Also see *Griffiths* v. *East and West India Dock Company* (1889), 5 T.L.R. 371.)

In *Hawkins* v. *Cooper* (1838), 8 Car. & P. 473, Tindal, C.J. said in charging the jury:

"What you will have to determine on the evidence you have heard is, whether you are satisfied that the injury was occasioned by the negligence of the defendant's servant in driving in an improper manner under the circumstances? But if you are of opinion that it was not occasioned by such negligence, but can be attributable in any degree to the incautious conduct of the plaintiff herself in running across the road at a time when, in the exercise of common caution and discretion, she ought not to have done so, then the defendant will not be liable . . . . . You will take the

COURT OF APPEAL

1919

Feb. 11.

FRASER v. B.C. ELECTRIC RY. CO.

case into your consideration, and determine for yourselves whether the injury was attributable to the negligence, carelessness, and improper mode of driving of the defendant's servant? If you think it was attributable to that, and to that alone, you will find your verdict for the plaintiff, and give such damages as you think proper under the circumstances. But if you think it was occasioned in any degree by the improper conduct of the plaintiff herself in crossing in so incautious and improper a manner, in such case the defendant will be entitled to your verdict."

In *Barry Railway Company* v. *White* (1901), 17 T.L.R. 644, the Lord Chancellor (Earl of Halsbury) said:

"Further, the judge said there must be gross negligence on the part of the plaintiff to disentitle him to damages. That was not the law—it must simply be negligence contributing to the accident."

In my opinion, *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719, relied upon so strongly by the learned counsel for the plaintiff (appellant), is in no way helpful to the plaintiff upon the facts of the present case. The language of Lord Sumner at p. 722 is conclusive, and supports Mr. Justice GREGORY in the judgment he pronounced for the defendant (respondent):

"Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered."

MCPHILLIPS, J.A.

We have no facts before us in this appeal that there was any possibility of obviating what occurred here. The wrongful conduct of the plaintiff precipitated an inevitable accident. There is no evidence whatever of defective equipment of the tram-car or that it could have been pulled up in time to prevent the accident; in fact, the whole case proceeds upon the premise that there was liability because of the high speed, and that alone.

In *Columbia Bitulithic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1 at p. 4, Sir Charles Fitzpatrick, C.J. said:

"However, the judgment of the Privy Council must be accepted as the law not only as to the abstract principle which is clear but as applicable to this particular case; and as Mr. Justice Archer MARTIN said in the Court of Appeal, 'on the inference to be drawn from facts about which there is no real dispute . . . . . the accident could . . . . . have been

avoided if the brake had been in good order.' This conclusion clearly brings the case within the decision of the Privy Council in *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719, 23 D.L.R. 4."

And see the language of Sir Louis Davies, J. at pp. 5-6.

It is clear that no such case is made out in the present case as was established in the *Loach* case or the *Columbia Bitulithic* case. Mr. Justice Duff, in the *Columbia Bitulithic* case, states the law in concise terms, which in my opinion is determinative, upon the facts of the present case, against the plaintiff's right of recovery in this action. At p. 26 he said:

"The broad principle is, of course, undisputed (it is distinctly recognized in the last paragraph of their Lordships' judgment in *Loach's* case) that a plaintiff whose negligence is a direct cause of the injury complained of cannot recover even though the accident would not have occurred but for the defendant's own negligence; in other words, where the injury complained of is 'directly' caused by the negligence of the plaintiff and the defendant. (See Lord Esher in *The Bernina* [(1887)], 12 P.D. 58 at p. 61, and Lindley, L.J. in the same case at pp. 88 and 89, and Mr. Justice Willes in *Walton* v. *The London, Brighton & South Coast Railway Co.* [(1866)], H. & R. 424 at pp. 429 and 430."

And as Lord Loreburn said in *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation, supra* (referred to by Anglin, J. in *Union Bank of Canada* v. *McHugh, supra*), as reported in 77 L.J., K.B. 847 at p. 849:

"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 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."

MCPHILLIPS, J.A.

Here we have the finding of fact of the learned trial judge against the plaintiff and, in my opinion, the incorrectness of that finding has not been established. In view of what was said by Lord Loreburn, this finding must be held to be conclusive, and the concluding portion of the judgment of Lord Sumner in the *Loach* case still further accentuates this. It was there said ((1916), 1 A.C. at p. 728):

"In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and determine the responsibility, and that upon the answers which they returned, reasonably construed, the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combina-

COURT OF APPEAL

1919

Feb. 11.

FRASER v. B.C. ELECTRIC RY. CO.

MCPHILLIPS, J.A.

tion of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs."

And in *Toronto Power Co. Lim.* v. *Kate Paskwan* (1915), 84 L.J., P.C. 148 at p. 152, Sir Arthur Channell, in delivering the judgment of their Lordships of the Privy Council, said:

"It is unnecessary to go so far as Mr. Justice Middleton did in the Court below, and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable."

Therefore, for the foregoing reasons, I am of the opinion that the appeal should be dismissed.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal dismissed, Eberts, J.A. dissenting.

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

SCHETKY v. BRADSHAW.

COURT OF APPEAL

1919

Feb. 11.

SCHETKY v. BRADSHAW

Company law—Winding-up Act—Contributory—Past member—Forfeiture of shares—R.S.C. 1906, Cap. 144, Secs. 51 and 52—R.S.B.C. 1911, Cap. 39, Part VIII., Table A(28)—B.C. Stats. 1912, Cap. 3, Sec. 28.

In the winding up of a company under the Winding-up Act, if the power of forfeiture has been properly and legally exercised by the company prior to liquidation, a person whose shares have been forfeited ceases to be a member or shareholder of the company and is not liable to be put on the list of contributories.

APPEAL by the petitioner (Schetky) from the order of MORRISON, J. of the 31st of October, 1918 (reported *ante* p. 153, *sub nom. In re Acadia Limited*), confirming the certificate of the district registrar, striking the name of C. W. Bradshaw off the list of contributories of Acadia, Limited. In March, 1913, Bradshaw became a member of said company in respect of two shares of $150 each. Between June, 1914, and May, 1915, five calls of $16 each were made upon the two shares, but they were never paid. On the 5th of July, 1915, a formal resolution forfeiting the shares was passed under the articles of association and notice thereof was sent to Bradshaw. The company went into liquidation in the following October. In pursuance of an order of MORRISON, J. the registrar, on the 11th of October, 1915, struck the name of C. W. Bradshaw off the list of contributories. Statement

The appeal was argued at Vancouver on the 10th of December, 1918, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant: The trial judge followed *In re D. Wade Co. Ltd.* (1909), 2 Alta. L.R. 117, in which is cited *Knight's Case* (1867), 2 Chy. App. 321; *Needham's Case* (1867), L.R. 4 Eq. 135; and *Ladies' Dress Association* v. *Pulbrook* (1900), 2 Q.B. 376, but these cases were decided on the English statute. This case depends on sections 51 and 52 of the Winding-up Act. Once an application for shares has Argument

COURT OF APPEAL

1919

Feb. 11.

SCHETKY v. BRADSHAW

been accepted he does not get rid of his liability no matter what happens in the meantime: see *Bridger's Case and Neill's Case* (1869), 4 Chy. App. 266 at p. 270; *Creyke's Case* (1869), 5 Chy. App. 63 at pp. 65-6. The word "shareholder" in section 52 of the Act means any one who was at any time a shareholder. The fact of the shares being extinguished does not affect the question.

Argument

J. A. MacInnes, for respondent: The question is the nature of the liability and not the amount. He is liable as a debtor to the company but not as a contributory and should not be on the list. He has not shewn any statutory liability on a past member. In sections 51 and 52 of the Act the words are "every shareholder or member"; my contention is Bradshaw is within a shareholder or member. In addition to *In re D. Wade Co. Ltd.* (1909), 2 Alta. L.R. 117 there are the following cases under the Dominion Act: *In re Wiarton Beet Sugar Co.* (1906), 12 O.L.R. 149; *Re Winnipeg Hedge & Wire Fence Co.* (1912), 22 Man. L.R. 83. As to liability as contributory see *Re Central Bank and Yorke* (1888), 15 Ont. 625; *Ings* v. *Bank of P.E.I.* (1885), 11 S.C.R. 265.

Cur. adv. vult.

11th February, 1919.

MACDONALD, C.J.A.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. The learned counsel for the appellant in a very careful argument endeavoured to distinguish the English and Canadian cases, in that all of the cases were decided upon different statute law, and while care must always be taken in giving weight to such cases, yet at times there may be such similarity of statute law which will admit of great assistance being obtained therefrom.

Lord Parmoor in the *City of London Corporation* v. *Associated Newspapers, Limited* (1915), A.C. 674 at p. 704 said:

> "I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends. So far, however, as it is allowable to be guided by decisions in analogous cases I agree . . . . ."

Now the present case may be said to be analogous to *In re D.*

Wade Co. Ltd. (1909), 2 Alta. L.R. 117. In that case Mr. Justice Beck held (see head-note) that:

"shareholders whose shares have been forfeited, while not liable to be placed on the list of contributories, are still liable (if the articles of association so provide), to be sued for the amount unpaid on calls made,—following *Ladies' Dress Association* v. *Pulbrook* (1900), 2 Q.B. 376; 69 L.J., Q.B. 705."

Section 51 of the Winding-up Act, R.S.C. 1906, Cap. 144, was considered by the learned judge; also clause 21 of the regulations of the company (which may be said to be similar to article 28 of Table A., which applies to the present case). At pp. 120-1 Beck, J. said:

"In my opinion, therefore, present members only can be placed upon the list of contributories when the proceedings are under the Dominion Winding-up Act; and as a consequence that the several persons whose names are now in question, inasmuch as they had ceased to be members of the company by reason of the forfeiture of their shares, cannot be made contributories: *Knight's Case* [(1867)], 2 Chy. App. 321; 36 L.J., Ch. 317; *Needham's Case* [(1867)], L.R. 4 Eq. 135; 36 L.J., Ch. 665."

MCPHILLIPS, J.A.

I cannot see that section 52 of the Winding-up Act is in any way helpful to the appellant. The case there provided for is not the present case.

I do not consider it necessary to, in detail, discuss the other authorities cited in the very full and complete argument addressed to this Court by counsel upon both sides. In my opinion it has not been established that the learned judge in the Court below arrived at a wrong conclusion.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitor for appellant: *W. J. Baird.*
Solicitor for respondent: *J. A. MacInnes.*

MURPHY, J.

1919

Feb. 7.

SYMONDS v. THE CLARK FRUIT AND PRODUCE COMPANY, LIMITED, AND CLARK.

Sale of goods—Acceptance—Warranty of soundness—Pleadings—Counterclaim—Amendment—Reference.

SYMONDS v. CLARK FRUIT AND PRODUCE CO.

The defendant purchased two car-loads of potatoes from the plaintiff, there being an express warranty in the contract that the potatoes were to be sound and marketable. It further provided that acceptance was to take place at warehouse in Vancouver. Upon the arrival of the first car in Vancouver the defendant Company's manager opened the car and immediately tried to sell the contents, but failing in this he ordered the car to the warehouse. On arrival of the second car he examined the potatoes, and finding them defective, immediately wired non-acceptance. The contents of both cars were found not to be sound and marketable potatoes. In an action for balance of purchase price of the potatoes:—

Held, that having attempted to sell the contents of the first car and taken it to the warehouse, the defendant Company thereby treated the potatoes as its own, and must be held to have accepted them, but could, nevertheless, counterclaim for breach of warranty.

The defendant counterclaimed in the action for breach of warranty in respect of the second car of potatoes, but not as to the first car.

Held, that the pleadings should be amended by extending the counterclaim to the first car, and that there be a reference as to damages on the counterclaim as amended.

ACTION to recover balance of purchase price on two car-loads of potatoes. The defendant counterclaimed for breach of warranty. The potatoes were put into cars by the plaintiff at Winch station and sent to Vancouver, the contract providing that acceptance was to take place at the defendant Company's warehouse in Vancouver. The facts are set out fully in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 29th and 30th of January, 1919.

Statement

J. A. Russell, for plaintiff.

S. S. Taylor, K.C., for defendant Company.

Coady, for defendant Clark.

7th February, 1919.

Judgment

MURPHY, J.: Action to recover balance of purchase price on two car-loads of potatoes. I find that these potatoes were pur-

chased under the contract set out in Exhibit 17. I find that plaintiff knew that he was dealing with the Clark Fruit & Produce Co., Ltd., and, consequently, the action as against W. Clark is dismissed.

The contract contains an express warranty, in my opinion, that the potatoes sold were to be sound and marketable. I find the potatoes, when shipped, were infected with a disease popularly known as "black rot" or "jelly stem rot" or "jelly end rot," according to its different manifestations, and that this infection was the result of the potatoes having been raised either from infected seed or on infected ground. They were so infected, consequently, when put into the cars at Winch station. In my opinion, on the evidence, potatoes so infected are not good, sound, marketable potatoes, and, therefore, defendant Company had the right to reject them when they arrived in Vancouver.

With regard to car No. 24042, spoken of at the trial as car No. 3, this car arrived in Vancouver on November 7th, 1918, at 1.50 p.m. The defendant Company was notified of its arrival on November 8th, at 10.35 a.m. The contract provides that acceptance is to take place in Vancouver warehouse, which, I think, means a warehouse to be provided by the defendant Company. The potatoes in this car arrived in such bad condition that the defendant Company notified plaintiff by wire that they could not accept same, and requested plaintiff to come to Vancouver. It is true this wire did not reach plaintiff until the 11th of November, but defendant Company is not to blame, the cause being that the wires were down. With regard to this car, therefore, I hold the action fails because there was no acceptance, and prompt steps were taken to notify plaintiff of that fact. Under the terms of the contract, defendant Company was justified in not accepting the same.

Judgment

With regard to car No. 73546, spoken of at the trial as car No. 4, this car arrived in Vancouver at 8.20 a.m. November 4th, and defendant Company was notified of its arrival on the same day at 3.15 p.m. On the 5th, Mr. Clark, manager of the defendant Company, opened up the car and attempted to sell its contents. He made a second attempt to sell its contents on the 6th, but failing to do so, ordered the car to be taken to his

MURPHY, J.

1919

Feb. 7.

SYMONDS v. CLARK FRUIT AND PRODUCE CO.

warehouse on November 7th. As already stated, car No. 24042 arrived in Vancouver November 7th, and reached the warehouse either that afternoon or next morning. On November 9th, defendant Company found that contents of the car No. 73546 were in a condition almost as bad as were the contents of car No. 24042, and the notification sent, November 9th, to plaintiff of non-acceptance covered both cars. On this state of facts the question arises whether defendant Company can set up non-acceptance as a defence. In my opinion, on the authority of *Parker* v. *Palmer* (1821), 4 B. & Ald. 387, it cannot do so. In that case, an attempted sale took place just as here. The language of Holroyd, J. at pp. 393-4 seems applicable to the facts in the case at bar. He says:

> "The defendant treats the goods . . . . as if they were his own property, for he actually attempts to dispose of them as such. By assuming the domination over the property, he treats the first sale to him as a valid sale, and he cannot afterwards insist that it is void."

And Best, J., in the same case, at p. 394 says:

> "If he avails himself of the privilege of selling, though under the name of another owner, that must be considered as a sale by himself; and the taking upon himself [purchaser] the disposition of the goods is equivalent to an acceptance."

I am of opinion, therefore, that the defendant Company must be held to have accepted car No. 73546, and in consequence, plaintiff must succeed in his action. The judgment of Best, J., however, shews, in the case cited, that defendant Company can still bring an action for a breach of warranty. In the case before me there is a counterclaim for a breach of warranty in connection with another car, No. 31162, purchased and shipped under the same contract, spoken of at the trial as car No. 2. If my finding is correct, that the potatoes did not come up to the warranty contained in the contract, then this counterclaim is well founded. It is true the counterclaim is confined to car No. 31162, but if all the evidence that has a bearing upon the question is before the Court, I think it is my duty to reform the pleadings by amending the counterclaim so as to extend it to car No. 73546: *Gouch* v. *Bench* (1884), 6 Ont. 699. It would be useless expense to compel the defendant Company, under the circumstances, to bring an action on this warranty, inasmuch as I directed a reference as to damages on the counterclaim as framed, and inasmuch as, in my opinion, all

Judgment

the relevant evidence, apart from evidence bearing on damages, is before the Court, because the only evidence that would be relevant is such evidence as is relevant to car No. 31162. I do so reform the counterclaim. No express application for amendment was made at the trial, but the matter was mentioned in argument. There will, therefore, be judgment for the plaintiff, with costs, for the balance due on car No. 73546, and judgment for the defendant for breach of warranty on car No. 31162. There will be judgment for the defendant for breach of warranty on car No. 73546, but on this cause of action no costs are to be allowed defendant except the costs of the reference as to damages and any costs that may hereafter be awarded on confirmation of the report. A reference is directed to ascertain damages on breach of warranty with regard to both cars—31162 and 73546. Costs to be set off *pro tanto*.

Judgment

Judgment accordingly.

IN RE WINDING-UP ACT AND JOHNSTON BROTHERS (LIMITED).

Winding-up — Petition for order — Proof of facts — Not within personal knowledge of petitioner—Oral evidence allowed in to prove facts— R.S.B.C. 1911, Cap. 13—R.S.C. 1906, Cap. 144, Sec. 12.

On a petition to wind up a company under the Winding-up Act, if the affidavit supporting the petition is not sufficient to prove the allegations therein contained, leave may be granted the petitioner to adduce oral evidence on the hearing to prove said allegations.

In re Maritime Wrapper Co. Re Dominion Cotton Mills Company (1902), 35 N.B. 682 followed.

PETITION under the Winding-up Act for an order for the winding-up of Johnston Brothers (Limited). The Company was incorporated under the Dominion Companies Act in 1908, as a wholesale dry goods company. On the 31st of November, 1918, the Company made an assignment for the benefit of its

MACDONALD, J. (At Chambers)

1919

Jan. 24.

IN RE WINDING-UP ACT AND JOHNSTON BROTHERS

Statement

creditors under the Creditors' Trust Deeds Act. On the 31st of December, 1918, Mrs. F. K. Johnston, a creditor and shareholder, petitioned to wind up the Company, first as a creditor, on account of the Company being insolvent, and secondly as a shareholder, on account of the share capital of the Company being depreciated more than 25 per cent. The usual short statutory affidavit was attached to the petition, proving the allegations therein contained. On the hearing, objection was raised that the affidavit supporting the petition was not sufficient to prove the allegations therein contained, of which the petitioner was not personally aware. The petitioner then applied for leave to adduce oral evidence to prove said allegations. This was allowed and evidence was submitted on behalf of the petitioner, the assignee and certain creditors opposing the petition. Heard by MACDONALD, J. at Chambers in Vancouver on the 20th to the 24th of January, 1919.

S. S. Taylor, K.C., and *Gillespie,* for the applicant.

Russell, K.C., for the assignee and certain creditors opposing application.

Wilson, K.C., for Bank of Montreal and other creditors opposing application.

Burns, and *O'Neill,* for creditors supporting the application.

Judgment

MACDONALD, J.: In this matter the petitioner seeks to obtain an order winding up the Company. Her petition is dated December 19th, 1918, and alleges, *inter alia,* that the Company was incorporated in June, 1908. The material portion of the petition, upon which the proceedings are based, is that she is a creditor for the sum of about $9,800, and that the Company has made an assignment for the benefit of its creditors to one E. St. John Howley, as assignee. An attack is then made upon Mr. Howley, which is not at all pertinent to the question I am considering. She then alleges some action by the Bank of Montreal, which is also immaterial, and recites that the unsecured creditors amount to about $90,000; also that there are wage claims. The assets consist of a stock of merchandise, book debts, and real estate, all situate within the Province. She states that the assets can be better dealt with and disposed

of under the direction of the Court, than by an assignee under the Creditors' Trust Deeds Act.

It appears that this Company carried on business for a number of years, at a profit. Dividends were declared and paid; but of recent years the Company has not been so successful in its operations, and it resulted in an impairment of capital. During the year 1918, Mr. Howley, referred to in the petition, became an active official of the Company; and in a measure, I think (if not wholly), with the approval of the Bank of Montreal, obtained a partial, if not complete, control of the financial affairs of the Company and its management. Be that as it may, amongst the different directors considerable friction arose; probably due in a great measure to the fact that the Company was not bringing about satisfactory profits from time to time. This friction culminated in an effort being made in the early part of last Fall to buy out, what might be termed the Johnston interests, consisting of A. W. Johnston and his brother, A. M. Johnston, coupled with the holdings of the petitioner herein. This very commendable course, which was to remove the friction, and have the Company under a management that was harmonious, came to naught, however. Then a meeting of the board of directors was held, and there is a conflict of opinion as to what took place, but the result was, that the Johnstons, who were present, coupled with their secretary, Mr. Munton, passed a resolution that the Company should assign for the benefit of its creditors. The reasons which induced this assignment taking place are also the subject of controversy. It appears, however, according to the articles of association, that the resolution thus passed was not binding, and would not create an effectual assignment, unless it were confirmed by the absent directors. This subsequently took place, so that the assignment became valid, and J. W. McFarland, a person fully qualified, was appointed assignee, and took upon himself the duties of that office.

Judgment

It would appear, that if all agreed, this was a satisfactory mode in which to carry out the realization of the assets, for the benefit, first, of its creditors, who are always to be considered in advance, and then if there be any surplus, to have it properly divided, amongst those entitled. However, the outcome was that at the first meeting of creditors called in pursuance of the

MACDONALD, J. (At Chambers)

1919

Jan. 24.

IN RE WINDING-UP ACT AND JOHNSTON BROTHERS

statute, they removed Mr. McFarland from being the assignee, and in his stead placed Mr. Howley. Whether the creditors then voting, and bringing about this result, were aware at the time that Mr. Howley had been carrying on active arrangements to become a member, or director in control of the Company, I am not aware. Suffice to say, that at that time, there was an agreement in existence, which remained in abeyance, it is true, but which was intended to bring about the purchase of the Johnston interests, and have the other directors adverse to the Johnstons, with the addition of Mr. Howley, in control of the Company. It is stated by counsel, who appeared for a large body of creditors, that this state of affairs is satisfactory to him; and I presume he has, to a great extent, authority to speak on behalf of his clients. There are, however, a number of creditors, outside of those represented by Mr. *Russell,* who have to be considered in this application, and who are supporting the petition. They should receive my serious consideration.

Then the next step after the assignee had been chosen, and Mr. McFarland removed, was that the petitioner deemed it advisable, presumably on the advice of her solicitor, to launch this application for winding-up. When the application came before me for hearing, an objection was taken by counsel appearing not for the Company, but for the Bank of Montreal and other creditors (and such objection was joined in by Mr. *Russell* on behalf of a large body of creditors), that the material was defective; and that the order sought should not be granted.

Judgment

It was contended that while the affidavit in the usual form, attached to the petition, was in pursuance of the rule in that behalf, that this rule was beyond the power vested in the judge under the Winding-up Act, allowing affidavits by a section of that Act. I felt, and still feel, that there might be some weight attached to this objection, but I cannot overlook the fact that this has been for years in this Province, the accepted form of an affidavit verifying a petition under the Winding-up Act. I see great difficulty, if it is to be held, that a petitioner has to be fully aware, so as to swear to all facts named in a petition. Take this instance, for example, how Mrs. Johnston could have knowledge personally (and it appears that the petitioner must make the affidavit) of the facts surrounding the assignment,

the transactions of the Company, and all essentials to constitute the material necessary, on an application of this kind, is beyond me even to conjecture. However, the point taken, as I say, had considerable strength. The difficulty thus presented was endeavoured to be overcome by counsel, supporting the petition, utilizing the New Brunswick case of *In re Maritime Wrapper Co. Re Dominion Cotton Mills Company* (1902), 35 N.B. 682, by introducing *viva voce* evidence. I allowed such evidence to be given, thus perchance introducing a new practice in this Province, and one which may, upon a contest, cause delay in disposing of a petition. I have to remember that it is not usual for these matters to take such a length of time; but here there is a sharp contest in which the assignee on one side, holding his office, and supported by a large number of creditors, is met with a petition also supported by a number of creditors in addition to the petitioner. Thus the conflict becomes intensified.

To resume, has the affidavit then been supplemented in such a way, as to overcome the objection raised by counsel for the Bank of Montreal, and other creditors; and does it comply with what I take to be the spirit of the Act, namely, that the Court shall, in deciding whether a petition should be granted or not, be satisfied that the material is sufficient to bring into operation the effect of this insolvency measure? The Act itself does not say that the petition has to be verified by affidavit; but the rules provide in the way I have mentioned. Then, if further facts have been brought to my attention, are they sufficient to warrant the granting of the order?

Judgment

I might, before I leave this branch of the case, however, as to the affidavit being effectual, and as to the introduction of the practice of *viva voce* evidence, refer to a case in Saskatchewan which has not been cited. It is that of *In re Outlook Hotel Co.* (1909), 2 Sask. L.R. 435. In that case the material upon the application was questioned. A perusal of the judgment of Chief Justice Wetmore shews that in his opinion (though not decidedly laying it down) an amendment should not be allowed, nor leave given to file further affidavits. It is true that he adds, "I was not asked to amend the petition." I refer to this, in fairness to the counsel who took objection to the course I pursued.

Then having to consider the material before me, upon what I

MACDONALD, J. (At Chambers)

1919

Jan. 24.

IN RE WINDING-UP ACT AND JOHNSTON BROTHERS

consider is a "hearing" of the petition, what are the objections raised by those opposing the granting of the order? I find that in *In re Strathy Wire Fence Co.* (1904), 8 O.L.R. 186 at p. 192 the different essentials that are required to be considered and passed upon by the Court are (after dealing with the matter of discretion) summed up as follows:

"The Court must, before granting the order, see that [a] the petitioner has a lawful claim, [b] that the company is insolvent, [c] that there are assets to be administered, and [d] that the proceedings proposed are necessary."

Taking these four points *seriatim,* I will endeavour (because I do not think this matter should be delayed) to dispose of them now, in preference to adjourning, and giving judgment later on. Has the petitioner a lawful claim? That seems to me to be a necessary ingredient. I do not think the Act should be brought into operation, except at the instigation of a party having a lawful claim. This is almost axiomatic, any more than a person would have the right to sue and succeed in an action unless the claim was a valid one.

Here the petitioner seeks, as one of a class, to have an order winding up the Company, taking the business out of the hands of the Company, or rather out of its assignee, and placing it under the control of an appointee of the Court. That requires me to consider the claim. It is outlined in the petition as follows:

Judgment

"I am a creditor of the Company for the sum of about $9,800; and also such amount as may be due for accrued interest thereon, which principal amount I loaned to the Company about eight years ago, and the same is now overdue and not paid, and I have no security for the said claim."

Standing by itself, and there being no statement that this money was represented by an instrument under seal, I would take it to be a simple contract debt, and thus outlawed in six years from the time the money was loaned. I think it is a fair test to determine whether the claim is lawful or not, to decide whether such claim being presented, would have been paid in liquidation, or rank with other creditors upon the estate. On its face it is an outlawed claim. The receipt produced also shews that the facts contained in the petition in this connection are correct. There was some evidence, if I recollect aright, that interest had been paid on this loan from time to time,

but the evidence was not definite. It did not shew that the debtor had paid it within a time sufficient to take the claim out of the statute; so that in that respect the statement as to payment of interest would not assist the creditor. It is then asserted that the assignee, Mr. Howley, in making up a statement of the assets and liabilities, which formed a schedule to his affidavit, admitted this claim as being correct. That again I do not think gives it any strength. It is not an admission on the part of an officer, say an auditor, which would have the effect of being any acknowledgment. Then again, the auditor's report is referred to, as containing a statement of this amount being owing, as late as May, of 1918. If that report had been shewn to have been adopted (and one can almost assume it was adopted, but there is no actual evidence of it), it might be considered as an acknowledgment by the auditor, especially if the fact of that auditor's report was known to the creditor. So that as far as this claim is concerned, it is left in rather an uncertain state, as to whether it is really a valid claim or not.

Counsel for the petitioner then says that evidence has been produced on this hearing to shew that the petitioner, in addition to having this separate claim against the Company, has also an interest in a claim which has been assigned to her husband and herself of one A. M. Johnston, amounting approximately $31,000. The assignment is produced. There is evidence before me to shew that whether that amount be wholly due or not, at any rate in a great measure it has been acknowledged from time to time, and appears as an indebtedness of the Company, so that the difficulty in so far as the claim referred to in the petition is concerned, has, to my mind, been overcome. Taking the two claims together, I consider that she is a creditor within the meaning of the Act, and is entitled to make this application for winding up. I am also not unmindful of the fact, that other creditors of the Company, who could present a petition, have appeared and supported the petition in question.

Judgment

Then as to there being any assets to be dealt with. There is no question that there are plenty of assets available. It is asserted that by proper winding-up proceedings, the assets will be sufficient to satisfy the claims of the creditors, and perhaps leave a residue for the shareholders.

MACDONALD, J. (At Chambers)

1919

Jan. 24.

IN RE WINDING-UP ACT AND JOHNSTON BROTHERS

Judgment

Then the last important point to be considered is, are the proceedings necessary? This involves consideration of a great many surrounding circumstances. This hearing has consumed four or five days. During that time I have endeavoured to view the situation from all sides. There has been some attack made upon the assignee, outside of the question of his intention to acquire a portion of the Company's assets, if possible. I pay no attention to that. He was not called upon to explain some unnecessary statements made in the petition, and I would not expect that his counsel would desire to go into that. It was not material. I find a man in the position of assignee, who according to his own statement, is supported by the Bank of Montreal, and other large creditors. He has stated under oath that he has reduced the outlay, or at any rate has so carried on the business as to shew a profit during the last year,—I might say a considerable profit. Then I find a large number of trade creditors, doing business throughout Canada and the United States, and some in England, who are brought face to face with a situation where an assignee is in office carrying out the provisions of the Act in that behalf, and on the other side there is a creditor, who is the wife of a director, opposed in a business way to the assignee thus chosen, and who has, as I have mentioned, been in an inharmonious state with his brother directors for some considerable period. The whole condition of affairs surrounding such a large business was such that one would not have expected it to have prospered, within recent years at any rate. In the face of that condition, however, this assignee has brought about the result I have just referred to; and I suppose that he and those associated with him could hope to have better results, had the end, which they are quite frank in admitting, was their desire, namely, the removal of the Johnstons, occurred.

But the parties to whom I must give my first consideration are what might be termed the trade creditors, as distinguished from creditors like the petitioner, who have given their money with a full knowledge of the surrounding circumstances. How can they best be served to bring about a satisfactory result? I hoped that there would be some proposition made by counsel representing the assignee, and those creditors who sought to retain him, to make a change, and have someone placed in that

position who would be absolutely independent, and have no axe of his own to grind, I could then feel that in the assignment, the interests of the outside or foreign creditors would be as well protected as they would be by a winding-up order. That suggestion was not given any attention by counsel, and with a loyalty, perhaps commendable, he sought still to adhere to the idea, that the interests of all would be well preserved and protected by retaining Mr. Howley as assignee.

I think, the insolvency having been admitted, that the right to a great extent is vested in any creditor, of invoking the aid of the Court. The cases to which I have been referred as shewing that the Court will exercise its discretion and hold its hand, in the granting of a winding-up order as against an assignee, were dissimilar to the facts presented here. I recollect in one case where the reason given was that the assignees had gone a great length in realizing upon the assets. Then again the estate might be small. But in no case that has been brought to my attention was there a situation where the assignee, seeking to be still retained, might be adverse in interest to those who might hope to have their claims paid out of the estate. Danger would exist, to my mind, where an assignee was seeking to obtain advantage for himself and his associates. However honest, he might not properly carry out the functions of his office. I think, therefore, when such a matter is presented to the Court, that it is my duty to see that those creditors, not from any question of preference, but for the general benefit (including those opposed), should have their interest first considered by the appointment of some independent person as liquidator.

Judgment

It has been said winding-up proceedings are more expensive than an assignment. I cannot see, for my part, why a liquidator, having due regard for his position, and appreciating the desirability of speedily realizing on the assets, could not as well carry out the intent of legislation of this kind; because, after all, both acts tend in the same direction, namely, where a company or an individual has so carried on its business as to be unable to pay its debts when they become due, then in the interests of the creditors the assets are realized upon and distributed rateably.

MACDONALD, J. (At Chambers)

1919

Jan. 24.

IN RE WINDING-UP ACT AND JOHNSTON BROTHERS

There are many other matters which have occurred to me during the lengthy hearing, but I feel it is unnecessary to refer to them. An order will be made for winding up, and I will hear parties later with reference to the choice of a liquidator.

Petition granted.

COURT OF APPEAL

1919

Feb. 11.

SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO.

SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO. AND McDONNELL, LIMITED. (No. 3.)

Practice—Costs—Appeal—Costs to follow event—Costs of issues—"Good cause"—B.C. Stats. 1913, Cap. 13, Sec. 5.

The party who upon the whole succeeds on an appeal is entitled to the general costs, but where there are separate and distinct issues involved, the word "event" should be read distributively, and the party who upon the whole has been unsuccessful is entitled to the costs of the issues upon which he has been successful.

MOTION by plaintiff to the Court of Appeal for directions that it is entitled to costs of certain issues on the appeal and that the defendant be deprived of any costs for good cause.

Statement

Heard at Vancouver on the 28th of November, 1918, by MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and EBERTS, JJ.A.

Argument

Davis, K.C., for the motion: We say the appellant should be deprived of costs for good cause. There is first the question of "good cause" and second as to the construction of the term "the event." As to the first, the counterclaim is based on the question of fraud, on which they failed. They succeeded on the question of the value of the dry dock, and on that alone. If a party alleges fraud and is unable to prove it, he is at least deprived of costs: see *Neale* v. *Winter* (1862), 9 Gr. 261;

Hodgins v. *McNeil, ib.* 305; *McKenzie* v. *Yielding* (1865), 11 Gr. 406; *Hughson* v. *Davis* (1853), 4 Gr. 588; *Ex parte Cooper; In re Baum* (1878), 10 Ch. D. 313; *Forster* v. *Farquhar* (1893), 1 Q.B. 564 at pp. 568-9; *Huxley* v. *West London Extension Railway Co.* (1889), 14 App. Cas. 26. As to "event," the word must be read distributively: see *V., W. & Y. Ry. Co.* v. *Sam Kee* (1906), 12 B.C. 1 at p. 5; *Pacific Coast Coal Mines, Limited* v. *Arbuthnot* (1917), A.C. 607 at p. 619; *Victoria and Saanich Motor Transportation Co.* v. *Wood Motor Co.* (1915), 21 B.C. 515 at pp. 520-1; *Deisler* v. *United States Fidelity & Guaranty Co.* (1917), 24 B.C. 278. We are entitled to the costs of the issues upon which we have succeeded.

S. S. Taylor, K.C., contra: The Court has disposed of the question of costs. I say, first, there is nothing exceptional as to the costs, and they are disposed of; and secondly, the statute says costs shall follow the "event," and "event" is a matter of taxation only. His argument on the appeal was based on non-insurance and negligence. "Good cause," on the authorities, cannot be determined unless you have present separate heads of claims, not separate arguments. As to what is "good cause" see *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501 at p. 504; *Jones* v. *Curling* (1884), 13 Q.B.D. 262 at pp. 265 and 274. Where the amount of the judgment below is reduced see *Dallin* v. *Weaver* (1901), 8 B.C. 241. I say there is only one event here, *i.e.*, the value of the dock: see *Abbott* v. *Gold Seal Liquor Co.* (1917), 24 B.C. 245.

Argument

Davis, in reply: Where an unnecessary burden is put upon the opposite party it constitutes "good cause." The question of distributive events is settled in the *Sam Kee* case: see also *Myers* v. *Defries* (1880), 5 Ex. D. 180; *Ellis* v. *Desilva* (1881), 6 Q.B.D. 521; *Howell* v. *Dering* (1915), 1 K.B. 54.

Cur. adv. vult.

11th February, 1919.

MACDONALD, C.J.A.: On the appeal, which was disposed of some time ago, the appellant succeeded in obtaining a substantial reduction in the damages awarded in the Court below, and the respondent now applies for a direction that it is entitled to

MACDONALD, C.J.A.

COURT OF APPEAL

1919

Feb. 11.

SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO.

MACDONALD, C.J.A.

the costs of issues in respect of which the Court upheld the judgment appealed from.

The appellant is entitled to the general costs of the appeal, which, in the absence of an order disposing of them otherwise for good cause, are, by the statute of 1913, Cap. 13, Sec. 5, directed to follow the event. The meaning of a like enactment in England in respect of the cost of jury trials has been exhaustively considered by the House of Lords in *Reid, Hewitt and Company* v. *Joseph* (1918), A.C. 717, and applying the law as there expounded to this case, I think the respondent's application must be acceded to. Where there are separate and distinct issues involved in an appeal, the general costs thereof go to the party who succeeds, but the costs of those issues upon which the other party succeeds must be given to that party. The decisions of this Court in the past are consistent with the rule affirmed in *Reid, Hewitt and Company* v. *Joseph*. That rule was succinctly stated by Coleridge, C.J. in *Lund* v. *Campbell* (1885), 14 Q.B.D. 821; 54 L.J., Q.B. 281, and is quoted with apparent approval by the Lord Chancellor in *Reid, Hewitt and Company* v. *Joseph*. Coleridge, C.J. said:

"Two principles seem to be established in the cases; first of all, that the party who in an action of this sort upon the whole succeeds, is entitled to the general costs; but that the word 'event' is to be construed distributively, and that the costs of the issues as to which the party who upon the whole is unsuccessful has been successful, are to be allowed to him."

Now, in the case at bar, the appellant, having secured a substantial reduction in the judgment, has been successful in the appeal, though it has failed to impeach the validity of the agreement for the breach of which damages were awarded.

In my view of the case there were, apart from the counterclaim and the arrears of rent, three issues, *viz.*: (1) The validity of the contract; (2) the breach thereof, and (3) the proper sum to be awarded as damages for the breach. As regards the counterclaim and the issue involved in respect of arrears of rent, they were not seriously contested in this Court, but if any costs were incurred in respect of them here, the respondent is entitled to such costs. I come back, then, to the three principal issues. The respondent succeeded on the first. As to the second, the respondent contended that there was a

breach of covenant to insure the floating dock, and it claimed $75,000 damages for breach thereof. It also contended that there was a breach of the covenant to return the dock to the respondent, which it says was also broken, and it claims damages in respect of that breach.

The Court did not decide the first, the majority being of opinion that as there was clearly a breach of the covenant to return the dock, and that as the measure of damages would be the same for either breach if committed, it was unnecessary to decide whether or not the covenant to insure had been broken. On the issue, therefore, of breach of covenant to insure, the respondent has not been successful. It has been successful in proving and obtaining relief on the appellant's covenant to return the dock to it in the condition specified in the covenant. Its costs, therefore, of establishing that breach should also be taxed to it.

The third issue I have already dealt with, it being the one upon which the appellant succeeded in the appeal.

It may be useful here to refer to the argument addressed to the Court in reference to a number of issues alleged to be involved in the appeal. It was submitted that fraud was an issue. Fraud undoubtedly was a question affecting the rights of the parties. It was one of the grounds of attack upon the validity of the agreement. But it is included in the larger question, the true issue, *viz.*: the validity of the contract. So are all other grounds of attack upon the contract affecting its validity. Then again, the several surveys and reports upon the hull of the dock, and other evidence relating thereto, may have a bearing on both the first and third issues. They may affect the question of Patterson's knowledge of the condition of the dock when he made the alleged representations which appellant relies upon as fraudulent. They may also affect the question of the value of the dock and, therefore, the question of damages.

MACDONALD, C.J.A.

There should be a direction that the appellant is entiled to the general costs of the appeal, and that the respondent is entitled to the costs (if any) applicable to the counterclaim and to the claim for arrears of rent; also the costs of maintaining

COURT OF APPEAL

1919

Feb. 11.

the breach of the appellant's covenant to return the dock, as well as those of maintaining the validity of the contract.

There will be no costs of this motion.

SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO.

MARTIN, J.A.: This is a motion to settle the question of costs consequent upon the judgment we delivered on November 5th last, reported in [26 B.C. 397]; (1918), 3 W.W.R. 703.

In the Full Court case of *V., W. & Y. Ry. Co.* v. *Sam Kee* (1906), 12 B.C. 1, *sub nom. Re Sam Kee,* 3 W.L.R. 8, I considered the meaning of the word "event," and have nothing to add to that judgment, for subsequent decisions of this and other Courts have only confirmed the view taken by my then brother DUFF and myself, of which the House of Lords decision in *Reid, Hewitt & Company* v. *Joseph* (1918), A.C. 717, is the latest, and wherein the subject is discussed at great length. As I pointed out in the first-mentioned case:

> "It is admitted that if there are distinct issues on an appeal, just as on a trial, the word ['issue'] must necessarily be read distributively to give due effect to it,"

and the question there was, if in the contest ending in the reduction of the amount of the award there were "separate heads of controversy" which could be regarded as "different issues." We thought there were, and I expressed my view as follows:

> "Though there could be only one result of this appeal if the appellant were successful, *viz.*: the reduction of the award, more or less, yet that was sought to be accomplished on several distinct grounds which had no necessary relation to one another, and were just as distinct as many issues which are formally raised on pleadings, and were in fact, on the argument, dealt with separately."

MARTIN, J.A.

That language covers the case at bar exactly, but in it there is a distinct issue raised on the pleadings, because, by paragraph 8 of the defence, it is set up as a complete answer to the whole lease of the floating dry dock (one of the covenants in which was to insure it for $75,000) that it was "wrongfully and unlawfully and by false and fraudulent representations procured," etc., and therefore invalid. If the defendant had been successful on this charge of fraud, there would have been an end of the plaintiff's case. But in the event of that contest it failed on it, though it was successful in reducing the amount of the judgment on the covenant to insure, the lease being held to be valid.

It follows, therefore, that this "head of controversy" of the validity of the lease must be regarded as an issue, the event of which has been determined against the defendant, and therefore, though it is entitled to the general costs of the action, it will have to bear those pertaining to this unsuccessful issue of fraud.

With respect to the second submission, that the defendant should be deprived of any costs of appeal, even though substantially successful, it is sufficient to say that I do not think a case of "good cause" for so doing has been made out, either within *Forster* v. *Farquhar* (1893), 1 Q.B. 564; 62 L.J., Q.B. 296, or otherwise, simply noting that in *Ex parte Cooper; In re Baum* (1878), 10 Ch. D. 313; 48 L.J., Bk. 40, the successful appellant, who was deprived of his costs, succeeded "on a mere point of law, and might have been taken in the Court below without any great expense" (p. 322 [10 Ch. D.]); apart from any question of fraud that is our practice. I refer to my reasons for judgment in *James Thomson & Sons* v. *Denny* [(1917), 25 B.C. 29]; (1918), 1 W.W.R. 435, wherein it was held that the plaintiff respondent had not abused its privileges so as to deprive it of costs.

MARTIN, J.A.

There should, I think, be no costs of this motion, as the success on the two main points argued has been divided.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am in agreement with the judgment of the Chief Justice.

MCPHILLIPS, J.A.

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

EBERTS, J.A.

Motion allowed in part.

COURT OF APPEAL

1919

Feb. 11.

GREAT WEST PERMANENT LOAN CO. v. NATIONAL MORTGAGE CO.

THE GREAT WEST PERMANENT LOAN COMPANY v. THE NATIONAL MORTGAGE COMPANY, LIMITED.

Mortgage—Foreclosure—Mechanics' liens—Covenant in mortgage allowing payment of — Second mortgage — Priority not established — R.S.B.C. 1911, Cap. 127, Sec. 73; Cap. 154, Sec. 9.

In a foreclosure action, the plaintiff added to the mortgage debt the amount of four mechanics' liens paid off under a clause in the mortgage entitling the mortgagees to pay "liens, taxes, rates," etc., affecting the mortgaged lands and add the amounts so paid to the mortgage debt. One of the liens was filed prior to the registration of the plaintiff's mortgage, but the remaining three were filed subsequently to the registration of a second mortgage held by the defendant.

Held, that such clause must be confined to the payment of liens which affected the plaintiff's interest in the property, and did not entitle them, as against subsequent mortgagees, to add to the mortgage debt amounts used to pay off mechanics' liens subsequent in date to the registration of the defendant's mortgage, and as to which there was no adjudication establishing priority through increase in value of the premises under section 9 of the Mechanics' Lien Act.

APPEAL from an order of MORRISON, J. of the 21st of June, 1918, on an application to vary the registrar's report in an action for foreclosure. The property in question was owned by one Murray, who gave a mortgage on the 26th of July, 1912, to Messrs. R. S. Day and H. G. Heisterman for $25,000, said mortgage being registered on the 13th of March, 1913. The mortgage moneys were not advanced until the 26th of March, 1913. Murray gave a further mortgage on the property to the the National Mortgage Company for $10,000 on said lands, but this mortgage was never registered. On the 1st of March, 1913, Murray gave a further mortgage on this property to the National Mortgage Company for $10,000, this sum being intended to cover a $5,000 balance due on the unregistered mortgage of August, 1912, and $6,000 owing by Murray to the vendors upon his purchase of the property. This mortgage was duly registered on the 13th of March, 1913. On the 10th of January, 1915, Messrs. Day and Heisterman assigned the first

Statement

mortgage to the Great West Permanent Loan Company. Mechanics' liens were filed against the property as follows: Harrell Lumber Company, on the 26th of December, 1912, for $859.85; Electric Supply Company, Limited, 10th October, 1913, for $424; Martin, Finlayson & Mather, Limited, 7th of November, 1913, for $501.84; and P. E. Harris & Company, Limited, 23rd of February, 1914, for $2,425.75. The work and material supplied in respect of all the liens, with the exception of that of the Harrell Lumber Company, appears by the evidence to have taken place after the registration of the mortgage held by the National Mortgage Company. The Great West Permanent Loan Company, under a clause in their mortgage which provided that "the mortgagees may pay any liens, taxes, rates, charges or encumbrances upon or charging or affecting the lands," etc., paid off the above-mentioned liens, and the registrar, in ascertaining the amount due the plaintiff under the mortgage, included in his report the sums paid by the plaintiff to the four lien-holders. An application to vary the report by reducing the sum found to be due by the amounts paid the lien-holders was by the order of MORRISON, J. dismissed. The defendant appealed.

Statement

The appeal was argued at Vancouver on the 21st and 22nd of November, 1918, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Bucke, for appellant: Three of the liens were filed subsequently to the registration of our mortgage of the 1st of March, 1913. As to the Harrell lien, my contention is our mortgage dated in August, 1912, and not registered, is in priority, as under the Mechanics' Lien Act it makes no difference whether the mortgage is registered or not. Prior mortgage in the Act means one prior in existence: see *Cook* v. *Belshaw* (1893), 23 Ont. 545 at p. 549; *McLaughlin* v. *Hammill* (1892), 22 Ont. 493. It is the duty of the registrar to take the accounts and grant the certificate. He has no right to fix priorities. The clause in the mortgage does not say the liens can be added to the debt.

Argument

J. A. MacInnes, for respondent: We have a right under the mortgage to pay off the liens. The liens were established by

COURT OF APPEAL

1919

Feb. 11.

GREAT WEST PERMANENT LOAN CO. v. NATIONAL MORTGAGE CO.

judgment. We had a contractual right to do this, and we paid them off. There could be no question of tacking, as we knew of the second mortgage. An order had been made directing a sale under the liens. The covenant in the mortgage is prior to all statutory proceedings. As to proof of mortgage account see Hunter on Foreclosure of Mortgages, 2nd Ed., 107. On the question of what are just allowances in taking accounts see *National Provincial Bank of England* v. *Games* (1886), 31 Ch. D. 582; *Blackford* v. *Davis* (1869), 4 Chy. App. 304 at p. 308; *Wilkes* v. *Saunion* (1877), 7 Ch. D. 188 at p. 192; see also *National Mortgage Co.* v. *Rolston* (1916), 23 B.C. 384 at p. 391.

Argument

Bucke, in reply, referred to *Independent Lumber Co.* v. *Bocz* (1911), 16 W.L.R. 316 at p. 321; *Tipton Green Colliery Company* v. *Tipton Moat Colliery Company* (1877), 7 Ch. D. 192 at p. 194; and *Knowles* v. *Spence* (1729), Mosely 225.

Cur. adv. vult.

11th February, 1919.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff is assignee of a first mortgage given by one Murray to Day and Heisterman on the 26th of July, 1912, and registered on the 13th of March, 1913. The mortgage moneys were not advanced until the 26th of March, 1913, but this circumstance is only of importance in its relation to the mechanic's lien of the Harrell Lumber Company, hereafter more particularly referred to.

In August, 1912, Murray gave a second mortgage to the defendant, which was not registered, but on the 1st of March, 1913, he gave a new mortgage to the defendant in substitution therefor to secure $11,000, being the balance remaining due on the unregistered mortgage and a sum representing the amount due to Murray's vendors for unpaid purchase-money. This mortgage was duly registered.

The following mechanics' liens were registered against the mortgaged property: Harrell Lumber Company, filed 26th December, 1912, for $859.85; three others for considerable sums, and filed subsequently to the registration of the second mortgage and to the payment of the mortgage money secured by the first mortgage. It was admitted at the bar that these

several lien-holders proceeded in the County Court and obtained judgments establishing their liens. It appears that an issue was directed in the said County Court in which the plaintiff and defendant herein were plaintiffs, and the said lien-holders defendants, to determine their respective priorities, but that issue was dismissed on technical grounds, and nothing further was done in the matter.

The plaintiff brought this action for foreclosure, and it was referred to the registrar to take the accounts and fix the dates for redemption. The only parties who appeared before him were the plaintiff and defendant in this action respectively. The registrar included in the sum found due under the mortgage the amounts claimed by the several lien-holders, with interest, which it is alleged the plaintiff paid to the lien-holders, but there is no proof of that in the case, and while a statement was made by counsel for the plaintiff in argument, it goes no further than this, that the plaintiff purchased the rights of the said lien-holders. Defendant moved to vary said report by striking out the said several mechanics' lien items, but the motion was refused, and hence the appeal to this Court.

It may be useful here to consider what were the rights and remedies of the lien-holders in relation to the mortgaged property and to plaintiff and defendant—the mortgagees. They were such only as were given by the Mechanics' Lien Act. That Act provides that there may be a sale of the property at the discretion of the County Court judge to ascertain the sum by which the value of the property was increased by the work done or material furnished by the lien-holders. It is to such sum only the liens subsequently to a mortgage attach in priority to the mortgage. Foreclosure under liens is not one of the remedies provided by the Act. While a lien may be a charge in priority to a mortgage, the person entitled to it can only realize upon it in the manner authorized by the statute. Therefore, when the plaintiff paid off, if it did pay off, the lien-holders, it did so before it was ascertained whether the lien, other than that of the Harrell Lumber Company, had any priority over the mortgages or not.

MACDONALD, C.J.A.

There is a covenant in the plaintiff's mortgage under which it is entitled to pay "liens, taxes, rates, charges or encum-

COURT OF APPEAL

1919

Feb. 11.

GREAT WEST PERMANENT LOAN CO. v. NATIONAL MORTGAGE CO.

MACDONALD, C.J.A.

brances" affecting the mortgaged lands and add them to the mortgage debt. It is apparently under this covenant that the items objected to as aforesaid were allowed.

Now, it is not known even today whether these liens, other than the one above mentioned, were entitled to priority over the mortgage or not. It is not known whether the County Court judge would have ordered a sale. It appears that the building was never completed, and it may well be that the learned County Court judge might decide not to order a sale. In these circumstances, was the plaintiff within its covenant when it paid off these liens and sought to charge them in its mortgage account to the prejudice of subsequent encumbrancers?

As I have already said, it may be that these are liens only upon the equity of redemption. Unless the holders of them gained a footing by shewing that the property had been increased in value by their services or material they clearly are such. With the exception of the Harrell Lumber Company, they are of later date than either the plaintiff's or defendant's mortgages.

Now, upon a fair interpretation of the said covenant, can it be said that the plaintiff is entitled to pay off liens not only subsequent in right to the plaintiff itself, but to the defendant, and thus give the lien-holders priority over the defendant? That is what is contended for in this appeal. That is the construction we are asked to put upon the covenant. Now, while the language of the covenant is general, I think it must be confined in its interpretation within reasonable limits, and within the apparent object to be attained. These payments must be in the nature of "just allowances." No doubt the covenant may include items which would not, apart from it, be included in that term, but I think its meaning must be confined to the payment of liens which affect the plaintiff's interest in the property. By the covenant, liens are in the same category with "charge" and "encumbrance."

If the plaintiff may pay off charges and encumbrances over which the defendant has priority, then perhaps a similar meaning can be given to the language in respect of liens. If that is the true interpretation of the covenant, then the plaintiff may pay off every mortgage, judgment, debt, and lien subsequent

in point of time to the defendant's mortgage, and thus give them priority over the defendant's mortgage. I think this proposition need only be stated to shew that that construction cannot in reason be given to the covenant, and that, therefore, when the plaintiff paid these liens before its *status* was ascertained, it did so at its own risk, and cannot, on the evidence in this case, claim to bring the sums so paid into the mortgage account. The lien of the Harrell Lumber Company was in a position different to that of the others. It existed before the money secured by the plaintiff's mortgage was paid to the mortgagor, and it therefore takes priority by virtue of section 9(*a*) of the Mechanics' Lien Act.

With regard to the Harrell Lumber Company's lien, it was contended that the unregistered mortgage already mentioned being prior in date, though not in registration, was prior in interest, but it is only necessary to point out that that mortgage was discharged and displaced by the subsequent mortgage, also already mentioned, and does not come in question here at all.

MACDONALD, C.J.A.

The evidence in the case is very meagre indeed, and I am able to deal only with the matter in its broad aspect, and on the footing that the plaintiff has failed to make out a case for the allowance of the amounts paid in respect of the liens other than that of the Harrell Lumber Company.

The appeal should be allowed and the case referred back to the registrar to take the accounts on the basis above outlined, and to fix a new date, or new dates, for redemption.

MARTIN, J.A.: It appears that the appellant's mortgage was registered on the 13th of March, 1913, before three of the liens had been filed or any work done or materials supplied thereon, *viz.*, those of Harris & Co., Martin & Co., and the Electric Supply Co. Section 9 [of the Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154] provides that liens shall be effective as against prior mortgages only to the extent of "the increase in value of the mortgaged premises by reason of such works or improvements, but not further . . . ." So before there can be any priority, an increase in value must be established, otherwise the prior mortgage retains its prior place as a charge; in other words, as against it there is no lien at all. The fact of the

MARTIN, J.A.

COURT OF APPEAL

1919

Feb. 11.

GREAT WEST PERMANENT LOAN CO. v. NATIONAL MORTGAGE CO.

increase, if any, is to be determined by the County judge under section 31, but until he adjudicates in favour of such an increase it does not exist. Despite this condition precedent, the registrar has allowed the plaintiff the full amount of these liens and interest (which it paid and took an assignment of, in alleged pursuance of a clause in its mortgage), and objection is taken that there is no foundation for such an allowance. In reply, it is submitted that under said clause authorizing the mortgagees to "pay any liens, taxes, rates, charges or encumbrances upon or charging or affecting the said lands . . . ." it was entitled to pay off any and all liens in gross, and that it would be assumed till the contrary was shewn, that they were effective to the full extent of their face value, so to speak. In my opinion, this is not the case, and it would lead to a manifest injustice and have the effect of establishing a lien even when there was in fact no "increase in value of the mortgaged premises"—the very thing the statute was passed to guard against. The said clause goes on to provide that,—

> "In the event of the money hereby advanced or any part thereof being applied to the payment of any charge or encumbrance the said mortgagees shall stand in the position and be entitled to all equities of the person or persons owning or holding or entitled to the charge or encumbrance so paid."

MARTIN, J.A.

So it follows that, having taken assignments of these liens, the mortgagee stands in the shoes of the lien-holders, and it is for the lien-holders to establish the fact that he holds a lien *ad hoc, i.e.,* for the increase in value, which is the only one that can stand in the way of the prior mortgagee—*Independent Lumber Company* v. *Bocz* (1911), 4 Sask. L.R. 103; 16 W.L.R. 316 at pp. 320-2. It follows that the allowance of these three liens in the report of the registrar must be set aside.

There remains a fourth lien, that of the Harrel Lumber Company, filed on the 26th of December, 1912, prior to the appellant's registered mortgage, but subject to an unregistered mortgage executed in the preceding month of August, of which the lienholder had no notice.

In view of section 104 of our Land Registry Act, R.S.B.C. 1911, Cap. 127, I agree with my learned brothers that the situation should not be governed by the decision of Chancellor Boyd in *Cook* v. *Belshaw* (1893), 23 Ont. 545, which was

relied upon by the appellant, because there was no provision in Ontario similar to that in said section 104. This view is in accordance with the principle involved in our recent decision in *National Mortgage Co.* v. *Rolston* (1916), 23 B.C. 384; (1917), 1 W.W.R. 494, affirmed by the Supreme Court of Canada ((1917), 2 W.W.R. 1144). And, therefore, the lien is not affected by section 9, which relates only to "works and improvements on mortgaged premises," *i.e.*, "registered mortgaged premises," and stands for the full amount for which judgment has been recovered thereon.

The event of the appeal is that the three subsequent liens, which are all in the same class, are disallowed, and the prior one is allowed, and so the respondent is entitled to the costs of that distinct successful issue, while the appellant has the general costs of the appeal pursuant to our decision delivered this day in *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* [*ante*, p. 560.]

MARTIN, J.A.

McPHILLIPS, J.A.: I concur in the judgment of the Chief Justice.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

Appeal allowed.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent: *A. E. Burnett.*

HUNTER, C.J.B.C.

1919

Feb. 3.

McINTOSH v. LAYFIELD

McINTOSH v. LAYFIELD *ET AL.*

Practice—Contract—Arbitration clause—Repudiation—Action for specific performance—Application to stay proceedings.

A contract for the purchase of certain timber contained an arbitration clause that any dispute as to the interpretation of the contract should be settled by arbitration. The purchaser, after inspecting the timber, repudiated the whole contract. Upon the vendor bringing action for specific performance, the defendants moved for a stay of proceedings on the ground that they should proceed under the arbitration clause.

Held, that as the defence goes to the root of the contract, the arbitration clause does not apply, and the application should be dismissed.

APPLICATION by defendants for a stay of proceedings. The defendants entered into a contract with plaintiff for the purchase of certain timber. The contract contained an arbitration clause, *viz.*:

"Any dispute which shall arise between them as to the interpretation of this contract, or as to the performance by the purchasers of the provisions thereof shall be settled by arbitration."

Statement

The defendant Layfield, shortly after entering into the contract, went up to inspect the timber, and on his return wrote to plaintiff stating that he repudiated the whole contract on the grounds of misrepresentation, and as far as he was concerned the contract was at an end. Plaintiff replied that he would hold him liable to said contract. Plaintiff then issued a writ for specific performance to compel defendant Layfield to carry out the terms of said contract. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 3rd of February, 1919.

Argument

Long, for the motion: The plaintiff should not have issued the writ. The dispute should be settled by arbitration: see *Northern Electric & Mfg. Co.* v. *City of Winnipeg* (1913), 4 W.W.R. 862 at p. 868.

R. M. Macdonald, contra.

Judgment

HUNTER, C.J.B.C.: A dispute of this character is not within the arbitration clause. The defence is that there is no contract. Application dismissed with costs.

Application dismissed.

MILNE v. CENTRAL OKANAGAN LANDS, LIMITED *ET AL.*

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

1919

Feb. 13.

MILNE v. CENTRAL OKANAGAN LANDS, LTD.

Practice—Verifying accounts—Registrar's certificate—Confirmation not necessary—Marginal rules 827 and 832.

Under the terms of Order LV., r. 65, it is unnecessary to obtain an order confirming the certificate of the district registrar verifying the accounts of the receiver and manager of a company in a debenture-holder's action.

APPLICATION by the plaintiff in a debenture-holders action for an order that the certificate of the district registrar verifying the accounts of the receiver and manager of the undertakings of The Central Okanagan Lands, Ltd., and Kelowna Irrigation Company, Ltd., be confirmed. The defendant the Dominion Trust Company (in liquidation) claiming to be interested as creditor of The Central Okanagan Lands, Ltd., objected to the application as unnecessary and premature. By the terms of Order LV., r. 65, unless an order to discharge or vary such a certificate is made the certificate shall be deemed to be approved and adopted by the judge, and under Order LV., r. 70, the certificate becomes binding on all parties to the proceedings unless discharged or varied upon application by summons to be made before the expiration of eight clear days after the filing of the certificate. The certificate in question had not been filed. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 24th of February, 1919. Statement

Alfred Bull, for the application.
G. A. Grant, for Dominion Trust Co. (in liquidation).

HUNTER, C.J.B.C.: The objection is sustained. The application is unnecessary by the terms of Order LV., r. 65. Application dismissed. Judgment

Application dismissed.

HUNTER, C.J.B.C.

1919

Feb. 13.

KINDER v. MACMILLAN.

Practice — Writ of capias — Arrest — Maintenance money — Payable in advance—Marginal rule 1026(a).

Order LXIX, r. 1, requires that the party at whose instance a writ of *capias* is issued pay the sheriff maintenance money in advance immediately after arrest. This rule is not affected by any private arrangement whereby the defendant agrees with the sheriff to pay the expense of an attendant in order to be at large.

KINDER v. MACMILLAN

APPLICATION by defendant to set aside a writ of *capias,* heard by HUNTER, C.J.B.C. in Vancouver on the 13th of February, 1919. The defendant was arrested on the 10th of February, 1919. On the following day defendant's counsel telephoned the sheriff and asked him whether plaintiff had paid any maintenance money, and the sheriff replied "no."

Statement

O'Dell, for the application: Under Order LXIX., r. 1, the writ should be set aside.

Gillespie, contra: The defendant waived the question of maintenance money. On the day of his arrest he arranged with the sheriff not to be locked up, agreeing to pay sheriff's bailiff for his time keeping him under arrest. Until defendant is locked up no maintenance money is due. The intention of the rule is not to cover sheriff's fees, but to cover cost of providing food, etc., for the party arrested.

Argument

HUNTER, C.J.B.C.: The rule requires that the sheriff shall be given the maintenance money in advance immediately after arrest, in order that the gaol authorities shall not be obliged to maintain the defendant at the public's expense. It is immaterial that the defendant by private arrangement with the sheriff agreed to pay the expense of an attendant in order that he might be at large; the sheriff might consider it necessary to put an end to the arrangement at any time and lodge him in gaol, and might not be able to get in communication with the plaintiff for some time. One condition of the creditor's right to gaol the debtor on civil process is the payment of the maintenance charges in advance. Defendant discharged.

Judgment

Application granted.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

BANK OF HAMILTON, THE v. HARTERY *et al.* (p. 22).—Affirmed by the Supreme Court of Canada, 17th March, 1919. See 58 S.C.R. 338; (1919), 1 W.W.R. 868.

BURNS & COMPANY, LTD., P. v. GODSON (p. 46).—Affirmed by the Supreme Court of Canada, 17th February, 1919. See 58 S.C.R. 404; (1919), 1 W.W.R. 848.

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY v. CORPORATION OF CITY OF ARMSTRONG (p. 222).—Reversed by the Judicial Committee of the Privy Council, 6th August, 1919. See (1919), 88 L.J., P.C. 147; 36 T.L.R. 5; 122 L.T. 11; 3 W.W.R. 352; (1920), A.C. 216.

CANADIAN NORTHERN PACIFIC RAILWAY COMPANY v. CORPORATION OF CITY OF VERNON (p. 222).—Reversed by the Judicial Committee of the Privy Council, 6th August, 1919. See (1919), 88 L.J., P.C. 147; 36 T.L.R. 5; 122 L.T. 11; 3 W.W.R. 352; (1920), A.C. 216 at p. 221(n).

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. TREAT (p. 275).—Affirmed by the Judicial Committee of the Privy Council, 1st August, 1919. See (1919), 121 L.T. 657; 35 T.L.R. 737; 3 W.W.R. 356.

EVANS *et al.* v. CORPORATION OF THE DISTRICT OF SOUTH VANCOUVER AND THE CORPORATION OF THE TOWNSHIP OF RICHMOND (p. 60).—Affirmed by the Judicial Committee of the Privy Council, 6th August, 1919. See (1920), A.C. 216; (1919), 3 W.W.R. 339.

SEATTLE CONSTRUCTION AND DRY DOCK COMPANY v. GRANT SMITH & CO. & MCDONNELL, LIMITED (p. 397).—Affirmed by the Judicial Committee of the Privy Council, 24th July, 1919. See (1920), A.C. 162; (1919), 3 W.W.R. 33.

Cases reported in 25 B.C., and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

HUDSON BAY INSURANCE COMPANY v. CREELMAN AND BERG (p. 307).—Affirmed by the Judicial Committee of the Privy Council, 27th June, 1919. See (1919), 88 L.J., P.C. 197; 3 W.W.R. 9; (1920), A.C. 194.

QUESNEL FORKS GOLD MINING COMPANY, LIMITED v. WARD AND CARIBOO GOLD MINING COMPANY (p. 476).—Affirmed by the Judicial Committee of the Privy Council, 21st October, 1919. See (1920), A.C. 222; (1919), 3 W.W.R. 946; 50 D.L.R. 1.

Case reported in Volume 23 B.C., and since the issue of that volume appealed to the Supreme Court of Canada:

YUKON GOLD COMPANY v. BOYLE CONCESSIONS LIMITED (p. 103).—Affirmed by the Supreme Court of Canada, 2nd May, 1917. See (1919), 3 W.W.R. 145; 50 D.L.R. 742.

Case reported in Volume 20 B.C., and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

ATTORNEY-GENERAL OF CANADA *et al.* v. RITCHIE CONTRACTING AND SUPPLY CO. *et al.* (p. 333).—Decision of Supreme Court of Canada, affirming decision of Court of Appeal, affirmed by the Judicial Committee of the Privy Council, 31st July, 1919. See (1919), A.C. 999.

INDEX.

PRACTICE—*Appeal—Failure to enter in time — Application to set down — Special circumstances.*] On giving notice of appeal, an appeal book was left with respondents' solicitor for approval when appellant was advised the book would be approved upon security for costs being put up. Nothing further was done for four weeks, when appellant on the fourth day prior to the last day for setting the case down, called for the appeal book. The book had been mislaid in respondents' office but appellant was reminded that security for costs had not been put up. Appellant then perfected the security and submitted another copy of the appeal book which was approved and returned to the appellant who, on the following day (the day prior to the last day for entry), applied to the registrar at Vancouver for entry of the appeal, but was advised the books had to be approved by the registrar at Nanaimo. They were immediately sent to Nanaimo for approval but arrived back in Vancouver three days late. Application was then made to set the case down for hearing. *Held* (MACDONALD, C.J.A. dissenting), that as the parties were at arm's length, the failure of the appellant to send the books to Nanaimo in time for their return and entry was no excuse for failure to comply with the statute and the application should be refused. BOUCH AND BOUCH v. RATH. - - - - - - **320**

2.——*Contract — Arbitration clause — Repudiation—Action for specific performance — Application to stay proceedings.*] A contract for the purchase of certain timber contained an arbitration clause that any dispute as to the interpretation of the contract should be settled by arbitration. The purchaser, after inspecting the timber, repudiated the whole contract. Upon the vendor bringing action for specific performance, the defendant moved for a stay of proceedings on the ground that they should proceed under the arbitration clause. *Held*, that as the defence goes to the root of the contract, the arbitration clause does not apply, and the application should be dismissed. MCINTOSH v. LAYFIELD *et al.* - - - - - - - - - - - - **574**

3.——*Costs — Appeal — Costs to follow event — Costs of issues — "Good cause" — B.C. Stats. 1913, Cap. 13, Sec. 5.*] The party who upon the whole succeeds on an appeal is entitled to the general costs, but where there are separate and distinct issues

PRACTICE—*Continued.*

involved, the word "event" should be read distributively, and the party who upon the whole has been unsuccessful is entitled to the costs of the issues upon which he has been successful. SEATTLE CONSTRUCTION AND DRY DOCK CO. v. GRANT SMITH & CO. AND MCDONNELL, LIMITED. (No. 3.) **560**

4.——*Costs — Plaintiffs successful in action — Certain questions in controversy decided in defendant's favour—Costs as to, for defendant — Issue — Event.*] A judgment allowed the plaintiffs the costs of the action "except so much thereof as relates to the questions in controversy which were decided in favour of the defendant," and the defendant was to recover from the plaintiffs "its costs of so much of the action as relates to said questions." The action was for compensation because of a railway company improperly encroaching upon the foreshore in front of the plaintiffs' land, and for taking a portion of the plaintiffs' land for railway purposes. The plaintiffs succeeded as to the foreshore but failed to shew that any of their lands had been taken. The Company contended that under its Act of incorporation the plaintiffs were not entitled to compensation in respect of foreshore rights if the Act were complied with in the construction of the railway. The trial judge held the defendant had constructed the railway in accordance with the Act, but that the Act did not deprive the plaintiffs of the right of compensation. The taxing officer allowed the defendant the costs of witnesses brought to prove that they had complied with the Act. *Held*, on review, that the defendant having failed upon the question as to the foreshore, it was not entitled to the costs relating to that issue. NELSON v. PACIFIC GREAT EASTERN RAILWAY COMPANY. THE ORDER OF THE OBLATES OF MARY IMMACULATE v. PACIFIC GREAT EASTERN RAILWAY COMPANY. - **1**

5.——*Costs—Taxation—Party and party —Increased counsel fee—Order LXV., r. 27, Subsec. (29)—Registrar's powers.*] On a taxation as between party and party there is no discretion in the registrar under Order LXV., r. 27, Subsec. (29) of the Supreme Court Rules to allow an increased counsel fee above the tariff without a *fiat* of a judge to that effect. SHELLY BROS. LIMITED v. CALLOPY *et al.* - - - **149**

6.——*Costs — Taxation — Witness fees— Witnesses present but not called — Rule 1002 (29).*] The Court will not review the allowance of a witness's expenses on the

PRACTICE—*Continued.*

ground that they were incurred through over-caution or mistake under marginal rule 1002(29) if on proper consideration they have been allowed by the taxing officer. *Oliver* v. *Robins* (1894), 64 L.J., Ch. 203 followed. ENDERSBY v. THE CONSOLIDATED MINING & SMELTING CO. OF CANADA, LIMITED. - - - - - - - - **380**

7.——*County Court—Jurisdiction—Question first raised on appeal—Power to transfer to Supreme Court — Costs — R.S.B.C. 1911, Cap. 53, Secs. 40 (2), (10), and 72—County Court Rules, Order IV., r. 13*.] In the case of an appeal from the County Court, if it appears there was no jurisdiction in the Court below to hear the case and that it should have been transferred to the Supreme Court under Order IV., r. 13, of the County Court Rules, the Court of Appeal will not dismiss the appeal, but will make the order that should have been made below. As the appellant did not raise the question of jurisdiction in the Court below, no order was made as to the costs of the appeal. GIANNINI v. COOPER. - - **382**

8.——*Court of Appeal—Costs—District Registrar of Titles a party—Appellant—Crown Costs Act—Application of—R.S.B.C. 1911, Cap. 61 — B.C. Stats. 1914, Cap. 43, Secs. 63 and 65*.] A district registrar of titles is an officer of the Crown within the meaning of the Crown Costs Act, and the Court is prohibited from making any order or direction as to costs for or against him. This rule applies to cases where by statute the costs are to follow the event also on the dismissal of an appeal taken by him to the Court of Appeal. *In re Gardiner and District Registrar of Titles* (1914), 19 B.C. 243 followed. *In re* LAND REGISTRY ACT AND SCOTTISH TEMPERANCE LIFE ASSURANCE COMPANY. - - - - - - - - - - - - **504**

9.——*Discovery — Corporation — One officer examined—Subsequent application to examine "agent"—Scope of term "agent"—Marginal rule 370c(2)*.] An agent of a company is included in the words "officer or servant" in marginal rule 370c(2), and may, on application, be examined for discovery. YAMASHITA v. HUDSON BAY INSURANCE CO. - - - - - - - - **387**

10.——*Discovery—Libel based on paper writing—Contents—Source of information relative to—Discretion*.] In an action for libel the plaintiff sought to compel the defendant to disclose, on discovery, the source of his information relative to the contents of the paper writing complained of:—*Held*, that if there are grounds for the suggestion that the questions are not put *bona fide* for the purpose of the pending action but for use in an action brought by the plaintiff against another, to compel an answer would be oppressive and illegitimate and the application should be refused. DE SCHELKING v. CROMIE. - - - **345**

11.——*Foreclosure action—No proceeding for one year—Application to consolidate actions—"Proceeding"—Rule 973*.] On an application to consolidate two actions where it appears that no proceeding has been taken in the first action for one year, the notice required under marginal rule 973 must be given. BUSCOMBE SECURITIES COMPANY, LIMITED v. HORI WINDEBANK AND QUATSINO TRADING COMPANY, LIMITED. - - - - - - - - - - - - **323**

12.——*Judgment of Supreme Court—Costs—Execution—Stay—Jurisdiction—Set-off*.] The plaintiff's action for rescission of an agreement for the sale of land and damages for deceit was dismissed on the trial and in the Court of Appeal. The Supreme Court of Canada allowed the appeal as to damages and ordered a reference as to the amount to the Master in British Columbia, and that there be a set-off between the said damages as found by the Master and the moneys payable on the agreement for sale. It was further ordered that the defendants pay the costs of the appeal and of the two Courts below. On application for stay of execution pending the reference:—*Held*, that as the plaintiff is entitled to her costs unconditionally under the judgment, the application for stay must be refused. BARRON v. KELLY *et al.* - - - - - - - - - - **379**

13.——*Motion—Notice—Short leave for service—Indorsement on notice—Particulars required — Marginal rules 704 and 734*.] When the time for return of a motion after service is curtailed by special leave, an indorsement on the notice must contain both the date upon which leave is given and upon which the motion is made returnable. BLUE FUNNEL MOTOR LINE COMPANY *et al.* v. CITY OF VANCOUVER AND BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. (No. 2). - - - - - - - - **388**

14.——*Motion for judgment — Court motion — Wording of motion — Rule 559, Form 18, Appendix B*.] Motion for judgment must be by way of notice of motion to

SALE OF GOODS—*Continued.*

used and owing to the defendant's improper use of the coal by mixing the different grades together the implied warranty that might otherwise have existed and rendered the plaintiff liable was in the circumstances inoperative. WESTERN FUEL COMPANY v. RAINY RIVER PULP & PAPER COMPANY. - - - - - - - - - - - **442**

3.——*Note or memorandum—Sufficiency of—Signatures — Stamped names — Trial—Finding of jury — Supplementing — Agreement to get bonds for performance of contract—Whether to be treated as a part of the contract on suspensory condition.*] In a vendor's action for damages for refusal by vendee to accept goods sold over $50 in value, the plaintiffs produced as a memorandum, signed by vendee's agent, a document which consisted of a printed form with the name of one of vendees appearing in print at the head and also at the foot in the place for signature. The evidence was that one Cummings who was admittedly agent for both defendants in the transaction, had filled up in writing the printed form with the terms of the contract, that the names of both defendants appeared, the one printed and the other written under it at the head and in the place for signature with the word "and" written between them. The jury found that the word "and" was so written by Cummings. The jury refused to find by whom the name of the vendee, "N.C.Co., Ltd." was stamped under the other vendee's name or whether the names of the vendees as occurring in the document were intended to operate as the "signature of the said companies." The evidence was that either Cummings or someone in defendant's office had added the stamped signature of "N.C.Co., Ltd."; that Cummings had written the word "and" between the names in both places and had then handed the document to vendors, saying "there is your contract," and had told them to get bonds for its performance which it was understood throughout would have to be done. The trial judge, on motion for judgment, drawing all inferences not inconsistent with the findings of the jury, held that there was a verbal contract, supported by a sufficient note or memorandum thereof, and he entered judgment for the plaintiff. *Held*, on appeal (*per* MACDONALD, C.J.A.), that, on the evidence, it was a term of the verbal contract that the plaintiffs should furnish security for its performance, and that since the document put forward as a memorandum did not set forth that term, it was insufficient; that what Cummings meant in saying "there is your contract" should have been decided by the jury and question 8 answered; that if Cummings meant the document as a written contract and not as a memorandum thereof, the non-inclusion of the term in the bonds was immaterial; that there should be a new trial. *Per* GALLIHER and EBERTS, JJ.A.: That question 8 should have been answered and there should be a new trial. *Per* MCPHILLIPS, J.A.: (1) The jury having failed to find by whom the name of defendant N. C. Co., Ltd., was stamped on the document, and whether the printed and stamped names of both defendants were intended as signatures and authorized execution thereof, the action should be dismissed, it being incompetent for the trial judge to supplement the answers of the jury by making those findings. (2) That, on the evidence, there was no concluded contract, and upon this ground as well the action should be dismissed. DAVID GIBB AND CO. v. NORTHERN CONSTRUCTION COMPANY, LIMITED AND CARTER-HALLS-ALDINGER COMPANY LIMITED. - - - - - - - - - - - - **429**

SALE OF GOODS—*Continued.*

4.——*Yacht—Payment deferred—Bills of sale acknowledging receipt of payment—Mortgage for amount of purchase price—Action for price of yacht—Liability.*] The plaintiff, the owner of a yacht, discussed with the defendant the purchase by him of an undivided four-fifths' interest for $2,000. The defendant could not pay this sum, but intimated that he owned a beneficial interest in a lot on Howe Street in Vancouver, that he intended to sell this interest, and that when he did so he would be in a position to make the purchase. The plaintiff claimed the defendant agreed in the first instance to purchase the four-fifths' interest and in the meantime pay 7 per cent. interest on the purchase price, and further agreed that upon perfecting his title he would give plaintiff a mortgage on the lot as security for the purchase price, thereby obtaining an extension of time for payment thereof. The defendant did not effect a sale of the lot, but about six months later, having perfected his title, executed and delivered a mortgage to the plaintiff on the lot for $2,000, subject to existing encumbrances and without containing any personal covenant, at the same time submitting to the plaintiff a draft agreement of sale of the four-fifths' interest in the yacht, which was ten days later returned to the defendant duly executed, and containing an acknowledgment of receipt of the purchase price. In an action for the purchase price of the four-fifths'

STATUTES—*Continued.*

STATUTES—*Continued.*