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 XXVIII.

VICTORIA, B. C.
PRINTED BY THE COLONIST PRINTING AND PUBLISHING COMPANY, Limited
1921.

JUDGES

OF THE

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

During the period of this Volume.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES:

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

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. GORDON HUNTER.

PUISNE JUDGES:

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

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

COUNTY COURT JUDGES:

HIS HON. JOHN ANDREW FORIN,	West Kootenay
HIS HON. FREDERICK McBAIN YOUNG,	Atlin
HIS HON. PETER SECORD LAMPMAN,	Victoria
HIS HON. JOHN ROBERT BROWN,	Yale
HIS HON. FREDERICK CALDER,	Cariboo
HIS HON. DAVID GRANT,	Vancouver
HIS HON. FREDERIC WILLIAM HOWAY,	Westminster
HIS HON. CHARLES HOWARD BARKER,	Nanaimo
HIS HON. JOHN DONALD SWANSON,	Yale
HIS HON. GEORGE HERBERT THOMPSON,	East Kootenay
HIS HON. HERBERT EWEN ARDEN ROBERTSON,	Cariboo
HIS HON. HUGH ST. QUINTIN CAYLEY,	Vancouver
HIS HON. HENRY DWIGHT RUGGLES,	Vancouver

ATTORNEY-GENERAL:

THE HON. JOHN WALLACE DEBEQUE FARRIS, K.C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A

B

E

H

K

L

M

Q

R

S

T

RULE OF COURT

April 18th, 1921.

HIS HONOUR the Administrator in Council, under the provisions of the "Supreme Court Act," directs that the following rule shall be added in Order 9 immediately after Rule 8:

3A.

Service on certain corporations, incorporated outside the Province.

Service of process on certain foreign corporations.

8. (*a.*) Any writ of summons or other process issued against a company incorporated outside of the Province and which is not licensed or registered in the Province as required by statute, may be served on the company in the following manner:—

Procedure.

(*b.*) The process shall be delivered to the District Registrar of the Supreme Court at Victoria, and such Registrar shall cause to be inserted in four issues of the Gazette consecutively following the delivery of the process to him, a notice stating the date of delivery, the nature of the relief sought, and the time limited, and the place mentioned for entering an appearance, and after such publication service of process so effected shall be deemed to be good service on the company.

Subsequent procedure.

(*c.*) For the purpose of entering up or applying for judgment by default or of taking any other proceeding the plaintiff shall not be required to file an affidavit of service, but shall instead thereof file a copy of each of the four issues of the Gazette in which the advertisement shall have appeared, and in any case to which this rule applies the plaintiff shall not be required to prove that the company was duly incorporated under the laws of any foreign state or jurisdiction or had power under such laws to make the contract or incur the liability in respect of which the action, suit, or proceeding against the company is brought.

J. D. MACLEAN,
Provincial Secretary.

RULE OF COURT

PROVINCIAL SECRETARY'S OFFICE,
June 1st, 1921.

HIS HONOUR the Lieutenant-Governor in Council, under the provisions of the "Supreme Court Act," directs that the following Rule shall be added to Order 36 of the Supreme Court Rules immediately after Rule 37; and shall come into force on the 1st day of June, 1921:—

No. 462.—Disallowance of Vexatious Questions in Cross-examination.

38. "The Judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter."

J. D. MACLEAN,
Provincial Secretary.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

IN RE ESTATE OF W. G. BROWN.

GREGORY, J. (At Chambers)

1920

Jan. 21.

IN RE ESTATE OF W. G. BROWN

Will—Construction—Devise of one-sixth share to each of five persons—No disposition of remaining one-sixth—Intestacy.

A testator devised a one-sixth share of his estate to each of five nephews and nieces and made no disposition of the remaining one-sixth share.

Held, that as there is nothing in the will to shew that it was the intention of the testator to dispose of the whole of his estate, there is an intestacy as to the one-sixth share.

Berkeley v. *Palling* (1826), 1 Russ. 496 distinguished.

APPLICATION by way of originating summons for the opinion of the Court upon the construction of the will of the above-named deceased. The testator bequeathed to five of his nephews and nieces (setting out their names in full) a one-sixth equal share of his estate and made no disposition of the remaining one-sixth share. The next-of-kin surviving in addition to the five mentioned in the will, were two brothers, two sisters and seven or eight children of two deceased sisters. Heard by GREGORY, J. at Chambers in Victoria on the 23rd of December, 1919.

Statement

Hall, for the executor.

J. de N. Kennedy, for the devisees.

GREGORY, J. (At Chambers)

1920

Jan. 21.

IN RE ESTATE OF W. G. BROWN

21st January, 1920.

GREGORY, J.: The construction of this will does not appear to me to present any real difficulty. The functions of the Court in construing a will are clearly expressed in Halsbury's Laws of England, Vol. 28, p. 627, par. 1226. The duty is to take the words used and ascertain the intention of the testator from them; it is not merely to ascertain what the testator's actual mental intentions were. It is not at all an unheard of thing for a testator to deliberately die intestate as to a portion of his estate, but where the will shews an intention to dispose of the whole of the estate, the Court will, where the testament is capable of two constructions, lean to the construction which operates as a complete disposition rather than to one which results in a partial intestacy (Halsbury's Laws of England, Vol. 28, p. 666, par. 1277), and that is the distinction between the present case and that of *Berkeley* v. *Palling* (1826), 1 Russ. 496. In that case the testator clearly directed that the residue of his estate should be disposed of " 'among the children of A.B.,' " although he directed that it should be divided into eight equal shares, and he only enumerated seven shares. The Court held that the division into shares had been made only with a view to apportionment among the children. The estate was therefore divided into seven shares instead of eight, which was distributed among the children as provided by the will.

Judgment

There is no such clear intention expressed in the present will, and absolutely nothing to shew that the testator intended to dispose of the whole of his estate, and so no excuse for increasing the value of each share.

There is an intestacy as to a one-sixth share in the estate, but I think the case was a proper one to be brought before the Court, and each party is entitled to his costs out of the estate.

Order accordingly.

PARKER v. LANGAN.

MORRISON, J. (At Chambers)

1920

Jan. 12.

PARKER v. LANGAN

Practice—Plaintiff resident outside jurisdiction—Mortgagee who had previously paid judgment for taxes—Security for costs—Marginal rule 981a.

A mortgagee residing out of the jurisdiction who previously to bringing action for foreclosure had paid a judgment against the mortgagor for taxes in order to save the property, will not be compelled to furnish security for costs.

APPLICATION by defendant that plaintiff furnish security for costs on the ground that he resides out of the jurisdiction. The plaintiff brought action on a mortgage given by the defendant on property situate in the Municipality of Coquitlam. Defendant did not pay taxes on the property for a number of years and the municipality brought action and obtained judgment. Later they applied to the Court for leave to sell the property. The plaintiff, who resides in England, being notified of the proposed sale, paid the judgment, amounting to $700. It was submitted that under the circumstances, the plaintiff having a claim in this Province of $700, defendant was not entitled to security. Heard by MORRISON, J. at Chambers in Vancouver on the 12th of January, 1920. Statement

Congdon, K.C., for the application.
Wood, contra.

MORRISON, J.: The application is dismissed. Judgment

GREGORY, J.

1920

Jan. 15.

WESTMINSTER TRUST v. RAND AND BREMNER.

Bond — Whether a guarantee or bond of indemnity — Extension of time granted principal debtor—Release of bondsman.

WEST-MINSTER TRUST *v.* RAND

A vendor under an agreement of sale of land assigned his interest in the agreement and gave a bond to his assignee for due performance in respect to payments under the agreement of sale. In an action for payment on the bond:—

Held, that the bond was a guarantee and not an independent contract of indemnity, because of its wording and the nature of the transaction, and it was so treated by the parties; and an extension of time given by the obligee to the purchaser operated as a discharge of liability under the bond.

Davys v. *Buswell* (1913), 2 K.B. 47 followed.

Whether the bond is a guarantee or an independent contract of indemnity depends on the fact of the original party remaining liable coupled with the absence of any liability on the part of the promisor or his property except such as arises from his express promise.

Statement

ACTION to enforce payment on a bond. The facts relevant to the issue are as follows: The defendant Rand sold certain property to one Dice under an agreement of sale in November, 1911, and in November, 1912, assigned his interest in the agreement to the plaintiff Company, said Company paying him what was due from Dice under the agreement less a certain percentage. Rand at the same time executed a bond in the Company's favour to secure performance of the agreement for sale. Dice was in default in payment of instalments and on two occasions the plaintiff Company granted him extensions of time for payment, in consideration for which it was agreed he should pay an increased rate of interest. The moneys were long overdue by Dice before Rand was asked to pay under the bond. Tried by GREGORY, J. at Vancouver on the 17th of June, 1919, and the 12th of January, 1920.

W. J. Taylor, K.C., and *Dixie*, for plaintiff.
Mayers, and *J. R. Grant*, for defendant Bremner.
Lennie and *O'Neill*, for defendant Rand.

15th January, 1920.

GREGORY, J.: This is an action on a bond, given by the

defendants to the plaintiff. The plaintiff claims it is a bond of indemnity, while defendants' claim it is a bond guaranteeing the payment of certain moneys by one Dice, that the plaintiff gave Dice an extension of time for his payments without consulting them, and that they are therefore released from their obligation. The non-payment by Dice has been proved, and I think it has also been established that Dice was given an extension of time as claimed by defendants.

It has not been questioned that if the bond sued on is a guarantee and the extension given, that such extension operates as a discharge of defendants' obligations, and the real question in dispute is purely one of law, *viz.*, is the bond a guarantee or an independent contract.

The material facts may be shortly stated as follows: Defendant Rand being the owner of certain lands entered into an agreement, dated 25th November, 1911, with Dice to sell the same to him. On the 7th of November, 1912, Rand sold his interest in the land in question to the plaintiff and executed a transfer and assignment of the same to the plaintiff, who paid him the amount still remaining due thereon by Dice, less a certain percentage. The defendants, at the same time, executed the bond sued on. The plaintiff still holds the lands, and there is no evidence to shew that it has ever attempted to realize upon the same in order to ascertain if it has really suffered any pecuniary loss. There were some dealings between Rand's vendor, one Meade, and the plaintiff Company, by which the plaintiff took a conveyance from Meade of the lands, less a small portion which it might readily be assumed was omitted by error, but I think nothing turns on this in my view of the case, so I make no further reference to it.

Judgment

The question is, is the instrument sued on a guarantee for the payment of the debt of another. I think it is. The parties themselves have so treated it. The moneys were long overdue by Dice before plaintiff asked defendants to pay the same, and the plaintiff in the interim on two occasions forced or persuaded Dice to enter into an agreement to pay an increased rate of interest for the extensions granted him. The case is not as strong as *Forbes* v. *Watt* (1872), L.R. 2 H.L. (Sc.) 214, but in that case the House of Lords held that where a document

GREGORY, J.

1920

Jan. 15.

WEST-MINSTER TRUST v. RAND

is obscure and the parties have long acted on the footing of a given practical construction, the Court in the absence of better evidence will accept that construction as correct.

The document itself is indorsed "Guarantee of Payments under Agreement of Sale" and it is headed or entitled "Vendor's bond to secure performance of an agreement of sale." I do not think the language used whatever form the instrument may take can make it other than a guarantee if in substance and in fact it is a guarantee. The formal part binds the defendants "in the penal sum of $22,400 to be paid to the plaintiff . . . ." as per terms entered into under a certain agreement, already referred to, and the defendants

"agree that in case the payments under said agreement are not fully and promptly met on the dates they became due, that they will from date of said default pay the plaintiff interest on said arrears at the rate of 10 per cent. and further will pay all payments under above agreement in case William C. Dice is in default," etc.

The condition which renders the obligation void is that the defendants

"shall from time to time and at all times hereafter well and truly pay, defend and keep harmless and fully indemnify the [plaintiff] from and against all loss, costs, charges and expenses, etc., which the plaintiff may at any time hereafter bear, sustain, suffer, be at or put to for or by reason or on account of the aforementioned agreement of sale or anything in any matter relating thereto where said agreement of sale is fully satisfied and paid up," etc.

Judgment

The bond itself is, I think, the strongest evidence that it was merely intended as a guarantee that Dice should make the payments called for by the agreement.

The payments referred to throughout are the payments under the said agreement and by that agreement Dice was the only person to make them. There is no suggestion that the defendants were to make them in the first instance. Rand had assigned his right to collect them to the plaintiff and the plaintiff was the only person who could give Dice an effectual receipt, therefore it would be preposterous to suggest that defendants were to collect them from Dice and then hand them over to the plaintiff without some express provision of that kind in the document of assignment. In order to ascertain the true nature of the transaction, all the documents must be looked at together.

Mr. *Mayers* argues that the whole question of whether the

document is a guarantee or not is "is there or is there not a principal debtor who remains liable" and that seems to me to pretty well state the rule, but Lord Justice Vaughan Williams in *Davys* v. *Buswell* (1913), 2 K.B. 47 at pp. 53-4, quoting from note to *Forth* v. *Stanton* (1669), in 1 Williams' Saunders, 211e, expresses it as follows [citing from 1 Williams' Notes to Saunders' Reports, 1871, p. 233]:

"'The fair result seems to be, that the question, whether each particular case comes within . . . . . the statute [of Frauds] or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.'"

In the present case there can be no question that Dice remains liable and that liability is under the assignment to the plaintiff and to the plaintiff alone, and it is equally clear that there was and is no liability on the part of the defendants to make the payments except the promise contained in the bond sued on. There is not even in the contemporaneous assignment from Rand to the plaintiff an undertaking or promise of any kind to make the payments. The case, therefore, seems to me to clearly fall within the rule accepted by Lord Justice Vaughan Williams. It is true that in that case he was dealing with the Statute of Frauds, but that seems to me to be immaterial, the question being practically the same, a guarantee being nothing more than an undertaking to answer for the debt, default or miscarriage of another. It is unnecessary to refer to any of the other cases cited by Mr. *Mayers* in his very clear and concise argument, for the only question seriously argued by plaintiff's counsel was, whether the bond was a guarantee or not.

Judgment

Mr. *Taylor* for the plaintiff urges "that the question, whether the undertaking is one of indemnity or guarantee depends upon whether the promisor has or has not an interest in the undertaking independent of the guarantee," and he cites a number of cases which, he argues, support that proposition. If any of the cases express the text in that way, none of them are so recent as *Davys* v. *Buswell,* to which I have already referred. I do not propose to discuss all the cases cited, but shall briefly refer to one or two of those upon which he seemed to particularly rely.

GREGORY, J.

1920

Jan. 15.

WEST-MINSTER TRUST v. RAND

Reader v. *Kingham* (1862), 13 C.B. (N.S.) 344. I cannot see the analogy between the cases. Erle, C.J. at p. 354 says: "the payment of the £17 therefore, would not necessarily have been a discharge of Malins's demand," and Byles, J. says, at p. 357:

"The contract is between Reader and Kingham,—'If you, Reader, will abstain from arresting Hitchcock, I will pay you £17.'"

It is a promise made to a stranger. At p. 353 Erle, J. says: "It has been distinctly settled, that, to bring the promise within the statute, the promisee must be the original creditor."

It seems to me that in the present case the plaintiff is the original creditor; not the original creditor in order of time but in the sense that Dice's liability is first to the plaintiff and then to the defendants if they have to pay the instalments. Lord Justice Vaughan Williams in *Harburg India Rubber Comb Company* v. *Martin* (1902), 1 K.B. 778 at bottom of p. 784 expresses the question somewhat differently and says, after referring to several cases:

"'These cases establish that the statute applies only to promises made to the person to whom another is already or is to become answerable.'"

In the present case, on the completion of the transaction, Dice became liable to plaintiff for the instalments as they fell due.

Thomas v. *Cook* (1828), 8 B. & C. 728 appears to me to support the defendants. The defendant in that case having to find sureties, applied to the plaintiff to join him in a bond and undertook to save him harmless, and on his execution being sued on that promise they set up the Statute of Frauds. Bayley, J. at p. 732 says:

Judgment

"The bond was given to Morris as the creditor; but the promise in question was not made to him."

It is here that the same learned judge says, on the same page, that a promise to indemnify and save harmless does not fall within the statute and the condition of the bond sued on is to save harmless. But in that case the plaintiff was an entire stranger to the whole transaction and except that he joined in the bond had nothing to do with it. His sole consideration for joining in the bond, and assuming a liability was the defendant's promise to save him harmless for all loss occasioned by his so doing. Such a contract of indemnity was surely an independent one and so not within the statute. But in the

case at bar the transaction is simply this, the defendant having a claim against Dice says to the plaintiff, I will for so much money sell and transfer to you my claim and guarantee that Dice will perform his obligation. If the promise of defendant was in reality one to save plaintiff harmless, etc., we would have to inquire, harmless from what and the answer could only be for loss sustained by not recovering back the moneys plaintiff had paid defendant and the profit he was to make, but no loss has been proved. Had Dice paid the money plaintiff would have had to transfer to him the land. This he has not done. He stills retains it and it is quite conceivable that it is today worth much more than the amount due by Dice, and, if so, where is the loss or damage?

The question is not by any means free from doubt, and I can easily understand that another judge might come to a different conclusion. Each case must be judged on its own particular facts, and the facts in each case vary so much that it is rather difficult to get much assistance from them, but applying the rule in *Davys* v. *Buswell* as I understand it, it seems to me that the defendants must succeed and there will be judgment accordingly. The costs will follow the event.

Action dismissed.

MORRISON, J.

1920

Jan. 19.

IN RE INFANTS ACT AND DAVIES

Habeas corpus—Custody of child—In care of aunt—R.S.B.C. 1911, Cap. 107.

IN RE INFANTS ACT AND DAVIES

If, on the application of a father for the return of his child at the time in the custody of an aunt, it appears to the Court that it would be in the best interest of the child that she should remain with the aunt, the motion should be dismissed.

Statement

MOTION by father for a writ of *habeas corpus* that the aunt produce the body of Edna Davies on a certain day for the Court to decide the custody of said Edna Davies. Heard by MORRISON, J. at Vancouver on the 19th of January, 1920.

G. G. McGeer, for the motion.
J. E. Bird, contra.

Judgment

MORRISON, J.: This is the renewal of an application by Chadwick L. Davies for the return to him of his infant daughter, Edna Davies, now in the custody of Mrs. Emily Parcells, its aunt. The infant's mother died in child-birth in Los Angeles, California, on the 29th of July, 1913, leaving the present infant and the newly-born babe. Edna Davies was, at that time, a year and seven months old. Soon after the mother's death, Davies requested Mrs. Parcells to come and take charge of the child. She did so. The family, at that time, were living in rather squalid conditions. The father then gave the other baby to people in Los Angeles, who cared for and brought it up without the father displaying, as I gather from the evidence, any interest whatever in its custody or welfare. Indeed, as appears from the evidence before me, he was not aware that the woman, who had adopted this younger child, had now been dead some three years. In February, 1914, the custody of the infant Edna was given to Mrs. Parcells by the father and she has since that time remained with her. In August, 1914, Mrs. Parcells and the child were in Alberta, Canada, and the father made several applications for the custody of the infant and the matter came before the Court

several times in various ways, the net result being the custody was given to Mrs. Parcells until the child was seven years of age. Then both Mrs. Parcells and the infant came within this jurisdiction and Davies again applied before me for the custody, which I refused, as from his appearance, and the evidence adduced before me, I was certainly not satisfied that it would be in the interests of the infant that she be taken from the care and custody of Mrs. Parcells, who impressed me favourably.

The application is now renewed before me and it turns out in the meantime that he has taken unto himself a second wife, whom he married in San Francisco, and who appeared and was present in Court. After again hearing Davies, and considering the whole circumstances of the case, I am less impressed now than I was previously and I cannot accede to his request. I regret to say that I am strongly of opinion that Davies is more concerned, owing to the feeling that has arisen between himself and Mrs. Parcells, in getting the child at any cost out of Mrs. Parcells's custody rather than being moved by any feeling for the child's welfare. From the appearance of Mrs. Parcells and the evidence on that aspect of the case, I am satisfied that the child is well looked after, that she has the greatest regard for its spiritual, intellectual and physical welfare. The application is refused.

Judgment

Application refused.

CAYLEY, CO. J.

1920

Jan. 24.

DAVIS v. FRASER & SHAW

DAVIS v. FRASER & SHAW.

Landlord and tenant—Lease—Bar premises—Vestibule—Whether portion of leased premises—Notice to quit—Reasonable length of time.

The defendants obtained a lease of "bar premises" immediately adjoining a hotel lobby. There are two entrances from the street, one into the hotel lobby and the other into the bar premises. In front of the bar premises proper, and next the street is a large vestibule originally constructed for the purpose of being used for a cigar-stand and a boot-black stand. The vestibule was vacant when the lease was taken but shortly before the termination of the lease the landlord rented the vestibule for a boot-black stand. On an application by the landlord to evict the tenant on the termination of the lease the defence was raised that the landlord had broken the lease by taking possession of a portion of the leased premises, that a monthly tenancy was thereby created and they were entitled to a month's notice to quit.

Held, that the defendants are not entitled to the vestibule under the terms of the lease and, further, that under a monthly or weekly tenancy unless there be some special agreement or custom, the tenant is not entitled respectively to a month's or a week's notice to quit. In each case only a reasonable notice of intention to terminate the tenancy is necessary.

Held, further, that eviction from a portion of the premises does not of itself determine a lease.

Statement

APPLICATION under the Landlord and Tenant Act, to evict the tenants from the premises, 445 Pender Street West, Vancouver, B.C. The tenants, under lease expiring on the 10th of January, 1920, occupied a portion of the premises described in the lease as the ground floor, consisting of the bar premises immediately west of the hotel lobby of the Balfour Hotel on Pender Street West, Vancouver, B.C., being number 445 Pender Street West, and the beer cellars connected with the bar, the bar fixtures. Immediately inside the entrance to the bar from the street there is space for a cigar-stand and boot-black stand, which had not been used as such during the tenancy until the boot-black stand was rented by the landlord on the 20th of November, 1919, to a boot-black. On the 17th of December, 1919, the landlord notified the tenants that a new lease would not me entered into, as the landlord proposed to run the bar premises herself, and further notified the tenants that the

premises must be vacated on or before the 10th of January, 1920. The tenants refused to vacate and these proceedings are brought for eviction. Heard by CAYLEY, Co. J. at Vancouver on the 17th of January, 1920.

R. L. Maitland, and *W. S. Lane,* for the application.
A. D. Taylor, K.C., and *Kappelle,* for the tenant.

24th January, 1920.

CAYLEY, Co. J.: This is an application by the landlord, under The Landlord and Tenant Act, for possession of demised premises. On July 10th, 1918, Samuel D. Bliss leased to Charles E. Fraser and Albert I. Shaw "All and singular the ground floor consisting of the bar premises immediately to the West of the hotel lobby of the Balfour Hotel on Pender Street, West, Vancouver, British Columbia, being numbered 445 Pender Street West, and the beer cellars connected with the said bar and bar fixtures" for one year and six months from the 10th of July, 1918, for the yearly rent of $1,020, payable as to the sum of $56.70 on the 10th day of July, 1918, and thereafter the sum of $85 on the 1st day of each and every month during the said term.

Sibbella Davis is the assignee from Samuel D. Bliss of all the right, title and interest in the said lease. The assignment to Mrs. Davis is dated the 6th of November, 1919, and notice of the assignment was given to Fraser and Shaw first verbally, and then in writing by letter, dated December 17th, 1919. This letter was afterwards relied upon by counsel for Mrs. Davis as constituting a written notice to quit, if such notice was required, and says as follows:

Judgment

"Dear Sirs:—

"Lease dated the 10th day of January, 1918, given by Samuel D. Bliss to you was transferred on the 6th of November last to Mrs. Sibbella Davis. Mrs. Davis has interviewed us with respect to an interview which you had with her as to extending the lease for a further period of time after it expired on the 10th of January, 1920.

"We have been asked to formally notify you that a new lease will not be entered into by Mrs. Davis inasmuch as Mrs. Davis proposes to run the bar premises herself after the expiration of your lease.

"Mrs. Davis mentioned in her interview with us that you were under a misapprehension with respect to giving notice. As the lease provides for a stated term of one year and six months, it is not necessary to give

CAYLEY, CO. J.

1920

Jan. 24.

any notice to you. You will therefore definitely understand that the premises must be vacated on or before twelve o'clock p.m. of the 10th January, 1920—this entails the removal of your stock before that time.

"This letter will be made use of in claiming punitive damages if you deliberately disregard it."

DAVIS *v.* FRASER & SHAW

Under the terms of the above lease the term expired on the 10th of January, 1920, at 12 o'clock midnight, but the tenants having refused to give up possession the formal demand for possession was delivered to the tenants on the 12th of January, 1920. This demand is as follows:

"I, Sibbella Davis, of the City of Vancouver, in the County of Vancouver, in the Province of British Columbia, your landlord under and by virtue of an assignment of lease dated the 6th day of November, 1919, which lease was entered into on the 10th day of July, 1918, between Samuel D. Bliss and yourselves, do hereby and require you forthwith to go out of possession and to deliver up to me possession of the premises demised to you, which premises I now own and which you have been permitted to occupy and hold the right of occupation under and by virtue of the said lease, dated the 10th day of July, 1918, and which lease and right of occupation have been determined and have expired by effluxion of time.

"Dated at Vancouver, B.C., this 12th day of January, A.D. 1920."

The ground upon which the demand to deliver up possession was refused is set out in a letter written to Mrs. Davis by the tenants' solicitor on the 19th of December, 1919, and is as follows:

"Dear Sirs,

"Messrs. Fraser and Shaw have handed me your letter to them of the 17th instant for attention. In reply I suggest that your client has failed to inform you that she has broken the lease under which my clients hold, by taking possession of a part of the premises demised to them. This being a fact I have advised my clients that they are now on a monthly basis and if my advice is followed my clients will not vacate without a legal thirty days' notice."

Judgment

The premises demised are, as the lease states, "the bar premises immediately to the west of the hotel lobby." The hotel lobby opens on to the street and the bar premises have a separate entrance on to the street, but in front of the bar premises proper there is a large vestibule measuring 11 x 24 feet and Mr. W. W. Walsh, who is the owner of the premises, and who had the hotel constructed, stated that this vestibule was constructed for the purpose of being used as a boot-black place and cigar-stand. Mr. Walsh stated that the vestibule was used for these purposes until conditions changed during the war, and that such vestibule used to rent $75 for the cigar-

stand and $30 a month for the boot-black. Mr. Bliss, during his tenancy, had not rented the vestibule to any person, but Mrs. Davis, on the 10th of November, 1919, rented the vestibule for a boot-black stand. The tenants did not protest but paid their rent as usual, under the terms of the lease, on the 1st of December and 1st of January, but on December 19th, it was set up by Mr. *Kappelle* for the tenants, in the above letter, that Mrs. Davis had broken the lease by taking possession of part of the demised premises and it was now contended by counsel that by renting the vestibule to the boot-black on November 10th (the boot-black took possession on November 18th) the lease, under which the tenants had held, was abrogated and a new tenancy from month to month created and that the tenants were entitled to one month's notice to quit.

The first question that arises is, whether the vestibule came within the wording of the original lease. The landlord, Mr. Walsh, gave evidence as above, and Mr. Masters, secretary of the Vancouver Hotel, gave evidence that "as a rule, if I rented the bar, the landlord would have the privilege of renting the vestibule—that is the custom." For the tenants, Mr. Reeves, real-estate broker, thought it would depend upon the wording of the lease. Mr. Harvey of the St. Regis Hotel said that he was the lessee of the bar and cafe and considers he owns the front, but as the front was an open place 40 feet x 5 feet, I do not consider this was any evidence as to vestibule. The same applies to Mr. Anderson of the Inverary Cafe. This place in front of the entrance is 25 feet x 3 or 4 feet. I do not consider this to be of the nature of a vestibule. Looking at the wording of the lease itself, I consider it an open question as to whether the words "ground floor consisting of the bar premises" would include the vestibule. The arguments for and against appear to me equally balanced. On the one hand, the vestibule was constructed to be used apart from the bar premises for separate purposes. On the other hand it had not been used for separate purposes until Mrs. Davis let it on November 10th. Any advantage the tenants might derive from this fact is discounted by Mr. Walsh's evidence that it had not been so used, because war conditions made it unprofitable. In my view, however, it was necessary for the tenants,

Judgment

CAYLEY, CO. J.

1920

Jan. 24.

DAVIS v. FRASER & SHAW

who were setting up a claim to be entitled to a new lease from month to month, to establish affirmatively that, under the terms of the lease, they are entitled to the vestibule. I hold that they have not been able to establish this.

It was contended by counsel for the tenants that eviction from part of the premises demised to them, coupled with the acceptance of the rent thereafter by the landlord, created a new tenancy, and they relied upon the case of *Carey* v. *Bostwick* (1853), 10 U.C.Q.B. 156 as authority to this effect. It may be that I have erroneously interpreted the terms of the lease and that the case might be sent back to me to settle definitely whether the vestibule was included in the lease or not, so that I may as well consider the legal argument that followed on the assumption by counsel for the tenants that the vestibule was included in the lease. I think then that *Carey* v. *Bostwick* is not an authority for the proposition that an eviction of the tenant from part of the premises demised determines the tenancy. Such an eviction suspends the rent and prevents the landlord from distraining, but I do not think it determines anything else. *Coleman* v. *Reddick* (1876), 25 U.C.C.P. 579 decided that such an eviction would not authorize the tenant to abandon the residue of the premises, which, if the eviction determined the tenancy, he would be entitled to do. It is evident that both landlord and tenant continued to pay and receive rent after the alleged eviction on the day provided for, and under the term contained, in the original lease. Counsel contends, however, that the old lease was determined and a new tenancy created by operation of law and without the consent or knowledge of the parties, which does not seem to me tenable.

Judgment

Again, assuming that a new tenancy from month to month was created, as was contended by counsel, what is the law regarding notice to quit? Mr. *Kappele's* letter states that in a monthly tenancy the tenant is entitled to thirty days' notice. The letter written on December 17th seems to shew that the tenants had conversations with Mrs. Davis with respect to extending the lease, so that they were aware before December 17th, but how long before is not apparent, but Mrs. Davis's evidence is that Fraser came to her on November 7th and asked

for a renewal of the lease after January 10th and that she refused. On December 7th again Mr. Fraser had a talk with her about the lease and finally on December 17th followed the letter cited above. I take it that the tenants knew for more than a month beforehand that the lease would not be renewed, and if these conversations and the letter referred to constitute a notice to quit, which I think they do, that they had had reasonable notice. I see no authority for the proposition that in a monthly tenancy a month's notice to quit is to be given. All that the authorities amount to is that a month's notice is sufficient. In *Jones* v. *Mills* (1861), 10 C.B. (N.S.) 788, Erle, C.J. says at pp. 796-7:

"It has been laid down that a weekly or a monthly holding does not require a week's or a month's notice to determine it, unless there be some special agreement or some custom."

Willes, J., at p. 799, says:

"To say as a matter of law, that a week's notice is necessary, is a proposition I am not prepared to assent to."

This, of course, was with reference to weekly tenancies where the judge thought that half a week's notice was sufficient.

Byles, J., at p. 800, says:

"There is some authority for saying that a week's notice is not necessary; but there is no authority defining what notice is necessary."

This also referred to weekly tenancies. Woodfall's Landlord and Tenant, 19th Ed., 404 says:

"Where the tenancy is otherwise than yearly, and there is no local custom or stipulation as to notice, it is very doubtful what notice to quit is necessary."

Judgment

I take it that this is the present state of the law on the subject and that 30 days' notice is not necessary, but that the notice required should be a reasonable notice. This was decided in our own County Court by Judge GRANT, in a case in which I appeared for the defendant—*Burgoyne* v. *Mallett* (1912), 5 D.L.R. 62; 21 W.L.R. 566, where the decision was that only a reasonable notice of the intention to terminate the tenancy is necessary. No local custom was contended for by counsel nor any evidence produced of custom, and I think that, taking the letter of December 17th as notice to quit (apart from the previous conversations), that letter was sufficient notice. It must be remembered that there is no statutory provision as in Nova Scotia and New Brunswick.

CAYLEY, CO. J.

1920

Jan. 24.

DAVIS v. FRASER & SHAW

For these reasons and for the reason that I do not hold there was any eviction established, the tenants must be ordered to deliver up possession to the landlord.

Application granted.

MURPHY, J.

1920

Jan. 29.

PAISLEY v. LEESON

PAISLEY v. LEESON *ET AL.*

Sale of goods—Bulk Sales Act—Creditors—Sale to—Set-off—Transaction within section 3—Waiver—B.C. Stats. 1913, Cap. 65, Secs. 3 and 4.

A creditor purchased the stock of goods of a debtor on the terms of paying certain claims against the debtor and setting off its own claim against the purchase price. After taking stock it was found the creditor's claim with the amount paid on claims exceeded the purchase price. In an action by a creditor who had not been paid to set aside the sale:—

Held, that the transaction was within section 3 of the Bulk Sales Act and the sale was void as against unsatisfied creditors.

Waiver from creditors under section 4 in order to be effective must be obtained after receipt of the statutory declaration provided for in the Act and before the sale is carried out.

Statement

ACTION to set aside a sale of goods as fraudulent and void under the provisions of the Bulk Sales Act. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 27th of January, 1920.

Raines, for plaintiff.
MacGill, for defendant.

29th January, 1920.

Judgment

MURPHY, J.: In this case I find that, on September 10th, 1917, the defendant Company purchased the stock in trade of their co-defendant. It is clear, I think, that this transaction was a bulk sale. The fact that litigation took place between the parties subsequent to September 10th, 1917, is, in my opinion, irrelevant. The question relevant is, what was the real transaction and when did it take place, and, on the evidence before me, there can be no question, I think, that it was a sale

as of the date of September 10th, 1917. The defendant Company did not obtain a declaration from their co-defendant as required by the Bulk Sales Act, 1913. I find the bargain to have been as follows:

Defendant Company was to take stock of the goods in the store and was to pay for same at invoice prices. They were to pay for the fixtures at a price to be agreed upon by them and their co-defendant after the fixtures had been listed. The defendant Company was to be entitled to set-off the indebtedness of their co-defendant to them against the purchase price. This transaction was forthwith carried out so far as the co-defendant Crawford was concerned. It is alleged that there was some delay in taking stock and in furnishing her with the stock lists. I find that the defendant Company eventually completed the transaction. One of the terms was, that the defendant Company should pay the claims of certain creditors other than themselves of the defendant Bella Crawford. These claims turned out to be much larger than the defendant Company expected and they eventually compromised them in so far as they knew of them. They had no knowledge of the plaintiff's claim until March 4th, 1919. This action is brought by her to set aside the sale of September 10th, 1917, as fraudulent and void under the provisions of the Bulk Sales Act.

It is urged that the transaction between the defendant Company and their co-defendant does not fall within the provisions of section 3 of the Bulk Sales Act, because it is said the defendant Company did not pay any part of the purchase price or deliver to the vendor, or her order, or to any person for her use, any promissory note or other document for or on account of the purchase price. I do not think this defence well founded. The transaction between the defendant Company and their co-defendant was in reality that the Company would, as soon as stock was taken, pay therefor at invoice prices and that their co-defendant would pay her indebtedness to the Company out of the money so received, if it were sufficient to cover such indebtedness and, if not, would pay the whole of such purchase price to the defendant Company. As the purchase price failed to cover the account of the defendant Company, what really was done was to credit the defendant, Bella Crawford, with the

Judgment

MURPHY, J.

1920

Jan. 29.

PAISLEY v. LEESON

amount of such purchase price. In other words, the defendant Company, as purchaser, has actually paid to itself, as a creditor of the defendant Bella Crawford, the whole purchase price, except such moneys as have been paid to her other creditors. If this view is correct, the case falls within section 3. Then, it is attempted to establish the defence of waiver under section 4. When the defendant Company became aware of the plaintiff's claim, they went to the creditors whose claims they had purchased and obtained from them an alleged waiver. They also obtained a waiver from two other creditors. Treating themselves as creditors and adding to their claims the amounts of the claims thus allegedly waived, this alleged waiver represents more than 60 per cent. of the total indebtedness of Bella Crawford, including therein the plaintiff's claim. On this set of facts, the proviso in section 4 is relied upon as a defence. That proviso, in my opinion, requires that the waiver therein dealt with must be obtained before the sale is carried out and that no bulk sale can be legally made where the purchase price is less than the amount of the total indebtedness of the vendor to his creditors, unless such consent is previously obtained. Further, I think, as a condition precedent to obtaining such consent, the purchaser must obtain the statutory declaration. Then, it is attempted to rest a defence on section 6 of the Act, and the same facts are set up as a waiver, but the waiver spoken of in section 6 is only contemplated to be obtained by the vendor in lieu of furnishing a statutory declaration, an altogether different proceeding from what has taken place here. There will be judgment for the plaintiff against the defendant Bella Crawford for the amount shewn to be due, with interest thereon at five per cent., and a declaration that the sale of September 10th, 1917, is void as against the plaintiff and of the other unsatisfied creditors of the defendant Bella Crawford.

Judgment

Judgment for plaintiff.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LIMITED v. WHITE. (No. 2.)

MURPHY, J. (At Chambers)

1920

Feb. 10.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LTD. v. WHITE

Practice—Judgment in default of defence—Application to enter conditional appearance.

After judgment had been entered in default of defence and a previous application to set aside the writ and other proceedings had been dismissed on the ground that the defendant not having entered an appearance, had no *status* to attack the writ, a further application to enter a conditional appearance was granted.

APPLICATION to be allowed to enter a conditional appearance. Judgment had been entered in the action in default of defence and on a previous application by the defendant (see 27 B.C. 559) it was held that he had no *status* to attack the writ or other proceedings for irregularity because he had not entered an appearance or conditional appearance but that he be allowed to enter an appearance. Heard by MURPHY, J. at Chambers in Victoria on the 14th of January, 1920. Statement

Alexis Martin, for the application.
J. R. Green, contra.

10th February, 1920.

MURPHY, J.: I can find no case bearing directly on the point raised. It is clear, however, that a person out of the jurisdiction can, before judgment with or without a conditional appearance, move to set aside the writ and service. As a result of the case of *Chock* v. *Fung* (1901), 8 B.C. 67, I held defendant had no *status* to move to set aside the default judgment herein until he had obtained leave to enter an appearance and had actually done so. This case is based on a paragraph in Daniell's Chancery Practice, 6th Ed., 351, the authority for which is the then r. 15 of Order XII., now r. 22 of Order XII. This rule, so far as relevant, merely states "A defendant may appear at any time before judgment." I have been referred to no case which deprives a defendant of his undoubted right to question the jurisdiction of the Court merely because judgment has been entered against him, yet, if compelled to enter Judgment

MURPHY, J. (At Chambers)

1920

Feb. 10.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LTD. *v.* WHITE

an ordinary appearance, authority can be found for the proposition that he has submitted to the jurisdiction for all purposes: Annual Practice, 1920, p. 117. Whilst there is no statutory authority for a conditional appearance, it is a convenient practice under certain circumstances: *Keymer* v. *Reddy* (1911), 81 L.J., K.B. 266. Having regard to the facts of this case, and in the absence of any authority which I can find, I think I ought to permit a conditional appearance to be entered.

Application granted.

GREGORY, J.

1920

Feb. 24.

CLARK *v.* MILLIGAN

CLARK v. MILLIGAN AND MILLIGAN.

Contract—Timber—Trespass—Cut after expiration of contract—Highway —Pre-emption — Timber lease — Rights as between — Reservation in Crown grant.

A claim for repayment of moneys paid under an agreement for sale of timber on the ground that there was misrepresentation as to title, will be refused when it is found on the evidence that the purchaser paid the money voluntarily with knowledge of the facts and received benefits under the contract.

Under an agreement of sale the timber not removed by the purchaser before a certain date became the property of the vendor. Exemplary damages were awarded the vendor for the timber cut after that date, and exemplary damages were also allowed for building a log road and chute in trespass on the vendor's lands.

The plaintiff pre-empted certain lands in July, 1892, obtained a certificate of improvements in January, 1903, and Crown grant in July, 1910, which contained an unsigned marginal note that it was issued and accepted upon the express understanding that he was not entitled to the timber thereon during the existence of a timber lease issued to the Pacific Coast Lumber Co. on the 7th of October, 1903 (the note upon registration of the Crown grant being copied under his protest into the certificate). On the 1st of April, 1893, a timber lease was issued to the Sayward Mill & Timber Co. covering the same lands and on the 7th of October, 1903, a renewal thereof was issued to the Pacific Coast Lumber Co. (which had acquired the Sayward interests). The lease included the following "the said lessor so far as the Crown hath power to grant the same doth hereby lease, etc., except thereout the right of pre-emption . . . . . in and over any part of said limits.

Except and also reserved thereout all existing private and public rights and that the rights of lessees should be considered as subject always to the provisions of the Land Act." The defendants claimed that by *mesne* assignments they were entitled under the timber lease.

Held, that the unsigned marginal notation upon the Crown grant was unauthorized and ineffective, that the plaintiff was in possession of the property, had acquired a right to a Crown grant without any reservation as to timber and his rights were preserved by and excepted out of the lease.

ACTION for trespass on that portion of section 82, Renfrew District, lying to the south of Government lease No. 91, and on that portion of said section 82 lying within the boundaries of said lease No. 91, and counterclaim for repayment of $1,000 paid by the defendants under an agreement of sale of timber, on the ground that the defendants relied upon the plaintiff's false representation that he owned the timber. Tried by GREGORY, J. at Victoria on the 21st to the 23rd of January, 1920.

Statement

Harold B. Robertson, and *E. L. Tait,* for plaintiff.

Luxton, K.C., for defendants.

24th February, 1920.

GREGORY, J.: For convenience I propose to deal first with the defendants' counterclaim. This is a claim for the repayment of the sum of $1,000 paid by the defendants to the plaintiff under an agreement of December, 1914, whereby plaintiff sold to the defendants all the timber on section 82, Renfrew District. The defendants allege they entered into this agreement relying upon the plaintiff's false representation that he, the plaintiff, owned the timber.

Judgment

The defendant, William John Milligan, was a most unsatisfactory witness, and I was not impressed with either his honesty, frankness or truthfulness. I cannot find that the plaintiff made any such representation, or that the defendants relied on any such representation in entering into the contract. On the contrary, I do find that they did know of the alleged defect in title, and that the plaintiff kept them informed at all times of the steps he was taking to remove the defect. This would appear to be sufficient to disentitle them to recover back the moneys paid. But in addition, they admit they knew of the defect in 1915, and after that they paid plaintiff $500 of

GREGORY, J.

1920

Feb. 24.

CLARK v. MILLIGAN

the moneys claimed and took an extension of time for the removal of the timber, which is surely a ratification after acquiring knowledge of the fact.

But their claim is inconsistent with their defence to plaintiff's claim, for they rely upon the very agreement they now impeach to justify their trespass and removal of timber from the southern portion of section 82. They admit they did take timber under the agreement, so in any case there has been no total failure of consideration. In short, they were not deceived, they knew all the facts, paid their money voluntarily, have received a benefit under the contract, and so for the purposes of the counterclaim it is immaterial whether plaintiff had a title to the timber or not. The counterclaim will be dismissed, with costs.

So far as the plaintiff's claim is concerned, it may be divided into two branches, *viz.*: first, claim for trespass to that portion of section 82, Renfrew District, lying to the south of Government lease No. 91, which for convenience I shall call "Lot A," and secondly, for trespass to that portion of said section 82 lying within the boundaries of said lease No. 91, which I shall call "Lot B."

As to the trespass upon Lot A, the defendants allege that they had a right to enter and cut under the terms of an agreement with the plaintiff, dated December, 1914, and so far as the lumber camp built thereon, they had an implied right to build it, that the plaintiff gave them permission to do so, and in any case the buildings are erected within the road limits of a Government road or public highway. They base this latter claim upon sections 6 and 8 of Cap. 99, R.S.B.C. 1911. Under section 6 it may be, and probably is, a public highway, so far as the actual travelled road is concerned, but that is only 12 feet wide, and the buildings are not erected upon the travelled road, but they are within a distance of 33 feet on either side of the centre lines of that road, but it is contended that the public highway is 66 feet wide by virtue of section 8, and the notice which appeared in the British Columbia Gazette of August 3rd, 1911, p. 10910. The revised statutes were not, I think, in force at this time, but section 88 of Cap. 30, B.C. Stats. 1908, is quite similar, and enabled the chief commissioner "to make public

Judgment

highways and to declare the same by notice in the British Columbia Gazette, setting forth the direction and extent of such highway."

The notice neither purports to make or declare, nor to set forth the nature and extent of the same, and is, I think, ineffective and unauthorized by the Act. It refers to "all public highways in unorganized districts," and "all main trunk roads in organized districts." As a matter of fact, I do not know, nor is there any evidence on the question whether Renfrew District is or is not organized. If it is organized, then there is no evidence to shew whether the road in question is or is not, a trunk road. The building of the camp was therefore a trespass. There is a further trespass in the building of a log road and chute on the easterly portion of Lot A, and admittedly the road and chute have been used by the defendants for putting into the water logs cut on other lands than section 82. It was, therefore, an aggravated trespass, for I am satisfied that the plaintiff never in any way authorized the use of his lands, nor did his brother directly, though he knew of it. The brother had no authority to give permission, and the plaintiff knew nothing of it. As to the actual cutting of the logs on Lot A, which the defendants admit, that cannot be justified under the agreement of December, 1914. That agreement, by its terms, expired on the 1st of July, 1916, was extended for one year, but no logs were cut until some months after the expiration of the extended term. The defendants deliberately refrained from cutting them because, as they frankly say, "the price of logs was low." It is contended that time was not of the essence of the agreement, being an interest in land, but in the face of the agreement itself, I cannot agree to this, for it provides that "all the timber not removed by that date (1st July, 1916) to become the property of the vendor," and further, "the contract to become null and void upon the purchasers (defendants) failing to comply with all or any of the foregoing conditions and all moneys paid to them to be forfeited." What is to become of these conditions if no attention is to be paid to the date of expiration? If the defendants' contention were to prevail, there would have been no necessity for them to have secured the extension for one

Judgment

GREGORY, J.

1920

Feb. 24.

CLARK v. MILLIGAN

year, but they realized that their rights were gone and the money actually paid forfeited, for in order to secure the extension they paid the balance called for by the agreement, namely, $500. For the timber cut on Lot A, defendants should pay exemplary damages.

As to Lot B, defendants admit to cutting of timber, but justify upon the same grounds relied upon as to Lot A, already disposed of, and also upon a lease from the Crown, dated 7th October, 1903, to the Pacific Coast Lumber Company, and duly assigned to the defendants, that the said lease was a renewal of a prior lease from the Crown dated 1st April, 1893, to the Sayward Mill & Timber Company, and say that the plaintiff had no title to the lumber, that his Crown grant was issued and accepted upon the express understanding that it carried no title to the timber.

In February, 1891, W. P. Sayward, under the provisions of the Land Act, advertised his intention to apply to the Crown for permission to lease the land in question. At this time the land had been pre-empted by one, Smith. Smith's pre-emption record was cancelled on the 17th of March, 1891. On the 14th of April, 1891, Sayward forwarded his application for lease to the chief commissioner. On the 7th of August, 1891, one, Wiley, pre-empted the land. He abandoned the pre-emption (no date given) apparently in favour of the plaintiff, for in the lands office books it is marked: "Abandoned, A. Wiley, see P.R. No. 680." On the 14th of July, 1892, the plaintiff, by record No. 680, pre-empted the land. On the 1st of April, 1893, the Crown issued a lease to the Sayward Mill & Timber Company. The lease states:

Judgment

> "The said lessor, so far as the Crown hath power to grant the same, doth hereby lease, etc., except thereout the right of pre-emption . . . . . in and over any part of said limits. Except and also reserved thereout, all existing private and public rights. It is provided further that the rights of the lessees should be considered as subject always to the provisions of the Land Act and amendments thereto."

On the 19th of January, 1903, the plaintiff obtained a certificate of improvements. On the 7th of October, 1903, the Crown issued a lease of the same premises to the Pacific Coast Lumber Company, Limited, which had acquired the interests of the Sayward Company. The Land Act provided for such

renewal. The lease to the Pacific Coast Company was made "so far as the Crown hath power," excepted and reserved thereout "all existing private rights," etc., provided that the chief commissioner could at any time enter upon the leased premises, "and sell and grant all or any part of the said premises," and the lessee covenanted that he would not assign any part of the premises without the consent in writing of the chief commissioner first had and obtained. The lease also provided the rights, etc., of the lessee "shall be construed as subject always to all the provisions of the Land Act and amendments thereof." This lease purports to be issued under the provisions of "section 7, Land Act Amendment Act, 1901." A reference to that section shews that it applies to "unsurveyed and unpre-empted Crown timber lands."

On the 4th of March, 1910, plaintiff obtained his certificate of purchase, and on the 30th of July, 1910, his Crown grant. The grant contained the following unsigned marginal note:

"This grant is issued and accepted upon the express understanding that the said Edwin Clark, his heirs, executors, administrators or assigns, shall not be entitled to the timber on, or to cut or remove the same during the existence of a certain timber lease known as Section Ninety-one (91) Renfrew District dated the 7th day of October, 1903, issued to the Pacific Coast Lumber Company, Limited, and any renewals thereof."

The plaintiff protested against this marginal notation upon his Crown grant and did all he could to have it removed. He had his grant registered in the land registry office and, against his protest, his certificate was issued subject to the same "express understanding," etc.

Judgment

This "understanding" does not purport to be an exceptional reservation or provision of the grant. It is merely a marginal note, and unsigned. There is no provision in the Land Act that I know of, or have been referred to, enabling such a note to be placed upon a Crown grant, or giving it any legal effect. It appears to be the mere unauthorized act of a clerk in the department.

The plaintiff pre-empted the land under the Land Act, C.S.B.C. 1888, Cap. 66. That Act provides, by section 25, the form of Crown grant to be issued, and the grant actually issued was on that form, but with the addition of the marginal

GREGORY, J.

1920

Feb. 24.

CLARK v. MILLIGAN

note, for which there appears to be no authority. The grant was issued on the 30th of July, 1910, but he was entitled to complete his title under the Act as it stood at the time of his pre-emption (see B.C. Stats. 1895, Cap. 27, Sec. 6; R.S.B.C. 1897, Cap. 113, Sec. 28; B.C. Stats. 1908, Cap. 30, Sec. 30), but in any case the provision as to the form of the Crown grant was practically the same under the 1908 statute (see section 26).

The plaintiff, therefore, was entitled to a grant containing no reservation, exception, provision or understanding with reference to the timber. This was a right which he had acquired.

An advertisement or application for a timber lease confers no interest in the land on the applicant: *Wilson* v. *McClure* (1911), 16 B.C. 82 at p. 88; *Brown and Bayley* v. *Mother Lode Sheep Creek Mining Co.* (1912), 17 B.C. 248.

The lease of the 1st of April, 1893, to the Sayward Company, must be governed by the statute then in force, *viz.*: the Land Act of 1888, Sec. 54, as amended by section 6, Cap 25, B.C. Stats. 1892, which only gave a right to lease unpre-empted lands. The plaintiff had at this date pre-empted these lands. On the 1st of April, 1891, when the application for the lease was made, section 54 of the 1888 Act was in force, and it also limited leases to unpre-empted lands, and the lands were then under pre-emption by Smith. The lease itself only purports to lease "so far as the Crown hath power to grant the same." It expressly exempts the "right of pre-emption" and "all existing private and public rights." This would appear to me to exempt from the operation of the lease all rights which the plaintiff had acquired by his pre-emption record. This lease was surrendered to the Government and a new lease issued in lieu thereof on the 7th of October, 1893, to the Pacific Coast Lumber Company, which had acquired the Sayward Company's rights. This lease was a renewal lease. It, like its predecessor, was granted only so far as the Crown had power to grant, exempted all existing public and private rights, provided that the chief commissioner could sell and grant any part of the premises, and further, "that the interests, rights and privileges

Judgment

of the lessee . . . . shall be construed or subject always to all the provisions of the Land Act and amending Acts."

It is to be remembered that both of these leases purported to lease many hundreds of acres not included in the plaintiff's pre-emption. The 1892 Act was still in force, and there was no right in the Crown to grant leases of pre-empted Crown lands. The plaintiff's right, acquired under his pre-emption, seems to have been expressly preserved by the very terms of the lease also, and it is under this lease that the defendants justify their acts.

By a series of assignments the renewed lease to the Pacific Coast Lumber Company became vested in one William F. McKnight, who, by an instrument dated the 21st of October, 1909, assigned to the Miami Lumber Company. There is no evidence as to the date of the delivery of this instrument, but its execution was acknowledged by the witness on the 21st of May, 1918, and the consent of the department to the assignment was obtained on the 9th of September, 1918, and it now stands on the books of the department of lands and works in the name of the Miami Company. The defendants claim the timber under an agreement with the said McKnight dated the 15th of December, 1917, by which McKnight purported to assign the renewal lease to the defendants. At the trial the defendants asked for an adjournment in the middle of their case, and for a commission to enable them to prove that McKnight at the time held the lease as trustee for the Miami Company. This was refused for the reason stated at the trial, it appearing that paragraph 8 of the defence set up the title in defendants, and they should come to Court prepared to prove their case. The reply having set up that the consent of the chief commissioner of lands and works had not been obtained to any transfer to the defendants, and it was not suggested that any such consent ever had been obtained, the defendants' application to add the Miami Company as a co-defendant was also refused.

Judgment

The plaintiff was in possession of the property. He had acquired a right to a Crown grant without any reservation as to timber. These rights appear to have been preserved by or

GREGORY, J.

1920

Feb. 24.

CLARK v. MILLIGAN

excepted out of the lease. The defendants have shewn no title under the lease. There therefore seems to be no alternative but to hold them liable in damages for their acts of trespass. They were notified to desist by Mr. Stacpoole's letter of the 21st of December, 1919. The very agreement under which they claimed sold the unexpired terms "subject to" the plaintiff's rights, if any, and by paragraph 3 of the same they agreed to institute an action against Clark within six months to ascertain what these rights were, which action they have never brought to the present day. They consulted a solicitor, but they do not say they were advised that the plaintiff's claim could not be sustained in law. They have taken a chance, and, I think, failed as to Lot B as well as Lot A.

Judgment

There will be a reference to ascertain the amount of damage which plaintiff has sustained, and liberty to apply for any necessary directions.

Judgment for plaintiff.

GREGORY, J. (At Chambers)

1920

Feb. 23.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LIMITED v. WHITE. (No. 3.)

Practice—Appearance—Application to set aside—Objections to be stated in summons—Marginal rule 1039—Orders effective when made.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LTD. v. WHITE

Orders are effective from the day they are made without being drawn up or entered.

On an application to set aside proceedings for irregularity the objections should be stated in the summons.

Statement

APPLICATION to set aside appearance for irregularity. Heard by GREGORY, J. at Chambers in Victoria on the 18th of February, 1920.

J. R. Green, for the application.
Alexis Martin, contra.

23rd February, 1920.

Judgment

GREGORY, J.: The plaintiff's summons to set aside the appearance entered herein must be dismissed. Costs in the

GREGORY, J. (At Chambers)

1920

Feb. 23.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LTD. v. WHITE

cause. I cannot agree that the order under which the defendant's appearance was entered had no effect until entered. The cases cited are all cases of attachment.

The general rule is that all orders are effective from the day they are made, without being drawn up or entered: Yearly Practice, 1920, p. 852. The form of the appearance is in accord with the form given in the Annual Practice, 1919, p. 127. The indorsement contended for by Mr. *Green* is under the Practice Master's Rules, which we have not got in British Columbia. So far as waiver is concerned, I cannot see any, and if there is, the plaintiff has by his subsequent acts waived the urgency, if any. The demand for statement of claim or copy of appearance filed is of no effect, and is evidently a slip. There was no such demand upon the appearance served on plaintiff. In all applications to set aside proceedings for irregularity, the objections to same should be stated on the summons of motion: Order LXX., r. 3. That was not done here.

Judgment

Application dismissed.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LIMITED v. WHITE. (No. 4.)

MACDONALD, J. (At Chambers)

1920

Feb. 27.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LTD. v. WHITE

Practice—Order for service ex juris—Judgment—Application to set aside order and all subsequent proceedings—Assignee of judgment—Added as party.

On an application to set aside an order for service *ex juris* and the writ of summons and all subsequent proceedings, it appeared the order was for service upon the defendant in England but subsequently service was effected in California. Judgment was entered in default of appearance and was subsequently assigned to a third party.

Held, that the Court should endeavour to have the rights of the parties considered and determined and not have them thwarted or affected by acts or slips of counsel or solicitors and an order should be made that the order for service *ex juris* and service of writ be not set aside but that the judgment be opened up and as security for the plaintiff and

MACDONALD, J. (At Chambers)

1920

Feb. 27.

its assignee the certificate of judgment remain unaffected by such opening up of the judgment and the action should be tried and disposed of as soon as possible.

Held, further, that the assignee of the judgment may apply to be added as a party if so advised.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LTD. *v.* WHITE

APPLICATION to set aside an order for service *ex juris* made by MURPHY, J. on the 4th of November, 1919, and the writ of summons and all subsequent proceedings. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. at Chambers in Victoria on the 27th of February, 1920.

Alexis Martin, for the application.
J. R. Green, contra.

Judgment

MACDONALD, J.: In this application defendant seeks to set aside an order for service *ex juris* made by MURPHY, J., dated 4th November, 1919, and the writ of summons herein and all subsequent proceedings, upon various grounds set forth in the application. It appears that the writ of summons was issued on the 5th of November, 1919, and the order was for service upon the defendant in England, but subsequently the service was effected in California. Before defendant had entered an appearance, and in default thereof, judgment was entered against the defendant for $2,127.70 and costs. Then, on the 5th of January, 1920, an application was launched to set aside the order for service *ex juris*, the writ and the judgment, on several grounds. This application was disposed of by Mr. Justice MURPHY, who held that the defendant had no *status* that entitled him to make such application, as he had not entered an appearance nor conditional appearance. The application was therefore dismissed, with costs, but leave was given to the defendant to enter a conditional appearance. This privilege was taken advantage of, and the appearance, which was termed a conditional appearance, has been entered. Then the question of the effect of this conditional appearance has also been considered by the Court, and other applications heard and disposed of. The present application then follows, on a line with those already dealt with, and a preliminary objection is taken that if this be so the application should be dismissed. I

feel that there is considerable weight attached to this objection; also other objections by way of a preliminary nature are made to the application; amongst others, that there is no affidavit of the defendant, and that, especially where a judgment recovered is being considered, this should be a condition, if the defendant is available to make an affidavit on his own behalf. He has been resident in Victoria for some little time and could have made an affidavit; and the further objection is made that the result of the proceedings, or rather, the actions taken by defendant amount to a general appearance; and also that where an affidavit of merits is filed, it amounts to a general appearance. As against all these objections taken on this application, I bear in mind that my endeavour, as a judge, should be to have the rights of the parties considered and determined, and not to have them thwarted or affected by any acts, either of counsel or solicitors, or slips that may have been made, resulting in loss or detriment to the party so acting. Here there is no reason given in the material, why defendant should not be willing to have his rights adjudicated upon in this Court, especially when it is evident that the cause of action, if any, arose in this Province and in connection with business carried on by him, while resident in the City of Victoria. I felt while these objections were being taken that they were entitled to consideration and might have affected my judgment, whereupon, during the course of the argument, I intimated that the judgment recovered would perhaps be perfectly fruitless should the defendant succeed in his application and be enabled to dispose of property, that it is stated, is secured by a certificate of judgment issued in due course. It was then stated by counsel for the defendant, as I understood him, that he was willing to have the rights of the defendant adjudicated upon in this Court and anxious to facilitate a trial for that purpose. Under these circumstances, I think the ends of justice can well be satisfied by not giving weight to the objections taken to this application; in other words, to deal with the merits of the parties through a trial of the action, to be held as speedily as possible. So my order on this application, of course, subject to the rights of appeal by either party dissatisfied, is that the order for service

Judgment

MACDONALD, J. (At Chambers)

1920

Feb. 27.

VICTORIA (B.C.) LAND INVESTMENT TRUST, LTD. *v.* WHITE

ex juris and service of the writ be not set aside, but that the judgment be opened up. In other words, as if the defendant had been served in this Province, as he could be at the present time. Then, as a security to the plaintiff and to its assignee, this certificate of judgment is to remain unaffected by such opening up of the judgment, and the order should so state in apt terms. Statement of defence should be delivered speedily, so that the action, if possible, should be tried and disposed of during the coming month.

As to the costs of this application, I think that the application being caused by the fact that the defendant did not enter an appearance in due course, that they should be costs in the cause to the plaintiff in any event.

With reference to the rights of the assignee of the judgment, represented by Mr. *Elliott* as counsel, he has presented an argument, that his client should not be affected by any course taken, with a view to opening up or setting aside the judgment. He has cited some authority alleged to be in support of this proposition. I understand the position of the defendant is that he does not admit either the *bona fides* of the assignment or that it has any legal effect, as far as his position is concerned, as the defendant, in the action now being contested. If, however, Ford, as assignee, desires to become a party to the action so as to have rights at the trial, he can apply in Chambers to be added as a party, or can now indicate through counsel his intention on that behalf. It seems to me, that if he has any rights they might not be superior to the rights possessed by the plaintiff, as far as it is concerned. It would be well to have such rights disposed of at the same time, and not to have the expense and trouble of a second action.

Judgment

Order accordingly.

JACOBSON GOLDBERG CO. v. LIVINGSTONE.

COURT OF APPEAL

1920

Feb. 9.

JACOBSON GOLDBERG CO. v. LIVINGSTONE

Practice—Change of venue — Convenience — Discretion — Appeal — Clause giving leave to set aside or vary order.

The Court of Appeal will not interfere with an order of a judge in Chambers changing the venue unless he has proceeded on a wrong principle or done an injustice to the party opposing the application.

An order granting a change of venue included a clause "that the plaintiff have leave to apply to this Honourable Court for an order setting aside or varying this order on shewing cause."

Held, on appeal, that a judge who makes an order for change of venue has no right to set aside that order and the clause should be struck out.

APPEAL by plaintiff Company from an order of MORRISON, J. of the 10th of December, 1919, granting the defendant's application to change the venue for the trial of the action from Vancouver to Prince George. The action was for damages, or in the adternative for specific performance of an agreement whereby the plaintiff agreed to purchase and the defendant agreed to sell a consignment of furs for $9,050. The purchase price was deposited with the defendant's brokers about four days after the agreement had been entered into, but the defendant claimed he gave the plaintiff a two-days' option to purchase the furs at the price mentioned and that the option was not exercised by the plaintiff and lapsed. The defendant claimed he had four material witnesses residing in Prince George and it appeared that one of the plaintiff Company was the only material witness on its own behalf. The learned judge in granting a change of venue included in the order a clause "that the plaintiff have leave to apply to this Honourable Court for an order setting aside or varying this order on shewing cause."

Statement

The appeal was argued at Victoria on the 9th of February, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, J.J.A.

Fleishman, for appellant: The plaintiff can select the place of trial. The venue is changed only where prejudice may prevent a fair trial; where the witnesses mainly reside in the

Argument

COURT OF APPEAL

1920

Feb. 9.

JACOBSON GOLDBERG CO. v. LIVINGSTONE

Argument

place to which the proposed change is to be made or in case a view of the property in dispute is necessary. There is no substantial reason for a change here, as there is no substantial difference as to witnesses. On the question of the judge's discretion see *In re Boyse. Crofton* v. *Crofton* (1882), 20 Ch. D. 760 at pp. 762-4; *Centre Star* v. *Rossland Miners Union* (1904), 10 B.C. 306 at p. 308.

Wood, for respondent: It is entirely a question of expense. The plaintiff is the only witness on his own behalf and we have four witnesses in Prince George. The learned judge has exercised his discretion in our favour, and he should not be interfered with: see *Thorogood* v. *Newman* (1906), 23 T.L.R. 97.

MACDONALD, C.J.A.: I think the appeal must be dismissed. If I were a Court of first instance, I might take a different view, that is on the facts of the case it is one on which there might very well be a division of opinion amongst judges. But we are not a Court of first instance. The learned judge below heard the motion and in the exercise of a very large judicial discretion he has decided that the venue ought to be changed. Now, unless we can come to the conclusion that he proceeded upon a wrong principle, we ought not, in the face of authorities, to interfere with his judgment.

MACDONALD, C.J.A.

The facts of the case are these: that a bargain was made in Prince George. There were only, admittedly, four persons present when the bargain was made, namely, the defendant, the plaintiff Jacobson, and the two witnesses. Of these four persons, three reside in Prince George and one in Vancouver. The crux of the case is: what was that bargain? It is not what was the evidence leading up to it, or negotiations leading up to it—that is not the question. There may be witnesses who can speak of negotiations leading up to it, yet of what value is their evidence against the evidence of the actual bargain? Therefore the crux, after all, is what was the bargain? Whatever may be said of any incidental questions arising in this action, these are the four principal witnesses in this case, and three of them reside in Prince George.

In the pleadings as they stand, I cannot see what material

evidence the bank manager and telegraph manager in Vancouver can give. We cannot shut our eyes to the pleadings. It is just as important to look at the pleadings as to look at the examinations.

It does seem to me that the learned judge has come to the right conclusion. Where there is a great preponderance of evidence and of expense, there might be a difference of opinion, but as the authorities stand, I think it would be quite contrary to what our duty is to interfere with the judgment of the learned judge. With regard to this last paragraph of the order:

"And it is further ordered that the plaintiff have leave to apply to this Honourable Court for an order setting aside or varying this order on shewing cause."

As I pointed out in the case which was before us the other day, where a very similar rider was put in the order, I very much doubt the power of the learned judge to put in a term of that kind, where the order is not one made *ex parte*. If it ought to be set aside it ought to be set aside by this Court. The appeal is to this Court. Once the order is drawn up and entered as expressing the final opinion of the learned judge in the Court below, I think the learned judge cannot rescind or review what is already done, so that such a term as this seems to me to be worse than superfluous; it perhaps goes beyond the powers of the judge.

MACDONALD, C.J.A.

After the argument the other day, I found a case (*The Western Bank of New York* v. *Koppel* (1891), 8 T.L.R. 36 at p. 37) where it was pointed out by Mr. Justice Wright that a rider of that sort was objectional. The other member of the Court seemed, without finally deciding it, to intimate that possibly that was so, and therefore, while the matter has never been finally decided, we at all events have a strong opinion by Mr. Justice Wright that the practice is not a proper one, and that the judge has no jurisdiction to set aside his own order. The costs must follow the event.

MARTIN, J.A.: Although I have some doubt as to the soundness of the order made herein, yet the authorities clearly shew it is not a case where I should be justified in interfering.

MARTIN, J.A.

I think the objection taken to the practice of making an order that may be varied should be upheld, and that very

COURT OF APPEAL

1920

Feb. 9.

JACOBSON GOLDBERG CO. v. LIVINGSTONE

objectionable clause at the end of the order should be struck out in pursuance of our judgment to the same effect delivered recently.

MCPHILLIPS, J.A.: In my opinion the appeal should succeed. Local venue has been abolished according to our practice, and it would be greatly against the convenience of the citizens of the Province that there should be any such thing as local venue. Of course, it is not suggested that this is the principle upon which the learned judge has gone, but it would look to me that in effect it is that.

This action was commenced in the Vancouver registry and it is an action dealing with mercantile business, and there is no reason why it should not be tried in Vancouver. Under our practice the plaintiff can select the place of trial, and that the plaintiff has selected. Heavy responsibility rests upon the defendant when he comes into Court and says the action should be tried somewhere else. On the affidavit as filed, the preponderance of convenience is in favour of the plaintiff. I do not think I am called upon to enter into the merits of the action and sit in revision as to what witnesses may be called—witnesses to relevant facts. I therefore think the order was made upon a wrong principle, in fact, it is not supported upon principle, and should be set aside.

MCPHILLIPS, J.A.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. H. Fleishman.*
Solicitor for respondent: *P. E. Wilson.*

LUTZ v. CANADIAN PUGET SOUND LUMBER & TIMBER CO.

COURT OF APPEAL

1920

Feb. 16.

LUTZ v. CANADIAN PUGET SOUND LUMBER CO.

Practice—Pleading—Statement of claim—Unnecessary and embarrassing paragraphs—Application to strike out—Marginal rule 223.

In the case of an allegation in pleadings which is merely superfluous and is not calculated to embarrass the other side, the Court will not strike it out.

APPEAL by defendant Company from an order of GREGORY, J. of the 9th of January, 1920, dismissing an application to strike out paragraphs 12 and 17 of the statement of claim. By a mortgage trust deed of June, 1911, the Canadian Puget Sound Lumber Company (known as the original company) conveyed all its assets to the Michigan Trust Company as trustees for subscribers to sinking fund gold bonds amounting to $1,500,000 and the plaintiff purchased of these bonds to the value of $9,800 in 1911. The Michigan Trust Company instituted foreclosure proceedings and pending the action the property charged vested in one, Ernest Temple, as trustee in place of the Michigan Trust Company. In November, 1917, Temple was by order substituted as plaintiff in the action and the original company being finally foreclosed in September, 1918, the properties comprised in the mortgage trust deed were by the order vested in Temple. Subsequently by order of the Court of the 17th of April, 1919, the defendant Reynolds was substituted as trustee instead of Temple. The plaintiff alleges that Reynolds was really the nominee and creature of a majority of the debenture stockholders and acted entirely under their instructions, the plaintiff and other debenture holders constituting the minority. As the trust deed contained no provision for the sale of the assets by the trustee, the majority shareholders procured the passing of an Act (B.C. Stats. 1919, Cap. 11) giving the Supreme Court, on application, power to order the disposal of the property. On the 30th of May, 1919, Reynolds, in pursuance of the Act, obtained an order of the Court directing him to transfer the assets of the original com-

Statement

COURT OF APPEAL

1920

Feb. 16.

LUTZ v. CANADIAN PUGET SOUND LUMBER CO.

pany to a new company (defendant Company), the sole consideration for which was bonds, preference and common stock in the new Company, and the order approved of a certain plan of agreement whereby the sale was to be made on the basis that those who did not subscribe to the agreement (being the minority shareholders) should receive 500 preferred shares and 500 common shares for every $1,000 worth of bonds held in the original Company, whereas those who subscribed to the agreement (majority shareholders) were to receive in addition to what the minority shareholders received $333.30 in five-year gold notes secured by first mortgage, for every $316 advanced, $166.66 of preferred shares and $333.33 common shares. The plaintiff asks that all proceedings under the order be set aside; for an injunction restraining the defendant from dealing with said assets; and that the sale was a fraud on the minority shareholders. Paragraph 12 of the statement of claim alleges that the passage of the Act was obtained by Reynolds as agent of and under instruction of the majority shareholders without the consent or knowledge of the minority shareholders and without notice. Paragraph 17 alleges that Reynolds did not really act as trustee for all the debenture holders but conspired with the majority debenture holders, regardless of the minority debenture holders, for the sale of the assets to a new company under the agreement of the 30th of May, 1919, which he knew was against the interest of the plaintiff and other minority debenture holders and for the benefit of the majority, and in pursuance of said conspiracy agreement obtained the passage of the Act, and the acts of said Reynolds were done fraudulently and with the intention of depriving the plaintiff of his interest in the property which he holds as trustee.

Statement

The appeal was argued at Victoria on the 16th of February, 1920, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

H. W. R. Moore, for appellant: The subject-matter of the action is the same as in *Brown* v. *Cadwell* (1918), 25 B.C. 405. An action for damages cannot be founded on an alleged conspiracy to procure the passage of an Act as set out in para-

Argument

graphs 12 and 17. The issues raised in said paragraphs are in any event irrelevant to the action brought and will embarrass and prejudice the Company's defence: see *Gower* v. *Couldridge* (1898), 1 Q.B. 348; *Sadler* v. *Great Western Railway Co.* (1896), A.C. 450.

Harold B. Robertson, for respondent: The summons is under marginal rule 223, but should be under rule 188, not to strike out, but for a separate action. The right to join several causes of action will not be interfered with unless embarrassing: see *Thomas* v. *Moore* (1918), 1 K.B. 555 at p. 563; *Tobin* v. *Commercial Investment Co.* (1916), 22 B.C. 481. As to interfering with pleadings see *Thornhill* v. *Weeks* (*No. 2*) (1913), 2 Ch. 464; *Mudge* v. *Penge Urban Council* (1916), 85 L.J., Ch. 814; *Knowles* v. *Roberts* (1888), 38 Ch. D. 263; *Wellington Colliery Company* v. *Pacific Coast Coal Mines* (1918), 25 B.C. 206.

Argument

MACDONALD, C.J.A.: I think the appeal must be dismissed. So far as paragraph 12 is concerned, being one of the paragraphs which it is sought to have struck out, I think it is merely superfluous. It alleges, without alleging any wrongdoing, the fact which is again alleged in paragraph 17. This is harmless, and as I recollect the authorities, they shew that where an allegation is made in pleadings which is merely harmless, and not calculated to embarrass the other side, the Court will not strike it out. In other words, it is not everything that is irrelevant in the pleadings that the Court will strike out.

MACDONALD, C.J.A.

Referring to paragraph 17, it seems to me that the allegations complained of as being embarrassing are quite proper and are not embarrassing. The allegation there that the defendant Reynolds obtained the Act of Parliament pursuant to a conspiracy with the majority of the debenture holders is an allegation of something which occurred in the course of the fraudulent conspiracy. It is one of the acts of the fraudulent conspirators. They could not and do not attack the Act of Parliament, but it is alleged as one of the circumstances which tend to prove the conspiracy which is alleged and which resulted ultimately in the fraudulent order sought to be set aside. The Court would have jurisdiction to set that order aside, that is, if it was

COURT OF APPEAL

1920

Feb. 16.

LUTZ v. CANADIAN PUGET SOUND LUMBER CO.

obtained by fraud. It seems to me that the pleadings as they stand, however defective they may be in other respects, are not embarrassing in the particulars set forth in this appeal. The law applicable to this case is very well set forth in the case of *Tobin* v. *Commercial Investment Co.* (1916), 22 B.C. 481.

GALLIHER, J.A.

GALLIHER, J.A.: I think the appeal should be dismissed. The case relied upon by Mr. *Moore, Gower* v. *Couldridge* (1898), 1 Q.B. 348, is, I think, distinguishable, as there are three separate acts alleged which were in no way dependent or interwoven with the other. In the present case I think the whole matter, as it is alleged—of course we are only passing on these matters for the moment—the whole matter as alleged is so interwoven that to my mind it is a different class of case altogether to that of *Gower* v. *Couldridge*.

I agree with what the Chief Justice has said in further dealing with the matter.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal must be dismissed. The application was one under rule 223 (striking out pleadings), largely discretionary, and I cannot see, upon the material, that the learned judge in Chambers exercised that discretion upon any wrong principle. Had there been a motion on the other hand, under rule 188, that the causes of action should not be tried together, but separate trials had, a different view might have to be taken, though, with regard to that I do not wish to indicate in any way whether or not the issues as set forth in the pleadings are proper, or have any legal force, but all these questions will come up upon the trial —that is, on points of law.

It must be clear to all that as a matter of law it would be quite improper in the abstract to introduce a defendant in an action if it were that that party merely had become the owner of the property, and was in no way connected with some special wrong-doing, having relation to that property—actions of others. I would certainly deprecate that being possible, or the Courts being used for that purpose. As a matter of fact, a defendant so added ought to be dismissed from the action. But I am not prepared at this stage to say that the acquirement by

COURT OF APPEAL

1920

Feb. 16.

LUTZ v. CANADIAN PUGET SOUND LUMBER CO.

the present Company of the assets of the previous company may not be subject to some attack. Whether the change of title can be the subject of attack or not will be a matter for the trial judge.

Appeal dismissed.

Solicitors for appellant: *Langley & Moore.*
Solicitor for respondent: *H. Despard Twigg.*

ISLAND AMUSEMENT COMPANY, LIMITED v. PARKER & KIPPEN AND PRICE.

COURT OF APPEAL

1920

March 19.

ISLAND AMUSEMENT CO., LTD. v. PARKER & KIPPEN

Sale of goods—Execution—Laws Declaratory Act—Purchaser—Rights of—Burden of proof—R.S.B.C. 1911, Cap. 133, Sec. 2(24).

The defendant purchased goods subsequent to the issue of execution by a judgment creditor of the vendor and moved them to his warehouse where they were later seized under the execution. The purchase price was $400 and there was evidence of their being worth nearly $2,000 on a forced sale. The sheriff had previously to the sale seized other goods of the vendor and advertised them for sale in two newspapers. It was held by the trial judge that the burden was on the defendant to shew he was a *bona fide* purchaser of the goods without notice, that on the evidence he had not satisfied that onus and the plaintiff should succeed.

Held, on appeal, MCPHILLIPS, J.A. dissenting, that before the purchaser can invoke the protection of section 2(24) of the Laws Declaratory Act he must prove that the sale was *bona fide* and for valuable consideration, and that on the evidence the finding of the trial judge should be upheld.

APPEAL by defendants Parker & Kippen from the decision of GREGORY, J. of the 22nd of April, 1919, on an interpleader issue. The plaintiff Company having obtained judgment against one Quagliotti, execution was issued on the 27th of June, 1918. The goods in question were seized under the execution on the 22nd and 25th of July and 22nd of August. On the 6th of July the defendants claimed that they purchased

Statement

COURT OF APPEAL

1920

March 19.

ISLAND AMUSEMENT CO., LTD. v. PARKER & KIPPEN

Statement

the goods in question from Quagliotti for $400, there being a cash payment of $300, and the balance of $100 was paid on the 13th of July, the defendants claiming they had no knowledge of the execution, although the sheriff had seized goods other than those in dispute under the execution and had advertised them for sale in the Colonist and Times newspapers of the 3rd of July and three following issues. The defendants, who were junk dealers, paid $400 for goods upon which a valuation of nearly $2,000 was placed by the plaintiff's witnesses, and the learned trial judge held the burden was on Parker (the defendant who made the sale) to shew the sale to him was a *bona fide* one, and he concluded from the evidence he had not satisfied that burden and that it was a reasonable supposition that he had seen the advertisement above referred to.

The appeal was argued at Vancouver on the 4th of November, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

F. C. Elliott, for appellants: The Island Amusement Company obtained judgment in March, 1916, and did nothing for over two years. The goods were seized after we had purchased and moved them, the advertisement in the papers of the 3rd of July and following days being as to other goods of Quagliotti's. Parker swears he did not see the advertisements and knew nothing of the execution. On the evidence there is no ground for the learned judge to disbelieve Parker, and secondly, when it is a question of notice, it must be brought home to the purchaser. The learned judge was in error in putting the burden on us. The advertisement is not sufficient to shew actual knowledge: see *Sweeney* v. *Port Burwell Harbour Co.* (1867), 17 U.C.C.P. 574 at p. 584-5. The trial judge finds we paid for the goods, and the burden of proof is not on a party to prove a negative: see Taylor on Evidence, 10th Ed., p. 283.

C. L. Harrison, for respondent: The Laws Declaratory Act does not change the law as laid down in *Murgatroyd* v. *Wright* (1907), 2 K.B. 333, as to the burden of proof. In fact, the claimant should have been plaintiff: see *Doran* v. *Toronto Suspender Co.* (1890), 14 Pr. 103; see also *Esquimalt and Nanaimo Ry. Co.* v. *McLellan* (1918), 26 B.C. 104 at pp. 110

and 113. The judge would not believe Parker and found there was not a *bona fide* sale. The Court of Appeal will not interfere with this finding. Parker kept no books, as required by the statute, and refused to assist the sheriff by shewing his papers: see *Vedder* v. *Chadsey* (1884), 1 B.C. (Pt. 2) 76.

Elliott, in reply.

Cur. adv. vult.

19th March, 1920.

MACDONALD, C.J.A.: I would dismiss the appeal. I concur in the reasons of my brother GALLIHER. MACDONALD, C.J.A.

MARTIN, J.A.: There are circumstances here, in my opinion, which would justify the learned judge in coming to the conclusion that the sale was not a *bona fide* one under section 2, subsection (24) of the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, apart, in this case, from the question of notice, which question, however, may become involved with that of *bona fides,* as pointed out in *Murgatroyd* v. *Wright* (1907), 2 K.B. 333; 76 L.J., K.B. 747, which is a decision of some, though not full, assistance, because of differences in the form and language of the statute there under consideration, section 26 of the Sale of Goods Act, 1893, Cap. 71. I am of opinion that before the purchaser can invoke the protection of said subsection (24) he must prove that "such goods [were] acquired by [him] *bona fide* and for a valuable consideration," and in this case I am unable to say (as I must say before I can disturb his finding) that the learned judge is "clearly wrong" in his view on the conflicting evidence, with certain suspicious circumstances, that the purchaser had acted *bona fide,* even though a "valuable consideration" had passed; and so the appeal should be dismissed. MARTIN, J.A.

GALLIHER, J.A.: At the hearing I entertained some doubt as to the correctness of the judgment appealed from, but on reading the evidence in full I am not prepared to say the learned judge came to a wrong conclusion. Outside the fact that dealers such as Parker & Kippen might reasonably be supposed to keep in touch with auction sales and sheriffs' sales, and to watch for advertisements as to such in the local newspapers, GALLIHER, J.A.

COURT OF APPEAL

1920

March 19.

ISLAND AMUSEMENT CO., LTD. v. PARKER & KIPPEN

the learned judge below has discredited Parker's evidence, and I cannot say he had not some reason to do so, contradictory in some respects as it is.

There is further a rather significant piece of evidence given by Parker to the effect that some two or three days prior to his purchase from Quagliotti on the 6th of July, he went down to Quagliotti's place where the goods in question were stored and made out a list of them. This would be during the time there was a notice running in the Victoria "Colonist" and "Times," advertising a sale by the sheriff, under *fi. fa.*, of certain goods of Quagliotti's. Now Parker had previously stated in evidence that he had not for six months discussed purchasing goods from Quagliotti, and it certainly looks peculiar that he should at this particular time, when the notice of sale was running, go down, make an inventory of these goods, and consider a purchase in so short a time.

GALLIHER, J.A.

I am afraid I cannot, under all the circumstances, say that the learned judge erred in concluding that there was no *bona fide* purchase without notice of the existence of the *fi. fa.*

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion, the appeal should succeed. With great respect for the learned trial judge, it was an error to have held, if it was so held, that "the burden of proof" was on the appellants. The judgment is an oral one, and I can quite believe that some mistake occurred in the taking down of what the learned judge said. The learned judge referred to *Murgatroyd* v. *Wright* (1907), 76 L.J., K.B. 747, and there it was held (it being the case of a bill of sale), *per* Phillimore, J., at pp. 752-3, that

> "He has to prove that he acquired the title in good faith and for valuable consideration after the goods had been bound by the writ and before the seizure. If he does so prove, the burden is then shifted, and the execution creditor must prove that he had notice. Really that portion of the section seems hardly necessary, because if he had notice he could hardly be acquiring in good faith."

Now, apart from all other considerations in the present case, it must be at first remembered that the appellants were the plaintiffs in the issue, the respondent being the defendant. It is settled practice that in such case the onus is on the respondent. The learned judge would not appear to have been

impressed by the evidence of one of the appellants, Parker. As to that, I cannot see that anything was said, or took place, by which Parker's evidence in so far as it is essential in the case can be reasonably questioned. His statement that he had a bill of sale, coming from a layman, is understandable when we see that he had in mind a certain writing that he might be well entitled to think amounted to a bill of sale. However, all the requisite facts in law to entitle the appellants to succeed can be said to be admitted facts, as I read the evidence.

The appellants purchased the goods for valuable consideration, a consideration which in amount, as I view it, was a good price for the goods, and it was not established that the appellants had notice of the writ of execution. He was in possession of the goods in his own warehouse, and the purchase was one in the ordinary course of trade. It would be perilous, and against the safe carrying on of business, if upon the facts of this case the sale was not effective in law. The policy of the law is that as against a sale made for value there must be shewn, not inferred, a plain contravention of the express terms of the statute, that is, the execution creditor (here the respondent) must make out its case, or the sale stands.

The actual consideration for the goods, which would not appear to have any ready sale value, being goods long in use and goods that a junk dealer only would purchase, was $400, which sum was fully paid, and nothing in the price imports any want of good faith in the purchase made. The receipt given by the judgment debtor for $300 of the purchase price reads as follows:

"Received from John Parker the sum of $300, three hundred dollars, on act. of price of junk and goods in my buildings and yard premises known at 507-509 Cormorant St. and 1525 and 1527 Blanshard St. Balance to be paid on removal of goods. Total amount to be $400."

The essential fact in the present case was to establish actual notice to the appellants of the outstanding writ of execution, otherwise the title to the goods was unaffected and complete. That there were means of knowledge is idle argument and ineffective in law, and rightly so, otherwise wherever any goods are offered for sale it would mean that the purchaser must say to the vendor, I am ready and willing to buy your goods, but I

COURT OF APPEAL

1920

March 19.

ISLAND AMUSEMENT CO., LTD. v. PARKER & KIPPEN

must first search in the office of the sheriff and see to it that there is no outstanding execution against your goods. This would be an intolerable condition of things, and one that Parliament so far has not created, and the Courts should not legislate—it is not their province. The Court's sole and only duty is to apply the law to the facts and accord the remedy, if remedy there be. If it should be that the arm of the law falls short of reaching the challenged transaction, it follows that it is not a challengeable transaction and not one against the law.

MCPHILLIPS, J.A.

It is reasonable and is in accord with the genius of the people that possession of personal property should import the ownership thereof; further, the easy and effective transfer thereof from hand to hand should be permissible, and all that should stand in the way of perpetuating this policy should be intractable law and without that the ownership and possession of personal property should be held to be inviolable. In the present case there has been invasion of that proprietary right. I would allow the appeal, the appellants to have their costs throughout.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Courtney & Elliott.*
Solicitor for respondent: *A. S. Innes.*

REX v. LEE TAN AND LEE HIM.

CAYLEY, CO. J.

1920

March 18.

REX v. LEE TAN

Criminal law—Damages to personal property—Dismissal of complaint—Appeal to County Court—Person "aggrieved" by acquittal—Criminal Code, Sec. 749.

Where an information is laid in the name of an individual for damage to the personal property of a Club of which the informant was the president, he is not a person "aggrieved" by reason of the magistrate's order dismissing the charge, within the meaning of section 749 of the Criminal Code, and he has no right of appeal from the order.

APPEAL from the decision of the police magistrate of the City of Vancouver dismissing a charge brought by one Sam Lock (a Chinaman) against three other Chinamen, namely, Lee Tan, Lee Him and Lee Chong Hung, for damages to personal property. The information recites that the informant suspects and believes that the accused did, on the 4th of November, 1919, at the City of Vancouver

"wilfully commit damage to certain personal property of the Dart Coon Club at their premises situate at Number 5 Pender Street, West, in the City of Vancouver, to wit. a wooden sign, such property not exceeding $20 in value."

The magistrate dismissed the charge. Notice of appeal was served on Lee Tan and Lee Him but not served on Lee Chong Hung. Counsel for the accused admitted that the notice of appeal and necessary preliminaries were in order. The notice of appeal read as follows: Statement

"Take notice that I, the undersigned, Sam Lock, of the City of Vancouver in said County and Province, thinking and believing myself aggrieved by the dismissal and order of dismissal hereinafter mentioned, intend to enter and prosecute an appeal at the next sittings of the County Court at Vancouver."

Upon the appeal coming on for argument on February 27th, 1920, counsel for the defence took the preliminary objection that "no appeal lies because in these cases the informant and appellant are not persons aggrieved under section 749 of the Code." Argued before CAYLEY, Co. J. at Vancouver on the 11th and 12th of March, 1920.

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

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

CAYLEY, CO. J.

1920

March 18.

REX v. LEE TAN

18th March, 1920.

CAYLEY, CO. J. [after stating the facts as set out in statement, continued]: The first point to settle is, what meaning the Courts have attached to the word "aggrieved." Trotter's Convictions Appeals, 2nd Ed., p. 9, says, "there should be some special and peculiar personal grievance to the appellant himself" and that parties aggrieved must mean parties who have sustained some damage by reason of the act done for which the penalty was fixed. *Rex* v. *The Justices of Essex* (1826), 5 B. & C. 431, is authority that it must be stated in the notice if appellant were aggrieved. In this respect the notice of appeal complies with the rule. In *Harrup* v. *Bayley* (1856), 6 El. & Bl. 218; 119 E.R. 845 at p. 847, Lord Campbell, C.J. says:

"The Act [The Town Improvement Act], by sect. 181, gives an appeal to any person who may think himself aggrieved; but that does not mean to any person who says he fancies he is aggrieved. Giving it a reasonable construction, the enactment means to give an appeal to any one who has legal ground for saying he is aggrieved."

At p. 848 of same case, Crompton, J. says:

"I agree that the appellant has no *locus standi* unless *bona fide* aggrieved by the order complained of."

There are other cases explaining the word "aggrieved" in the same way and amounting to this, that the person aggrieved must have sustained some pecuniary damage by the decision of the magistrates. It is true that these cases do not fully apply, because the judges inclined to the view that the right of appeal was scarcely given to a prosecutor at all, while section 749 of the Code gives that right distinctly. In *The Queen* v. *Justices of London* (1890), 59 L.J., M.C. 146, Lord Coleridge, C.J. says at p. 148:

Judgment

"Giving an appeal against an acquittal is something which is *prima facie* not favoured by the law. The general principle of law is that a person must not be a second time vexed for the same cause."

The same judge at p. 149 says:

"What is the fair meaning of this provision, can it be said to contemplate an appeal by a person who has not got, and cannot get, a conviction?"

Wills, J. at p. 149 says:

"Having looked into the books, I fail to find any instance in which an appeal has been successfully prosecuted upon an acquittal."

Section 749 of the Criminal Code, however, provides "that the prosecutor or complainant is to be included amongst those parties who can claim to be 'aggrieved.'"

This settles the point as to whether the prosecutor can be considered an aggrieved person, but it does not do away with the old decisions as to what constitutes an aggrieved person. The grievance must be some injury suffered by the appellant by the acquittal to give him the legal *status* of an aggrieved person.

It will be noticed that the informant, in this case, lays the information as a private person and in his information he described the property injured as the property not of himself but of another person, to wit, a certain Club. How can a man be said to have the legal *status* of a person "aggrieved" with reference to the destruction of another person's property? But it is alleged, by counsel for the informant, that this private person, Sam Lock, is president of the Club whose property was destroyed and this fact was admitted by counsel for the accused, and as president of the Club, whose duty it is to protect the Club property, he becomes a person aggrieved. But in his notice of appeal, he still acts as a private person, and to say that the appeal is really taken by him in his public capacity as president of the Club is something he cannot do. In *Canadian Society* v. *Lauzon* (1899), 4 Can. Cr. Cas. 354, it is decided that an information laid in the name of an individual does not give a *locus standi* to the society to appeal from the justices' order dismissing the charge. But that is really what the prosecution in the present case desires to do. Sam Lock is not aggrieved as a private person. He is aggrieved for the Club, which means that he takes an appeal on behalf of the Club in respect of a charge laid by him as a private person. As a private person, I hold that he cannot be said to be aggrieved for the destruction of another person's property, within the meaning of the decisions, and, therefore, he has no right to appeal. It is the Club which is the "aggrieved" person, but as the Club did not lay the information and as the complainant did not lay it in the name of the Club, it cannot appeal under the decision last cited.

Judgment

In *Minister of Inland Revenue* v. *Thornton* (1917), 28 Can. Cr. Cas. 3, it was held that an information under The Special War Revenue Act, 1915, Can., may be laid in the name of the

CAYLEY, CO. J.

1920

March 18.

REX v. LEE TAN

minister of inland revenue by an authorized revenue officer and an appeal from the dismissal of the charge may thereupon be taken in the name of the minister as the "prosecutor." This case was relied on by counsel for the appellant. Judd, Jun. Judge says (p. 4):

"The informations, however, shewed that they were laid in the name of the Minister, though signed and sworn to by Dager [an inland revenue officer]."

The information in the present case does not shew that it was laid in the name of the Club. It was laid by Sam Lock as a private individual.

I have assumed that the word "aggrieved," as it occurs in section 749 is used distributively and applies to the prosecutor, to the complainant and to the defendant. The language of Judge Forbes (of County Court for District No. 2, Nova Scotia) in *Rex* v. *Hatt* (1915), 25 Can. Cr. Cas. 263 at p. 265, is open to an expression of doubt as to whether he held this view. Judge Forbes says:

"It is presumed that no one aggrieved could appeal; therefore, it is limited to three classes: (1) any one aggrieved; (2) if a dismissal, the prosecutor or complainant, and (3) the defendant."

He says he feels constrained to that view by the line of reasoning adopted by Abbott, C.J. in *Rex* v. *The Justices of Essex, supra.* Section 749 of the Code says:

Judgment

"Any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal."

Here the words "as well as" have the effect of giving the prosecutor or complainant the same right of appeal, in case of dismissal, as the defendant always had in case of conviction. The defendant is presumed to be a person aggrieved in case of conviction (Halsbury's Laws of England, Vol. 19, p. 647), but the prosecutor and complainant are not so presumed in case of dismissal, so they must allege it in their notice. Judge Forbes could not have meant that any stranger to the case, who might, as a ratepayer or otherwise, be said to be aggrieved, could come in after dismissal and carry a case, to which he was not a party, to appeal.

The objection of the defence is sustained.

IN RE DOMINION TRUST COMPANY, LIMITED.

MURPHY, J. (At Chambers)

1920

March 10.

IN RE DOMINION TRUST CO., LTD.

Practice—Company—Assets and liabilities taken over by new company—Winding-up of new company—Old company subsequently wound up—Assets of old company—Disposition of—B.C. Stats. 1913, Cap. 89, Sec. 24.

The Dominion Trust Company was incorporated in 1912 by Dominion statute for the purpose of taking over the assets and assuming the liabilities of the Dominion Trust Company Limited (incorporated under the Provincial Companies Act). The two companies entered into an agreement whereby the old Company assigned its assets to the new Company and the new Company assumed the liabilities of the old Company, provision being made for shareholders in the old Company to exchange their shares for an equal number of shares in the new Company. The agreement was subsequently ratified by an Act of the Provincial Legislature. The new Company then continued the business until ordered to be wound up under the Winding-up Act in October, 1914. In 1916 on the petition of a shareholder in the old Company, the old Company was ordered to be wound-up. On an application for directions by the liquidator of the old Company it was held (1) that the agreement made between the two companies assigned the unpaid capital of the old Company to the new Company absolutely for its own use. (2) That the new Company was entitled to receive and give a valid discharge to any shareholder of the old Company who made payments on account of such capital. (3) That a shareholder in the old Company prior to being settled on the list of contributories of said Company could obtain a valid discharge from the liquidator of the new Company for payments made on account of capital of his shares in the old Company. (4) That any capital of the old Company remaining unpaid is an asset of the new Company to be called up by the liquidator of the old Company for the benefit of the new Company and is not liable to be applied by such liquidator in discharge of the general liabilities of the old Company.

APPLICATION by the liquidator of the Dominion Trust Company, Limited, for directions in the winding up of the Company upon the following questions:

"(1) Did the agreement, dated the 8th of January, 1913, between the Dominion Trust Company Limited and the Dominion Trust Company, assign the unpaid capital of the Dominion Trust Company Limited to the Dominion Trust Company, its successors and assigns, absolutely for its and their own use?

"(2) Was the Dominion Trust Company entitled to receive and give a valid discharge to any shareholder of the Dominion Trust Company Limited who made payments on account of such capital?

Statement

MURPHY, J. (At Chambers)

1920

March 10.

IN RE DOMINION TRUST CO., LTD.

"(3) Could a shareholder of the Dominion Trust Company Limited prior to being settled on the list of contributories of that Company obtain a valid discharge from the liquidator of the Dominion Trust Company for payments made to him by such shareholder on account of capital of his shares in the Dominion Trust Company Limited?

"(4) Is any capital of the Dominion Trust Company Limited now remaining unpaid an asset of the Dominion Trust Company, to be called up by the liquidator of the Dominion Trust Company Limited for the benefit of the Dominion Trust Company?

"(5) Or is such unpaid capital liable to be applied by such liquidator in discharge of the general liabilities (if any) of the Dominion Trust Company Limited?

"(6) Whether creditors or alleged creditors shall be permitted to claim to rank as creditors in respect to the same indebtedness or otherwise upon both the Dominion Trust Company Limited and the Dominion Trust Company, or in the event of doing so, whether they should not be compelled to elect one or other of the said Companies against which their claims should be preferred?

"(7) Whether the liquidator of the Dominion Trust Company Limited is or was entitled to collect any assets other than the uncalled capital, and apply the proceeds to the debts of the Dominion Trust Company Limited, or whether the assets of the Dominnion Trust Company Limited have been transferred to the Dominion Trust Company?

"In the event of the first part of this question being answered in the affirmative, then whether the liquidator of the Dominion Trust Company Limited may follow the funds of the Dominion Trust Company Limited, collected by the liquidator of the Dominion Trust Company?"

Statement

On the 27th of November, 1903, the Trust Agency and Loan Corporation, Limited, was incorporated under the Provincial Companies Act, and the name was altered to that of Dominion Trust Company, Limited, on the 10th of June, 1905. On the 1st of April, 1912, the Dominion Trust 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 Dominion Trust Company, Limited (old Company). The two companies then entered into an agreement 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 being a term of the agreement that it would not come into effect until ratified and confirmed by an Act of the Legislature. The Act was passed in 1913 and the old Company sus-

pended business, the new Company taking over its affairs under the agreement and continuing business until October, 1914, when it was ordered to be wound up under the Winding-up Act. On the petition of a shareholder an order was made by MURPHY, J. on the 4th of September, 1917 (confirmed on appeal: see 26 B.C. 302), winding up the old Company. The application was heard by MURPHY, J. at Chambers in Vancouver on the 9th of March, 1920.

Gwynn, for Company Liquidator.
Sir C. H. Tupper, K.C., for Dominion Trust Co., Ltd.
Burns, for creditors of Dominion Trust Co., Ltd.
Davis, K.C., for depositors.
J. A. MacInnes, for shareholder Oxley.
Bucke, for shareholder Bridges.
Van Roggen, for shareholders (old Company).

10th March, 1920.

MURPHY, J.: In this judgment the Dominion Trust Co., Ltd., will, for convenience, be called the old Company and the Dominion Trust Co. the new Company. In my opinion, *In re Dominion Trust Co., Boyce and MacPherson* (1918), 26 B.C. 302, does not govern the answers to be given to the questions asked herein. A case is only authority for what it actually decides: *Quinn* v. *Leathem* (1901), 70 L.J., P.C. 76 at p. 81. What was actually decided in the *Boyce* case was, that the petitioner had a *status* to petition for the winding up of the old Company, and that there being evidence of the old Company having both assets and liabilities (although proof of assets was not necessary), it was, under all the circumstances, just and equitable that it should be wound up. The question of the beneficial ownership of the assets of the old Company was not in issue, nor was the question of how such assets should be distributed in the winding up thereby ordered before the Court. Uncalled capital is part of the property of a company and will pass under such words as are used in the transfer clause set out in the agreement ratified by Cap. 89, B.C. Stats. 1913: *Webb* v. *Whiffin* (1872), L.R. 5 H.L. 711 at p. 735; *In re Pyle Works* (1890), 44 Ch. D. 534; *Howard* v. *Patent Ivory*

Judgment

MURPHY, J. (At Chambers)

1920

March 10.

IN RE DOMINION TRUST CO., LTD.

Manufacturing Company (1888), 38 Ch. D. 156; *Newton* v. *Anglo-Australian Investment, &c., Co.* (1895), 64 L.J., P.C. 57. Unless, therefore, there is some provision in said Cap. 89 preventing this result, the uncalled capital of the old Company became the property of the new Company, to be gotten in, however, only through the board of directors or liquidator of the old Company, because said agreement and statute did not, *ipso facto,* make the shareholders of the old Company shareholders in the new Company: *In re Dominion Trust Co. and Allan* (1917), 24 B.C. 450, and *Sadler* v. *Worley* (1894), 2 Ch. 170. Section 24 of Cap. 89 is relied upon as such a provision. The relevant words are, "nothing in this Act shall impair or affect the rights of any creditor of the said respective companies or of either of them." The rights of a creditor were to demand payment, and if that demand was not complied with, to sue, get judgment and issue execution. Only after actual seizure would the creditor have any right in the assets of the old Company, and then only in the assets actually seized: subsection (24) of section 2 of the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133. If it were intended to give creditors a lien on the assets of the old Company or to provide that either the old Company must be wound up or its creditors paid in full before the new Company could have the ownership of the old Company's assets, it could, and should, have been done by express words. To prevent any injustice said section 24 goes on not only to make the new Company liable for all the debts, liabilities, obligations, contracts and duties of the old Company, but expressly gives the right of enforcing same against the new Company to any holder thereof or person entitled thereto. If the contention raised on behalf of the creditors of the old Company is to prevail, then, if, as I consider established by the authorities cited, the uncalled capital is a part of the property or assets of the old Company, it must follow that what is true of uncalled capital is true of all other assets and property transferred by said agreement from the old Company to the new Company. The result must be to make it impossible for the new Company to acquire title to the assets of the old Company, or in practice to carry on business, until it had paid in full the debts of the

Judgment

old. But this is contrary to the purpose of said Cap. 89 as expressed in the preamble, and renders meaningless the various provisions therein fixing the liabilities of the old Company on the new. I would answer the first question in the affirmative.

It follows that question 2 must be similarly answered. If my view is correct, then the new Company could call on the directors of the old Company, or after liquidation, on its liquidator, to get in and pay over to the new Company the uncalled capital: *Sadler* v. *Worley* (1894), 2 Ch. 170 at p. 175. If the new Company, or its liquidator, can ask another to compel payment it, or he, must have the power to receive such payment if made voluntarily, and to give a valid discharge therefor. In fact, this must necessarily follow if the first proposition herein laid down, that the uncalled capital is the property of the new Company, is correct.

For the same reasons, I would answer question 3 affirmatively. If the new Company could give such a discharge, its liquidator could also do so.

From what has hereinbefore been said, question 4 must be answered affirmatively and question 5 negatively.

If these answers so far given are correct, question 6 is only of academic interest, since there will be no assets in the hands of the liquidator of the old Company except such as he must hand over to the liquidator of the new. The answer, I think, should be that a creditor has the right to rank in both liquidations. Section 24 does not, I think, effect a novation of such claims, nor merely confer a right of choice on a creditor of the old Company. It opens by expressly reserving all his rights against the old Company, one of which is to rank in case of liquidation. The possibility of a winding-up of the old Company is expressly preserved by section 26. The true effect of section 24 is, I think, to preserve to a creditor of the old Company his rights against it and to confer on him the additional rights of a creditor of the new Company, one of which is to rank in case of its liquidation.

Judgment

Question 7 must, from what has been said, be answered in the negative as to the first part and in the affirmative as to the second.

MACDONALD, J. (At Chambers)

1920

March 4.

MANSON v. PRINCE RUPERT DRY DOCK AND ENGINEERING COMPANY.

Company law—Application to appoint auditor—Companies Act—Notice of application—R.S.B.C. 1911, Cap. 39, Sec. 119.

MANSON v. PRINCE RUPERT DRY DOCK AND ENGINEERING CO.

The appointment of an auditor of a company should not be made by the Lieutenant-Governor in Council under section 119 of the Companies Act without notice of the application being given to the company; this especially applies where on such appointment there is to be considered the validity of the annual general meeting of the company and there is pending litigation.

Where an auditor was appointed without such notice the Court refused to make a mandatory order directing the company to give him access to the company's books, accounts, etc.

Statement

APPLICATION by plaintiff for a mandatory order that the defendant Company, its agents, servants, directors and officers should forthwith give one A. P. Foster, auditor of the Company, right of access to the books, accounts and vouchers of the Company, and such information and explanation as might be necessary. The defendant Company had previously brought action against Williams, Manson and others, in which the aid of the Court was sought to determine who were the legal shareholders of the Prince Rupert Dry Dock Company at the time the writ was issued. Williams, Manson and the other defendants in that action were in possession of the property and operating. The Company obtained an injunction restraining them from operating or interfering with the property until the trial. Before trial the defendants wished an auditor appointed to audit and inspect the books of the plaintiff Company, and for that purpose applied *ex parte,* under section 119 of the Companies Act, to the Lieutenant-Governor in Council. On such application A. P. Foster was appointed auditor. He proceeded to inspect the books for a time, but later was refused access to same by the Company. Heard by MACDONALD, J. at Chambers in Vancouver on the 4th of March, 1920.

Mayers, for the application.
Davis, K.C., contra.

MACDONALD, J. (At Chambers)

1920

March 4.

MANSON v. PRINCE RUPERT DRY DOCK AND ENGINEERING CO.

MACDONALD, J.: In this action Alexander M. Manson seeks to obtain a mandatory order directing the defendant, the Prince Rupert Dry Dock & Engineering Company, Limited, and its agents and servants, to give to Albert P. Foster, as auditor of the Company, right of access to the books, accounts and vouchers, and such information and explanation as may be necessary. It is not shewn on the face of the writ that Alexander M. Manson has any right to the order, or that he is in any way interested in the Company, either as a shareholder or otherwise; but there is an affidavit filed, which, I presume, is intended to supplement the summons, made by Mr. G. L. Fraser. In one paragraph of this affidavit he says that he is informed by Mr. *Mayers,* of the firm of Taylor, Mayers, Stockton & Smith, that the plaintiff is a member of the defendant Company, so if I accept that as sufficient, it would indicate that the plaintiff is seeking to obtain the order on the basis, that he is a shareholder or member of the defendant Company, and has a right to have the auditor of the Company pursue his investigations and make his report in due course.

It is apparent that the auditor mentioned was appointed by the Lieutenant-Governor in Council, under section 119 of the Companies Act, which provides that every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting. If such an appointment is not made, the Lieutenant-Governor in Council may, on the application of any member of the company, appoint an auditor of the company for the current year and fix the remuneration to be paid by the defendant company for his services. Further provisions are made, as to the rights of an auditor so appointed, and the general clause applying to all auditors, whether appointed by the Lieutenant-Governor in Council or by the company in general meeting, gives the power of access at all times to the accounts of the company, and further requires the directors also to give information and explanation. It is a very complete power intended to be vested in the auditor or auditors, so that the shareholders may be enabled to determine the true state of affairs, in connection with the company in which they are interested.

Judgment

MACDONALD, J. (At Chambers)

1920

March 4.

MANSON v. PRINCE RUPERT DRY DOCK AND ENGINEERING CO.

The material shews that Mr. Foster, when appointed, proceeded to act as an auditor and had been so engaged for a short time, when he was prevented from further pursuing his work by direction of Newman Erb, who is one of the directors of the Company, if not the controlling spirit in the faction known as the "Erb faction" in connection with this Company.

The right of an auditor, so appointed, to have access to the office and all books that would enable him to properly audit the Company's affairs is questioned. It is contended on the part of the defendant Company in this action that the appointment of Mr. Foster was not regularly made. Before I proceed, however, to discuss for a moment his appointment, I think it well to say that I cannot shut my eyes to the belief, that this action and application are not brought for the purpose of finding out, so much the affairs of the Company, as it is to supplement and assist in a pending action, between the Prince Rupert Dry Dock Company and others against Williams, Thompson, Manson and others. It appears in such litigation, that the pleadings are closed and the action is ready for trial, which is fixed for the 26th of March. I think that this effort, to have an auditor appointed, was with a view of having some one responsible obtain information of a reliable nature. In this connection there is no objection to the personality of Mr. Foster—to my knowledge, he is quite competent. The object to be gained would be that by the report he might make, assistance would be rendered to the defendants in the action that is thus coming on for trial. It seems to me that such information, or all information in fact that would lead the Court in the direction of shewing that any fraud, such as suggested by the defendant, had been committed by Erb and his associates should be afforded. However, counsel for the defendant Company, while stating that they are quite ready to have an investigation of the affairs, especially from a financial standpoint, insists upon his legal position, namely, that this action is founded upon a basis that is not tenable. The essential ground, upon which the plaintiff must succeed, is to satisfy the Court that the auditor has been properly appointed; so that, whatever course may be pursued by the defendants in the

Judgment

action coming on for trial, for the purpose of obtaining information, I have to determine whether this action is properly brought and the remedy sought can be applied in the direction suggested.

I think the whole question, for the moment, turns upon whether the appointment of the auditor was properly made. It was discretionary, to my mind, in the Lieutenant-Governor in Council whether he appointed an auditor or not under section 119; and, whether discretionary or not, I think, if such an appointment was to be made, some notice should have been given to the Company of the action, that was proposed to be taken, as to such appointment, especially when you view the circumstances and the order in council itself. It is not a clear-cut order in council, and it satisfies me, that the executive had before it for consideration the validity of the annual general meeting and that there was pending litigation, involving the question as to such meeting having been regular or valid. I think, when you consider these circumstances, it was especially incumbent upon the executive, or whoever had the matter in hand before the executive, to have served notice upon the Company of the proposed application for an appointment. I think that civil rights are involved. Certainly the payment of money by the Company, if this order in council prevailed, would follow. The rate of payment was fixed, and the right given to the auditor, if appointed, to have access to the office, and to call upon the directors for information, and they would be required to give it. The appointment is a most important one, and should not necessarily be made without due consideration. In my opinion, the Company should have been notified.

Judgment

Coming to a conclusion in this connection, I am following what I think is the trend of the decisions shewing that no person or company shall be called upon to bear a burden without having due notice. It is true that it is not a trial, but at the same time it is a determination arrived at which is a finality, to this extent, that the appointment, if made, has the effect to which I have referred.

It is only necessary for me to refer to the cases that are cited in *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909),

MACDONALD, J. (At Chambers)

1920

March 4.

MANSON v. PRINCE RUPERT DRY DOCK AND ENGINEERING CO.

14 B.C. 412, to support the decision that no rights shall be invaded, without due notice to the party who may suffer by such course being pursued. So, in my opinion, the application should be refused, with costs.

I am not disposing of the action, only disposing of the application itself.

Application refused.

SWANSON, CO. J.

1920

Feb. 27.

ISITT v. MERRITT COLLIERIES, LIMITED

ISITT *ET AL.* v. MERRITT COLLIERIES, LIMITED *ET AL.*

Mechanics' liens — "Owner" — Property held in trust for bondholders — Liability—R.S.B.C. 1911, Cap. 154, Secs. 2 and 6—B.C. Stats. 1917, Cap. 40, Sec. 2.

Persons who are the registered holders of the mining properties of a company as trustees for the bondholders are not "owners" within the meaning of section 2 of the Mechanics' Lien Act and as such liable under section 6 of said Act for work done on the properties unless there is something in the nature of a direct dealing between the contractor and the persons sought to be charged, mere knowledge of or mere consent to the work being done is not sufficient.

Statement

Gearing v. *Robinson* (1900), 27 A.R. 364 followed.

Under section 2 of the Mechanics' Lien Act Amendment Act, 1917, a labourer's lien for work done in or about a mine to the extent of twenty-five days' wages is absolute and unconditional and the lienholders can enforce their liens to the extent of twenty-five days' wages, their rights being prior to the mortgages on record.

ACTION to enforce a mechanic's lien against certain coal properties known as the Diamond Vale Collieries, near Merritt, B.C. The claimants were miners and employees hired by the Merritt Collieries, Limited. The registered owners of the properties are the defendants Orme, Rogers, May and Smith, who hold as trustees for the bondholders of the Diamond Vale Collieries, Limited, subject to a large mortgage held by the Union Trust Co., Ltd. The defendant Smith was the only

one of the owners who was in and about the mine when the work was in progress, but he had no control, and did not hire the workmen. The facts are set out in the judgment. Tried by SWANSON, Co. J. at Kamloops on the 15th of February, 1920.

P. McD. Kerr, and *Murphy,* for plaintiffs.
G. F. Cameron, for defendants.

27th February, 1920.

SWANSON, Co. J.: This is an action to enforce a mechanic's lien against the coal mining properties commonly known as the Diamond Vale Collieries, near Merritt, in this County. The lien claimants are a number of miners and mining employees who have been doing work in and about such mines. The men were hired by the Merritt Collieries, Ltd., who do not defend this action. Apparently any remedy against the Merritt Collieries, Ltd., solely would be fruitless of result.

The present registered owners of the properties are: George L. Orme, George H. Rogers, George P. May (all of Ottawa, Ontario), and T. J. Smith. Smith was in and about the mines whilst the work in question was going on. The men all scouted the idea that they were in any way employed by Smith, as they apparently looked on him from previous experience as a financially negligible quantity. The above four parties, who appear on the register of the Land Registry office at Kamloops as owners, are such in a representative capacity, as trustees for the bondholders of the Diamond Vale Collieries, Ltd., subject to a large mortgage to the Union Trust Company, Ltd. The only hope that the lien claimants have of getting their wages, or any part thereof, is to succeed in impressing their lien upon the interest or estate in said properties of the said four individuals and of the Union Trust Company, Ltd.

Judgment

Now it is objected by the counsel who appeared for the four individuals named and also the Union Trust Company, that these four men are improperly sued in their individual capacity, whereas they should be joined as party defendants in their representative capacity as trustees, and that it is now too late to amend. Plaintiffs' counsel, Mr. *Kerr,* asks for an

SWANSON, CO. J.

1920

Feb. 27.

ISITT v. MERRITT COLLIERIES, LIMITED

amendment allowing him to join the four parties above named in their representative capacity, as trustees. I have some doubt as to the need of such an amendment, but if plaintiffs' counsel desires an amendment, an order will go permitting such amendment. Apart from the general powers of amendment of the Court, I think the specific provisions of section 20 of the Mechanics' Lien Act (the parent Act, in R.S.B.C. 1911, Cap. 154) ample enough to justify such an amendment.

The main argument addressed to me was over the meaning of "owner" in section 6 of the Act, and as defined in the interpretation clause 2. It was sought to be shewn by Mr. *Kerr* that because Smith, one of the registered owners, was on the spot, his knowledge was the knowledge of the other three owners, and that the work was done at their "request and upon their credit," or that it was done with their "privity and consent," or "for their direct benefit."

The authorities submitted by Mr. *Cameron* are clearly against such a contention. I do not wish to expand my judgment to unnecessary length, and will make but brief reference to some of the authorities. Riddell, J., in *Marshall Brick Co.* v. *Irving* (1916), 28 D.L.R. 464 at p. 468:

"Heney knew that the work was going on, but took no part in it in any way: the Chancellor decided [in *Graham* v. *Williams* [(1884)], 8 Ont. 478] that, though the work might turn out to his advantage, it was not his 'direct benefit.' He further thought that merely permitting a tenant to build, &c., as in the case under consideration, would not be satisfying the requirements of the statute as to 'privity and consent'—and it is in connection with 'privity and consent' that the statement is made. The Act contemplates a direct dealing between contractor and the owner (p. 482)."

Judgment

See also, Riddell, J., at p. 469, quoting rule from *Graham* v. *Williams*:

" 'There must be something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged.' . . . . . 'mere knowledge of, or mere consent to, the work being done is not sufficient.' "

Grimmer, J. (in Appeal Division of New Brunswick Supreme Court) in *Eddy Co.* v. *Chamberlain and Landry* (1917), 37 D.L.R. 711 at p. 713:

"The trend of authority today with respect to 'privity and consent' is that to create a lien against the interest of an 'owner' by this means, there

must be something in the nature of direct dealing between the contractor and the 'owner' or person whose estate is sought to be charged."

Anglin, J., in *Marshall Brick Co.* v. *York Farmers Colonization Co.* (1917) 36 D.L.R. 420 at 427 (in the Supreme Court of Canada), says:

"While it is difficult if not impossible to assign to each of the three words 'request,' 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others, after carefully reading all the authorities cited, I accept as settled law the view enunciated in *Graham* v. *Williams* [(1884)], 8 Ont. 478; 9 Ont. 458, and approved in *Gearing* v. *Robinson* [(1900)], 27 A.R. 364, at 371, that 'privity and consent' involves 'something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged. . . . . Mere knowledge of, or mere consent to, the work being done is not sufficient.'"

See also Court of Appeal of Saskatchewan in *Northern Plumbing and Heating Co.* v. *Greene* (1916), 27 D.L.R. 410.

It would seem to me, therefore, apart from the amendment of 1917, chapter 40, that the plaintiffs' case would fail.

Mr. *Murphy* has argued very strenuously that this amending Act places an entirely different front on the plaintiffs' case, the plaintiffs being "labourers in or about a mine" within the purview of section 2 of chapter 40. Mr. *Murphy* states that he is the author of this very drastic amendment, which he says is quite *"sui generis,"* no such statutory provision being found in any of the other Provinces. It reads in part as follows:

"Provided always that in connection with work done in or about any mine or mineral claim, notwithstanding anything to the contrary in this or any other Act contained, a labourer's lien as provided for in section 6 hereof to the extent of twenty-five days' wages as salary, whether the employment in respect of which the same is payable is by the day, by the week, by the job or piece, or otherwise, shall be absolute and shall to such extent, but no further or otherwise, be prior to any mortgage or other encumbrance whatsoever."

Mr. *Murphy* assures the Court that such a case as the one now before the Court was in the mind of the draftsman in preparing this amendment. I can not, of course, take judicial notice of such a statement of "intention," but must endeavour to interpret the amendment as it stands, and in its relation to the parent Act, to find the "intention" of the Legislature. I have considered the amendment with great care, and I confess it is not without its difficulties. Mr. *Cameron* argues that the reference "labourer's lien as provided for in section 6," lets in all the objections connected with the definition of "owner"

SWANSON, CO. J.

1920

Feb. 27.

ISITT v. MERRITT COLLIERIES, LIMITED

alluded to in section 6. However, I think Mr. *Cameron's* connotation of the term "labourer's lien as provided for in section 6" is too narrow. Apart from this amendment, there are clear-cut conditions or requirements which must be satisfied before the word "owner" can be successfully invoked by the lien-claimant. The very object of this amendment is to sweep away such conditions and requirements. The amending section, with great brusqueness, says that

"notwithstanding anything to the contrary in this or any other Act contained, a labourer's lien as provided for in section 6 hereof to the extent of twenty-five days' wages as salary . . . . shall be absolute," etc.

What is the meaning and import of "absolute"? In Webster's Imperial Dictionary, 1913, "absolute" is defined in part as: "Free of anything extraneous, complete in itself, unconditional, unlimited by extraneous power." I am able to find one judicial interpretation which quite agrees with Webster. Rigby, L.J., in *In re Pickworth* (1899), 68 L.J., Ch. 324 at p. 328, says:

"What is the meaning of the word 'absolutely'? If any independent meaning can be given to it, it must be 'unconditionally.'"

Now, taking Lord Justice Rigby's definition as the correct meaning of "absolute," how can it be said that such a narrow interpretation as that sought to be placed upon "labourer's lien as provided for in section 6" can prevail? Surely that would be entirely in the face of this word "absolute," which means "unconditional." I think that word wipes out all the conditions and limitations above referred to. A condition or limitation is imposed clearly in section 21 of the Act:

Judgment

"No lien shall be filed unless the claim or joined claims shall amount to or aggregate twenty dollars or more."

Is not this condition wiped out by this amendment? Does it not make a "labourer's lien for work done in or about a mine" to the extent of twenty-five days' wages "absolute," that is, "unconditional"? I think that such must be the rather startling effect even as applied to section 21. Mr. *Murphy* may not have had that phase of it in his mind when he drafted this sweeping amendment. He may be now reaping where he did not sow; but I must seek to interpret the section as it now stands enacted.

In my opinion, therefore, thanks only to this amendment, the plaintiffs are entitled to succeed in enforcing their liens to

SWANSON, CO. J.

1920

Feb. 27.

ISITT v. MERRITT COLLIERIES, LIMITED

the maximum extent in each case of 25 days' wages as salary, and to that extent their rights to a lien under the Act shall be prior to the mortgages on record. If the parties cannot agree as to the several amounts coming to each lien claimant, the matter will be referred to the registrar at Merritt to settle amounts.

The plaintiffs will be entitled to costs of action and to a decree as prayed for, to the extent of their claims as above set forth.

Judgment for plaintiffs.

KEANE v. SELLON *ET AL.*

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

1920

Feb. 25.

KEANE v. SELLON

Practice—Chambers—Summons—Returnable before presiding judge.

A summons should be made returnable before the presiding judge in Chambers and should not mention the name of any particular judge.

EX PARTE application by way of Chamber summons for substituted service, heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 25th of February, 1920. The summons was made returnable before the Honourable the Chief Justice, to which objection was taken. Statement

The plaintiff appeared in person.

HUNTER, C.J.B.C.: This application must be dismissed. In the first place, it is irregular, not being authorized by any rule of the Court. The summons should have been made returnable before the presiding judge in Chambers and should not have mentioned the name of any particular judge. No litigant is allowed to select his judge any more than to select his jury. If the presiding judge is for any reason disqualified, he will doubtless order it to stand over to be dealt with by some other judge. Judgment

Application dismissed.

MORRISON, J.

1920

Feb. 23.

REX
v.
YET SUN

REX v. YET SUN.

Criminal law—Tobacco not in packages and stamped—Manager of store—Liability—"Possession"—Inland Revenue Act, R.S.C. 1906, Cap. 51, Sec. 356.

One who is in charge and has the responsibility for the conduct of a store during the absence of the owner will be held to "have in his possession" within the meaning of section 356 of the Inland Revenue Act tobacco in the store which was purchased by him in the course of his management of the business and he is responsible for its not being in packages and stamped as required by the Act.

CASE STATED by the deputy police magistrate of the City of Vancouver for the opinion of a judge of the Supreme Court, under section 761 of the Criminal Code. Heard by MORRISON, J. at Vancouver on the 23rd of February, 1920.

The text of the case is as follows:

"An Information was laid under oath before me by James Thorburn, of the City of Vancouver, inland revenue officer, for that, at the said City of Vancouver, on the 11th of October, 1919, the said Yet Sun, not being a licensed tobacco manufacturer, did unlawfully have in his possession manufactured tobacco not put up in packages and stamped in accordance with the provisions of the Inland Revenue Act, contrary to the form of the statute in such case made and provided.

"The charge was duly heard before me in the presence of both parties, under Part XV. of the Criminal Code, and after hearing the evidence adduced and the statements of counsel, I found that the said Yet Sun had not been proven to be guilty of the said offence, and on the second day of December, 1919, dismissed the said charge, but at the request of counsel for the prosecution I state the following case for the opinion of this Honourable Court.

Statement

"It was shewn before me, *inter alia*:

"1. That on the day of the alleged offence James Thorburn, inland revenue officer, and two detectives, entered certain premises at 107 Pender Street, East, in the said City of Vancouver, and found the accused in charge of a tobacco store. They also found a quantity of tobacco not put up in packages and stamped in accordance with the provisions of said Act:

"2. The accused stated in his defence, and which I find to be a fact, that the store and contents belonged to one Wong Noon; that Wong Noon was then in China, and had been in China for eight months last past; that the accused is an employee of said Wong Noon; that when Wong Noon went to China he left the accused in charge of said store; that the accused

handles moneys received from the business, and has remitted a small amount to Wong Noon in China; that the accused buys all goods for said store during the absence of said Wong Noon; that he bought the tobacco in question about two months before the date of the alleged offence; that he cut the tobacco up and put it in the packages in which it was found by the officers, and that he was offering such tobacco for sale;

"3. Neither the said Wong Noon nor the said Yet Sun had any licence to have the unstamped tobacco in possession. Counsel for the accused contended that the said Wong Noon was the party guilty of the offence as he was the owner and hence legally in possession. After consideration I concurred and dismissed the charge. My decision turned entirely on the meaning of the word 'possession.' I found that the accused had not been proven to be in possession of the said tobacco as provided by section 356 of the Inland Revenue Act;

Statement

"4. Counsel for the prosecution desires to question the validity of my said judgment on the ground that it is erroneous in point of law, the question submitted for the opinion of this Honourable Court being whether or not the facts, as found by me, warrant the finding that Yet Sun was not in possession of said tobacco within the meaning of section 356 of the Inland Revenue Act."

Baird, for Inland Revenue Department.

Eyre, for accused.

MORRISON, J.: The accused was the person in charge of the store in which the tobacco in question was found. The responsibility for conducting the store in accordance with the requirements of the statute rested on him. The tobacco was there with his knowledge and consent; in fact, he was responsible for its having been brought there. He must, therefore, be held to be in possession of the tobacco. The question should be answered in the negative. *Rex* v. *Young* (1917), 24 B.C. 482; (1917), 3 W.W.R. 1066; 30 Can. Cr. Cas. 137 differentiated. Case remitted to the magistrate.

Judgment

COURT OF APPEAL

1920

Feb. 16.

BEAUMONT v. HARRIS

BEAUMONT v. HARRIS.

Interim injunction—Interest in mining claims—Transfer—Parties—Marginal rule 133.

The Court will not grant an injunction which restrains a person not a party to the proceedings.

H. who lived in Vancouver held an option to purchase three mineral claims for $3,500. B., living in Prince Rupert, agreed with H.'s agent to purchase 51% of the claims for $3,500. The payment on H.'s option coming due before B.'s money arrived, he borrowed $3,500 from S. to make the payment. On the following day a bank in Vancouver received instructions from B. to pay for the aforesaid interest on his agent passing the title. The agent refused to pass the title as the number of H.'s free miner's certificate did not appear on the bill of sale. After a week's endeavour to satisfy as to title B.'s agent still refusing to accept, H. called the sale off and by arrangement he gave S. a bill of sale of 51% of the claims in consideration of his advance of $3,500. B. then brought action against H. and obtained an *interim* injunction restraining H. from disposing of the property and ordering the mining recorder to refrain from registering any transfer or charge. A subsequent application by H. and S. to dissolve the injunction was dismissed.

Held, on appeal, that S. should be added as a party defendant (by consent of the plaintiff) with the right to take such course in the action as he may be advised and that the injunction continue to the trial and extend to S. as well as H.

Statement

APPEAL from an order of MORRISON, J., of the 29th of January, 1920. The defendant Harris held an option to purchase three claims known as "True Blue," "Premier Extension Number One" and "Premier Extension Number Two," in the Salmon River Valley, for $3,500. He instructed an agent, one Racey, that he would sell 51 per cent. of the claims for $3,500. Racey communicated with the plaintiff who lived in Prince Rupert with a view to a sale and on the morning of the 22nd of December, 1919, the plaintiff agreed to purchase said interest. As the defendant had to pay the $3,500 on his option on that day (the money from the plaintiff not having arrived) he borrowed $3,500 from Dr. Shewan on that afternoon for that purpose. On the following day the Bank of Montreal received instructions from the plaintiff to pay the defendant for the interest on the title being passed by Captain C. H. Nicholson, and on the 24th of December, Nicholson refused to

pass the title, on the ground that the bill of sale of the properties to the defendant did not shew the number of his free miner's certificate, nor the dates of location and record of the claims. A week later the parties again met with a view to closing the sale but as the defendant could not produce his certificate, Nicholson would not pass the title and the defendant then called the deal off. It was then arranged between the defendant and Dr. Shewan that Shewan should take the 51 per cent. interest in the claims for the $3,500 he had advanced and the defendant transferred the interest to Shewan by bill of sale. The plaintiff then brought action against Harris (neither Shewan nor the mining recorder being made parties) for specific performance and for an injunction restraining the defendant from disposing of the claims and directing the mining recorder to refrain from recording any transfer. An *interim* injunction was obtained on the 14th of January following restraining the defendant from disposing of the interest in question and directing the mining recorder to refrain from registering any transfer. A motion by the defendant and Dr. Shewan to dissolve the *interim* injunction and to add Dr. Shewan as a party defendant was refused and the injunction was continued until the trial. The defendant and Dr. Shewan appealed.

Statement

The appeal was argued at Victoria on the 16th of February, 1920, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

F. C. Saunders, for appellant: The injunction should be dissolved, as neither Shewan nor the mining recorder are parties to the action: see *Trowbridge* v. *McMillan* (1902), 9 B.C. 171.

A. Alexander, for respondent: Marginal rule 133 is the guide, and it comes down to a question of convenience: see *Metropolitan District Railway* v. *Earl's Court, Lim.* (1911), 55 Sol. Jo. 807. If Dr. Shewan is added as a party, his defence should be confined to such issues as are raised between the plaintiff and the defendant Harris.

Argument

MACDONALD, C.J.A.: I think the appeal should be allowed to this extent, that Dr. Shewan, by the consent of the plaintiff's counsel, should be added as a defendant; that the injunction should extend to him as well as to the other defendant, and should not otherwise be interfered with.

MACDONALD, C.J.A.

COURT OF APPEAL

1920

Feb. 16.

BEAUMONT v. HARRIS

Now the alternative to that, had the plaintiff's counsel not so consented, would have been to have dissolved the injunction against the mining recorder. As to whether or not the injunction was properly directed to the mining recorder I desire to express no opinion. I do not wish this case to be taken as a precedent upon the propriety of joining an official of that kind who is not a party to the action. I do not say whether it was proper or improper; I refrain from expressing any opinion, because the point has not been argued before us.

The result, therefore, is that the appeal is allowed in part and is dismissed in part.

The appeal contained a prayer that the injunction should be entirely dissolved. Of course, the appellant failed in that. Having succeeded in part and having failed in part, strictly, the order which the Court ought to make if the parties do not agree is that the appellant should have the costs of the appeal and the respondent should have the costs of the appeal in respect to that issue in which the respondent succeeded. However, by consent, the costs in this appeal shall be costs in the cause. I would like to add my view in relation to what my learned brother GALLIHER has just said, so that if it should be the subject of discussion in proceedings that may follow there may be no misunderstanding. In adding Dr. Shewan as a defendant, I think he should be free to take any course which he should be advised to take, and if he should take any course which is embarrassing to the plaintiff, then the plaintiff has his right to make application to the Court. To make any other order, it seems to me, might lead to considerable confusion; it might be misleading, and also might interfere with what might be the proper attitude of Dr. Shewan in the action, which we do not foresee. In other words, it might be more or less a prophetic judgment. In connection with my judgment as delivered originally, I think the course which I am adopting in this case is supported by the *Metropolitan District Railway* v. *Earl's Court, Lim.* (1911), 55 Sol. Jo. 807.

MACDONALD, C.J.A.

GALLIHER, J.A.: As to costs, it seems to me there should be no difficulty in counsel arriving at an agreement. I agree with what the Chief Justice says, except with this limitation, that so far as I am concerned, I think Dr. Shewan should be added as a party defendant, but at the same time, by so doing, he should

GALLIHER, J.A.

not be permitted to raise by way of defence any issues which are not involved in the present action as it stands. I might say that the difference between the Chief Justice and myself in this matter is simply this, that, placed on strict grounds, I would not be in favour of adding Dr. Shewan as a defendant at large, which is what is asked for in the notice of appeal.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I am of the like opinion as the Chief Justice. I wish to add also that I am of the like opinion with the Chief Justice on the question of adding the defendant—that he should be added without trammels at all.

Appeal allowed in part.

Solicitor for appellant Harris: *F. C. Saunders.*
Solicitors for appellant Shewan: *Craig & Parkes.*
Solicitors for respondent: *Tiffin & Alexander.*

BROWNE v. SIDNEY MILLS LIMITED.

Vendor and purchaser—Sale of logs—Assignment by vendor for benefit of creditors—Reassignment—Notice—Action by vendor for price of logs—Parties—R.S.B.C. 1911, Cap. 13.

The plaintiff sold and delivered logs to the defendant and later assigned for the benefit of his creditors. The assignee took no action to recover the purchase price of the logs and the plaintiff then brought action claiming the assignee had previous to the action made a verbal disclaimer of the debt in question. The action was dismissed.

Held, on appeal, that the assignee could not make a disclaimer of the debt without the consent of the creditors, that the disclaimer was not pleaded and the appeal should therefore be dismissed.

Statement

APPEAL by plaintiff from the decision of GREGORY, J., of the 24th of June, 1919, in an action to recover the value of certain logs sold and delivered by the plaintiff to the defendant. The plaintiff, after delivering the logs, assigned for the benefit

COURT OF APPEAL

1920

March 19.

BROWNE v. SIDNEY MILLS, LTD.

of his creditors on the 27th of December, 1918. The assignee took no action to recover the purchase price of the logs, and on the 24th of February, 1919, the plaintiff brought this action. The reassignment, although alleged by the plaintiff to have been made on the 20th of February, was not made until the following month, notice of which was not given the defendant. The learned trial judge dismissed the action.

Statement

The appeal was argued at Vancouver on the 17th and 18th of November, 1919, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for the appellant: There are two points, one of substance and one of form. The first is as to whether the defendant is liable for goods admittedly received but not properly sued by the right parties. In this case, my submission is the plaintiff is the right party to sue, but if not, then the assignee should have been added as a plaintiff. The assignee never took any action as to this claim, and not having done so, the right of action revests in the assignor: see *Rennie* v. *Block* (1896), 26 S.C.R. 356 at p. 370. When it is a question of form the amendment should be made: see *Hostrawser et al.* v. *Robinson* (1873), 23 U.C.C.P. 350. As to the substitution of the assignee as plaintiff see *Hughes* v. *Pump House Hotel Company (No. 2)* (1902), 2 K.B. 485; *The Duke of Buccleuch* (1892), P. 201.

Argument

D. S. Tait, for respondent: *Rennie* v. *Block* (1896), 26 S.C.R. 356, does not apply, as the assignee there holds in trust for the assignor only. This cannot be under the Creditor's Trust Deeds Act. He cannot have the benefit of disclaimer, as it was not pleaded, and the Act was not complied with. As to his contention that in spite of the assignment it was competent for the assignor to sue see *Hughes* v. *Pump House Hotel Company* (1902), 2 K.B. 190. They must shew the learned judge exercised his discretion on wrong grounds. The reassignment was post-dated and there was no notice: see *Murray* v. *Stentiford* (1914), 20 B.C. 162; *Dell* v. *Saunders* (1914), 19 B.C. 500; *Reynolds* v. *McPhalen* (1908), 7 W.L.R. 380; Odgers on Pleading, 8th Ed., 478. As to the refusal to add the assignee as a party see *In re Harrison. Smith*

v. *Allen* (1891), 2 Ch. 349 at p. 353; *Viscount Gort* v. *Rowney* (1886), 17 Q.B.D. 625 at p. 632. The application was made too late: see *McCheane* v. *Gyles* (*No. 2*) (1902), 1 Ch. 911; *Sheehan* v. *Great Eastern Railway Co.* (1880), 16 Ch. D. 59; Annual Practice, 1919, p. 220; *New Westminster Brewery* v. *Hannah* (1876), W.N. 215; (1877), W.N. 35. On the question of jurisdiction to make the order see *Clowes* v. *Hilliard* (1876), 4 Ch. D. 413; *Walcott* v. *Lyons* (1885), 29 Ch. D. 584. The element of *bona fide* mistake is not in this case.

Argument

Mayers, in reply: The assignee is as well a trustee for the creditors as for the assignor, and the assignee should be added as a party: see *Woodward et al.* v. *Shields* (1882), 32 U.C.C.P. 282.

Cur. adv. vult.

19th March, 1920.

MACDONALD, C.J.A.: The assignment for the benefit of the plaintiff's creditors was in accordance with the Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13, and while the plaintiff alleges in his statement of claim that the assignee did not accept the trust, yet the evidence fails to bear this out. The cause of action herein therefore vested in the assignee on the 27th of December, 1918, the date of the assignment. On that date the plaintiff wholly divested himself of his right to sue for the recovery of the moneys in question in this action. Nevertheless, he commenced this action on the 24th of February, 1919, alleging that the debts sued on had been reassigned to him on the 20th of the same month. This reassignment was in fact not executed until March following, and counsel for the plaintiff frankly admitted at our Bar that he could not rely on it, but that he did rely on what purports to be a disclaimer by the assignee of this debt made on the 17th of January, 1919, and therefore before the issue of the writ.

MACDONALD, C.J.A.

There are, in my opinion, fatal impediments in the plaintiff's way. The disclaimer was not pleaded; the assignee had no power to disclaim without a breach of his trust, he having signed this document without even consulting the creditors or inspectors. Even if the subject-matter of the disclaimer falls

COURT OF APPEAL

1920

March 19.

BROWNE v. SIDNEY MILLS, LTD.

within section 54 of the said Act, which I do not think it does, the conditions therein imposed were not complied with.

It was argued for the defendant that the disclaimer, if effectual, released it from liability to the plaintiff as well as to the assignee, but I do not find it necessary to consider this argument.

Application was made on behalf of plaintiff, at the trial, to add the assignee as a party plaintiff, but the learned judge held that this would prejudice the defendant, and with the exercise of his discretion I see no sufficient grounds for interference.

MACDONALD, C.J.A.

The appeal should therefore be dismissed.

GALLIHER, J.A.: It is clear, on the plaintiff's own evidence, that at the time he brought the action he had no reassignment of the debt in question from Sing, the assignee of the estate. Counsel for the plaintiff, during the trial, when this fact developed, asked leave to amend by adding Sing as a party plaintiff. After considerable discussion the learned trial judge refused the application and dismissed the action, without prejudice to the plaintiff bringing a new action. The plaintiff appealed. The appellant urged before us that the assignee for the creditors had made a verbal disclaimer of the debt in question. This, I take it, could not be done without the assent of the creditors, and the evidence falls short of establishing any such consent.

In *New Westminster Brewery* v. *Hannah* (1877), W.N. 35, the Court of Appeal held that where the plaintiff had no interest in the matter he could not be allowed by the amendment to introduce new plaintiffs and make an entirely new case. This can hardly be said to be the case at Bar, but the learned trial judge, with the parties before him and during the progress of the case, seemed inclined to grant the application, Mr. *Tait,* for defendant, being allowed to plead certain pleas not on the record, and which were not considered necessary as the case stood. To certain of these proposed pleas the plaintiff's counsel objected, and the learned trial judge seems to have concluded that to allow the amendment under the rule, without leave to the defendant to plead anew as fully as they might be advised, would be to embarrass and prejudice the defendant.

GALLIHER, J.A.

I do not think, under these circumstances, this Court should interfere, and would dismiss the appeal.

MCPHILLIPS, J.A.: I am of the opinion that the appeal should be dismissed.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *J. R. Green.*

Solicitor for respondent: *Geo. A. Morphy.*

CAMPBELL v. SHAW.

Practice—Libel—Indorsement on writ—Statement of claim served at same time—Interlocutory judgment—Motion to set aside—Irregularity—Marginal rules 18a, 105 and 225.

In an action for libel where the indorsement on the writ does not comply with marginal rule 18a, the service of a statement of claim at the same time as the writ does not cure the defect and enable the plaintiff to sign interlocutory judgment after eight days in default of appearance under rule 105. Where interlocutory judgment is so signed the defendant is entitled to have it set aside *ex debito justitiæ* without an affidavit of merits.

APPEAL by plaintiff from the order of HUNTER, C.J.B.C., of the 6th of October, 1919, setting aside an interlocutory judgment signed in default of appearance. The action was for libel, but the indorsement on the writ of summons did not contain sufficient particulars to identify the publication. The statement of claim was served on the defendant at the same time and in conjunction with the writ. The plaintiff appealed on the ground that on the application no affidavit of merits was filed.

Statement

COURT OF APPEAL

1920

March 19.

CAMPBELL v. SHAW

The appeal was argued at Vancouver on the 13th and 14th of November, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant: A judgment regularly signed will only be set aside when a meritorious defence is shewn by affidavit. No defence was shewn and the circumstances shew there is no defence. As to want of address in the writ, the defendant waived such irregularity by appearing: see *Re Merchants Bank* v. *Van Allen* (1884), 10 Pr. 348 at p. 351; *Sears* v. *Meyers* (1893), 15 Pr. 381 at p. 456; *Matthews* v. *Victoria* (1897), 5 B.C. 284. As to the statement of claim not being a true copy, service of the statement of claim is not necessary: see *Stanley* v. *Litt* (1900), 19 Pr. 101. As to granting an indulgence where there are no merits see *Attorney-General* v. *McLachlin* (1869), 5 Pr. 63; *Fordham* v. *Hall* (1914), 19 B.C. 80. The omission of the words of libel in the writ is covered by service of the statement of claim with the writ.

Fell, K.C., for respondent: Judgment could not be signed on the writ alone because of non-compliance with rule 18a. If they rely on the statement of claim, the time for entering defence had not expired. The indorsement does not shew publication, to whom it was sent, or when it was written: see *Harris* v. *Warre* (1879), 4 C.P.D. 125; *Davey* v. *Bentinck* (1893), 1 Q.B. 185 at p. 188. As to the non-compliance with rule 18a being a nullity see *Farden* v. *Richter* (1889), 23 Q.B.D. 124 at p. 129; Odgers on Libel and Slander, 5th Ed., 613. It is not absolutely necessary to have an affidavit of merits: see *Watt* v. *Barnett* (1878), 3 Q.B.D. 183.

Argument

Mayers, in reply, referred to *Smith* v. *Dobbins* (1878), 37 L.T. 777; *Richardson* v. *Howell* (1892), 8 T.L.R. 445.

Cur. adv. vult.

19th March, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree with Mr. Justice GALLIHER.

MARTIN, J.A.

MARTIN, J.A.: Several questions are raised herein, but seeing that the indorsement on the writ does not comply with rule 18a, in that it fails to "state sufficient particulars to iden-

tify the publication" of the libel, I am of opinion that interlocutory judgment was irregularly signed under rule 105, and therefore said judgment was liable to be set aside *ex debito justitiæ* without an affidavit of merits.

It was submitted that the statement of claim, served at the same time as the writ, could be resorted to so as to supply the deficiency in the writ, but I am unable to take that view, the two processes being quite distinct and subject to different requirements by the rules. The case was one for the exercise of discretion under rule 110 in setting aside the judgment, and I see nothing in the material upon which the learned judge acted that would justify us in interfering with that discretion.

MARTIN, J.A.

GALLIHER, J.A.: I do not think we can say here that the writ was indorsed in accordance with marginal rule 18a of our Supreme Court Rules. The plaintiff, however, served with the writ a statement of claim, which he may do under marginal rule 225. If the writ had been indorsed as provided for in marginal rule 18a, the plaintiff could, under marginal rule 105, sign interlocutory judgment in default of appearance, and this was what was done. The writ and statement of claim were served on defendant on the 15th of September, 1919, and judgment signed on the 25th of September. The question arises as to whether the plaintiff, having served the statement of claim with the writ, could at the expiration of eight days sign judgment in default of appearance. I do not think we should treat the statement of claim so served as any part of the writ and as curing the defect in the indorsement on same. The writ not being indorsed in accordance with the rule, judgment in default of appearance was irregularly signed, and an affidavit of merits was not necessary upon an application to set it aside, the defendant being entitled to have it set aside *ex debito justitiæ*.

GALLIHER, J.A.

I would dismiss the appeal.

MCPHILLIPS, J.A.: I would affirm the judgment of HUNTER, C.J.B.C. In my opinion the learned Chief Justice decided rightly in setting the judgment aside. We have no reasons for judgment before us, but amongst others that might be dealt with, the judgment was entitled to be set aside *ex debito*

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

March 19.

CAMPBELL v. SHAW

justitiæ upon the ground that a statement of claim being served with the writ which admits of a statement of defence being filed within ten days, it being the longest time, the plaintiff was not entitled to sign judgment at the expiration of the eight days fixed for the entry of appearance. This disposes of the question of the need for an affidavit of merits, as in such a case no such affidavit is necessary. I would refer to Daniell's Chancery Practice, 8th Ed., Vol. 1, p. 306. Here a statement of claim was delivered with the writ, and in such case no judgment could be signed for default of appearance. In any case, the time for defence must first have expired. The plaintiff cannot be allowed to entrap the defendant: see Fry, L.J. in *Anlaby* v. *Prætorius* (1888), 57 L.J., Q.B. 287 at p. 289:

MCPHILLIPS, J.A.

> "Where a statement of claim is delivered to a defendant, he is to deliver his defence within ten days from the delivery of the statement of claim, or from the time limited for appearance, which ever shall be last."

The judgment has been, in this case, prematurely signed.

EBERTS, J.A.

EBERTS, J.A. concurred in dismissing the appeal.

Appeal dismissed.

Solicitor for appellant: *John R. Green.*
Solicitor for respondent: *Thornton Fell.*

THE WESTHOLME LUMBER COMPANY, LIMITED v. THE CORPORATION OF THE CITY OF VICTORIA.

COURT OF APPEAL

1920

March 19.

WESTHOLME LUMBER CO. v. CITY OF VICTORIA

Contract—Action—Judgment of Privy Council based on undertaking of counsel—Dispute as to scope of undertaking—Mandamus.

The plaintiff Company entered into a contract with the City of Victoria to construct a waterworks system. After partial construction, owing to non-compliance with the terms of the contract the City took the work over and completed it. The plaintiff brought action to set aside the contract for fraudulent misrepresentation, damages and a *quantum meruit* for the work performed. The action was dismissed and an appeal to the Court of Appeal was dismissed. An appeal to the Judicial Committee of the Privy Council was also dismissed but as questions of account on the footing of the contract remained to be settled, on the suggestion of their Lordships of the Judicial Committee, counsel for the respondent undertook that any question which would have been left to the engineer by the contract should be left to an independent engineer. The parties later agreed on an independent engineer, but a dispute then arose, the City claiming that all progress estimates made by the former engineer were binding and that the new appointee should only have power to determine the liability without re-opening such progress estimates. The plaintiff Company then applied for and obtained a *mandamus* to compel the City to proceed with the reference before the engineer decided upon.

Held, on appeal, that neither the contract nor the undertaking contains any provision for a reference to the engineer. Under the contract the City water commissioner is to account to the plaintiff and although the engineer may be called upon incidentally to decide matters referred to him by the contract, when it is not alleged that some concrete question which ought to have been submitted for his decision was not submitted, the order appealed from should not have been made.

APPEAL by defendant from the order of MACDONALD, J. of the 30th of September, 1919, on a motion by the plaintiff for a mandatory order to compel the defendant to proceed to arbitration in pursuance of defendant's undertaking given the Judicial Committee of the Privy Council on the hearing of the appeal in the action in connection with the construction of the waterworks system from Sooke Lake to the City of Victoria. The judgment of the Privy Council recited that inasmuch as the respondent's engineer was personally mixed up in the con-

Statement

COURT OF APPEAL

1920

March 19.

WESTHOLME LUMBER CO. v. CITY OF VICTORIA

troversies which arose under the contract, counsel for the respondent undertook that a neutral engineer would be named in his place to decide such questions as by the contract were referred to the determination of the engineer. Subsequently Mr. P. W. W. Bell was agreed upon as an independent engineer, but the City then claimed that all progress estimates made by the former engineer should be binding on the parties. To this the plaintiff Company would not agree. The order was that the defendant proceed with the reference by way of arbitration before Mr. P. W. W. Bell, as provided in the contract.

Statement

The appeal was argued at Vancouver on the 13th of November, 1919, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Argument

Harold B. Robertson, for appellant: The undertaking of Mr. *Ritchie* is mentioned in the reasons for judgment from the Privy Council but not in the formal order, and the undertaking as expressed in the reasons is broader than what was actually given. The undertaking in the notes was confined to clause 15 of the contract, whereas from the judgment it appeared to apply to the whole contract. The terms of a contract between private parties cannot be enforced by *mandamus*: see Daniell's Chancery Practice, 8th Ed., 1433; Fry's Specific Performance, 5th Ed., p. 6, par. 13; *Benson* v. *Paull* (1856), 6 El. & Bl. 273; *Norris* v. *Irish Land Company* (1857), 8 El. & Bl. 512. The undertaking is the one actually given by Mr. *Ritchie* and found in the notes. The reasons for judgment are not a part of the record. On the question of what the undertaking was see *Beaudry* v. *Gallien* (1902), 5 O.L.R. 73; *In re Hull and County Bank* (1879), 13 Ch. D. 261.

W. J. Taylor, K.C., for respondent: A remedy by *mandamus* is applicable and you can so enforce a right of a private nature: see *The Queen* v. *Lambourn Valley Railway Co.* (1888), 22 Q.B.D. 463 at p. 469; *Reg.* v. *The Vestry of St. George, Southwark* (1892), 67 L.T. 412; *Smith* v. *Chorley District Council* (1897), 1 Q.B. 532; *Davies* v. *Gas Light and Coke Company* (1909), 1 Ch. 248 and 708. The cases distinguish between a private right *solus* and a private right when the public are affected, as in the case of compelling a public body

to perform a public duty. The new engineer is not bound by the old progress estimates certificates made by the former engineer.

Robertson, in reply.

Cur. adv. vult.

19th March, 1920.

MACDONALD, C.J.A.: The plaintiff's action appears to me to be the result of a misconception on its part of the character of an undertaking given by the late Mr. *Ritchie, K.C.,* counsel for the defendant in an appeal before the Privy Council in a former action between the parties.

The plaintiff was contractor for the construction of pipe lines which were to form part of the water supply system of the City of Victoria. Disputes arose, and the City took over and completed the lines pursuant to powers enjoyed under the agreement between the parties. The said appeal to the Privy Council was dismissed *simpliciter,* but at the close of the argument, Lord Parker of Waddington, addressing Mr. *Ritchie,* said:

"The second question I wanted to ask you is this. There is a good deal on the evidence to shew that the engineer under the contract is not in a position to exercise fairly, as between the Corporation and the contractors, his discretion on the questions which would devolve upon him for decision. What we want to know is whether you will undertake that, in future proceedings, the person to decide those questions which are referred by the contract to the engineer shall be an independent person?

"Mr. *Ritchie*: That the person to make up this final statement under clause 15 of the contract should be an independent engineer?

"Lord Parker of Waddington: Yes.

"Mr. *Ritchie*: Yes, I am willing to undertake that.

"Lord Parker of Waddington: That questions arising on the final account should be referred, not to the engineer under the contract, but to an independent engineer.

"Mr. *Ritchie*: Yes, my Lord, I will undertake that.

"Lord Parker of Waddington: Questions arising in making up the accounts.

"Mr. *Ritchie*: Those are the accounts under clause 15 of the contract?

"Lord Parker of Waddington: Yes. . . . . We shall embody those admissions on your part in the order which we will advise His Majesty to make. Subject to that we need not call upon you."

MACDONALD, C.J.A.

And again, in addressing Mr. *Taylor,* counsel for appellant, his Lordship said:

"And in deciding the final adjustments of accounts any questions which would have been left to the engineer by the contract will now be left to an independent engineer."

COURT OF APPEAL

1920

March 19.

WESTHOLME LUMBER CO. v. CITY OF VICTORIA

The undertaking, as I read it, amounts to no more than this, that an indifferent person shall thereafter act in matters referable to the engineer under the contract. Such a person has been agreed upon between the parties and therefore, in my opinion, there has been up to the present time no breach of the undertaking. I do not think it is the duty of the Court in these proceedings to make a declaratory order, when no concrete issue has arisen.

While the final judgment of His Majesty in Council contains no reference to the said undertaking, their Lordships, in their reasons, refer to it in these words:

> "It was agreed by counsel for the respondents that nothing decided in this action will affect any claims which the appellants may have under the contract, or the respondents' counterclaim (*sic*). But inasmuch as the respondents' engineer, Mr. Meredith, seems to have been personally much mixed up in the controversies which have arisen under this contract, counsel for the respondents undertook that a neutral engineer would be named in place of Mr. Meredith, to decide such questions as by the contract are referred to the determination of the engineer."

There is, in my opinion, nothing in this inconsistent with the undertaking given by Mr. *Ritchie,* and it seems to me entirely consistent with what I have said, that all that was contemplated was the substitution of one engineer for the other, but in no other particular were the rights of the parties under the contract to be affected.

MACDONALD, C.J.A.

The present action is for a *mandamus* to compel the defendant "to proceed to arbitration" before the new engineer, "pursuant to the defendant's undertaking," and the order complained of peremptorily directs defendant to proceed to such arbitration. Neither the contract nor the undertaking contains any provision for a reference to the engineer, or to anyone else in the broad terms employed in this order. The taking of the accounts is a matter between the parties to the contract. It is the City's water commissioner who, under the contract, is to account to the plaintiff, and while, incidentally, the engineer may be called upon to decide matters referred to him by the contract for his decision, that fact does not justify the order in question here, when it is not alleged that some concrete question which ought to have been subimtted for his decision has not been so submitted.

The appeal should be allowed.

MARTIN, J.A. would allow the appeal.

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

Appeal allowed.

Solicitor for appellant: *H. S. Pringle.*
Solicitor for respondent: *W. J. Taylor.*

IN RE DOMINION WINDING-UP ACT AND BANK OF VANCOUVER.

Practice—Dominion Winding-up Act—Application in Chambers under—Form of order—R.S.C. 1906, Cap. 144, Sec. 2 (e) (vi).

Although applications under the Dominion Winding-up Act are made by summons or motion in Chambers the order must take the form of a Court order.

APPLICATION by way of Chamber summons for leave to appeal from an order of the Supreme Court. It was submitted that under the Dominion Winding-up Act, Cap. 144, Sec. 2(*e*) (vi), "'Court' means, in the Province of British Columbia, the Supreme Court," and that under the British Columbia Winding-up Rules, 1906, subsection 46, "Every application to the Court shall be by summons at Chambers, or motion in Chambers," that the order must therefore take the form of a Court order although applied for by way of Chamber summons to a judge in Chambers. Heard by MORRISON, J. at Chambers in Vancouver on the 27th of February, 1920. Statement

Mayers, for the application.

MORRISON, J.: The order under the Dominion Winding-up Act must take the form of a Court order although made by way of Chamber summons or motion in Chambers. Judgment

COURT OF APPEAL

1920

March 19.

IN RE TAXATION ACT AND THE ALL RED LINE, LTD.

IN RE TAXATION ACT AND THE ALL RED LINE, LIMITED.

Taxation—Income—Steamship company—Two steamers sole assets of company—Voluntary liquidation—Steamers sold at profit—Excess, taxed as income—R.S.B.C. 1911, Cap. 222—B.C. Stats. 1917, Cap. 62, Secs. 2 and 5.

A steamship Company formed for the purpose of carrying on a coastwise trade, operated two vessels, its sole assets, for six years. The vessels were then sold at a profit and the Company went into voluntary liquidation. The profit derived from the sale was assessed as "income" under the Taxation Act.

Held, on appeal, MCPHILLIPS, J.A. dissenting (reversing the decision of the Court of Revision) that such profit should not be assessed as income under said Act.

APPEAL by The All Red Line, Limited, from the decision of the Court of Revision on appeal from the tax assessment of 1919. The Company was formed by a few seafaring men in 1911 for the purpose of carrying on coastwise shipping between Vancouver and Powell River. They brought one steamer from England and shortly after purchased another, running them both as coastwise steamers until 1917, when the Company went into voluntary liquidation, selling the two steamers, which were their sole assets. The purchase price of the steamers was $83,375, and they were sold in 1917 for $117,500. The profit on the sale was assessed as income. The Company appealed on the ground that profits derived from the sale of capital assets of the Company should not have been assessed as income under the Taxation Act, as amended in 1917, and that the profits so derived are not "income" within the meaning of the Act.

Statement

The appeal was argued at Vancouver on the 14th of November, 1919, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Buell, for appellant: We were assessed on the profits that arose from the sale of the entire assets of the Company. The Company operated these boats for six years. It then went into liquidation and sold the two vessels at a profit of $35,000.

Argument

They paid a tax on these vessels as personal property up to 1917. The basic principle is that income is the product of capital, labour, industry or skill. The business of this Company was coastwise shipping, the buying and selling of boats being in no way connected with the industry in which they were engaged. The additional amount realized by the eventual sale of all their assets is not "profits" within the Act: see *Commissioner of Taxes* v. *Melbourne Trust, Limited* (1914), A.C. 1001 at p. 1010; *Stevens* v. *Hudson's Bay Company* (1909), 101 L.T. 96 at p. 97.

Carter, for respondent: The sole question is whether this is income or capital. My contention is that when boats are sold at more than the purchase price the difference is profits within the Act, and taxable: see *Californian Copper Syndicate* v. *Harris* (1904), 6 F. 894 at p. 899; *Scottish Investment Trust Co., Limited* v. *Inland Revenue* (1893), 21 R. 262.

Argument

Buell, in reply: These two cases are distinguishable, as in both, the sales made, were held to be in the line of the Company's business.

Cur. adv. vult.

19th March, 1920.

MACDONALD, C.J.A.: The question for decision is one of fact, and the inference to be drawn from the evidence is to my mind quite clear, that the moneys taxed as income were not such, but formed part of the taxpayer's capital.

MACDONALD, C.J.A.

The appeal should therefore be allowed.

MARTIN, J.A.: I concur in the view that this appeal should be allowed.

MARTIN, J.A.

MCPHILLIPS, J.A.: This appeal from the decision of the judge of the Court of Revision and Appeal (Vancouver Assessment District) raises a point of great general importance.

It would appear that the appellant is a steamship company (now in voluntary liquidation) and when in active business owned the S.S. "Selma" and S.S. "Santa Marie." The steamships were operated for some time out of the Port of Vancouver to and from Powell River, and were finally sold to the

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

March 19.

IN RE TAXATION ACT AND THE ALL RED LINE, LTD.

Union Steamship Company (the appellant then going out of business) for $117,500. The cost of the steamships to the appellant being deducted, the profit on the sale was $35,176.21.

The appellant has been assessed in respect of this profit as being income under Class G. The appellant appealed to the judge of the Court of Revision and Appeal, and the decision of that Court was in the following terms:

"Held, that the profits made on these boats are properly classed as income, since they are closing out the business and distributing this profit or surplus. That the English precedents do not make authority under our Act, and that saving recourse to the higher Court, which is recommended, the appeal from the assessment is dismissed.

"The definition of the word 'income' as amended in 1917, Sec. 20, is too broad to allow of doubt."

The statute law governing in the matter, giving the definition of income is as set forth in section 2 of Cap. 222, R.S.B.C. 1911, as amended by section 2 of Cap. 62, B.C. Stats, 1917, and reads as follows:

" 'Income' means and shall include the amount earned, derived, accrued, or received from any source whatsoever, the product of capital, labour, industry, or skill, during the twelve months ending the thirty-first day of December immediately preceding the date of assessment, or during any portion of the said period, and shall include, without being specially defined or enumerated, all wages, salaries, emoluments, and annuities accrued or due for any purpose whatsoever, and all income, revenue, rent, or interest accrued or due from bonds, notes, stock, shares of stock, debentures (including interest or dividends from the stock, bonds, or debentures of this Province, or of any municipality of this Province), and from real and personal property, and from interest on money lent, deposited or invested, and from all indebtedness secured by deed, mortgage, contract, agreement, or account, and from all ventures, businesses, professions, offices, avocations, or employments of any kind whatsoever, and means and shall include all the rents, incomes, and profits of every business and every corporate undertaking, and every industrial, manufacturing, and business undertaking of every nature and kind whatsoever, howsoever arising, received, gained, or acquired, subject nevertheless to the exemptions hereinafter in this Act defined: Provided that where any person has a method of accounting fixing a fiscal or business year ending on any other day than the thirty-first day of December, the Minister may in his discretion adopt such other day as the day from which to compute the income of such person for the preceding twelve months."

MCPHILLIPS, J.A.

The appeal now is to this Court from the decision of the judge of the Court of Revision and Appeal, and the grounds of appeal are as follow:

"(1) That the profits derived from the sale of the capital assets of

the appellants were, but should not have been assessed as income under the provisions of the Taxation Act (R.S.B.C. 1911, chapter 222) as amended by the Taxation Act Amendment Act, 1917 (1917, chapter 62, sections 2 and 5).

"(2) That the profits so derived are not 'income' within the meaning of the intent of the said Act.

"(3) That the said judgment is contrary to the law and the facts."

Mr. *Buell,* the learned counsel for the appellant, in a very able argument, supported the appeal upon the grounds taken, and in particular laid great stress upon, and relied greatly upon, the decisions under which he contended was analogous statute law in England, and some Scotch cases were also referred to.

When considering decisions upon other Acts it is well to remember what Lord Parmoor said in the *City of London Corporation* v. *Associated Newspapers, Limited* (1915), A.C. 674 at p. 704:

"I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends. So far, however, as it is allowable to be guided by decisions in analogous cases I agrêe. . . . ."

Now the Imperial Income Tax Act, 1853 (16 & 17 Vict., c. 34), s. 2, schedule D, which was under consideration in *Stevens* v. *Hudson's Bay Company* (1909), 101 L.T. 96, was in the following terms:

"For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains:

"And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains:

"And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof."

MCPHILLIPS, J.A.

In the above case, where it was the sale of land and moneys derived therefrom, it was

COURT OF APPEAL

1920

March 19.

IN RE TAXATION ACT AND THE ALL RED LINE, LTD.

"*Held*, that the sum in question could not be regarded as profits or gains derived by the defendant company from carrying on a trade or business; that they were not carrying on the trade of selling land, but were doing no more than a private landowner did who was minded to sell from time to time as opportunity offered portions of his property; and that therefore the sum in question was not liable to income tax."

Cozens-Hardy, M.R. at p. 97 said:

"The real question is whether this money can be regarded as profits or gains derived by the company from carrying on a trade or business. In my opinion it cannot. The company are doing no more than an ordinary landowner does who is minded to sell from time to time, as purchasers offer, portions suitable for building of an estate which has devolved upon him from his ancestors. I am unable to attach any weight to the circumstance that large sales are made every year. This is not a case where land is from time to time purchased with a view to resale. The company are only getting rid by sale, as fast as they reasonably can, of land which they acquired as part of the consideration for the surrender of their charter. Channell, J. has treated it as a conclusion of law from the facts stated in the case that the company were carrying on the trade of selling land. With great respect to the learned judge, I am unable to accept this view. Some stress was laid in argument upon the supplemental charter of 1892, but I do not think it assists the Crown. It declared, what was the law previously, that sums received by the company in respect of the sale of lands might be applied in payment of dividends. It did not state that such sums were profits of the trade or business. In my opinion the facts stated in the case do not, in point of law, justify the conclusion that the sum in question is liable to income tax, and I think the judgment of Channell, J. should be reversed, and the decision of the commissioners should be restored."

And Farwell, L.J. at pp. 97-8 said:

MCPHILLIPS, J.A.

"I also am unable to agree with Channell, J. in this case. It is well settled that income, not capital, is taxable under the Income Tax Acts; and that income is so taxable notwithstanding that on an adjustment of accounts part of the sums accruing as income ought to go to recoup capital. Income is not the less income for the purposes of income tax because it is produced by embarking capital in a wasting subject-matter, *e.g.*, in buying and working mines; nor, on the other hand, does an annual sum become income merely because it is paid annually. If it be in its inception, and not by adjustment and subsequent recoupment, composed partly of capital and partly of income, then the tax is chargeable only on so much as is income—*e.g.*, the Indian Railways Annuities (*Secretary of State for India* v. *Scoble*, 89 L.T. Rep. 1; (1903), A.C. 299), or one of the old turnpike bonds which was repayable by equal yearly instalments made up of principal and interest varying inversely to one another in each year. It is clear, therefore, that a man who sells his land or pictures or jewels is not chargeable with income tax on the purchase-money or on the difference between the amount that he gave and the amount that he received for them. But if, instead of dealing with his property as owner, he embarks on a trade in which he uses that property

for the purposes of his trade, then he becomes liable to pay not on the excess of sale prices over purchase prices, but on the annual profits or gains arising from such trade, in ascertaining which those prices will no doubt come into consideration."

The reasons of the Master of the Rolls and Farwell, L.J. certainly would seem to lend great support to the submission of counsel for the appellant, but yet we are not to be unmindful of the fact that the statute law, whilst it may be said to be somewhat analogous, still differs in essential particulars, with which differences I will deal later.

Then we have the case of the *Commissioner of Taxes* v. *Melbourne Trust, Limited* (1914), A.C. 1001. There the Income Tax Act under consideration provided that

"so far as regards any company liable to pay tax, the income thereof chargeable with tax shall . . . . . be the profits earned in or derived in or from Victoria by such company during the year immediately preceding the year of assessment."

Lord Dunedin, in delivering the judgment of their Lordships of the Privy Council in the case last referred to, at p. 1010 said:

"Holding, then, that the shareholders of this company are shareholders in an ordinary venture, the only question that remains is whether the surpluses realized represent profits. Their Lordships think that the principle is correctly stated in the Scottish case quoted, *Californian Copper Syndicate* v. *Harris* [(1904)], 6 F. 894. 'It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.' In the present case the whole object of the company was to hold and nurse the securities it held, and to sell them at a profit when convenient occasion presented itself. Their Lordships therefore come to the conclusion that there is ample evidence here that the company is a trading company and that the surplus realized by it by selling the assets at enhanced prices is a surplus which is taxable as profit."

It will be seen then that care must be exercised in applying the authorities as to whether the profit made is in respect of investment or trading and the authorities in each case require close study. In the present case there is the further and very pertinent point that the trading or business carried on by the

COURT OF APPEAL

1920

March 19.

IN RE TAXATION ACT AND THE ALL RED LINE, LTD.

appellant has been brought to an end and that which has been assessed has been treated by the appellant itself as profit in its accounts.

In the *Scottish Investment Trust Co., Limited* v. *Inland Revenue* (1893), 21 R. 262, where the company was authorized to raise money by share capital and invest the same in stocks and shares and to vary "the investments of the company and generally to sell, exchange or otherwise dispose or deal with or turn to account any of the assets of the company," it was

"*Held*, that gains made by the company by realizing investments at larger prices than those paid for them were to be reckoned as 'profits and gains' of the company, in the sense of the Property and Income-Tax Act, 1842, Schedule D."

I would refer to what the Lord President said at p. 266:

"My view of this company is, therefore, that its position in the present question is entirely distinguished from that of a private individual or an ordinary trader. Accordingly I think that it is wrong in its contention that increases on realization of stocks of the company are capital sums and therefore not liable to assessment for income-tax. As regards the sums in question, they are stated in the report of the company to be net profits on sales of securities during the year. There is nothing before us to shew that a wider view of the operations of the company would prove this statement to be misleading, and if the appellant company point to their third contention in the case—'In the year in which the tax is charged, the capital account of the company has had greater losses than profits, and the permanent loss on the capital account during the year has been considerable,'—I must observe that there is no statement of fact in the case to instruct it. This remark applies with the more force now that, after the various points had been mooted in debate, the case has been reconsidered and amended by the Commissioners."

MCPHILLIPS, J.A.

In the *Assets Co., Limited* v. *Inland Revenue* (1897), 24 R. 578, it was held by Lord Young and Lord Trayner, that when a person buys a doubtful debt and recovers a larger sum than he paid for it the gain is not profit in the sense of the Income Tax Acts unless the purchaser is making a trade of buying such debts. I would refer to what Lord Young said at pp. 586-7:

"I should say that I have really no doubt that any person or any company making a trade of purchasing and selling investments will be liable in income-tax upon any profit which is made by that trade. It is quite an intelligible business, just as intelligible as a trade consisting in the purchase and sale of goods in the ordinary trade of a merchant or shopkeeper. The trade is good or bad according as it is carried on profitably or not, and the profit arises from purchasing goods at the trader's price and in selling them at a retail price or wholesale price or larger price

than that which was paid for them. But it is another proposition altogether, that where no trade is carried on, a gain or loss upon the purchase and re-sale of property comes within the meaning of the Income-tax Acts. Take even proper traders. If proper traders sell their old premises and buy new ones, and sell the old premises at a higher price than they paid for them, investing the price which they get in the purchase of a site and the erection of new premises, I should say it was a totally untenable proposition that anything in excess of what they had paid for the old premises perhaps twenty years before, at a better time for purchasing property, is income within the meaning of the Acts. I do not think it is at all. It is no more so in the case of a trader than in the case of a private individual selling his house at more than he had paid for it, or selling his carriage or pictures at more than he paid for them. That is not income in any sense, although a dealer in pictures, like a dealer in goods or a dealer in the buying and selling of houses, who made it a trade, would come within the region of income-tax. But this company in realizing more for the debts which they had purchased were not making a trade of buying and selling debts. There is nothing to indicate that. Anybody who makes a trade of buying and selling doubtful debts will be liable, upon the principle which I have indicated, in income-tax upon any gain which he makes by that trade. But it is no part of this case that that was the trade of this company. They took over all the debts of the bank and they undertook to pay them. On the other hand, they got assigned to them all the debts due to the bank by doubtful debtors, and which the bank could not immediately realize, and which it was inconvenient for them to wait on for; they bought these. Is it to be said that they were making a trade of buying and selling doubtful debts? There is nothing to indicate that in the least. The proposition that where anybody purchases a doubtful debt and realizes more than he paid for it—there being only one purchase, and the purchaser not being a trader in that kind of thing—such gain is income, is, I think, a proposition which cannot be sustained."

It will be seen upon reading all of these authorities that there is a *ratio decidendi* running throughout them all based upon the statute law under review that profits are taxable, if in the language taken from *Californian Copper Syndicate* v. *Harris* (1904), 6 F. 894; 5 Tax Cases 159, approved in the *Commissioner of Taxes* v. *Melbourne Trust, Limited, supra,* "what is done is not merely a realization or change of investment but an act done in what is truly the carrying on, or carrying out of a business."

Now it was not disputed but is, I understood, admitted at this bar that the appellant was a Company with authority to buy and sell ships. It can, though, be assumed that that was not its principal business or really that for which it was incorporated—it would in any case possibly be an incidental power.

COURT OF APPEAL

1920

March 19.

IN RE TAXATION ACT AND THE ALL RED LINE, LTD.

MCPHILLIPS, J.A.

It therefore becomes necessary to give special attention to the statute law governing in the present case, and the question is, whether the tax imposed and claimed by the Crown and so far allowed to the Crown, is permissible taxation? Mr. *Carter*, the learned counsel for the Crown, in a very careful argument, discussed and distinguished the case here referred to, and greatly relied upon the British Columbia statute law as being ample in its terms and apt in its expression to authorize the tax as imposed. Now it is more extensive in its terms than the statute law under which the authorities cited dealt with and in what particular, even if deemed analogous, can it be said that the taxation is permissible? Dealing with the statute law, we have income as distinguishable from the English Act, covering "amount earned, derived, accrued, or received from any source whatsoever," also from "the product of capital," from "real and personal property," from "all ventures," also, "incomes, and profits of every business and every corporate undertaking, and every . . . business undertaking of every nature and kind whatsoever, howsoever arising, received, gained, or acquired." In view of this very comprehensive language, it is difficult indeed to claim that the judgment under appeal is erroneous. If the appellant was a going concern and the money realized from the sale of the ships was devoted to the purchase of other ships or to betterments in the undertaking, then assuming that the statute law is no stronger than the English Act, it would occur to me that there would be grave doubt about the validity of the challenged assessment, but the present case is not that case, and in this connection it is well to again bear in mind the quotation from the Scottish case approved in *Commissioner of Taxes* v. *Melbourne Trust, Limited, supra*:

> "But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business."

In the present case it is the closing out of a business, and in the closing of it out there is shewn and declared to be a certain profit; it is specific, it has been ascertained. That being the position of matters, why is it not assessable? I can see no possible, tenable or sustainable ground upon which the taxation can be excepted to and can only answer that upon the special

facts and circumstances here presented the assessment has, in my opinion, been validly imposed. I would, therefore, dismiss the appeal and sustain the judge of the Court of Revision and Appeal.

EBERTS, J.A. would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *J. H. Senkler.*
Solicitor for respondent: *W. D. Carter.*

OLSON v. BIETERILLA.

Contract — Agreement for service by labour — Remuneration by legacy — Repudiation—Quantum meruit.

The plaintiff and defendant entered into a verbal contract whereby the defendant agreed to leave all his property by will to the plaintiff in consideration of his looking after and rendering all necessary service on defendant's farm. The will was duly executed and delivered to the plaintiff. After the plaintiff had worked under the contract for about three years the defendant ordered him off the farm. Judgment was given for the plaintiff in the action on a *quantum meruit* for work done.

Held, on appeal, that on the evidence there was no repudiation of the contract by the defendant and the action should be dismissed.

Per MACDONALD, C.J.A.: If the defendant's conduct amounted to a repudiation of the contract the proper remedy was an action for damages.

APPEAL by defendant from the decision of SWANSON, Co. J., of the 25th of April, 1919, in an action for $548.50, for services rendered and materials supplied. The defence was that a verbal arrangement had been entered into between the parties whereby the defendant would make a will in favour of the

Statement

COURT OF APPEAL

1920

March 19.

OLSON v. BIETERILLA

plaintiff leaving him all his property in consideration for which the plaintiff was to look after the defendant's farm and render all necessary service thereon during the life of the defendant, and the will was duly executed and handed to the plaintiff who retained it. The plaintiff took charge and some time later brought his family to the farm. After being there for about three years the parties quarreled over some household matter and the defendant ordered the plaintiff out of the house. The plaintiff left, taking his family and household goods with him. The learned trial judge found that the agreement had been made, that the defendant had acted without good cause in turning the plaintiff out, and that his so doing constituted a repudiation of the agreement. By his conduct he made it impossible for the plaintiff to perform his contract to serve the defendant, and plaintiff was entitled to judgment on a *quantum meruit*.

Statement

The appeal was argued at Vancouver on the 14th and 17th of November, 1919, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellant: The question is whether there was a repudiation of the contract and if there was, whether the judge gave a proper measure of damages. The defendant was a squatter on a timber limit in the railway belt. After working under the contract the plaintiff wanted pay. My contention is there was no repudiation: see *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460 at p. 467; *Synge* v. *Synge* (1894), 1 Q.B. 466.

Argument

Abbott, for respondent: Olson worked under a contract of hiring before the contract in question and the woman Clement had been working there for five years previously. After being put out the plaintiff could do nothing and there was repudiation. The plaintiff is entitled to a *quantum meruit*: see *Smith* v. *McGugan* (1892), 21 A.R. 542; 21 S.C.R. 263; *Walker* v. *Boughner* (1889), 18 Ont. 448; *Giles* v. *McEwan* (1896), 11 Man. L.R. 150. As to a gift by will in connection with a contract see *Raser* v. *McQuade* (1904), 11 B.C. 161.

Mayers, in reply, referred to Halsbury's Laws of England, Vol. 28, p. 514.

Cur. adv. vult.

19th March, 1920.

COURT OF APPEAL

1920

March 19.

OLSON v. BIETERILLA

MACDONALD, C.J.A.: The learned County Court judge in a very exhaustive and carefully considered judgment dealt first with the question of the validity of the verbal contract entered into between the plaintiff and defendant, by which the defendant agreed to devise and bequeath to the plaintiff, all his (defendant's) property in consideration of the plaintiff assisting him with work on the farm. The will was actually made and delivered to the plaintiff.

There was considerable discussion as to the application of the Statute of Frauds to the verbal contract aforesaid, but as the statute was not pleaded, I do not find it necessary to enter into the consideration of that question.

The learned judge has found the contract was a valid one, and with his conclusion I agree.

Some two or three years after this arrangement had been entered into and some months after the plaintiff and his wife had come to reside in defendant's house, a thing not stipulated for in the contract, defendant in a moment of anger, ordered them out and this the learned judge has found to have amounted to repudiation of the contract, notwithstanding that during a subsequent meeting between the parties and their friends who intervened, the defendant stoutly declared that he stood by the agreement. I think, with respect, that no repudiation has been shewn. Ordering plaintiff and his wife and mother-in-law out of defendant's house cannot be said to indicate an intention not to be bound by the contract. Under the contract, they had no right to be there at all. If I am right in this conclusion, that is an end to the case, and the action ought to have been dismissed.

MACDONALD, C.J.A.

But there is another fatal objection to the plaintiff's right to succeed in this action as framed. He sues upon a *quantum meruit*. Now the services claimed and material alleged to have been supplied, were rendered and supplied before the said quarrel took place, that is to say, on the assumption of repudiation, there could be no *quantum meruit*. The services and supply of material are referable to an express contract and therefore there can be no implied contract, such as arises under the doctrine of *quantum meruit*.

COURT OF APPEAL

1920

March 19.

OLSON v. BIETERILLA

If the defendant's conduct already referred to, amounted to a breach of the contract or to a repudiation of it, which is more reprehensible than the ordinary breach, then the remedy was an action for damages, so that also in this view of the case, the action should have been dismissed.

There was some contention that a memorandum drawn up by friends of the parties in an endeavour to affect a reconciliation between them, purporting to set forth the claim of the plaintiff, his wife and mother-in-law for services and other things and which are itemized in the pleadings, and which memorandum was signed by the defendant, although not, as I think, sufficiently explained, amounted to a new agreement which took the place of the old one. Apart from the objection that the agreement, if it amounted to such, was made on Sunday,

MACDONALD, C.J.A.

an objection which I am not now considering, the weight of the evidence is that the defendant distinctly refused to promise payment, but reasserted his determination to stand by the agreement under which he had made the will. The learned judge makes no specific findings on this point, but in effect, I think, concluded that the plaintiff had not satisfied the burden of proof which rested upon him. I am of opinion that there was no new agreement.

It follows from what I have said that, in my opinion, the appeal should be allowed and the action dismissed with costs here and below.

MARTIN, J.A.: This is a peculiar case wherein the plaintiff has succeeded upon a *quantum meruit,* but the evidence establishes beyond any doubt that the original contract between the parties, found by the learned judge below as having been entered into, has never been rescinded, and the ground taken by the

MARTIN, J.A.

defendant, appellant, before us on which, in my opinion, he is entitled to succeed, is that he always has stood by and does now stand by and invoke the contract in pursuance of which he has executed his will in the plaintiff's favour and delivered it to him and which he still holds, according to the evidence. The fact that it is physically possible for the defendant to wrongfully revoke said will is no answer to his undoubted right to point to it now as the best evidence of the fact that he has

completed his part of the contract, of which, be it noted, it was not a term that the plaintiff or his family should be entitled to live with the defendant at his expense.

While a contract indeed to leave property by means of a will is open to violation, so likewise is a contract to convey property by means of a deed 10 or 20 years from now; there is always the risk of violation, but there is no assumption thereof, and there is no power in this Court to invalidate contracts simply because they are of a very risky nature. It is not at all strange that in a matter of this sort between foreigners essaying to deal with Crown land upon which the defendant was only a squatter, as the learned judge finds, difficulty and misunderstanding should have arisen, but it is to be hoped that now the legal situation is defined a way will be found to adjust equitably those differences, but so far as this Court is concerned the only order that can, in my opinion, be legally made is to allow the appeal and set aside the judgment below. MARTIN, J.A.

McPHILLIPS, J.A.: I am in entire agreement with the judgment of my brother MARTIN, and am of the opinion that nothing further can be usefully added. MCPHILLIPS, J.A.

The appeal should be allowed.

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

Appeal allowed.

Solicitor for appellant: *F. Temple Cornwall.*
Solicitor for respondent: *Henry L. Morley.*

MURPHY, J.

1919

June 25.

COURT OF APPEAL

1920

March 19.

JONES v. CITY OF VANCOUVER

JONES v. CITY OF VANCOUVER.

Municipal law — By-law — Pool-room — Wager on games prohibited — Validity.

A by-law of the City of Vancouver provided that the keeper of a billiard and pool-room should not permit any person to play on a licensed premises for a wager other than the price of the game. A motion to quash the by-law was dismissed.

Held, on appeal, affirming the decision of MURPHY, J., that the by-law is *intra vires* of the Council as it does not amount to prohibition but is within the province of regulation of pool-rooms. It does not create a new offence nor does it intrench in any way upon criminal law.

APPEAL by plaintiff from the decision of MURPHY, J., of the 25th of June, 1919, on a return of a rule *nisi* for the City of Vancouver to shew cause why by-law number 1352 should not be quashed on the grounds:

"1. That [it is] *ultra vires* of the Council . . . . . as affecting to exercise the power (a) to prohibit . . . . . the playing or taking part in any game [as set out in subsection (2) of section 11 of said by-law].

"2. That the said by-law is *ultra vires* of the Council . . . . . as affecting to exercise power (a) to constitute said certain lawful games, unlawful games; (b) to constitute keepers of billiard and pool-rooms, within the meaning of the said by-law, keepers of common gaming-houses, or common betting-houses, or both; (c) to constitute billiard and pool-rooms, within the meaning of the said by-law, common gaming-houses, or common betting-houses, or both; thereby trenching on the exclusive legislative power of the Parliament of Canada over the Criminal Law."

Statement

Subsection (2) of section 11 of said by-law is as follows:

"No keeper of a billiard and pool-room shall permit or allow any person to play or take part in any game on any billiard, pool or bagatelle table (in the premises occupied by him and for which a licence has been granted to him to keep such tables) upon the result of which there is any wager or stake other than the price of the game, which price shall not in any case be greater than the price usually charged for such game by such keeper."

Heard by MURPHY, J. at Vancouver on the 24th of June, 1919.

D. A. McDonald, K.C., for applicant.

Harper, for respondent.

25th June, 1919. MURPHY, J.

1919

June 25.

COURT OF APPEAL

1920

March 19.

JONES v. CITY OF VANCOUVER

MURPHY, J.: It is contended first, that subsection 2 of section 11 of the by-law is invalid because it does not regulate, but prohibits, what would, apart from its provisions, be lawful, reliance being placed on such cases as *Municipal Corporation of City of Toronto* v. *Virgo* (1896), A.C. 88. The true principle laid down by these decisions is, I think, that a municipal council cannot, under the guise of regulation, absolutely prevent the carrying on of what is a legal occupation. The provision complained of cannot be said to prevent the carrying on of the business of keeper of a billiard or pool-room. The contention, therefore, fails. Next, it is said that the subsection is invalid because it is in reality an enactment of criminal law and, therefore, encroaches upon the exclusive domain of the Dominion under the B.N.A. Act. I cannot agree. This subsection is no attempt at legislation binding on the general public. The prohibition it contains is addressed solely to keepers of billiard and pool-rooms, and is addressed to them because admittedly they cannot carry on such places unless licensed by the municipality. Clearly I think this is a matter of a merely local or private nature and, therefore, within the ambit of Provincial legislation. The penalties imposed are not imposed because a public wrong has been committed, but because of a violation of regulations relating to billiard and pool-rooms and to them only.

MURPHY, J.

Finally, it is said the subsection is unreasonable because passed after applicant had obtained a licence, to which it adds onerous conditions. It is now well settled that in matters (such as municipal by-laws) which directly or mainly concern the people, 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: *Kruse* v. *Johnson* (1898), 2 Q.B. 91. This being so, it is not for me to say that this particular action of the City Council is unreasonable, particularly as in an analogous case a somewhat similar prohibition was upheld: *Rex* v. *Laird* (1903), 6 O.L.R. 180. The application is dismissed.

MURPHY, J.

1919

June 25.

COURT OF APPEAL

1920

March 19.

JONES v. CITY OF VANCOUVER

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 24th of November, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

T. B. Jones, for appellant: We are attacking by-law No. 1362 of the City of Vancouver. Section 132 of Cap. 54, B.C. Stats. 1900, gives the Court jurisdiction to hear the appeal. We say, first, that the by-law purports to prohibit, whereas there is only the power to regulate, and secondly, it encroaches on the exclusive jurisdiction of the Dominion in dealing with a question of gain. As to the Council not being authorized to enforce such prohibition see *Virgo* v. *The City of Toronto* (1894), 22 S.C.R. 447; (1896), A.C. 88; *Rex* v. *Sung Chong* (1909), 14 B.C. 275. The by-law purports to create an offence against public morals and is directed against gaining: see *Russell* v. *The Queen* (1882), 7 App. Cas. 829. The criminal law is reserved to the Dominion: see *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A.C. 524. As to what can be made an offence by the Provincial Act, the cases with relation to the Lord's Day Act applies: see *Regina* v. *Wason* (1890), 17 A.R. 221; *Regina* v. *Shaw* (1891), 7 Man. L.R. 518; *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502; *Regina* v. *Keefe* (1890), 1 Terr. L.R. 280. This is a public wrong and comes within the criminal law: see *In re Narain Singh* (1908), 13 B.C. 477. Wager is gaming and betting is gaming. Betting under the Code is not a crime and the by-law, being directed against gaming, is creating a new offence: see *Rex v. Walden* (1914), 19 B.C. 539; *Drapeau* v. *Recorder's Court* (1918), 43 D.L.R. 309; *Upton* v. *Brown* (1912), 3 W.W.R. 626; *La Corporation de la Paroisse de St. Prosper* v. *Rodrigue* (1917), 56 S.C.R. 157.

Harper, for respondent: This is not prohibition. It is a condition of his carrying on his occupation: see *Re Crabbe and Swan River* (1913), 23 Man. L.R. 14; 23 W.L.R. 372. By-laws are properly passed that you cannot play billiards in certain hours: see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Rex* v. *Laird* (1903), 6 O.L.R. 180; *Re Neilly et al. and the Town of Owen Sound* (1875), 37 U.C.Q.B. 289. A

gambling house can only be dealt with by the Parliament of Canada but not a billiard room: see Meredith's Municipal Manual, 247.

Jones, in reply.

Cur. adv. vult.

19th March, 1920.

MACDONALD, C.J.A.: The observations of Lord Hobhouse, in *Slattery* v. *Naylor* (1888), 13 App. Cas. 446 at pp. 449-50, seem to me to be particularly apposite to the situation here. He said:

"It is difficult to see how the Council can make efficient bye-laws for such objects as preventing fires, preventing and regulating places of amusement, regulating the killing of cattle and sale of butcher's meat, preventing bathing, providing for the general health, not to mention others, unless they have substantial powers of restraining people, both in their freedom of action and in their enjoyment of property."

The prohibition of betting which is said in the case at Bar to invalidate the by-law, is, I think, clearly aimed at regulation, and therefore *intra vires* of the Council.

I would dismiss the appeal.

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

In support of the submission that the by-law is *ultra vires,* reliance was placed on the two cases of *Municipal Corporation of the City of Toronto* v. *Virgo* (1896), A.C. 88; 65 L.J., P.C. 4, and *Rex* v. *Sung Chong* (1909), 14 B.C. 275; 11 W.L.R. 231, but neither of these is similar to the present, because the first was a total prohibition of the business of hawkers as regards area, *viz.,* "the most important part of the city for the class of traders in question," (p. 94 (1896), A.C.); and the second was a total prohibition as regards time, *viz.,* of the same class of traders during certain hours on market days. These cases have clearly no application to the present, where there is no prohibition as regards place or time, but simply that there shall not be attendant circumstances which are considered detrimental to the public interest in the carrying on of the business, which is recognized as lawful; this is manifestly merely regulation.

MURPHY, J.

1919

June 25.

COURT OF APPEAL

1920

March 19.

JONES v. CITY OF VANCOUVER

MACDONALD, C.J.A.

MARTIN, J.A.

MURPHY, J.

1919

June 25.

COURT OF APPEAL

1920

March 19.

JONES v. CITY OF VANCOUVER

Then reliance was placed on the case of *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502; 20 Can. Cr. Cas. 458, in support of the submission that this by-law in effect created a new offence against public morals and therefore was an infringement upon the Federal jurisdiction of criminal law. But an examination of that case shews that it does not in any way support the submission, the Court being of the opinion that "the evident object [of the statute therein] was to conserve public morality and to provide for the peace and order of the public on the Lord's Day" (p. 507), which of course was a clear encroachment on Federal jurisdiction and could in no sense be regarded as a "local, municipal or police regulation" (p. 505). Despite which it was pointed out in that case (p. 526) by Mr. Justice Duff that even in the cases of criminal law under the Lord's Day observance legislation, Sunday-closing provisions in connection with the liquor trade were lawfully enforced in most of the Provinces, and Mr. Justice Anglin pointed out that the Act was only *ultra vires* because the legislation in question

"indicates unmistakably that [its] purpose is to make what the Legislature deemed suitable provision 'respecting the observance of Sunday' in the Province" (p. 529).

MARTIN, J.A.

I am unable to see any similarity in principle between that case and the one at Bar, which is simply one wherein a lawful business is allowed to be carried on, but regulated by the fact that certain harmful attendant circumstances must be excluded from such carriage, which circumstances might be of various kinds, in the opinion of the municipal corporation, such as drunkenness, profanity, gambling, or disorderly conduct, etc., and I am entirely in accord with the view taken by the Manitoba Court of Appeal in *Re Crabbe and Swan River* (1913), 23 Man. L.R. 14 at p. 19; 3 W.W.R. 1047; 23 W.L.R. 372; wherein it was said that "the Courts must not be too astute in finding grounds for holding by-laws invalid on such refined grounds." It follows that the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal. I am clear that the section in question in the by-law is governing and regulating, and not prohibiting. *Municipal Corporation of City of Toronto* v. *Virgo* (1896), A.C. 88, is not in point. I

am also clear that it creates no new offence and does not in any way trench upon the criminal law. The principle is fully discussed in the cases cited.

McPHILLIPS, J.A.: In my opinion Mr. Justice MURPHY arrived at the right conclusion in refusing to quash the challenged by-law. It is clear to me that the applicant, the holder of a billiard and pool-table licence accepted the same subject to the provisions of the then existent by-laws of the City of Vancouver, and such further by-laws as might rightly be passed regulating and governing the carrying on of a billiard and pool parlor.

Now, by-law No. 1362 was passed on the 27th of May, 1919, the licence being dated the 8th of January, 1919. The challenged part in the by-law (No. 1362) reads as follows, section 11, subsection 2: [already set out in statement.]

It was urged, firstly, that the by-law was *ultra vires* of the mayor and council and trenched upon the powers of the Parliament of Canada. This point may be immediately dismissed by stating that it cannot be successfully established that the by-law in any way is relative to the keeping of a common gaming-house, a crime which admittedly could only be dealt with by the Parliament of Canada, and were it that, the Provincial Legislature could not empower a municipality to pass by-laws upon or deal with any such subject. Secondly, that that which has been done amounts to a prohibition, not merely a regulation. The power the municipality has in the matter is set forth in subsection (99) to section 125 of the Vancouver Incorporation Act, 1900 (Cap. 54, B.C. Stats. 1900), which reads as follows:

"For licensing, regulating and governing all persons who for hire or gain, directly or indirectly, keep or have in their possession or on their premises any billiard, pool, or bagatelle table, or who keep or have a pool, billiard, or bagatelle table in a house or place of public entertainment or resort, whether such pool, billiard, or bagatelle table is used or not."

It is abundantly evident that the by-law under review is in the subject-matter objected to plainly "regulating and governing," and that being the case, no valid objection can be maintained.

MURPHY, J.

1919

June 25.

COURT OF APPEAL

1920

March 19.

JONES v. CITY OF VANCOUVER

MCPHILLIPS, J.A.

In *Municipal Corporation of Toronto* v. *Virgo* (1895), 65 L.J., P.C. 4 at p. 7, Lord Davey said:

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and, to a certain extent, as to place, where such restrictions are, in the opinion of the public authority, necessary to prevent a nuisance, or for the maintenance of order."

Here it may be well said, that that which is aimed at is the maintenance of good order and good government in the billiard parlor, and from the municipal authority solely goes the right to maintain a billiard parlor, being a place of public entertainment and resort. It is an understandable provision and in the interests of the public, and cannot be said in its provisions to be at all unreasonable (*Kruse* v. *Johnson* (1898), 67 L.J., Q.B. 782).

In *London County Council* v. *Bermondsey Bioscope Co.* (1910), 80 L.J., K.B. 141, Lord Alverstone, C.J. at p. 144 said:

"This case is an illustration of the well-recognized principle that where there is a competent authority to which an Act of Parliament entrusts the power of making regulations, it is for that authority to decide what regulations are necessary; and any regulations which they may decide to make should be supported, unless they are manifestly unreasonable or unfair."

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

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *T. B. Jones.*
Solicitor for respondent: *E. F. Jones.*

PETERSON v. VANCOUVER GAS COMPANY, LIMITED LIABILITY, AND KEILLOR.

MURPHY, J.

1919

Sept. 25.

COURT OF APPEAL

1920

March 19.

PETERSON v. VANCOUVER GAS CO.

Practice—Examination for discovery—False imprisonment and malicious prosecution—Information upon which prosecution was commenced—Steps taken by defendant.

In an action for malicious prosecution (the plaintiff having been acquitted on a charge of stealing gas, brought by defendant) the witness who was an officer of the defendant Company, refused to answer questions on examination for discovery directed to the point of reasonable and probable cause. An application to strike out the defence because of such refusal was dismissed, it being held that in the absence of special circumstances the Court will not order such questions to be answered on the ground of public policy following *Maass* v. *Gas Light and Coke Company* (1911), 2 K.B. 543, and it was further held that the principle was equally applicable to examination for discovery as by way of interrogatories.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A. (reversing the decision of MURPHY, J., in part), that the test as to questions not being answered on the ground of public policy is whether they are calculated to discourage the giving of information leading to the investigation and punishment of crime; if, therefore, the inquiries are directed to persons and the information is from persons, the rule against disclosing its sources must prevail, but the rule is inapplicable when the questions are directed to witnesses' enquiry into circumstances and his information obtained by personal inspection of things the disclosure of which does not tend to hamper the administration of justice.

Per MARTIN and MCPHILLIPS, JJ.A.: That the appeal should be allowed and the examination proceed *de novo*.

APPEAL from an order of MURPHY, J., of the 29th of September, 1919, dismissing the plaintiff's application to strike out the defence by reason of the refusal of the defendant Keillor to answer questions submitted to him on behalf of the plaintiff on his examination both personally and as an officer of the defendant Company. Heard at Chambers in Vancouver on the 24th of September, 1919. The action was for damages for false arrest and imprisonment and malicious prosecution, the defendant having preferred a charge on the 30th of May, 1919, that the plaintiff, on the 29th of May, stole gas, the property of the defendant Company, and a second charge was preferred on

Statement

MURPHY, J.

1919

Sept. 25.

COURT OF APPEAL

1920

March 19.

PETERSON v. VANCOUVER GAS CO.

Statement

the 4th of June, that on the 30th of May he stole gas. On the first charge a warrant was issued and the plaintiff was arrested and imprisoned. Both charges were dismissed by the magistrate. On the examination of the defendant Keillor for discovery, on advice of counsel, he refused to answer any question disclosing the facts and circumstances upon which he preferred the charges. *Inter alia* the defendant refused to answer the following questions:

"Was it you who gave Carper instructions to go to the house in question on the night of the 29th of May?

"Was Carper at that time your superior or inferior officer?

"What instructions did you give Carper with regard to the matters in question?

"What is Carper's position with the defendant Company?

"Did you make any inquiries from Mrs. Tewson with regard to the action in question before swearing out the information against Peterson?

"Did you make any inquiries from Mrs. Tewson after swearing out the information?

"When did you first see Mrs. Tewson with regard to the matters in question?"

Arnold, for the application.

McPhillips, K.C., contra.

25th September, 1919.

MURPHY, J.: In so far as the questions which defendant refused to answer were directed to the point of reasonable or probable cause, it seems clear, as in authority of *Maass* v. *Gas Light and Coke Company* (1911), 2 K.B. 543, that in the absence of special circumstances, the Court will not order such questions to be answered on discovery. The principle of the decision is equally applicable to discovery by way of examination as by way of interrogatories, for it is based on the ground of public policy. The case of *Humphrey* v. *Archibald* (1893), 20 A.R. 267, a decision on the discovery by examination made, holds definitely that the name of informant, whose information led to the prosecution, cannot be asked on discovery examination. No special circumstances were shewn to exist here. I did not carefully consider each question, and it may be that some of them should be answered. If so, the matter may be spoken to again, but answers to all questions directed to reasonable and probable cause were properly refused in this case, no special circumstances having been shewn.

MURPHY, J.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 24th and 25th of November, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

MURPHY, J.

1919

Sept. 25.

COURT OF APPEAL

1920

March 19.

PETERSON v. VANCOUVER GAS CO.

J. A. MacInnes, for appellant: The order was that in actions of this nature plaintiff cannot have discovery evidence on questions of reasonable and probable cause, following *Maass* v. *Gas Light and Coke Company* (1911), 2 K.B. 543, but that case does not apply to examination for discovery. It was decided on a question of interrogatories. Examination for discovery is *ex debito justitiæ* and he is subject to the same cross-examination as a witness on trial: see *Bank of B.C.* v. *Trapp* (1900), 7 B.C. 354; *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23; *McInnes* v. *B.C. Electric Ry. Co.* (1908), 13 B.C. 465. On the exclusion of evidence on ground of public policy see Phipson on Evidence, 5th Ed., 180-5; Taylor on Evidence, 10th Ed., 641, 666-7; Best on Evidence, 11th Ed., 557; *Attorney-General* v. *Briant* (1846), 15 M. & W. 169; *Marks* v. *Beyfus* (1890), 25 Q.B.D. 494; *Humphrey* v. *Archibald* (1891), 21 Ont. 553; (1893), 20 A.R. 267. This is different from the case of protection afforded a public officer, and he is not entitled to the privilege granted in such cases.

Argument

McPhillips, K.C., for respondents: This is a case where the judge has used his discretion and the Court will not interfere. *Maass* v. *Gas Light and Coke Company* (1911), 2 K.B. 543, applies as well to discovery as it does in the case of interrogatories, as it is founded on the doctrine of public policy not to disclose the names of informants.

MacInnes, in reply.

Cur. adv. vult.

19th March, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal from an order of MURPHY, J., dismissing an application to strike out the statement of defence because of the refusal of the defendant, Keillor, to answer questions on examination *viva voce* for discovery. He was being examined as a defendant and also as an officer of the defendant Company.

MURPHY, J.

1919

Sept. 25.

COURT OF APPEAL

1920

March 19.

PETERSON v. VANCOUVER GAS CO.

MACDONALD, C.J.A.

The action is for malicious prosecution of the plaintiff at the instance of the witness acting as such officer, for the theft of gas. The refusal to answer the questions was based on the principles affirmed by the Court of Appeal in *Maass* v. *Gas Light and Coke Company* (1911), 2 K.B. 443.

Before entering into the subject as to whether any of the questions fall within the class of questions which English Courts have not compelled a party to whom interrogatories had been exhibited to answer, I wish to make some observations upon the argument advanced by counsel for the defendants, that owing to the difference between our Rules of Court and English rules, the English cases are inapplicable here. Our rules provide for interrogatories as do the English rules, but are supplemented by rules, not found there, permitting *viva voce* examination of parties for discovery. Under the latter, one party may compel his adversary to attend before an examiner and "testify in the same manner, upon the same terms and subject to the same rules of examination as a witness," and it is also provided that "any one examined orally under these rules shall be subject to cross-examination and re-examination; and the examination, cross-examination and re-examination shall be conducted as nearly as may be as at a trial." These rules may in some respects be wider and in others narrower than the English rules respecting interrogatories, but they do not, in my opinion, interfere any more than do the English rules with the inherent power of the Court to exclude evidence on grounds of public policy.

The objections to answering the questions are founded on the grounds referred to by Cozens-Hardy, L.J., in his reasons, concurred in by the majority of the Court, in the above-mentioned case, and as I understand them as therein stated, and by reference to other authorities on the subject, they are grounds of public policy.

I am inclined to think that the following observations of the Lord Justice have been given in the argument of plaintiff's counsel too wide a meaning. "'What information,' 'what steps,' 'what grounds,' 'what precautions,' 'what inquiries,' necessarily involve the source of the information, and the appel-

lant's counsel admitted that this was the object of the interrogatory."

Now I think the real test is, were the questions such as to trench on the policy aforesaid, that is to say, were they calculated to discourage the giving of information leading to the investigation and punishment of crime? The words "information" and "inquiry" are not necessarily confined in their meanings to inquiries made and information obtained from persons. One may inquire into circumstances and inform oneself by personal inspection of things, and the disclosure of these sources of information may have no tendency whatever to hamper the administration of justice. If, however, the inquiries are directed to persons, and information is from persons, the rule against disclosing its sources must prevail, but in my opinion, that rule is inapplicable when, for instance, the witness had examined the *locus in quo* and from his own observations had informed himself as to the facts bearing on the guilt or innocence of the accused.

I apprehend that Cozens-Hardy, L.J., when he used the expressions aforesaid, had in mind inquiries and information of the first-mentioned character only. That is confirmed by what he himself has said in his reasons, where he points out that the interrogatory could not be useful, or indeed, fairly answered without in effect disclosing names, and this language, I take it, is also applicable in the particular circumstance of that case to the other expressions set out above, namely, "What steps, what grounds, what precautions."

We have this advantage however, that our *viva voce* rules give greater elasticity than do the English rules. Under ours the enquiry may be carried on up to the point at which it becomes apparent that the questions are directed to disclosures which it is against the policy of the law to compel an answer, and may then be stopped.

I think a true understanding of the ground of objection to questions of the character under consideration will clear away much of the uncertainty which has existed as to the bounds within which questions of this sort should be kept. These bounds are, in my opinion, the same, whether the questions are

MURPHY, J.

1919

Sept. 25.

COURT OF APPEAL

1920

March 19.

PETERSON v. VANCOUVER GAS CO.

asked by way of interrogatory, by way of discovery *viva voce* or at the trial. In either case, the decision will be influenced by the nature of the case, and the rule excluding questions contrary to public policy will only be relaxed under special circumstances.

Coming, then, to the particular questions under review, I cannot see fault in any of them up to and inclusive of question 59. With respect to these, so far as counsel has proceeded, he has not shewn an intention to elicit information of an objectionable character. Questions 60, 61, 62 and 63, however, tend, I think, to trench indirectly upon the rule which I have endeavoured to explain, and questions 64, 65 and 66 clearly violate it. Questions 67, 68, 69 and 72 are not directed to sources of information, but to the motives which actuated the defendant in instituting the prosecution. These questions, I think, should be answered. Questions 74 and 75 should be answered, short of disclosing the identity of persons giving the information aimed at.

MACDONALD, C.J.A.

The result is that all the questions objected to, with the exception of questions 60 to 66, both inclusive, should be answered. The witness must attend at his own expense before the examiner and answer these questions, and the defendants should pay the costs here and below of his refusal, except such as relate to the questions lastly above mentioned, the costs relating to which must be paid by the plaintiff.

MARTIN, J.A.

MARTIN, J.A. would allow the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I am in agreement with the Chief Justice with the one exception, that in my view questions 60, 61, 62 and 63 are proper questions to be answered.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the judgment of my brother MARTIN as to the law that governs in respect to examinations for discovery where the question of public policy arises, and with the reasons for judgment enunciating the principles.

I, however, reserve giving opinion as to the relevancy of or right to put and have answered any of the questions. Without itemizing, it may be well stated that some of the questions are

not permissible, but as the learned trial judge refrained from dealing with the questions specifically, I do not consider that this Court is called upon to do so.

Further, as a matter of practice where questions are objected to, the party proceeding to obtain an order compelling the answering thereof should put the questions in a concrete form not embarrassed by anything that has gone before in the examination, so that the question of context does not arise, admitting of the questions being considered apart from all other parts of the examination. In my opinion, the appeal being necessary, it must be allowed, but the examination will be proceeded with *de novo*.

Appeal allowed in part.

Solicitors for appellant: *McInnes & Arnold.*
Solicitors for respondents: *McPhillips & Smith.*

REX v. CALBIC.

Constitutional law—Statute—Construction—By-laws—Regulation of trade—Express power to prohibit—Interference with "trade and commerce"—B.C. Stats. 1900, Cap. 54; 1915, Cap. 72, Sec. 19; 1918, Cap. 104, Sec. 7—Vancouver City by-laws, Nos. 1359 and 1370.

Section 7 of the 1918 amendment of the Vancouver Incorporation Act, 1900, which provides "that the City may if it should deem it advisable to do so, arrange all motor-vehicles in classes and differentiate in the conditions contained in licences granted and the licence fees imposed on the owners of motor-vehicles coming within one and the same class and on owners of motor-vehicles coming within different classes, or prohibit the operation on any or all of its streets of all motor-vehicles coming within any of such classes," is not *ultra vires* of the Legislative Assembly as being an interference with trade and commerce in violation of section 91(2) of the British North America Act.

Where the statutory power conferred upon the City to make by-laws respecting vehicle and motor traffic contains express power to prohibit, the City Council may pass by-laws prohibiting certain classes of vehicles from driving or operating on its streets.

COURT OF APPEAL

1920

April 6.

REX v. CALBIC

Municipal Corporation of City of Toronto v. *Virgo* (1896), A.C. 88 distinguished.

The power given to the City to "arrange all motor-vehicles in classes and differentiate in the conditions contained in licences granted" is not restricted to classification of the vehicles themselves, but extends to the routes or areas over which they run or within which they operate.

APPEAL by accused from an order of MORRISON, J., of the 22nd of October, 1919, refusing a writ of *certiorari,* the accused having been convicted by the police magistrate in Vancouver on a charge that he unlawfully drove a motor-vehicle in the City of Vancouver, coming within class "B" as defined by section 11(1) of by-law 1359, as amended by by-law 1370 of the City of Vancouver. Section 11(1) of the by-law provided that for the purpose of the by-law all motor-vehicles be arranged in classes. Class "B" is as follows:

"This class shall include every motor-vehicle which accepts, carries and discharges as passengers such persons as may offer themselves for transportation at or near the terminus of the route traversed by such motor-vehicle," etc.

And section 11(2) provides that,

"No person shall, after the passing of this by-law, drive or operate, or permit to be driven or operated, on any of the streets of the City, any motor-vehicle coming within Classes 'A' or 'B.'"

It appeared by the evidence that accused, who ran his car between Vancouver and New Westminster, was taking on and discharging passengers at the terminus of his run within the City of Vancouver.

Statement

The appeal was argued at Vancouver on the 11th of December, 1919, and the 13th of January, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

R. M. Macdonald, for appellant: The by-law is directed at jitneys, and the statute does not justify the by-law. It is the construction put on the Act by the city council that has rendered the by-law *ultra vires.* The Act must be strictly construed and the council must not go beyond the powers conferred by the Act. The discrimination established by the by-law against class "B" (therein defined) and permitted to other classes is not authorized by the Act, and the by-law is bad on its face, as evidently passed for the sole purpose of giving a monopoly of the business of carrying passengers, and said

by-law should have received the assent of the electors. The Act is *ultra vires,* as the Legislature has not the absolute and unqualified right to prohibit.

[MACDONALD, C.J.A.: The argument will be adjourned until the 13th of January in order that the Minister of Justice and the Attorney-General may be notified that the validity of the Act is in question.]

13th January, 1920.

Class "B" of section 11(1) of the by-law is an interference with trade and commerce, which belongs to the Dominion only: see *Attorney-General for Canada* v. *Attorney-General for Alberta, &c.* (1916), 85 L.J., P.C. 124. When the Provincial Legislature attempt to prohibit as distinguished from regulation it is beyond its powers, and here they prohibit the issuing of licences to those coming under class "B," which is *ultra vires*: see *Bonanza Creek Gold Mining Co., Lim.* v. *Regem* (1916), 85 L.J., P.C. 114; *Attorney-General for Alberta* v. *Attorney-General for Canada* (1914), 84 L.J., P.C. 58. Here the offence is picking up passengers at terminus of route: see *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502 at p. 519; *Rex* v. *Walden* (1914), 19 B.C. 539; *Regina* v. *Shaw* (1891), 7 Man. L.R. 518 at p. 520.

Argument

Orr, for respondent: On the question of classification the Legislature has given the City power in its discretion, and the ambit of the whole Act is user of the streets. If they classify in a reasonable way in their discretion they come within the Act, and there is no limit to the word "classification." The Act gives them power to prohibit. The City has made a class and then has prohibited. The Court should, as far as it can, uphold by-laws.

Macdonald, in reply, referred to Meredith's Municipal Manual, p. 254, and *In re Glover and Sam Kee* (1914), 20 B.C. 219.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.: The facts in this case are analogous to those in question in *Municipal Corporation of City of Toronto* v. *Virgo* (1896), A.C. 88, with this difference, that there the

MACDONALD, C.J.A.

COURT OF APPEAL

1920

April 6.

REX v. CALBIC

municipality had not been given by the Legislature power to prohibit but only to regulate. Here the by-law does not transgress the power given by the Legislature.

There was some argument directed to the jurisdiction of the Legislature to confer the powers exercised by the city council, but I entertain no doubt of the jurisdiction.

MARTIN, J.A.: At the argument the first point raised by the appellant's counsel respecting the constitutionality of the by-law was not plausible enough to justify our calling upon the respondent's counsel to reply to it, and we only desired to hear him upon the question of classification raised by section 7 of Cap. 104 of 1918, which provides that:

"The City may, if it should deem it advisable to do so, arrange all motor-vehicles in classes and differentiate in the conditions contained in licences granted . . . ."

It is submitted that the only classification open under this section is restricted to the vehicles themselves and does not extend to the routes or areas over which they run or within which they operate, or otherwise.

Now a power to classification, to be exercised as the donee "should deem it advisable," is a very wide one, and I am quite unable to see upon what ground it should be cut down, as suggested, far below its ordinary meaning.

MARTIN, J.A.

What the city has made here is undoubtedly a classification of a reasonable kind, based partly upon the style of the vehicles, or their routes or areas (or "zones") or place of hiring or the fares charged, a combination of all of which elements is to be found in, *e.g.*, class "C," dealing with a particular style of motor-vehicle, *viz.*, "taxi cabs or touring cars," hired from public stands or garages, operating on unspecified routes and charging a minimum fare of 25 cents. Now this is a classification upon four distinct bases, *viz.*, the vehicle itself, the place of hiring, the route of operation and the fare charged, and so embraces the very element which is conceded to be *intra vires*.

Then class "D" relates to "sight-seeing trip" motors, a well-known feature of our tourist traffic requiring a special type of car, not used in carrying passengers in the ordinary way; class "E" with hotel motor-buses; class "F" with ambulances and

hearses; and class "G" with vehicles operating on a particular route, from Woodward's Landing to the Vancouver post office; all of which shews how varied the classification must necessarily be to cover the various kinds of traffic, and how unreasonable it would be to attempt to curtail it in the manner suggested.

The appeal should, in my opinion, be dismissed.

GALLIHER, J.A.

GALLIHER, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appeal, in my opinion, is a hopeless one. The conviction was one for the unlawful driving of a motor-vehicle coming within class "B" as defined in subsection (1) of section 11 of by-law number 1359, as amended by by-law number 1370 of the City of Vancouver, passed in pursuance of Cap. 104 of B.C. Stats. 1917, Sec. 7.

The offence was clearly proved, but it is attempted to quash the conviction upon proceedings by way of *certiorari,* the contention being that the Legislature, in passing the enactment under which the challenged by-law was passed, exceeded its powers, that is, the legislation was *ultra vires* of the Legislative Assembly of the Province of British Columbia, the express exception being that it is an interference with trade and commerce, and thereby transcends Provincial authority under the British North America Act. Other grounds were taken even if it were assumed that the point of *ultra vires* was not fatal, such as discrimination between rival businesses, that there was no power of delegation of authority from the Legislature to the municipal corporation, that the by-law was not *bona fide,* but passed for the purpose of creating a monopoly, and that it was necessary to have the assent of the electors to the by-law, which was not obtained.

The motion for the writ of *certiorari* came before MORRISON, J., who dismissed the same, and now the appeal to this Court is presented upon the same grounds as contained in the motion made to the Court below.

The *ultra vires* ground of appeal was the one most strenuously pressed. With all deference to the very able argument of Mr. *R. M. Macdonald,* the learned counsel for the appellant,

COURT OF APPEAL

1920

April 6.

REX v. CALBIC

I cannot see that the legislation in any way offends against the provisions of the British North America Act, or that it is beyond the power of the Legislature to prohibit the plying for hire of certain named and described vehicles in and throughout the boundaries of any municipality, without the boundaries thereof, and generally throughout the Province, and the delegation of authority to the municipal corporations to pass by-laws so prohibiting the same. Wherein does this affect trade and commerce? I cannot see that there is any invasion of the domain of legislation exclusively vested in the Parliament of the Dominion.

It is idle to contend that the effect of the legislation is the dislocation of all business, or the inhibition of all travel. It might well be said to be merely regulatory and the exercise of control over the streets of the City, and what class of vehicles may pass over the same. The by-law is not attacked as being unreasonable, but in any case, with the power of prohibition conferred upon the municipal authority and that power implemented by the passage of the by-law, the by-law has the force of statute law, and if it does not in its effect transcend the powers committed to the Provincial Legislature, it must be upheld and obeyed.

MCPHILLIPS, J.A.

As in my opinion the legislation was *intra vires* of the Legislative Assembly of British Columbia, I am in agreement with the judgment of the Court below.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Bird, Macdonald & Co.*
Solicitors for respondent: *MacKay & Orr.*

DRAKE v. CARTER.

COURT OF APPEAL

1920

March 19.

DRAKE v. CARTER

Pleading—Expiration of time for bringing action—Application to amend—Substantially same cause of action—R.S.B.C. 1911, Cap. 13, Sec. 31.

The plaintiff brought action on four promissory notes. The writ was specially indorsed and at the end of the claim, below the solicitor's signature was a note "The defendant is sued as the assignee for the benefit of the creditors of Joshua Z. Strong." After the time within which the action should be brought under the Creditors' Trust Deeds Act had expired an application to amend by striking out the special indorsement and substituting a new statement of claim was granted.

Held, on appeal, that as the amended claim was substantially the same as that originally made there being no new cause of action, the old cause being merely restated in proper form which the original claim failed to do, the order was properly made.

Mercer v. *B.C. Electric Ry. Co.* (1912), 17 B.C. 465 applied.

APPEAL by defendant from an order of MURPHY, J., of the 10th of October, 1919, granting leave to amend the statement of claim. The plaintiff held four promissory notes payable by one Strong, who assigned for the benefit of his creditors to the defendant Carter. The plaintiff brought action, the writ being specially indorsed, the claim reading in part as follows: "The plaintiff's claim is for the sum of $8,438.46 as maker of four promissory notes dated at Vancouver and payable on demand to the order of the plaintiff," etc., and at the end, below the solicitor's signature, was a note as follows: "The defendant is sued as the assignee for the benefit of the creditors of Joshua Z. Strong." After the time within which the action should be brought had elapsed, the application was made to amend by striking out the special indorsement and substituting a new statement of claim. The proposed amendment shewed clearly that the claim was against the defendant as assignee for the benefit of the creditors of Strong, and after giving particulars of the claim substantially as in the special indorsement, paragraphs were added setting forth the appointment of the defendant as assignee, that proofs of claim were furnished pursuant to the statute and the assignee had given notice of contestation. Then instead of claiming the specific sum men-

Statement

COURT OF APPEAL

1920

March 19.

DRAKE v. CARTER

tioned in the special indorsement, the plaintiff asked for a declaration that he be entitled to rank against the estate for the amount of his claim along with the other creditors.

The appeal was argued at Vancouver on the 25th and 26th of November, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

J. A. MacInnes, for appellant: The amendment granted sets up an entirely new case, which is barred by section 31 of the Creditors' Trust Deeds Act. There was no application to extend the time, and the time within which application for extension should be made under the Act had expired before application for amendment. He is sued personally on the indorsement. When the time has expired an extension cannot be granted: see *Laursen* v. *McKinnon* (1913), 18 B.C. 10; *Glengarry Election Case* (1888), 14 S.C.R. 453; *Doyle* v. *Kaufman* (1877), 3 Q.B.D. 7 and 340; *Bailey* v. *Owen* (1860), 9 W.R. 128. They will not allow an amendment to be made to recover a dead and gone cause of action: *Hewett* v. *Barr* (1891), 1 Q.B. 98; Annual Practice, 1919, p. 454. Where the proposed amendment works an injustice on the defendant it will not be made: see *Steward* v. *North Metropolitan Tramways Company* (1886), 16 Q.B.D. 556 at p. 558; *Weldon* v. *Neal* (1887), 19 Q.B.D. 394; *Hudson* v. *Fernyhough* (1889), 61 L.T. 722; *Lancaster* v. *Moss* (1899), 15 T.L.R. 476; *Hogaboom* v. *MacCulloch* (1897), 17 Pr. 377; *Elmsley* v. *Harrison, ib.* 425 at p. 437. A pleading in an action is the precise and definite form of his action, and an assignee is totally different from an individual: see also Parker on Frauds on Creditors and Assignees.

Argument

Sir C. H. Tupper, K.C., for respondent: The section is the same as in the Ontario Act. This is simply a case of slip and the slip rule applies, the only change being from the defendant in his personal capacity to that of assignee: see *Grant* v. *West* (1896), 23 A.R. 533. As to the Statute of Limitations see *Jones* v. *Davenport* (1900), 7 B.C. 452. The time may be extended as well after the expiration of the period as before: see *Banner* v. *Johnston* (1871), L.R. 5 H.L. 157 at p. 172. This case is the same as *Russell* v. *Diplock-Wright Lumber Co.*

(1910), 15 B.C. 66; see also *Challinor* v. *Roder* (1885), 1 T.L.R. 527. In the case of *Doyle* v. *Kaufman* (1877), 3 Q.B.D. 7, the right had gone, but we saved it, as our cause of action is not changed: see *Smalpage* v. *Tonge* (1886), 17 Q.B.D. 644; *Mercer* v. *B.C. Electric Ry. Co.* (1912), 17 B.C. 465.

MacInnes, in reply.

Cur. adv. vult.

19th March, 1920.

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

The amended claim is substantially the same as that originally made; no new cause of action is pleaded by the amendment. It is the old cause restated in proper form, which the original statement of claim failed to give it. The case is analogous to *Mercer* v. *B.C. Electric Ry. Co.* (1912), 17 B.C. 465, in which an amendment of like nature was allowed by this Court.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion the discretion to amend was rightly exercised, there being an obvious clerical slip and omission in copying of a number of words in the statement of claim, which if they had been inserted in the way indicated in the note at the end of the claim would have covered the point in question, *viz.,* had they read, "The plaintiff's claim is for the sum of $8,438.46 *against defendant as the assignee of Joshua Z. Strong* as maker of four promissory notes," etc., said omitted words (without which the claim is inoperative and unintelligible, as it names no one against whom relief is sought, or even as maker) I have put into italics to shew this.

MARTIN, J.A.

The matter therefore should be dealt with on that basis and not on that in which a different rule may be applied in another class of amendments, and the appeal should be dismissed.

GALLIHER, J.A.: I think the learned trial judge was right in making the order appealed from. It is not, as I view it, a case of setting up a new cause of action at all, but the correcting of an obvious error in the statement of claim.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. It is clear, and there could be no misunderstanding of the character in

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

March 19.

DRAKE v. CARTER

which the defendant is sued in the action, *i.e.*, as assignee for the benefit of the creditors of Joshua Z. Strong. The order for the amendment was rightly made and is not the setting up of a new case.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *MacInnes & Arnold.*
Solicitors for respondent: *Tupper & Bull.*

COURT OF APPEAL

1920

March 19.

HOLMES v. KIRK & CO.

HOLMES v. KIRK & COMPANY, LIMITED.

Negligence — Motor-vehicles — Passing standing car taking passengers — Car about to start being previously backed to its position—Motor-traffic Regulation Act—Sounding of horn—Onus—New trial—R.S.B.C. 1911, Cap. 169, Sec. 31—B.C. Stats. 1913, Cap. 46, Sec. 16; 1914, Cap. 51, Sec. 4.

A street-car backed from a cross-street and stopped to take on passengers before proceeding forward on the main track. The plaintiff who was about to board the car was struck and severely injured, about four feet from the gate, by a motor-truck going in the same direction as the street-car was about to proceed. Section 16 of the Motor-traffic Regulation Act Amendment Act, 1913, requires that "every driver of a motor going in the same direction as and overtaking a street-car which is stopped, or about to stop, for the purpose of discharging or taking on passengers, shall when such car stops, also stop . . . . . until the said car has been again set in motion," etc.

Held, that the section does not apply to a case where the street-car has been backed to where it stopped immediately preceding its going forward in the same direction as the motor-truck.

Section 4 of the Motor-traffic Regulation Act Amendment Act, 1914, provides that "every motor shall be equipped with an alarm bell, gong, or horn, and the same shall be sounded whenever it shall be reasonably necessary to notify pedestrians and others of the approach of such motor."

Held, that in an action for negligence the onus is on the plaintiff to shew not only that it was reasonably necessary to sound the horn but also that it was not sounded.

COURT OF APPEAL

1920

March 19.

HOLMES v. KIRK & CO.

APPEAL by defendant from the decision of MURPHY, J. and verdict of a jury, in an action for damages for negligence, the jury having found negligence and assessed the damages at $5,000. On the 23rd of May, 1918, the plaintiff was standing near the northeast corner of Main Street and Broadway Avenue waiting for a car going east on Broadway. A Robson Street car was going north on Main Street, and on reaching Broadway it turned west into Broadway, stopped and then backed, turning north into Main and stopped on reaching the east track on Main Street to the north of Broadway, from which point it was about to proceed forward immediately turning into Broadway east. The plaintiff proceeded across the fairway and stood close to the entrance door. He was about to get on, when, seeing a lady approaching to get on the car, he stepped back about four feet from the gate and was run into by the defendant's motor-truck, going south on the east side of Main Street. The driver of the truck said he sounded his horn, but on getting close to the back of the car the plaintiff suddenly took two steps back without looking, and although he did his utmost to stop the car and avoid hitting the plaintiff, he was too close to do so. The plaintiff was knocked down and run over, his left leg being fractured and severely crushed. The plaintiff admitted he stepped back without looking. The jury, without answering the questions submitted to them, brought in a general verdict for $5,000.

Statement

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

McPhillips, K.C. (*E. J. Grant,* with him), for appellant: We contend (1), that section 16 of the Motor-traffic Regulation Act Amendment Act, 1913, does not apply, as the car had just finished backing up; (2) that the plaintiff was negligent in backing up suddenly without looking; (3) that there was wrong direction by the learned judge; (4) the damages are excessive. As to the plaintiff's action amounting to contributory negligence see *Todesco* v. *Maas* (1915), 8 Alta. L.R. 187; *Hawkins* v. *Cooper* (1838), 8 Car. & P. 473; *Allen* v. *North*

Argument

COURT OF APPEAL

1920

March 19.

HOLMES v. KIRK & Co.

Metropolitan Tramways Company (1888), 4 T.L.R. 561. As to what the powers of the Court are see *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53. The Court has the power and on the facts as disclosed should find that the jury came to an unreasonable conclusion: see *Jackson* v. *B.C. Electric Ry. Co.* (1917), 24 B.C. 484 at p. 489; *Gavin* v. *Kettle Valley Ry. Co.* (1918), 26 B.C. 30 at p. 45, and *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512 at pp. 532 and 542, in which is cited many cases on the duty of the Court notwithstanding the jury's findings. On the question of negligence, first as to not stopping behind the car, the Act, I contend, does not apply, as the car had just come from the other direction, but assuming there was negligence, the omission of the plaintiff to use reasonable care is the real cause of the accident: see *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70; *Brenner* v. *Toronto Ry. Co.* (1908), 40 S.C.R. 540 at p. 555; *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719; *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Macleod* v. *Edinburgh and District Tramways Co., Limited* (1913), S.C. 624 at p. 629. On the question of onus, he told the jury we must prove we have complied with the law; in other words, he makes us prove we are not guilty. I say this is misdirection that entitles us to a new trial: see *Marshall* v. *Gowans* (1911), 24 O.L.R. 522; *Bradshaw* v. *Conlin* (1917), 40 O.L.R. 494; *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838. As to what "overtaking" means see *The Main* (1886), 11 P.D. 132; *The Franconia* (1876), 2 P.D. 8. The damages, on the evidence, are excessive: see *Panetta* v. *Canadian Pacific Ry. Co.* (1917), 24 B.C. 249; *Wand* v. *Mainland Transfer Company* (1919), 27 B.C. 340.

Argument

Rubinowitz, for respondent: There is a sharp conflict as to whether the car was stationary or backing up at the time, but the door was open for reception of passengers, the woman being about to get in, so that it must have been stationary. Plaintiff, in stepping back to allow a lady to enter, might reasonably expect motors would stop. There was room for these motors between the curb and the street-car.

Sir C. H. Tupper, K.C., on the same side: The evidence is ample to sustain the verdict, because (1) there was negligence at common law; (2) negligence under the statute, (a) no warning; (b) passing a car about to take on passengers; (c) no evidence of contributory negligence. On the question of the charge to the jury, I submit that on the whole there is not misdirection and a new trial should not be granted: see *Doyle et al.* v. *Canadian Northern Ry. Co.* (1919), 1 W.W.R. 21; *Gaffney* v. *D.U.T. Co.* (1916), 2 I.R. 472 at p. 486; *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423 at p. 428. Where there is evidence, no matter what the Court's view may be, they are loath to interfere with the verdict: see *Herman* v. *Canadian Pacific Railway Company* (1919), 3 W.W.R. 45. On the question of breach of statutory duty see *Groves* v. *Wimborne* (*Lord*) (1898), 2 Q.B. 402 at p. 412.

Argument

McPhillips, in reply, referred to *Tait* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 571.

Cur. adv. vult.

19th March, 1920.

MACDONALD, C.J.A.: Unless it can be said that the learned judge misdirected the jury the verdict cannot, in my opinion, be disturbed. Several grounds of appeal are stated, but I find it necessary to refer only to those which deal with misdirection, and only two of these need, I think, be considered. The two grounds I refer to are stated in paragraphs 14 and 19 of the amended notice of appeal, the latter of which deals with the following situation.

MACDONALD, C.J.A.

The plaintiff was injured by being struck when about to board a street-car by a motor-truck driven by the defendant's servant. Section 16 of the Motor-traffic Regulation Act Amendment Act, 1913, B.C. Stats. 1913, Cap. 46, reads:

"(1.) Every driver of a motor going in the same direction as and overtaking a street-car which is stopped, or is about to stop, for the purpose of discharging or taking on passengers, shall, when such car stops, also stop such motor at a distance of at least 10 feet from said car, and shall keep such motor at a standstill until the said car has been again set in motion, and all passengers who have alighted shall have reached the side of the highway or otherwise gotten safely clear of said motor."

At the time of plaintiff's injury the street-car, having been

COURT OF APPEAL

1920

March 19.

HOLMES v. KIRK & CO.

backed from a cross-street to the point in question preparatory to proceeding forward on its journey, was standing still. The plaintiff stepped back for the purpose of allowing a lady to precede him, when he was struck. The question raised in argument is that, assuming there was evidence on which the jury could find that the street-car was standing at the place aforesaid, after having been backed to that point for the purpose of taking on passengers, and not having yet moved forward, could the provisions of the said section be made applicable?

It was argued by the appellant that the truck was not overtaking a street-car "going in the same direction." Primarily it is a question of fact as to whether the street-car was going in the same direction as the truck, but the facts upon which the question now under consideration has to be decided are not in dispute. The question has become one of construction. If the Act applies, the judge was called upon to instruct the jury that if they found that the car had been backed up to that point with the intention of its being driven forward, though it had not yet started on its forward journey, the defendant's driver was "overtaking a street-car going in the same direction" and that it was his duty under the statute to stop. The learned judge, I think, did instruct the jury on this point correctly from his point of view as to the meaning of the said words. Reading his charge to the jury, it seems to me quite manifest that this was the view which the learned judge took of the statute. But unless I can construe the words "going in the same direction" as capable of being read, "about to go in the same direction," then the section does not, in my opinion, apply to the facts of this case. The word "going" has a great variety of meanings, and shades of meaning, but it is essentially a word denoting motion, and while it would be quite usual and proper to say of a car standing at a terminus and about to go on a journey that that car is "going" south, or is "going" into town, yet I think that that was not the sense in which the Legislature meant to use the word "going" in the section aforesaid.

MACDONALD, C.J.A.

It will be observed that the driver of the motor is assumed to be "going"; that he is assumed to be "overtaking" a street-car;

that the street-car is "going" in the same direction as the following vehicle; it is contemplated that it may stop, or that it may be about to stop, that the motor should be kept at a standstill until the car has been "again set in motion." The whole section contemplates a situation in which a car shall be moving or proceeding and shall be caught up with by a motor-vehicle following it. "Again set in motion" is significant. The idea suggested to my mind is that the car has been in motion going in that direction and has stopped and is "again" to be put in motion. The fact, if it be a fact, that the driver must have known that the car was about to go in the direction he was going and should have observed the spirit of the Act cannot, I think, be relevant. The construction of the statute cannot be made to depend on the knowledge or conduct of this particular driver. I am therefore forced to the conclusion that there was misdirection on this point in the case.

The other ground above-mentioned, set out in paragraph 14 of the notice of appeal, also turns on misdirection. The said statute also provides that "every motor shall be equipped with an alarm bell, gong or horn, and the same shall be sounded whenever it shall be reasonably necessary to notify pedestrians and others of the approach of such motor." The learned judge told the jury that "if the plaintiff has proven it was reasonably necessary for the horn to be sounded then the defendant must adduce evidence that would lead you to believe it was sounded, and in another place he repeats his instruction by saying that in the circumstances above, "the onus is upon the defendant to shew that it was sounded, because that is a duty cast upon him by law."

With great respect, I think the learned judge was clearly wrong in so directing the jury with regard to the onus of proof being upon the defendant to shew that the horn had been sounded. While it is impossible to say that it had influenced the jury's verdict, there being evidence *pro* and *con*, yet it is equally impossible to say that it had not. I think, therefore, the judgment and verdict must be set aside and a new trial ordered.

The costs of the previous trial should abide the result of the

COURT OF APPEAL

1920

March 19.

HOLMES v. KIRK & CO.

new trial. As to the costs of the appeal, I see no reason for ordering that these shall be disposed of otherwise than in accordance with the event.

MARTIN, J.A.: This case primarily depends upon the question of the application thereto of section 16 of the Motor-traffic Regulation Act Amendment Act, 1913, Cap, 46, and after careful consideration of that section, I have reached the conclusion that it does not apply to the circumstances before us, because it cannot appropriately be said that when a street-car is backing up towards an approaching motor, or has just stopped after doing so, that either it or the motor is "going in the same direction," or either of them is "overtaking" the other.

So it follows from this that the directions to the jury given by the learned judge in more than one particular cannot be upheld, because he told them that it was the duty of the motor-driver, under said section 16, "to stop such motor at a distance of at least 10 feet from said car," etc., whereas there was no such duty. Likewise, and flowing therefrom, his direction was further erroneous on the question of contributory negligence, wherein he told the jury that the plaintiff had "the right to believe, because every man is presumed to know the law, that no motor-car would be passing there," and "the law was and is that a motor-car should stop 10 feet behind a street-car that is stopping for the purpose of taking on or letting off passengers"; whereas in the circumstances the plaintiff was not entitled to act upon that assumption, because "he had no right to believe" that to be in existence what the law did not so require.

MARTIN, J.A.

Furthermore, in regard to the obligation imposed by section 4 of the Motor-traffic Regulation Act Amendment Act, 1914, Cap. 51, respecting the sounding of alarm-bells, gongs or horns "whenever it shall be reasonably necessary to notify pedestrians," etc., it was, with all due respect, an error in law to direct the jury that once it was established that it was reasonably necessary that the gong should be sounded that thereupon the "onus was upon the defendant to shew that it was sounded," etc., the true construction of the law being, of course, that the plaintiff must shew (1) that there was such a statutory obliga-

tion imposed upon the defendant; and (2) that he failed to discharge it.

Should the case come before us again, I feel impelled to again remark that steps should be taken to invite the jury to answer the questions submitted to them in the manner indicated in *Guthrie* v. *W. F. Huntting Lumber Co.* (1910), 15 B.C. 471, and I observe that some doubt seems to have existed in the minds of the Court as well as counsel as to their respective duties on this point, although since the reported decision of this Court in *Howard* v. *B.C. Electric Ry. Co.* (1918), 3 W.W.R. 409, there is no reason why any doubt should exist in that important matter. The failure to adopt said indicated course has much too often caused unjustifiable expense and delay to litigants and embarrassed this Court very much in the discharge of its duty. It is worthy of note that the party who in the long run has suffered most from said failure has been the plaintiff, in my judicial experience.

MARTIN, J.A.

GALLIHER, J.A.: In this case the jury brought in a general verdict for $5,000, and we must assume that they found all facts in favour of the plaintiff necessary to entitle him to a verdict. As to whether the car was standing ready to take on passengers or not, there is a direct conflict of evidence, and if the jury believed the evidence of the conductor, the plaintiff, and Mrs. Patton, then there was evidence upon which they could find that the car was standing at the place where passengers were taken on. But the words of the section (section 16 of Cap. 46 of 1913) are:

GALLIHER, J.A.

"Every driver of a motor going in the same direction as and overtaking a street-car which is stopped," etc.,

and Mr. *McPhillips* contends that this street-car was backing up in an opposite direction and had not reached the point where passengers were taken on, therefore it was not going in the same but in an opposite direction, and the motor did not overtake the street car. If the jury had believed the defence evidence, that would have been an end of the plaintiff's case on this branch.

The car, when the passengers would be taken on, would proceed in the same direction as the motor, and if the jury found

COURT OF APPEAL
1920
March 19.

HOLMES v. KIRK & Co.

that it was standing still at the point where passengers were taken on, I think it would be in no different position to what it would have been had the car been proceeding in the same direction as the motor and had stopped to take on passengers, if it were not for the particular wording of the section. The Act says "going in the same direction as and overtaking a street-car which is stopped," and further on states that "such motor shall be kept at a standstill until the car has again been set in motion." This language seems to point to the fact that the car must be previously in motion in the same direction as the motor, and therefore the Motor-traffic Regulation Act does not apply on this branch. There was, therefore, misdirection by the judge.

The driver of the motor admits that he knew the locality, had often driven over it, and must have known that the car which had backed up on the east track would, when it had taken on its passengers, be moving in the same direction as himself, and this was urged in argument, but this can be of no assistance to us in interpreting the statute. The jury may not have found negligence on this ground, but as there was another ground on which they may have found defendant negligent, *viz.*, for not sounding the horn, and as the learned trial judge directed the jury on that ground as to onus, which direction is objected to by Mr. *McPhillips,* it will be necessary to consider this also under the head of misdirection. As to the sounding of the horn, the plaintiff's witnesses all say they did not hear it sounded, while on the other hand, Ferguson, the driver of the motor, and Boyd, who was sitting beside him, both swear the horn was sounded while still some 20 feet from the plaintiff. Apart from the direction as to onus of proof of the sounding of the horn, we have again contradictory evidence upon which the jury might find in favour of the plaintiff.

GALLIHER, J.A.

The next point is as to contributory negligence of the plaintiff. Again assuming that the jury found as they must have, that the car was stationary at the point for taking on passengers, and if they believed the evidence of the plaintiff and considering that the distance from the street curb to the nearest rail was 25 feet, and that there was 17 feet clear in which to

drive after the plaintiff had stepped back, I am not prepared to say the jury would be wrong in not finding contributory negligence in the plaintiff's stepping back without looking. I do not think that any question of ultimate negligence arises upon the evidence; apparently all was done that could be done.

As to the question of damages I express no opinion, as I think there should be a new trial on the ground of misdirection. I will not go over the different grounds of appeal, but will state generally that in my opinion it was not a case that should have been taken from the jury, nor is it a case where I could say that the verdict of the jury is perverse. The learned judge charged the jury as to the negligence of the defendant on two grounds. The jury may have found on one or the other, or on both, and not having answered the questions submitted, we cannot determine this. They may have found negligence on the second ground, *viz.*, failure to sound the horn, and if the learned judge had properly charged as to where the onus of proof lay as to sounding the horn, then I should not interfere. Mr. *McPhillips's* complaint is founded on ground 14 of the notice of appeal, as follows:

"The learned judge erred in telling the jury that when the plaintiff had convinced the jury that the conditions were such that it was reasonably necessary that the horn should be sounded, then the onus was upon the defendant to shew that it was sounded, because it was a duty cast upon him by law under the circumstances."

If that is a correct statement of the law, that the onus was on the defendant, even if plaintiff put in no evidence, the jury could say, "we disbelieve the defendant's witnesses" and find the onus has not been satisfied, while on the other hand, if the onus is on the plaintiff to satisfy the jury that the horn was not sounded, the plaintiff must produce evidence to justify a jury in so finding.

I do not think it is a correct statement to say that when a statute imposes a duty a breach of which would constitute negligence, that when the circumstances are such that (as in this case) it was reasonably necessary that the horn should be sounded, the plaintiff can stop there and it is incumbent on the defendant to shew that the horn was sounded. I think the plaintiff must go further and adduce evidence.

COURT OF APPEAL

1920

March 19.

HOLMES v. KIRK & CO.

McPHILLIPS, J.A.: In my opinion the proper order to make in view of all the circumstances of this case, is that a new trial be had between the parties.

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

New trial ordered.

Solicitor for appellant: *E. J. Grant.*
Solicitor for respondent: *I. I. Rubinowitz.*

COURT OF APPEAL

1920

March 19.

WHIMSTER v. DRAGONI

WHIMSTER AND OWEN v. DRAGONI. WHIMSTER AND OWEN v. MILLS. WHIMSTER AND OWEN v. NORTHERN CLUB & CAFE COMPANY, LIMITED.

Police—Provincial—Authority within a municipality—British Columbia Prohibition Act—B.C. Stats. 1914, Cap. 52, Sec. 409.

Intoxicating liquors—Sale by employee on premises—Liability of occupant—Knowledge—B.C. Stats. 1916, Cap. 49, Secs. 2, 29, 38 and 39.

Statute—Penal—Construction—Intention of Legislature to be effectuated.

A member of the provincial police may lay an information in the case of an offence against the British Columbia Prohibition Act committed within a municipality.

A sale of liquor on a premises by an employee of the occupant contrary to the provisions of the British Columbia Prohibition Act, subjects the occupant to conviction under sections 38 and 39 of the said Act, though he had no knowledge of the sale, and a prior conviction of the employee is no bar to such a conviction.

The word "vendor" in subsection (2) of section 39 of the Act is confined to a person appointed by the Lieutenant-Governor in Council under section 4 of the Act and has no reference to the ordinary sale of liquor by an employee.

The chief object in construing penal as well as other statutes is to ascertain the intention of the Legislature. A subsection relating only to penalties after conviction under a previous section of the Act, after referring to convictions under said previous section in the case of a person, proceeded with the words "and if the offender convicted under this subsection be a corporation, it shall be liable," etc.

Held, that the words "under this subsection" could be read "under this section" meaning the previous section dealt with, or could be treated as obvious surplusage.

McGregor v. *Canadian Consolidated Mines* (1907), 12 B.C. 373 applied.

APPEALS by the prosecution from the decision of THOMPSON, Co. J. of the 19th of September, 1919, setting aside the conviction of Simon Dragoni, that he did on or about the 26th of May, 1919, by his clerk, servant or agent at his premises known as the Central Hotel, Fernie, B.C., sell intoxicating liquor. The facts are that on the date above mentioned two of the members of the Provincial police entered the Central Hotel aforesaid and purchased from the bar-tender a bottle of whisky, for which they paid $8. The accused admitted having sold liquor previously but not subsequently to the alleged sale, having ten or twelve days prior thereto taken away his liquor and refused to sell. At the time of the sale his bar-tender asked him for some liquor to sell to a returned soldier, which he refused to give, but owing to the bar-tender's persistence he gave him a bottle "to do what he liked with," and in this he is corroborated by the bar-tender. The facts in the case of *Whimster* v. *Mills* are substantially the same as in the *Dragoni* case. The case of *Whimster* v. *Northern Club & Cafe Co., Ltd.*, differs, in that one Barrett, the manager of the Company, denies any knowledge of liquor being on the premises or of knowledge of any previous or subsequent sale of liquor on the premises. He also swore he gave specific instructions to the employees not to sell liquor.

Statement

The appeal was argued at Vancouver on the 7th and 10th of November, 1919, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Carter, for appellants.

A. Macneil, for respondent, raised the preliminary objection as to the jurisdiction, in that the proceedings were not properly before the magistrate. The alleged infringement of the Act was in the town of Fernie. The information was made by the Provincial police. The Provincial police have no jurisdiction in a town. Under section 409 of the Municipal Act, an order

Argument

COURT OF APPEAL

1920

March 19.

WHIMSTER v. DRAGONI

in council must be passed giving them the right: see *Anderson* v. *Hamlin* (1890), 25 Q.B.D. 221 at p. 224. Section 29 of the British Columbia Prohibition Act provides for prosecutions and private persons cannot lay an information: see *Foster* v. *Fyfe* (1896), 2 Q.B. 104 at p. 107; *The Queen* v. *Cubitt* (1889), 22 Q.B.D. 622; *Beland* v. *Boyce* (1913), 21 Can. Cr. Cas. 421.

Carter: Any one can lay an information, and the right can only be taken away by express words in the statute: see *Cole* v. *Coulton* (1860), 2 El. & El. 695, and section 29 of the British Columbia Prohibition Act gives the Provincial police the right to act in a municipality. Section 409 of the Municipal Act only applies to riots. As to the construction of the statute see *McGregor* v. *Canadian Consolidated Mines* (1906-07), 12 B.C. 116 and 373; *Cox* v. *Hakes* (1890), 15 App. Cas. 506 at p. 518.

Macneil, in reply: All the liquor licence Acts state specifically that every one may prosecute, but there is no such provision in this Act.

[Judgment on the preliminary objection was reserved.]

Carter, on the merits: This is a case as to the liability of the occupants of a premises, and the question is the interpretation of section 38 of the British Columbia Prohibition Act. The bar-tender sold the liquor, and on informations both the bar-tender and owner were convicted at different times. As to statutory presumption against occupant see *Rex* v. *Rogers* (1906), 11 Can. Cr. Cas. 257 at p. 259; *Rex* v. *Hanrahan* (1902), 5 Can. Cr. Cas. 430; *Rex* v. *McQuarrie; Ex parte Rogers* (1906), 37 N.B. 374. As to proprietors' responsibility for servants' sale see *Rex* v. *Bradley* (1911), 19 Can. Cr. Cas. 110; *White* v. *Leek* (1911), 18 Can. Cr. Cas. 337; *Regina* v. *Williams* (1878), 42 U.C.Q.B. 462; *Regina* v. *Campbell* (1879), 8 Pr. 55; *Rex* v. *Labrie* (1914), 23 Can. Cr. Cas. 349; *Rex* v. *Cahoon* (1907), 17 Can. Cr. Cas. 65. There will be cited against me *Rex* v. *Borin* (1913), 29 O.L.R. 584; *Rex* v. *Michael Gee* (1901), 5 Can. Cr. Cas. 148; *Rex* v. *Hoffman* (1917), 2 W.W.R. 839.

Argument

Macneil, for respondents: Where a place is used contrary to

law and becomes notorious or known as such a place, the owner is liable, but only in such a case: see *Emary* v. *Nolloth* (1903), 2 K.B. 264. The accused knew nothing of the sale. As to belief of accused's evidence see *Rex* v. *Covert* (1917), 1 W.W.R. 919 at p. 931. Two men cannot be convicted separately for the same offence arising out of the same act.

Carter, in reply.

Cur. adv. vult.

19th March, 1920.

MARTIN, J.A.: Objection is taken to the jurisdiction of the convicting police magistrate Whimster on the ground that the deputy inspector of Provincial police, who laid the information, had no power to do so within the limits of the municipal corporation of the City of Fernie. It was said, and the fact is, that the Lieutenant-Governor in council has not seen fit, under section 409 of the Municipal Act, B.C. Stats. 1914, Cap. 52, "to direct and empower the superintendent of police to take charge of the policing of such municipality," but, in my opinion, that section has no application to this case, but is a special one to meet an emergency in times of exceptional danger to the public peace or safety, as a careful consideration of the section, and the very unusual powers it confers, will shew. By section 29 of the British Columbia Prohibition Act, Cap. 49 of 1916, the duty of enforcing that Act and of prosecuting offenders thereunder, is laid upon

MARTIN, J.A.

"the superintendent and upon all constables and officers of every Provincial and of every municipal police force in the Province, and they shall severally have full authority to enforce all such provisions."

By section 5 of the Police and Prison Regulation Act, Cap. 180, R.S.B.C. 1911, constables of the Provincial police force already had "authority to act in any part of the Province," and it is not strange that they and the municipal police should be required to co-operate "to suppress the liquor traffic" (to cite the preamble), in municipal as well as in unorganized districts.

Subsection (2) goes on to declare that "every police constable or officer shall be deemed to be within the provisions of this Act" and imposes upon him the duty of making "diligent inquiry" with the object of prosecuting offenders.

COURT OF APPEAL

1920

March 19.

WHIMSTER v. DRAGONI

The mere fact that section 28 (3) directs that in certain cases penalties recovered upon conviction shall be paid into the Provincial, and in others into a municipal, exchequer, cannot nullify the said plainly conferred right and duty to prosecute; the subsection may be regarded as an incentive to the different classes of police to be vigilant in their duties upon their "several" initiatives.

A further objection is taken in the conviction of the Northern Club & Cafe Company, Limited, that as it is a corporation it cannot be convicted, because the only penalty is that under section 28 (1), which, after reciting convictions under section 10 in the case of a "person," goes on to say:

"And if the offender convicted under this subsection be a corporation, it shall be liable to a penalty of one thousand dollars."

The point is taken that in fact there is not and cannot be any conviction "under this subsection," because it relates only to penalties after conviction under section 10, and therefore the conviction, incorporating, as it does, the imposition of an unlawful penalty, cannot stand.

Now there has been a conviction under section 10, and section 28 (1) need only be resorted to for the appropriate penalties. The way penal statutes must now be construed was laid down by the Full Court of this Province, affirming the decision of Mr. Justice DUFF, in *McGregor* v. *Canadian Consolidated Mines* (1906-07), 12 B.C. 116, 373; 4 W.L.R. 101; 2 M.M.C. 428:

MARTIN, J.A.

"'The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important; and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the Legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are, indeed, frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Lord Coke's words, to suppress the mischief and advance the remedy."

In that case the Court felt justified in reading the word "section" as "rule" in order to give effect to the manifest inten-

tion of the Legislature, and here still less a change is necessary, because merely to read "subsection" as "section" attains that object, and then the statute would read, "if the offender convicted under this section," *i.e.*, section 10, which is the sole subject being considered by section 28 (1). Indeed, the same result can be appropriately accomplished by treating the three words "under this subsection" as an obvious surplusage, and still the statute would be fully effective.

It follows that, in my opinion, both objections should be overruled.

Then it is submitted that section 38 does not warrant the conviction of the occupant in the absence of knowledge on his part of the prohibited "sale, barter or traffic of liquor" made or had on the occupied premises "by some other person who cannot be proved to have acted so under or by the directions of such occupant."

In each of the three cases before us, the sale was made by the occupants' servant, the bar-tender, who has been convicted of such offence, and the police magistrate convicted the three respective occupants, but the learned County judge, upon appeal ((1919), 3 W.W.R. 411), quashed the convictions upon the ground that section 38 "presupposes knowledge and consent on the part of the occupant, whereby authority and direction may be presumed," and he was of opinion that such knowledge and consent were wanting.

MARTIN, J.A.

After careful consideration of the reasons given by the learned judge, I am, with every respect to him, unable to adopt them. He fails, if I may say so, to appreciate the all-important distinction between "conclusive evidence" under section 38 and *"prima facie* proof" under, *e.g.*, section 41. The case upon which he chiefly relies, *Rex* v. *Hoffman* (1917), 28 Man. L.R. 7; (1917), 2 W.W.R. 839; 28 Can. Cr. Cas. 355, as being "very similar" to the one at bar, is, when carefully examined, very dissimilar, because it is a conviction upon the charge that the accused "did unlawfully have liquor in a place other than in a private dwelling-house," etc., which charge has not herein been (even assuming it could be) preferred under our section 38, which relates to "sale, barter or traffic, of liquor

COURT OF APPEAL

1920

March 19.

WHIMSTER v. DRAGONI

or any matter, act, or thing in contravention of this Act," etc., whatever that may be held to include. The words in the Manitoba Act, under which that charge was laid, *viz.*, "having, keeping or giving liquor," are not in our section; moreover, the Manitoba section makes proof of certain facts "*prima facie* evidence" merely, instead of "conclusive evidence," as does our section as aforesaid.

The case of *Rex* v. *Bradley* (1911), 20 O.W.R. 33, 3 O.W.N. 58, 19 Can. Cr. Cas. 110, is very much in point, wherein the mere innocent permission of the use of the premises (there a stable) for unlawful purposes rendered the owner personally liable as an occupant, the statute declaring that an occupant is so liable for any offence committed upon the premises by any person who is suffered to be or remain upon the premises, and the proof of sale by such person is made conclusive evidence that such sale took place with the authority and by the direction of such occupant, which is the same as our section.

The learned judge made the following observations upon the statute, with which I am in entire accord:

"By this double statutory 'conclusive' presumption, the owner is made liable for offences committed upon his premises and he is called upon to exercise such care in his choice of tenants and the terms of his leases as to guard himself from the very serious consequences of repeated violations of the law for which he may be called upon to suffer."

MARTIN, J.A.

"I have to accept the law as I find it, and it is no part of my duty to criticize either its wisdom or its justice. If it has appeared necessary and right to the Legislature, to secure obedience to the law, to impose a penalty upon a landlord whose tenant violates the law, it is the duty of the magistrate, and of this Court, when clearly satisfied that this is the meaning of the statute, to enforce its provisions. All considerations of hardship must be addressed to the Legislature itself."

In my opinion, therefore, the occupant was rightly convicted as well as his servant, apart from the question of a double penalty, as to which reliance is placed upon *Rex* v. *Martin* (1916), 9 Alta. L.R. 265; 9 W.W.R. 1317; 33 W.L.R. 809; 26 Can. Cr. Cas. 42, wherein it was held that under a section identical practically with our section 38, the conviction of the occupant is a bar to the conviction of his employee, and it is submitted the principle should apply to the converse, *i.e.*, the prior conviction of the employee. Doubtless this would be the case if

the principle be sound, but with every respect, I am of opinion that it is not, but that the statute clearly contemplates the distinct and double liability of occupant and employee. It has apparently escaped the attention of Mr. Justice McCarthy, with whom the majority of the Court agreed (Mr. Justice Stuart dissenting), that the question is not really, "Can both be convicted of the same offence?" because the statute deals also with acts which have nothing whatever to do with employees, *viz.*, those of "any person . . . . who is suffered to be or remain in or upon the premises of such occupant," and therefore it is not in reality the "same offence," but a distinct liability arising out of it may be all or part of the same circumstances. The offence of the employee or other person is that he committed the unlawful act; the offence of the occupant is that he "suffered" the offender to commit said act upon his premises, whether done, *e.g.*, by the employee in the public dining-room, or by the "other person" in his private bedroom. The cases of *Ex parte Kelly* (1893-4), 32 N.B. 271, and *Reg.* v. *Williams* (1878), 42 U.C.Q.B. 462, and *Reg.* v. *Howard* (1880), 45 U.C.Q.B. 346, relied upon are distinguishable where they are not *obiter*, being purely cases of employer and employee.

The reasons given by Mr. Justice Stuart in his dissenting judgment in *Rex* v. *Martin, supra,* commend themselves to me, and with all due respect to contrary views, I feel that they should have prevailed. There is only one answer, in my opinion, to his most apt question at p. 268 (9 Alta. L.R.), *viz.*, that where the occupant is first convicted, could a roomer or visitor, not an employee, go scot free? Assuredly not. This gives an unmistakeable indication to the intention of the Legislature to impose a distinct and dual liability. The learned judge goes on appropriately to remark:

MARTIN, J.A.

"Upon any contrary view it is left quite open to an occupant and employees upon premises where they all know there is no licence at all to agree to sell liquors knowingly in contravention to the Act, and to have only one of themselves, *i.e.*, the occupant, fined when the employees have wilfully broken the law. Why they also should not be punished for their illegal act committed with full consciousness of its illegality, I am, I confess, utterly unable to comprehend."

There is, however, a further section in this Province not

COURT OF APPEAL

1920

March 19.

WHIMSTER v. DRAGONI

present in *Rex* v. *Martin,* which, if support were needed (though I think it is not) to my said view, would supply it, *viz.,* 39 (1):

"Every offence against the provisions of this Act committed by the employee, servant, agent, or workman of any person unlawfully selling liquor shall be deemed to be the offence of the person so unlawfully selling liquor, and such person shall be answerable for and shall be punished for such offence. Provided that nothing therein shall absolve the actual offender from guilt and punishment, but he shall be punished also."

This means that the offence of the employee in "selling liquor" shall be deemed also the offence of his employer as the real "person so unlawfully selling liquor," and "such person" (*i.e.,* the employer) shall be answerable for, and shall be punished for, said offence. And the statute goes on to say that the "actual offender," *i.e.,* the employee, "shall be punished also" for that same offence, which provisions, in any event, exactly cover this case and mean precisely what they clearly say, though they are restricted to cases of "selling liquor" only.

MARTIN, J.A.

As a matter of precaution I note that subsection (2) of 39 has no application to this case. The word "vendor" there, as in sections 4 *et seq.* and 36, meaning a person appointed by the Lieutenant-Governor in council under section 2 defining that term.

The appeal, therefore, should be allowed.

GALLIHER, J.A.: Mr. *Macneil* takes the preliminary objection that the magistrate had no jurisdiction, basing his objection upon the fact that the offence charged had been committed within the municipality of Fernie, and that the police officials of that municipality only and not the Provincial police authorities (who laid and prosecuted the charge) had power to do so.

GALLIHER, J.A.

It seems to me that section 29, subsection (1), of the British Columbia Prohibition Act, Cap. 49 of 1916, is clear enough. It reads as follows:

"The duty of seeing that the provisions of this Act are complied with and of enforcing the same and of prosecuting persons offending against such provisions shall devolve upon the commissioner, superintendent, and upon all constables and officers of every Provincial and of every municipal police force in the Province, and they shall severally have full authority to enforce all such provisions."

Mr. *Macneil* refers us to section 409 of the Municipal Act

of 1914, Cap. 52, by which the Lieutenant-Governor in council is given power to direct the superintendent of police to take charge of the policing of any municipality and thereafter during such time as shall be fixed by order in council all officers and constables of the municipality shall be under the sole direction and control of the Provincial police. Also to section 6 of Cap. 169 of 1911, The Motor-traffic Regulation Act, where the superintendent of Provincial police is primarily charged with the enforcement of the provisions of the Act, with directions that all chiefs of police, police officers and constables shall aid in the enforcement of the Act, and the prevention of infractions of same. And again to section 418 of the Municipal Act of 1914, defining the duties of municipalities as to enforcement of the law. From all these he argues that had it been the intention of the Legislature, when passing the Prohibition Act, that the Provincial police should have authority to act within the limits of a municipality, a special section authorizing them so to do would have been inserted. In support of this argument he invokes subsection (3) of section 28 of the British Columbia Prohibition Act, which directs that penalties resulting from proceedings by Provincial authorities are paid into the Consolidated Revenue Fund, and those resulting from proceedings by municipal authorities are paid into the treasury of the municipality. If the Provincial officers have power to enforce the provisions of the Act within municipalities, this subsection would create no difficulty, as the penalty would go to those most diligent in enforcing the Act. I think the language in section 29, which imposes on the superintendent, officers and constables of the Provincial police the duty of seeing that the provisions of the Act are complied with and of prosecuting persons offending against same, is broad enough to fix their authority either within or without municipalities. I would overrule the objection.

GALLIHER, J.A.

On the main appeal, sections 38 and 39 of the British Columbia Prohibition Act have to be considered. Sections 38 and 39 (1) are as follows:

"38. The occupant of any house, shop, room, or other place in which any sale, barter or traffic of liquor or any matter, act, or thing in contravention of any of the provisions of this Act has taken place shall be personally

COURT OF APPEAL

1920

March 19.

WHIMSTER v. DRAGONI

liable to the penalty and punishment prescribed in this Act, notwithstanding such sale, barter, traffic, matter, act, or thing be made by some other person who cannot be proved to have acted so under or by the directions of such occupant: and proof of the fact of such sale, barter, or traffic or other act, matter, or thing by any person in the employ of such occupant, or who is suffered to be or remain in or upon the premises of such occupant, or to act in any way for such occupant, shall be conclusive evidence that such sale, barter, or traffic or other act, matter, or thing took place with the authority and by the direction of such occupant.

"39. (1.) Every offence against the provisions of this Act committed by the employee, servant, agent, or workman of any person unlawfully selling liquor shall be deemed to be the offence of the person so unlawfully selling liquor, and such person shall be answerable for and shall be punished for such offence: Provided that nothing therein shall absolve the actual offender from guilt and punishment, but he shall be punished also."

GALLIHER, J.A.

Mr. *Macneil's* argument is that as the employee has been convicted and a penalty imposed, you cannot impose on another a like sentence for the same offence, citing *Rex* v. *Martin* (1916), 28 D.L.R. 578, and note in 5 Can. Cr. Cas. at p. 430. Neither of these can be regarded as authorities when we consider the definite and specific wording of our section 39 (1), differing from the Act under which *Rex* v. *Martin* was decided.

The Legislature has seen fit to place this enactment on the statute books, and it is not for us to question the wisdom or unwisdom of same, but to interpret and give effect to it as we find it, and in my opinion, the language is so clear as not to admit of doubt. It was pointed out that subsection (2) of section 39 could not be reconciled with section 38, but Mr. *Carter,* for the Crown, has pointed out to us that this subsection is directed to an offence by an employee of a vendor and section 2 of the Act defines "vendor" as a person appointed by the Lieutenant-Governor in council under section 4 of the British Columbia Prohibition Act, so that subsection has no reference to an ordinary seller of liquor.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with my brother MARTIN and would allow the appeal.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

WHIMSTER AND OWEN v. MILLS.

MARTIN, J.A. would allow the appeal.

GALLIHER, J.A.: I would allow the appeal for the reasons given in *Whimster* v. *Dragoni,* just handed down.

MCPHILLIPS, J.A.: I concur in allowing the appeal.

EBERTS, J.A. would allow the appeal.

WHIMSTER AND OWEN v. NORTHERN CLUB & CAFE COMPANY, LIMITED.

MARTIN, J.A. would allow the appeal.

GALLIHER, J.A.: There is one point in this appeal not raised in *Whimster* v. *Dragoni.* In other respects my reasons in that case apply. The offender here convicted is a corporation and was fined $1,000 under section 28 (1) of the Act. There is a manifest error in the words used, convicted "under this subsection." Section 28 (1) provides the penalty for committing a breach of any of the provisions of section 10 of the Act and imposes imprisonment for a first and second or subsequent offence against persons convicted, and, as a corporation cannot be imprisoned, goes on to provide a penalty in case the offender shall be a corporation, and in doing so uses in the same subsection these words, "and if the offender convicted under this subsection be a corporation, it shall be liable to a penalty of one thousand dollars." There is, of course, no offender convicted under this subsection, which is one imposing a penalty for an offence under section 10 of the Act, but it is clear what the Legislature had in mind, *viz.,* the dealing with a corporation offender, which could not be dealt with in the same way as an individual. The words used are, I think, a manifest slip or error, and may be regarded as surplusage and struck out. In referring to subsection (2) of section 28 I find the error is not perpetuated. To give effect to these words, "under this subsection," would render it meaningless, so far as a corporation offender is concerned, and I think we should not do so when the intention of the Legislature is so clear.

COURT OF APPEAL

1920

March 19.

WHIMSTER v. NORTHERN CLUB & CAFE CO.

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

EBERTS, J.A. would allow the appeal.

Appeals allowed.

Solicitor for appellants: *A. B. Macdonald.*
Solicitors for respondents: *S. Herchmer and A. Macneil.*

MURPHY, J.

1920

March 25.

BEAUMONT v. HARRIS.

BEAUMONT v. HARRIS. (No. 2.)

Mineral claims — Option to purchase — Time for sale extended by oral agreement—Action to enforce—Statute of Frauds.

BEAUMONT v. HARRIS

The plaintiff, who lived in Prince Rupert, agreed in writing to purchase an interest in mineral claims, the purchase price to be paid in a certain bank in Vancouver on or before a certain date. The money did not arrive until the following day but the parties met at the bank with a view to carrying out the sale, when the plaintiff's agent refused to sanction payment owing to a flaw in the defendant's title. The parties again met later but the title not being perfected to the satisfaction of the plaintiff's agent he still refused to sanction payment. The defendant then declared that the sale was off. In an action for specific performance:—

Held, that the plaintiff cannot recover on the contract contained in the correspondence as he failed to leave the purchase price in the bank within the time specified, and as there is no memorandum to shew that the defendant had, subsequently to the breach, agreed to go on with the deal as required by the Statute of Frauds, the action must be dismissed.

Statement

ACTION for specific performance of an agreement for the sale of certain mineral claims, tried by MURPHY, J. at Vancouver on the 16th and 17th of March, 1920. The defendant, Harris, held an option to purchase three mineral claims known as "True Blue," "Premier Extension No. 1," and "Premier Extension No. 2," in the Salmon River Valley, the purchase price being $3,500, payable at the Bank of Montreal in Vancouver on or before the 22nd of December, 1919. Harris,

desiring to obtain the money to take up the option, instructed his agent, one Racey, that he would sell 51% of the claims for $3,500 provided he would obtain a purchaser who would pay that amount cash on or before the 22nd of December. On the 18th of December Racey communicated with the plaintiff, who lived in Prince Rupert, by telegram, advising him to purchase the interest as aforesaid. On the 22nd of December the plaintiff wired Racey, "Land wires down accept proposition money telegraphed today." The money, in fact, did not arrive at the Bank of Montreal in Vancouver until the following day (23rd December). Harris, requiring the money to take up his option, borrowed $3,500 from the defendant Shewan on the 22nd of December and took up the option, agreeing to refund the amount to Shewan upon the sale to the plaintiff being carried out. The Bank of Montreal, on receiving the money from the plaintiff, was instructed to pay Harris upon the title being passed by one Captain C. H. Nicholson. On the following day the parties met at the bank, but Captain Nicholson would not pass the title, as the bill of sale to the defendant Harris did not shew the number of his free miner's certificate nor the date of location and record of the respective claims. The parties again met at the bank a week later, but as nothing had been done to satisfy Captain Nicholson as to the title, and he still refused to pass it, Harris called off the sale to the plaintiff, and under arrangement with the defendant Shewan sold him a 51% interest in the claims for the money he had advanced.

Statement

A. Alexander, for plaintiff.
Craig, K.C., for defendant Shewan.
F. C. Saunders, for defendant Harris.

25th March, 1920.

MURPHY, J.: Assuming that there was an existing contract on December 22nd, 1919, I am of opinion that the Statute of Frauds prevents plaintiff from succeeding on the facts as proven at the trial. He cannot recover on the contract as contained in the telegram, for he broke that contract, if it existed, when he failed to leave the money in the bank by noon of December 22nd. He can only succeed, therefore, by proving

Judgment

MURPHY, J.

1920

March 25.

BEAUMONT v. HARRIS

that this term of the contract was changed after the contract was broken, for there is no question on the facts that any such change was made before breach. Even if it were so made, the Statute of Frauds would require it to be done in writing if the effect of such change was the making of a new contract as distinguished from the continuance of the existing contract and the granting of a revocable indulgence under it at defendant's request: *Hickman* v. *Haynes* (1875), 44 L.J., C.P. 358. Here the plaintiff broke the original contract and he has no memorandum in writing to shew that a new one was made. In proving his case he had necessarily to resort to parol evidence, not to explain why he had not carried out the terms of the contract of December 22nd, but to shew that, although he did not carry them out, defendant had, subsequently to breach, verbally agreed to go on with the deal. This brings the case, in my opinion, within the Statute of Frauds, and such decisions as *Stowell* v. *Robinson* (1837), 3 Bing. (N.C.) 928; *Plevins* v. *Downing* (1876), 45 L.J., C.P. 695, and *Munday* v. *Asprey* (1880), 13 Ch. D. 855, are decisive against plaintiff. If I am right in holding that what plaintiff must necessarily rely upon is a new contract, the case of *Leather Cloth Company* v. *Hieronimus* (1875), 44 L.J., Q.B. 54, has no application, as the judgments therein shew the evidence there admitted was not in proof of a new contract, but evidence in proof of the performance of the original contract.

Judgment

As to part performance, there was nothing done under the new contract by the defendant Harris. Plaintiff had his money in the bank under the first contract, if it ever existed, and he did nothing in connection with it at the request of the defendant during the subsequent negotiations, which, as stated, in my view, constituted a new contract, but one not enforceable by reason of the Statute of Frauds. The action is dismissed.

Action dismissed.

WALLACE FOUNDRY CO., LTD. v. DOMINION SHINGLE & CEDAR CO., LTD.

MURPHY, J.

1920

March 26.

WALLACE FOUNDRY CO. v. DOMINION SHINGLE & CEDAR CO.

Negligence—Damage to wharf—Trespass—Boom of logs—Tied to wharf without leave—Wharf constructed without authorization—Navigable waters.

The owner of a boom of logs cannot justify damaging another's wharf to which the boom was tied without leave, on the ground that the building of the wharf was unauthorized and constructed in navigable waters.

Dimes v. *Petley* (1850), 15 Q.B. 276 applied.

ACTION for damages to the plaintiff's wharf caused by a boom of logs of the defendant Company that had been tied to the wharf. The boom of logs in question was brought by contract for the defendant Company to False Creek. The contractor tied the boom to another boom of logs without leave, and subsequently the manager of the defendant Company fastened the booms together more securely. Later the boom was unfastened by some third party and secured to the wharf of the plaintiff Company. The defendant received express notice of this at once but took no action to see that the boom was properly fastened. Owing to the short length of cable from the boom to the wharf, the wharf was damaged, for which this action was brought. Tried by MURPHY, J. at Vancouver on the 25th of February, 1920.

Statement

Abbott, for plaintiff.
Bourne, for defendant.

26th March, 1920.

MURPHY, J.: In my opinion the tying of the boom to another boom in False Creek was an act of trespass. The fact that this practice was indulged in on several occasions would not alter the legal nature of the act. The only thing that could do so would be permission of the owner of the boom to which the defendant's boom was tied, assuming that such permission could be legally given. It cannot, I think, be argued that such permission can be implied from the fact that on other occasions

Judgment

MURPHY, J.

1920

March 26.

WALLACE FOUNDRY CO. v. DOMINION SHINGLE & CEDAR CO.

such tying had taken place. The owner of the boom to which the boom herein in question was fastened might not have been the owner in the other cases, and the evidence falls, I think, far short of establishing such a custom as would imply consent from all owners of booms in False Creek. Further, such a custom, if proven, would be illegal in view of the harbour regulations. This original trespass was the act of an independent contractor. But, in my opinion, defendant's manager adopted it when he, instead of calling on such contractor to carry out his contract, proceeded to make the fastenings more secure. I also think that if this boom were to be adrift in False Creek, it would be a dangerous thing. The defendant's manager, in view of the length of time between this further fastening of the boom and of his hearing any more about it, allowed some considerable time to elapse before taking any further action if the suggestion is to be accepted that he only heard of its being tied to plaintiff's wharf from the person who so tied it about the same time that he heard of it being there from defendant. Now, ought he, as a reasonable man, to have anticipated that this boom might be cut adrift and thus become a dangerous thing? I think so. He knew he had no legal right to allow the boom to be fastened to the other boom if the view above expressed, in reference to this act, is correct. If so, he ought to have known that the owner of the boom, to which the defendant's boom was fastened, would be within his rights, so far, at any rate, as the defendant Company was concerned, in cutting it adrift. If so, and if it thus might, in the contemplation of a reasonable man, become a dangerous thing, ought he further to have anticipated that it might, *inter alia,* be carelessly, or improperly, tied by some third party to some structure, such as defendant's wharf, which it might damage? Again, I think he should. But I think it is a fair inference, from the evidence, that he had express notice that it was tied to defendant's wharf shortly after this happened. One would expect that such notice, if given at all by the party who did the tying, would be promptly given. Admittedly such notice was given. Bourne's memory is not distinct as to when it was actually given, but he thinks not until about the time he heard from

Judgment

plaintiff. In this, for the reason given, I think his memory is at fault. At any rate, admittedly he saw the Company's boom so tied to plaintiff's wharf some time before he heard from plaintiff. Now, considering the locality and the potentiality of a boom of logs to do damage, if improperly fastened, as shewn by the results herein, I think it was the clear duty of defendant Company to at once have visited the scene and to have looked after its property to the extent at any rate of seeing it was so placed as not to damage others. Admittedly it did not do so for some two days after being notified by plaintiff. As stated, I think it had such notice shortly after the tying took place. The direct cause of the damage seems to have been the short length of cable from the boom to the wharf. This would have been apparent to anyone having such knowledge of tying booms as must be imputed to defendant Company, inasmuch as it is in the lumber business. Prompt inspection, which, I think, as stated, it was incumbent on the defendant Company to make, would have prevented the damage. If my view of the time when it first heard of its boom being at plaintiff's wharf is erroneous, then, I think it clearly adopted the original trespass when, taking its own evidence, it allowed a considerable length of time to elapse, after getting notice, before taking any steps to care for the boom. Therefore, though there is no clear evidence as to just when the damage was done to plaintiff's wharf, it was done by defendant's boom, and I must hold it liable therefor. As to the point that plaintiff's wharf is unauthorized, and is constructed in navigable waters, I hold both these assertions established by the evidence. It follows, I think, that the wharf is an illegal structure by virtue of section 4 of 8-9 Geo. V., Cap. 33: *In re Padstow Total Loss and Collision Assurance Association* (1882), 51 L.J., Ch. 344; *Jennings* v. *Hammond* (1882), 51 L.J., Q.B. 493; *Shaw* v. *Benson* (1883), 52 L.J., Q.B. 575.

Judgment

The question then arises, can plaintiff recover? It is argued it cannot, and *Contant* v. *Pigott* (1913), 5 W.W.R. 946, and *Etter* v. *City of Saskatoon* (1917), 3 W.W.R. 1110, are relied on. In these cases owners of unlicensed automobiles were held unable to recover in actions for negligence. The

MURPHY, J.

1920

March 26.

WALLACE FOUNDRY CO. v. DOMINION SHINGLE & CEDAR CO.

Contant case decides that the driver of an unlicensed automobile has, as to persons lawfully using the highway, no other right than that of being exempt from wanton or wilful injury. But here defendant had no lawful right, or right of any kind, to do the act that caused the damage, *i.e.*, the improper tying of their boom to plaintiff's wharf. In the *Etter* case, the decision, I think, amounts to this, that plaintiff was illegally operating his car, and but for such operation no accident would have happened. Some such distinction is suggested in *Chase* v. *New York Central R. Co.* (1911), 94 N.E. 377, cited in the judgment in the *Contant* case. In the case at bar, the illegal construction of the wharf had nothing to do with the accident. It might have been otherwise had the boom struck the wharf when being towed by. In *Dimes* v. *Petley* (1850), 15 Q.B. 276, a case very similar to this, plaintiff was held entitled to succeed. The chief distinction is, I think, that in the *Dimes* case apparently there was no statutory prohibition, but plaintiff admittedly had committed a nuisance in erecting his wharf, yet he recovered damages for injury to it. In the absence of authority shewing that this distinction would prevent plaintiff from succeeding, I am of opinion I should not give effect to this objection. Judgment for plaintiff.

Judgment

Judgment for plaintiff.

REX v. LEAHY.

MACDONALD, J. (At Chambers)

1920

March 29.

REX v. LEAHY

Criminal law—Summary conviction—Appeal—Duplicity—Amendment—Expose for sale and offer to sell—Prohibition—B.C. Stats. 1916, Cap. 49, Sec. 10—Criminal Code, Secs. 725-754 and 1124.

In the case of a summary conviction by a magistrate of a person on a charge that he did "expose for sale and offer to sell 24 double cases and 4 single cases of intoxicating liquor," etc., and the evidence returned on *certiorari* was sufficient to convict such person on the charge that "he did offer to sell," etc., the Court will not quash the conviction for duplicity and uncertainty but will amend the conviction under section 1124 of the Criminal Code by striking out the charge of exposing for sale.

APPLICATION by way of *certiorari* to quash a summary conviction of Daniel Leahy made on the 19th of February, 1920, on the charge that he did "on the 13th of February, at the City of Prince Rupert, expose for sale and offer to sell, 24 double cases, and 4 single cases of intoxicating liquor for the consideration of $5,000." The facts are set out fully in the reasons for judgment. Heard by MACDONALD, J. at Chambers in Vancouver on the 29th of March, 1920. Statement

R. L. Maitland, for the application.
Wood, for the Crown.

MACDONALD, J.: Upon this application for *habeas corpus* and to quash the conviction upon which Daniel Leahy is confined in Okalla gaol, B.C., it appears that he was convicted on the 19th of February, by the police magistrate of Prince Rupert, for that he did "on the 13th of February at the City of Prince Rupert, expose for sale and offer to sell 24 double cases and four single cases of intoxicating liquor for the consideration of $5,000." It has been agreed that all papers and proceedings, including the conviction, should, upon this application, be considered as if they had been properly returned to the Court, upon a writ of *certiorari* duly issued. Judgment

The contention is made that the warrant of commitment is defective, in that it alleges two offences; further, that section

MACDONALD, J. (At Chambers)

1920

March 29.

REX v. LEAHY

1124 of the Code, which has been made part of our Summary Convictions Act, cannot be utilized to cure such a defect, if I should find it to exist, by amendment of the warrant and of the conviction upon which it is based. I have first to consider whether this conviction and warrant of commitment are void on such ground. I find, in the short time at my disposal, upon looking at the authorities which have been so carefully collected, that they do not, to my mind, seem to be consistent; perhaps a more extended review of these authorities might shew that such inconsistency, appearing at first blush, is not so striking as I, for the moment, think it to be. It should be the endeavour of Courts dealing with criminal or *quasi*-criminal matters, if possible, to obtain a uniformity in the decisions throughout Canada. I have borne this in mind in previous applications of this nature. With the difficulties, however, that present themselves, I will endeavour, as best I can, to arrive at what I consider a fair conclusion, based upon the evidence, and bearing in mind that the trend of the legislation is to arrive at the merits of the conviction, provided always that the accused is not prejudiced by such a course.

Judgment

First, as to the question of duplicity, it is submitted that the case of *Rex* v. *Toy Moon* (1911), 19 Can. Cr. Cas. 33, is distinguishable, upon the facts, from those presented in this case. Further, that in the *Toy Moon* case, the duplicity was held to exist, and section 1124 was applied, because the applicants were simply convicted, under the Code, of an offence contrary to the Vagrancy Act, but alleged to have occurred in two modes, as distinguished from one—that is, that they were convicted of having unlawfully played in a common gaming-house as well as having looked on while the play was proceeding. In the judgment of Perdue, J. in that case, he cites with approval the case of *Rex* v. *Ah Yin* (*No. 1*) (1902), 6 Can. Cr. Cas. 63, in which BOLE, Co. J. took the view that playing and looking on at play were separate and distinct offences, though both arising under the vagrancy provisions of the Code. If I read the *Toy Moon* judgment aright, section 725 of the Code was only referred to incidentally and not applied. In order to effect an amendment of the conviction and consequently of the warrant, section 725 reads:

"No information, summons, conviction, order or other proceeding shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively."

Then an example is given that the defendant "did unlawfully cut, break, root up, and otherwise destroy or damage a tree, sapling or shrub."

It has been pointed out there is a case in Ontario, where it was held, that selling and allowing liquor to be on the premises for sale, constituted two separate offences, so the distinction is sought to be drawn in the present case between a person exposing for sale and offering for sale. I must say the distinction is rather fine as far as the guilt is concerned. However, there might, and probably would be, upon the facts, a different set of circumstances required to exist, so that if section 725 was not required to be invoked in the *Toy Moon* case, then the next question that arises is whether it has any application here. *Rex* v. *Brouse* (1913), 21 Can. Cr. Cas. 17, was a case under Dominion legislation, and somewhat similar to the facts in this case. There the defendant was convicted of an infraction of the Inspection and Sales Act, for that "he did unlawfully offer, expose, or have in his possession for sale" 10 barrels of apples contrary to the statute. Objection was taken that this was a conviction in the alternative and subject to objection on that account. It is to be noted, however, that there the defendant pleaded guilty, and Britton, J. said (p. 18):

Judgment

"If the objection had been taken before the police magistrate, and before the plea of 'guilty' was recorded, the information could, if necessary, have been amended."

Then he refers to the Act and goes on to discuss the different offences that come within the purview of the legislation, and adds (p. 19):

"I think the information discloses only one offence, and so is not open to the objection taken."

If this statement be accepted as a "decision," then the conviction before me does not shew two offences; it states that the accused "exposed for sale" and "offered for sale," so if I were not required to even consider the evidence, I might follow that authority, as supporting a conclusion that there is only one

MACDONALD, J. (At Chambers)

1920

March 29.

REX v. LEAHY

offence charged. Mr. Justice Britton referred to the case of *Reg.* v. *McDonald* (1898), 6 Can. Cr. Cas. 1, with approval. He says, the case then before him for consideration falls within that decision, as being an offence which might be committed in one of several ways. I lay stress upon this approbation, as it places a construction upon the meaning of the words "nature of the offence" in section 1124. The "nature of the offence" here charged is an infraction of the Prohibition Act. In *Reg.* v. *McDonald*, Ritchie, J., according to the head-note, held that "a summary conviction for unlawfully distilling spirits and making or fermenting beer without a revenue licence is not void as charging two offences." It was held to be only one offence through applying section 907 of the Code. I take it the matter was well considered by such a distinguished jurist. He says (p. 2):

> "The objection that the conviction finds the person guilty of two offences is, I think, disposed of by section 907 [now 725] of the Code."

In *Reg.* v. *Monaghan* (1897), 18 C.L.T. 45, Scott J. upheld a conviction that the defendant, under the Indian Act, did "give and sell" intoxicating liquor, deciding that this allegation did not constitute two offences—giving and selling are akin, as constituting a disposition, but differ as to the mode adopted.

In *Regina* v. *Young* (1884), 5 Ont. 184a, it was conceded by counsel for prosecution and decided by the Court, that the selling of liquor and allowing liquor to be consumed on the premises were two offences.

Judgment

The conviction in question was for infraction of the provisions of section 10 of the Prohibition Act. As to this section, the side-note says: "Sale of Liquor prohibited." It describes different modes of infractions of the Act, *e.g.*, no person shall "expose or keep for sale" or "offer to sell or barter" any liquor. Other authorities have been cited which seemingly shew the conflict to which I have referred. The conviction and warrant in this case may only indicate different modes of committing the same offence and so not be defective on account of duplicity.

I propose, however, in any event, to apply the decision in *Rex* v. *Toy Moon*, in which section 1124 of the Code (which

has been incorporated in our Summary Convictions Act) is referred to as follows by Perdue, J.A. (p. 37):

"By the effect of that section [1124], construed with sections 754 and 749, the Court shall, notwithstanding any defect in the conviction, determine the complaint on the merits, and it is empowered to confirm, reverse, or modify the decision of the justice or make such other conviction as the Court thinks just. . . . . Under these provisions, therefore, the Court should, in the present case, look at the evidence to ascertain if an offence of the nature described in the conviction was committed for which the accused might have been convicted by the magistrate; and, if the Court is of the opinion that there is no evidence to warrant it, the conviction may be modified or a new conviction may be made, so as to declare the accused guilty of the offence so warranted by the evidence."

It is not necessary for me in this case, in my view of the evidence, to go as far as was indicated by Mr. Justice (now Chief Justice) Perdue. I am quite satisfied upon the evidence of Miller, coupled with the evidence given by the applicant and his son, that there was an offering for sale. As to the exposing for sale the evidence is somewhat limited. It appears only a sample was produced, so it could not be said that defendant Daniel Leahy actually exposed for sale 24 double cases and four single cases of intoxicating liquor. I see no reason, even if I were hearing the evidence in the first instance, to refuse to follow the evidence of Miller, as compared with the evidence of the party who is accused of an offence under the Act. There is no suggestion that Miller did not come into the matter innocently. He was not even cross-examined by counsel appearing for the accused.

Judgment

As to the evidence necessary to prove an offence, *e.g.*, a sale, even though the person accused is not actually engaged as a principal, I might refer to the amendment to the Summary Convictions Act in 1918, section 67A. It is similar to the Code in that respect, and stated that

"Every person who—(*a.*) Does or omits an act for the purpose of aiding any person to commit an offence; or (*b.*) Abets any person in commission of an offence; or (*c.*) Counsels or procures any person to commit an offence—is a party to the offence, and shall be liable to be tried, convicted, and punished as a principal offender."

Under these circumstances I see no reason to quash the conviction. That means the warrant is supported and held to be valid except that, under the powers of amendment, as the evidence does not fully support the charge of exposing for

MACDONALD, J. (At Chambers)

1920

March 29.

REX v. LEAHY

sale, I pursue the same course as in the *Toy Moon* case, of amending the conviction and warrant, by eliminating that portion and simply alleging in the conviction and warrant that defendant "did offer for sale," etc.

Conviction sustained.

COURT OF APPEAL

1920

April 6.

MALTBY v. BRITISH COLUMBIA ELECTRIC RY. CO.

MALTBY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Collision—Automobile and tram-car—Damages—Verdict of jury for plaintiff—Judgment for defendant notwithstanding verdict—Contributory negligence—R.S.C. 1906, Cap. 37, Secs. 274-5.

In an action for damages for wreckage and non-user of the plaintiff's automobile owing to a collision with a tram-car of the defendant Company the jury brought in a verdict for the plaintiff but on motion of the defendant the trial judge dismissed the action.

Held, on appeal, affirming the decision of RUGGLES, Co. J. (MARTIN, J.A. dissenting), that notwithstanding the verdict of the jury the plaintiff's action should be dismissed as his own negligence in not looking carefully when approaching the crossing was the cause of the accident and the jury's verdict was unreasonable.

Statement

APPEAL from the decision of RUGGLES, Co. J., of the 6th of July, 1919, dismissing an action for damages owing to a collision between his automobile and a car of the defendant Company, the plaintiff claiming $309.05 for damages to his car and $5 a day for eleven days' loss of use of car. One Carrie had hired the car in question from the plaintiff on the 31st of January, 1919. On the same day, shortly after seven o'clock in the evening, he was driving along 8th Avenue westerly. On approaching the intersection of 8th Avenue and the defendant Company's right of way he was going at about ten miles an hour. When about ten feet from the track he saw a car of the defendant Company coming north, and he put on the brakes, at the same time turning his car to the left, but he struck the defendant's tram-car about three-quarters of the

way back as it was crossing the street and the automobile was wrecked. There was a slight down grade as the defendant's tram-car came from 9th to 8th Avenue and there was a down grade from the east on 8th Avenue as the street approached the car line. The defendant did not move for nonsuit at the end of the plaintiff's case but proceeded with the evidence. The jury brought in a verdict for the plaintiff. On motion for judgment the defendant moved for dismissal, notwithstanding the verdict of the jury. The action was dismissed. The plaintiff appealed.

Statement

The appeal was argued at Vancouver on the 9th and 10th of December, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

S. S. Taylor, K.C., for appellant: There was a slight down-hill grade on the track from 9th to 8th Avenue. On the question of taking the case from the jury see *The Metropolitan Railway Co.* v. *Wright* (1886), 55 L.J., Q.B. 401; 11 App. Cas. 152. The jury is the constitutional master of the facts and the circumstances were such that the case should have been left to the jury. First, there was no sufficient whistle or gong in approaching the crossing. Second, there was no gong at the crossing; and third, they were going at too great a speed: see sections 274-5 of the Railway Act.

McPhillips, K.C., for respondent: The auto hit our car three-quarters of the way back. On the question of evidence of not hearing a gong see *Lane* v. *Jackson* (1855), 20 Beav. 535 at p. 539. On the question of speed, the onus is on them: see *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1 at pp. 9 and 15. The Railway Act with relation to whistles, gongs and signals does not apply: see *Columbia Bithulitic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1 at pp. 17-8. As to the effect of not moving for nonsuit at the end of the plaintiff's case see *Banbury* v. *Bank of Montreal* (1918), A.C. 626. As to whether there was evidence justifying the submission of the case to the jury see *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536; *Fawkes* v. *Poulson and Son* (1892), 8 T.L.R. 725; *Allen* v. *North Metropolitan*

Argument

COURT OF APPEAL

1920

April 6.

MALTBY v. BRITISH COLUMBIA ELECTRIC RY. CO.

Tramways Company (1888), 4 T.L.R. 561; *Gavin* v. *The Kettle Valley Rway. Co.* (1919), 58 S.C.R. 501.

Taylor, in reply, referred to *Jones* v. *Spencer* (1897), 77 L.T. 536; *Dunphy* v. *B.C. Electric Ry. Co.* (1919), 27 B.C. 327.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.: Assuming that there was evidence of defendant's negligence, the question is, could the jury reasonably acquit the driver of the plaintiff's auto of contributory negligence? I think not. The driver knew the locality, he knew the dangerous situation of the crossing which he was approaching, and he came coasting down the grade towards it at, as he says, the rate of 10 to 12 miles an hour. He did not see the approaching tram-car until he was right upon it. It was night time and the tram-car was lighted, and I assume carried a head-light, as there was no suggestion to the contrary. The auto was coming down the centre of the highway. Looking at the plan, and drawing a line between a point on the centre of the highway 25 feet back from the near rail and clear of the house and fence, the driver had a full view of the railway track in the direction from which the tram-car was coming of more than 100 feet. At 20 feet back from the rail, the view would be extended to half a block or about 200 feet.

MACDONALD, C.J.A.

The driver was asked:

"Now the evidence in here is at 20 feet, you could have seen half a block? I was not watching the left hand side (the side from which the car was coming).

"The first time you looked you were ten feet from the track? I was watching the right-hand side, then I looked to the left."

The evidence of the plaintiff is that the motor-car could have been stopped in a very short distance, he would not quite say, three or four feet. To my mind, on his own evidence and that furnished by the *locus in quo,* there is only one conclusion to which reasonable and honest men could come, namely, that had the driver exercised any care at all, he could have avoided the collision.

I would dismiss the appeal.

MARTIN, J.A.: In my opinion, this is a case where, with all

MARTIN, J.A.

respect to the action taken by the learned County judge, the verdict of the jury in favour of the plaintiff should have been allowed to stand, because, shortly, the address of the learned judge to the jury itself shews that there was evidence before them upon which they could reasonably find the verdict that they did find. The appeal, therefore, I think, should be allowed.

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

MCPHILLIPS, J.A.: In my opinion the learned trial judge, RUGGLES, Co. J., arrived at the right conclusion upon the facts of this case in dismissing the action, notwithstanding the verdict of the jury, which was unreasonable (see Lord Morris in *Jones* v. *Spencer* (1898), 77 L.T. 536 at p. 538). This case is within the language of Mr. Justice Duff in *Columbia Bithulitic Limited* v. *B.C. Electric Rway. Co.* (1917), 55 S.C.R. 1 at p. 26:

"That is to say if the injury is not only the actual consequence but the consequence which any reasonable person in the plaintiff's position, knowing what the plaintiff knew, must have seen to be the probable consequence of his negligence and the chain of casuality is not interrupted by the negligence of the defendant, then it is settled law that the plaintiff cannot recover."

Upon the facts of the present case—the driver of the automobile upon his own testimony was going slow, admittedly he could have stopped, he did not even look in the direction in which he knew the electric-car would come but looked the other way—he was throughout negligent and reckless—and he was the author of the injury to the car.

MCPHILLIPS, J.A.

Fawkes v. *Poulson* (1892), 8 T.L.R. 725 was an action for negligence, personal injuries being sustained. The jury found for the plaintiff and the Court of Appeal directed judgment to be entered for the defendants. Lindley, L.J. said—

"that the plaintiff had made out a *prima facie* case (although that *prima facie* case was uncommonly slight) and the judge had acted wisely in not withdrawing the case from the jury. But the question was whether, when all the facts were brought to light, there was any such evidence as would warrant the jury in finding a verdict for the plaintiff."

Here upon the facts the driver of the automobile so negligently proceeded that it was an inevitable accident which the Railway Company could not possibly prevent. There was no

COURT OF APPEAL

1920

April 6.

MALTBY v. BRITISH COLUMBIA ELECTRIC RY. CO.

failure of the exercise of reasonable care upon the part of the Railway Company.

Fraser v. *B.C. Electric Ry. Co.* (1919) [26 B.C. 536], 2 W.W.R. 513, was a case where it was held by this Court that the plaintiff was

"disentitled to recover for injury through collision between his automobile which he was driving and defendant's tram-car because the accident occurred at a dangerous point where the plaintiff should have looked to see if a car were coming and if he looked he would have seen it, and either the failure to look, or, if he looked, the crossing in front of the car, was reckless conduct constituting contributory negligence on his part, which was the *causa causans* of the accident."

In that case I took occasion to review a large number of cases bearing on contributory negligence, establishing that where upon the facts it can be reasonably said that one view only is permissible judgment may rightly be entered in accordance with that view, which was the course adopted by the learned trial judge in the present case (see Duff, J. in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53; 5 W.W.R. 926; 27 W.L.R. 444).

MCPHILLIPS, J.A.

That this is a proper case to sustain the judgment for the defendant and not direct a new trial is conclusively established by the judgment of the House of Lords in *Banbury* v. *Bank of Montreal* (1918), A.C. 626. At p. 706, we find Lord Parker saying:

"Instead of granting a new trial, they can [the Court of Appeal], in a proper case, direct judgment to be entered for the defendant. They ought, in my opinion, to exercise this power whenever such a course will, in their opinion, do complete justice between the parties—for example, when they have all the available evidence before them, and there is no chance of a new trial bringing to light other material facts. It appears to me that this is precisely that case."

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *P. J. McIntyre.*
Solicitors for respondent: *McPhillips & Smith.*

WILLIAMS v. RODGERS.

COURT OF APPEAL

1920

April 6.

WILLIAMS v. RODGERS

Contract—Shares in company—Property of two persons—Sale by agent—Judgment obtained after action against one owner—Right of action against other owner with whom contract was made.

R., living in British Columbia, and H., living in New York, owned all the shares in a mining company that they contemplated selling. R. wrote the plaintiff "referring to our conversation about your having a purchaser for the Hidden Creek Copper property. I will give you a commission providing your purchaser takes up the property, of not to exceed $10,000," etc., and later H. wrote R., "referring to our conversation about the sale of the Hidden Creek Copper Company, B.C., I am agreeable to and authorize you to pay a commission of $10,000 to R. P. Williams or others upon sale of the same," and a copy of this letter was sent by R. to the plaintiff. The plaintiff procured a purchaser and a sale was made. The plaintiff then, upon the advice of R., brought action against H. and recovered judgment for $10,000, but failed in an attempt to enforce same in the State of New York. The plaintiff then brought action against R. to recover $10,000, which was dismissed.

Held, on appeal (reversing the judgment of MURPHY, J.), that in view of the correspondence, the proper construction to be placed on the letter from H. to R. is not that it authorized R. as the agent of H. to enter into an executory agreement with the plaintiff to pay him a commission, but that it merely expressed the consent of H. to the payment to plaintiff of the sum mentioned "upon a sale" of the property. The contract to pay commission was the contract of R., and there was no question of agency or joint liability, the attempt of the plaintiff to enforce payment from H. not being a ground for depriving him of his rights against R.

APPEAL by plaintiff from the decision of MURPHY, J., of the 25th of September, 1919, in an action to recover commission alleged to be due from the defendant through a sale by the defendant to the Granby Consolidated Mining, Smelting & Power Company of certain shares in the capital stock of the Hidden Creek Copper Company, the defendant having entered into an agreement in writing with the plaintiff whereby he agreed to pay the plaintiff a commission of $10,000 provided he obtained a purchaser who would take up the shares. The facts are sufficiently set out in the judgment of MACDONALD, C.J.A.

Statement

COURT OF APPEAL

1920

April 6.

WILLIAMS v. RODGERS

The appeal was argued at Vancouver on the 5th and 6th of January, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: The plaintiff performed his part of the contract and the learned judge should have so found. The plaintiff found a purchaser who took the property, and he is not concerned with any subsequent modification of the transaction between the parties. After the defendant had elected to move for dismissal, the learned judge was in error in allowing the defendant to give further evidence, also in refusing an adjournment after admitting the evidence.

Argument

Reid, K.C., for respondent, referred to Addison on Contracts, 10th Ed., 293; 11th Ed., 315-6; *Desrosiers* v. *Regem* (1919), 18 Ex. C.R. 461; *Hatsall* v. *Griffith* (1834), 2 C. & M. 679; *Keay* v. *Fenwick* (1876), 1 C.P.D. 745; *Ex parte Buckley in re Clarke* (1845), 14 M. & W. 469. These cases shew it was a joint liability, and Hodgens and Rodgers should have been sued together. Having obtained judgment against Hodgens, he cannot sue Rodgers now: see *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504 at p. 515.

Mayers, in reply: I say it was the sole contract of Rodgers and he is the proper party to sue: see Addison on Contracts, 10th Ed., 298.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Unless the plaintiff is precluded by his course of conduct subsequent to the contract from making the claim sued on herein, there can, I think, be no doubt as to his right to succeed.

The only apparent parties to the contract of agency are the parties to this action, but it was submitted by defendant's counsel that his client was merely agent for one, Hodgens, or that he and Hodgens were joint contractors. It appears that the defendant and Hodgens at the time in question were the owners of all of the capital shares in an incorporated mining company which owned the "Hidden Creek" mines. Rodgers lived in British Columbia and Hodgens in New York. The

contract of agency is contained in a letter written by Rodgers to the plaintiff, dated the 7th of December, 1909, and is in the following words:

"Referring to our conversation about your having a purchaser for the Hidden Creek Copper property. I will give you a commission providing your purchaser takes up the property, of not to exceed $10,000, payable 5% to you of the payments as they are made by the purchaser, until you have received the amount of $10,000 and no more."

Some six months later Hodgens wrote to defendant the two letters following, each bearing date the 20th of July, 1910:

"Referring to our conversation about the sale of the Hidden Creek Copper Company, B.C., I am agreeable to and authorize you to pay a commission of $10,000 to R. P. Williams or others upon sale of the same."

The other letter reads:

"I am agreeable to and authorize you to pay a commission of $15,000 upon a sale of the Hidden Creek Copper Company property."

It has not been clearly explained why these two letters, in practically the same terms except as to price, were written. The plaintiff is suing only for $10,000, the amount promised him by Rodgers, and no question was raised before us which makes it necessary to consider the reason why the above two letters were in different terms as to price. Copies of these two letters were sent by Rodgers to the plaintiff about the time of the receipt thereof. The plaintiff procured a purchaser in the Granby Consolidated Mining & Smelting Company, and subsequently the Hidden Creek mines were transferred to the purchasers by the assignment of all the shares of the company which were held or controlled by Rodgers and Hodgens.

MACDONALD, C.J.A.

It was not contended that if plaintiff is entitled to succeed at all he is not entitled to $10,000; in other words, 5 per cent. of the purchase price would not be less than $10,000. The plaintiff had no direct communication with Hodgens, but Rodgers induced him to endeavour to get the commission from Hodgens. The plaintiff therefore brought an action against Hodgens and obtained judgment for $10,000 which he afterwards endeavoured to enforce in New York, but for some reason gave up the effort. He then brought this action against Rodgers alone, and the only defence of substance is *transit in rem judicata,* based upon the contention that Rodgers was Hodgens's agent in making the contract with the plaintiff, or in the alternative, that Rodgers and Hodgens were joint contrac-

COURT OF APPEAL

1920

April 6.

WILLIAMS v. RODGERS

tors, that is to say, that Rodgers made the contract for himself and as agent for Hodgens, and that the plaintiff having recovered judgment against the principal could not thereafter sue the agent, or, in the alternative, having recovered judgment against one of the joint contractors, could not sue the other.

It was not contended before us that the contract was the contract of the mining company. The additions to the signatures must, I think, be taken as merely descriptive of the parties. However, as I say, there was no argument directed to such an issue.

Now in view of the fact that Rodgers was here on the ground, actively promoting a sale of the mines, which, if consummated, would result in a large sum of purchase money being brought into his hands or under his control, in which both he and Hodgens were interested, the fair construction, I think, to be placed upon the letter of the 20th of July is not that it authorized Rodgers as the agent of Hodgens to enter into an executory agreement with Williams to pay him a commission, but that it merely expressed the consent of Hodgens to the payment to Williams of the sum mentioned "upon a sale" of the property. The contract to pay commission was therefore the contract of Rodgers, and in that view of the case, there can be no question of agency or joint liability. This view of the character of the letter of the 20th of July is borne out by the correspondence in which Rodgers himself speaks of that letter as "an order."

MACDONALD, C.J.A.

It may well be that Hodgens was quite willing that a commission should be paid out of the purchase-money, or should be paid on the joint account of himself and Rodgers when the sale had been completed, and yet would not be willing to authorize Rodgers to make him a principal in an executory contract which might afterwards give rise to litigation.

It was hardly contended before us that if it should be decided that the obligation was not joint, that the defendant could succeed in his defence unless what took place between him and the plaintiff amounted to a release of a right which had accrued when the plaintiff had performed his part of the contract. The plaintiff's course in endeavouring to get the commission from

Hodgens, between whom and the plaintiff there was, in my view of the transaction, no privity of contract, although good-natured and unwise, is no ground for depriving him of his rights against Rodgers, at whose instance these proceedings were taken. There is no suggestion of want of good faith on the plaintiff's part in pursuing the course which he took. As between themselves Hodgens and Rodgers were to pay half of the commission, as is evidenced by an agreement between them made after the sale and before the plaintiff brought this action against Hodgens.

Even after the plaintiff failed to get the money from Hodgens, Rodgers acknowledged his obligation by offering to give a promissory note for what he called his half of the commission.

MACDONALD, C.J.A.

There can, I think, be no question as to where the equity lies. Neither Rodgers nor Hodgens have ever denied that Williams had earned the commission. It is true each of them has defended an action for the same, but apart from that there is not the slightest suggestion that the commission had not been fairly earned.

I would therefore allow the appeal.

MARTIN, J.A.: In my opinion the letter of December 7th, 1909, constituted, in the circumstances, a sole contract with Rodgers, being a confirmation of the contract concluded in October-November previous, before Hodgens came into the matter, and I am unable to see how Rodgers was released from that obligation. The suit against Hodgens and the arrangement regarding the payment of $5,000 in connection therewith were begun and made at the instigation of and for the benefit of Rodgers, who by his letters admits clearly, in my opinion, one half of his liability at least, $5,000, and it flows from that, in the circumstances, that there was, and is, in strict law, a liability for the whole sum of $10,000, for which amount judgment should be entered and the appeal allowed.

MARTIN, J.A.

GALLIHER, J.A.: I would allow the appeal for the reasons given by the Chief Justice.

GALLIHER, J.A.

COURT OF APPEAL

1920

April 6.

WILLIAMS v. RODGERS

McPHILLIPS, J.A.: I agree in allowing the appeal.

Appeal dismissed.

Solicitor for appellant: *A. M. Whiteside.*

Solicitors for respondent: *Bowser, Reid, Wallbridge, Douglas & Gibson.*

COURT OF APPEAL

1920

April 6.

JONES v. CITY OF VANCOUVER

JONES v. CITY OF VANCOUVER. (No. 2.)

Practice—Appeal to Privy Council—Right of appeal—Loss of business resulting from enforcement of by-law — Proof — Privy Council rules 2(a) and 5(a).

On an application for leave to appeal to the Privy Council from a judgment of the Court of Appeal, it was submitted in evidence that the loss to appellant's business resulting from the enforcement of a city by-law providing "that the keeper of a billiard or pool-room should not permit any person to play on the licensed premises for a wager other than the price of the game," would exceed the sum of £500, counsel for respondent admitting that the loss would exceed that amount.

Held, MACDONALD, C.J.A. dissenting, that notwithstanding the admission of counsel for respondent, the evidence of loss of profit arising from the by-law is purely problematical and lacks the definiteness of proof required to bring the case within the rules.

Statement

APPLICATION by plaintiff for leave to appeal to the Privy Council from the decision of the Court of Appeal of the 19th of March, 1920, affirming an order of MURPHY, J., dismissing a rule *nisi* to shew cause why by-law number 1362 of the City of Vancouver should not be quashed. The application was directed against subsection (2) of section 11 of the by-law, which provided that

"No keeper of a billiard and pool-room shall permit or allow any person to play or take part in any game on any billiard, pool or bagatelle table (in the premises occupied by him and for which a licence has been granted to him to keep such tables) upon the result of which there is any wager or stake other than the price of the game, which price shall not in any case be greater than the price usually charged for such game by such keeper."

COURT OF APPEAL

1920

April 6.

JONES v. CITY OF VANCOUVER

For the application, it was submitted that the loss to the plaintiff's business resulting from the enforcement of the above subsection exceeded £500, and that an appeal lies as of right under rule 2(a) of the Privy Council Rules. Counsel for the defendant admitted that the loss to plaintiff's business would exceed £500. Heard at Vancouver on the 6th of April, 1920, by MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

T. B. Jones, for the application.
Orr, contra.

MACDONALD, C.J.A.: When a civil right is involved to the value of £500 it is our duty, under the rule, to grant leave. In fact, we have no option in the matter as the rule stands at present, and when that case has been made out, as here by the admission of counsel for respondent, which I see no reason for declining to act upon, leave should be granted as a matter of course. But the majority of the Court think that the application should be refused. The application is therefore refused.

MACDONALD, C.J.A.

GALLIHER, J.A.: I am not satisfied with the admission of counsel because, while I am always prepared to take the admission of counsel, this is a case where, to my mind, everything is problematical, and it has not been demonstrated. It may be, in the mind of counsel, that it would amount to that, and he may be honest enough in making his admission that it would amount to that, but that does not satisfy me. There is no definiteness in the proof that it does amount to that which comes within the rule, and that is the reason why I am taking the stand I am in the matter.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I wish to state in the most positive terms that I decline to agree to this application, and I cannot refrain from saying that it is a great surprise to me that the Corporation of the City of Vancouver should have instructed counsel that the matter in dispute is of the value of five hundred pounds sterling and upwards, when the matter that is in dispute here is a problematical profit arising from the inhibition to play pool on the tables for an amount greater than the amount of the game, *i.e.,* to an amount which this Court has

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

April 6.

JONES v. CITY OF VANCOUVER

MCPHILLIPS, J.A.

held to be contrary to an *intra vires* by-law. Now that is a purely hypothetical valuation of an alleged right, quite apart from the licence itself, which may be revoked at any minute, and I cannot think that it is the duty of a judge or a Court to take an admission from counsel which is purely illusory on its face—patently so. That the Corporation of the City of Vancouver should put its ratepayers to the expense of going to the Privy Council in a matter of this kind passes my comprehension. It is certainly with no reluctance that I consider that the application is one that does not admit of an appeal as of right, and if an appeal were made to our discretion, our discretion would be rightly exercised by a refusal.

Application refused.

COURT OF APPEAL

1920

April 6.

MARITIME MOTOR CAR CO. v. MCPHALEN

MARITIME MOTOR CAR COMPANY LIMITED v. McPHELAN AND McPHALEN.

Chose in action—Bond—Assignment—Notice of—Validity—Application to add parties refused—R.S.B.C. 1911, Cap. 133, Sec. 2(25).

The person named in a notice of assignment of a bond was not the name of the assignee in the assignment itself, and the notice was of an assignment of a bond "bearing date on or about the 18th of September, 1915," whereas the bond sued on was dated "this 18th day of September, 1815."

Held, on appeal (affirming the decision of GREGORY, J., 27 B.C. 244), that there was not a sufficient "express notice in writing" of the assignment as required by section 2(25) of the Laws Declaratory Act and the plaintiff had no *status* to bring the action.

Statement

APPEAL by plaintiff from the decision of GREGORY, J., of the 19th of June, 1919 (reported 27 B.C. 244), in an action against sureties on a bond. The plaintiff Company sold a motor-chassis under a lien agreement to the B.C. Independent Undertakers, Limited, the purchasers equipping same with a hearse body. Subsequently, the purchasers being in default,

the plaintiff Company seized the whole vehicle under the lien. The purchasers then brought action for the wrongful taking of the body of the hearse and two tires, and they obtained an order of replevin, which provided that they must give a bond for $2,000 to the sheriff, with two sureties, for the prosecution of the action with effect, and without delay, the defendants D. J. McPhelan and Caroline McPhalen being the sureties. The B.C. Independent Undertakers, Limited, failed in their action, and on the assessment the plaintiff Company was awarded $350 as the value of the property wrongly replevied and $3,538.15 damages and costs. The Maritime Motor Car Company refused to take an assignment of the bond from the sheriff, on the ground that he had not included in the bond an obligation to pay the damages and costs as well as the value of the goods, and sued him for the amounts recovered from the B.C. Undertakers. That action was settled by the sheriff paying the Maritime Motor Car Co. $2,000 and giving an assignment of the bond. The notice of the assignment of the bond that was served on the sureties named the B.C. Independent Undertakers as the assignee instead of the Maritime Motor Car Co., and gave the date of the bond as on or about the 18th of September, 1915, whereas the bond was dated the 18th of September, 1815. The bond itself was also defective in that it read "the sum of two thousand of lawful money of British Columbia" without further words in the document to assist in construing it, with the further defect that although it included the words "sealed with our seals," no seals were in fact affixed to the document. The learned trial judge dismissed the action.

Statement

The appeal was argued at Vancouver on the 28th of November and 1st of December, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

R. M. Macdonald, for appellant: My contention is the word "dollars" should be added in construing the bond: see Halsbury's Laws of England, Vol. 15, p. 474; Elphinstone on Deeds, 2nd Ed., 83; *Coles* v. *Hulme* (1828), 8 B. & C. 568. I contend the defect is curable by extrinsic evidence for two reasons: first, the Court can put itself in the position of the

Argument

COURT OF APPEAL

1920

April 6.

MARITIME MOTOR CAR CO. v. MCPHALEN

party, and secondly, while extrinsic evidence is not permitted to supply a complete blank, it is permitted to supply a partial one: see Phipson on Evidence, 5th Ed., 579; *In the Estate of Hubbuck* (1905), P. 129. This is a case of partial blank only. As to the necessity of a seal to the bond see Halsbury's Laws of England, Vol. 10, pp. 382-3. Although the notice of assignment was defective, having the wrong name as assignee, I contend it was sufficient notice under the Laws Declaratory Act. The notice is to direct him to the assignment: see *Denney* v. *Conklin* (1913), 82 L.J., K.B. 953; *Imperial Bank of Canada* v. *Georges & Son* (1909), 12 W.L.R. 398; *Eastman* v. *Pemberton* (1900), 7 B.C. 459. We asked to add the sheriff as a party. The application was, I contend, wrongly refused: see *Murray* v. *Stentiford* (1914), 20 B.C. 162; *Dell* v. *Saunders* (1914), 19 B.C. 500 at p. 505; *Armstrong* v. *Marshall* (1914), 19 D.L.R. 183; *The Canadian Bank of Commerce* v. *La Brash* (1918), 1 W.W.R. 8.

Argument

A. D. Taylor, K.C., for respondent: The name of the assignee is an essential part of the notice, and both *Denney* v. *Conklin* and *Imperial Bank of Canda* v. *Georges & Son* do not apply, as the name of the assignee is shewn in both: see also *Stanley* v. *English Fibres Industries, Lim.* (1899), 68 L.J., Q.B. 839; *Strong* v. *Canadian Pacific Ry. Co.* (1915), 22 B.C. 224. The defendants in this case were merely sureties and not parties to the replevin proceedings: see Halsbury's Laws of England, Vol. 15, p. 479, par. 914. A bond must be under seal unless there is a consideration: see Halsbury's Laws of England, Vol. 3, p. 80, par. 158; and p. 83, par. 170. The seal on the bond is the Company's and cannot be the McPhalens: see De Colyar on Guarantees, 3rd Ed., 15; *Barrell* v. *Trussell* (1811), 4 Taunt. 117; *Pillans* v. *Mierop* (1765), 3 Burr. 1663. On the question of invalid assignment and adding the sheriff as a party see *Durham Brothers* v. *Robertson* (1898), 1 Q.B. 765; *Cropper* v. *Smith* (1884), 26 Ch. D. 700.

Macdonald, in reply: On notice of assignment see *Armstrong* v. *Marshall* (1914), 8 Alta. L.R. 449.

Cur. adv. vult.

6th April, 1920.

COURT OF APPEAL

1920

April 6.

MARITIME MOTOR CAR CO. v. MCPHALEN

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Out of the confused material before us, these facts, as nearly as I can ascertain them, appear to emerge.

The Maritime Motor Car Company Limited having sold, under a lien agreement, a motor-chassis to the B.C. Independent Undertakers, Limited, and the latter having equipped it with a hearse body, and having thereafter made default in payment of the purchase-money, the Motor Company seized the whole, that is to say, the chassis and body constituting the motor-hearse. The Undertakers then brought action for the wrongful taking of the body of the hearse and two spare tires and obtained an order of replevin, under which the Undertakers were bound to give a bond to the sheriff, with two sureties. The defendants, husband and wife, became the sureties. The condition of the bond was such that if the Undertakers should duly prosecute their action and return the hearse body and tires, if a return thereof should be adjudged, then the obligation should be void. The penal sum was expressed to be "two thousand of lawful money of British Columbia." The bond was dated 18th September, 1815. Though it was expressed that the bond was "sealed with our seals," no seals were in fact affixed, other than the corporate seal of the Undertakers, who were also parties to the bond. The Undertakers failed in their action.

On the assessment the Motor Company were awarded $350 as the value of the property taken and not returned, and certain large sums for damages and costs. Parenthetically it may be suggested that if the plaintiff is entitled to succeed at all, its right is to $350 only.

The Motor Company refused to take an assignment of the bond from the sheriff and sued him for the several amounts which it had recovered against the Undertakers. It claimed that, under the Replevin Act, the sheriff ought to have included in the bond an obligation to pay the damages and costs, as well as the value of the goods taken, which he did not do. That action was settled by the sheriff paying $2,000 and assigning the bond. Notice of assignment was given to Mrs.

COURT OF APPEAL

1920

April 6.

MARITIME MOTOR CAR CO. v. MCPHALEN

MACDONALD, C.J.A.

McPhalen; it is not clear whether it was also given to Mr. McPhalen. This writing gave notice of an assignment of the bond from the sheriff to the Undertakers, not to the plaintiff, and the action was then commenced by the plaintiff in its own name.

To recapitulate this comedy of errors, the so-called bond was ante-dated 100 years, the penalty was "two thousand," whether dollars or cents is not stated, "of lawful money of British Columbia," which has no currency of its own. No seals were affixed, so that it is not a bond in the legal sense of the term. The obligation in respect of damages and costs was omitted, and the notice of assignment was palpably erroneous and misleading. There may have been some other errors, but the above list is sufficiently enlightening.

Now, it may be that the errors in date, in currency and in respect of seals are not fatal errors. With respect to these I express no opinion, as in the conclusion to which I have come it is unnecessary to do so. But the notice of assignment which would have to be given pursuant to the Laws Declaratory Act to entitle the plaintiff to sue in its own name has not been given. The notice given is of an assignment by the sheriff without stating to whom. Then follows the warning that action will be commenced to enforce the bond, "as it is now the property of the B.C. Independent Undertakers, Limited." Had the notice stated, as the fact was, that the bond was then the property of the plaintiff, not much fault could have been found with it, though even then it would have inaptly expressed the transaction.

The giving of the written notice provided for by statute was a condition precedent to the plaintiff's right to sue in its own name, and as it has failed to perform this condition, this action was, I think, rightly dismissed.

I may add that I do not think I ought to interfere with the discretion exercised by the learned trial judge, when he refused, in the circumstances of this case, to stay his hand until a new party could be added.

The appeal is therefore dismissed.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, I think, be dismissed

upon the first objection, apart from others, that there has not been a sufficient "express notice in writing" of the assignment as required by section 2 (25) of the Laws Declaratory Act, Cap. 133, R.S.B.C. 1911.

The case of *Stanley* v. *English Fibres Industries, Lim.* (1899), 68 L.J., Q.B. 839, shews that a mistake in the notice of the true date of the assignment invalidates the notice, and *Denney* v. *Conklin* (1913), 3 K.B. 177; 82 L.J., K.B. 953, holds, upon the reasoning, as I understand it, that the assignee must be named or inferentially disclosed in the notice, even though it is not necessary to use the word "assignee" or its appropriate variations, and it was held (under the corresponding section in The Judicature Act, 1873) that a statement in the notice, by way of a letter, that a claim was put forward on behalf of the trustees under a certain deed of arrangement dated December 5th, 1907, was a sufficient notice of assignment because the

MARTIN, J.A.

"letter, though not worded with the precision of a more formal notice does indicate with sufficient certainty to the defendant that Derham, has executed a deed which assigns to the trustees the debt formerly due to him, and that the debt, when the amount is ascertained, must be paid to the trustees and not to Derham."

But the difficulty here is not only that no assignee at all is mentioned in the notice, but that another company and not the plaintiff is stated to have "now the property" in the assigned bond, and so that "indication with sufficient certainty," which saved the situation in the *Denney* case, *supra,* is worse than absent here. Therefore I see no other course open than to dismiss the appeal.

GALLIHER, J.A.: The bond in question recites that the defendants are jointly and severally bound in the sum of two thousand of lawful money of British Columbia. The respondents object that in the absence of any words denoting the species of money after the word "thousand," the bond is defective and cannot be enforced.

GALLIHER, J.A.

In *Coles* v. *Hulme* (1828), 8 B. & C. 568, it was held that this defect could be cured where you could find in the instrument itself references to the debt for the securing of which the

COURT OF APPEAL

1920

April 6.

MARITIME MOTOR CAR CO. v. MCPHALEN

MARTIN, J.A.

bond was given, such debt being referred to in £, s. and d. In that case Lord Tenterden, C.J., at p. 573, said:

"In every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties."

And Bayley, J. at p. 574:

"It has been decided, that in furtherance of the obvious intent of the parties, even a blank may be supplied in a deed."

Now, could there be a doubt in the mind of any reasonable man as to what the parties intended here? I think not.

The second objection is that in the notice of assignment served on the defendants the name "B.C. Independent Undertakers, Limited," is inserted where it should be "Maritime Motor Car Company Limited," and the case of *Stanley* v. *English Fibres Industries, Lim.* (1899), 68 L.J., Q.B. 839, is relied on.

In that case there was an error in the notice giving the date of the assignment as October 25th, 1898, instead of November 17th, 1898. Ridley, J. held the notice bad, as notice of the actual assignment had never been given, but notice of an assignment which never existed. What happens here is that the defendants are notified that the B.C. Undertakers are the owners of the bond and they find themselves sued by the Maritime Motor Car Company Limited. The notice is sent by a firm of solicitors who do not state for whom they are acting, but on the face of the notice it would be presumed they were acting for the B.C. Undertakers.

Subsection (25) of section 2 of the Laws Declaratory Act, Cap. 133, R.S.B.C. 1911, states that express notice must be given. I think that the notice given would have been a sufficient compliance had the proper name of the assignee been inserted.

It may very well be that the defendants knew it was an error, but no duty lay upon them in that connection, nor could their knowledge in any way affect the necessity for a sufficient compliance with the statute on the part of the assignee. It was, to use the language of Ridley, J., notice of an assignment which never existed.

This, in my opinion, is sufficient to dispose of the case in favour of the respondents.

MCPHILLIPS, J.A.: I am of the opinion that the appeal should stand dismissed.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Bird, Macdonald & Co.*
Solicitors for respondents: *Taylor & Campbell.*

GREER v. GODSON.

Principal and agent—Sale of ship—Commission—Sale effected through series of agents—Effective cause.

The plaintiff having assisted the defendant in the reconstruction of a ship, the defendant promised him a commission if he procured a purchaser. The plaintiff employed a sub-agent who negotiated with another broker, and through him the matter was passed on through four other brokerage firms. After a lapse of about nine months a broker to whom the matter was last mentioned came to the defendant and made an arrangement directly with him, resulting in a purchaser being obtained. The plaintiff, however, continued his services as a broker, with the acquiescence of the defendant, up to the time of the sale, and also materially assisted in procuring the Government's consent to a transfer of the ship to a foreign registry. It was held by the trial judge that on the evidence the plaintiff found the purchaser and was entitled to his commission.

Held, on appeal (affirming the decision of CLEMENT, J.), *per* MACDONALD, C.J.A. and GALLIHER, J.A., that although the plaintiff could not be deemed the effective cause of the sale (following *Gibson* v. *Crick* (1862), 1 H. & C. 142), he continued to assist at the request of the defendant up to the time of the sale on the implied promise of remuneration on the basis of his original employment.

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

Per MCPHILLIPS, J.A.: That the employment of the plaintiff was a general one, which continued to the day of the sale; he was, upon the facts, the effective cause of the sale, and is entitled to the commission claimed.

[Affirmed by Supreme Court of Canada.]

CLEMENT, J.

1919

Sept. 18.

COURT OF APPEAL

1920

April 6.

GREER v. GODSON

APPEAL by defendant from the decision of CLEMENT, J. in an action for $13,000 commission on the sale of the steamship "Bowler," tried by him at Vancouver on the 3rd, 4th, 5th and 18th of September, 1919. The steamship in question had formerly been known as the S.S. "Zafiro," but the defendant had her reconstructed and registered under the name of S.S. "Bowler" and obtained permission to transfer the flag to one of the allied nations. The plaintiff, a broker and personal friend of the defendant, was consulted and rendered material assistance in having these changes made. The defendant then employed the plaintiff to find a purchaser of the ship at $250,000, and agreed to pay a commission of 5% if a sale were effected. The plaintiff communicated with one F. R. Robertson, a Vancouver broker, who put the plaintiff in touch with one Aldrich, of Seattle, who in turn communicated with one Dorr, of the American Mercantile Company. Dorr discussed the proposition with one Ward, of Saunders, Ward & Co., brokers, Seattle. Aldridge, Dorr and Ward then worked together in an endeavour to obtain a purchaser for $275,000, contemplating a profit of $25,000 for themselves. Ward then offered the ship to Thorndyke and Trenholme, of Seattle, for $275,000, and after negotiations, Thorndyke went to Vancouver and, after viewing the ship, saw the defendant, with whom he discussed the proposed sale, and without consulting the brokers he and the defendant entered into an agreement whereby, subject to certain conditions, the ship was to be sold to one Scott, of Mobile, Alabama, for $260,000, $50,000 to be paid at once and the balance on or before the 15th of November, 1917, before which time the defendant was to obtain for the ship "Bureau Veritas Rating 5/6 L.I.I." This arrangement was not carried out, as the Bureau Veritas Rating was not obtained, but by subsequent arrangement the agreement continued to be binding on the parties and the sale eventually took place on the 1st of April, 1918.

Statement

A. D. Taylor, K.C., for plaintiff.
A. H. MacNeill, K.C., and *Haviland,* for defendant.

CLEMENT, J.

CLEMENT, J.: I am prepared to say Greer did find Scott, the

purchaser. I am quite clear in my own mind that there is a direct chain of causation. As I said, it is a question of fact. It was not through Thorndyke. Thorndyke was told by the man above him that the ship was for sale and gets all the necessary particulars and then choses, dishonestly, I think, to go behind the backs of all his predecessors and goes to Godson.

The question is whether the purchaser was procured through the efforts of Greer. As a matter of fact, through the chain of correspondence there is relationship of principal and agent, and maybe if the agent did things which if they came to Godson's knowledge he would repudiate, difficulty might arise, but there is no suggestion he was going to keep him in the dark. First of all, Greer and Godson between them authorized Aldrich, and if there was to be further commission it had to be by increase in price.

Aldrich says that Robertson told him that Greer had authorized it. It ultimately came back to Godson, disassociated from those objectionable features. Nothing is disclosed at all, because one of the agents acted dishonestly, who tells Godson, "I am the man who found the buyer," and he chooses to believe him. Thorndyke did not bring the buyer and the ship together. He got the ship from Greer. I think there must be judgment for the plaintiff for $13,000 with costs, 5 per cent. commission on $260,000.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 1st and 2nd of December, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

A. H. MacNeill, K.C., for appellant: The broker is not entitled to commission when a buyer is obtained through a series of brokers. The transaction is too remote: see *Gibson* v. *Crick* (1862), 1 H. & C. 142. Where an agent is employed to obtain a buyer, or a lessee, and he obtains a lessee who later buys, the broker is not entitled to a commission on the sale: see *Millar, Son, and Co.* v. *Radford* (1903), 19 T.L.R. 575. In this case he opposed the sale that was eventually made: see *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910),

Argument

CLEMENT, J.

1919

Sept. 18.

COURT OF APPEAL

1920

April 6.

GREER v. GODSON

A.C. 614 at p. 624. There must be a contractual relation between the introducer of the purchaser and the seller: see *Toulmin* v. *Millar* (1887), 58 L.T. 96. As to whether the broker is the efficient cause of the sale see *Nightingale* v. *Parsons* (1914), 2 K.B. 621; *Willis* v. *Colville* (1909), 14 O.W.R. 1019; *Bridgman* v. *Hepburn* (1908), 13 B.C. 389 at p. 397; (1908), 42 S.C.R. 228. As to the effect of raising the principal price see *Holmes* v. *Lee Ho* (1911), 16 B.C. 66; *Manitoba and North-West Land Corporation* v. *Davidson* (1903), 34 S.C.R. 255 at p. 258; *Salomons* v. *Pender* (1865), 3 H. & C. 639; *Peacock* v. *Crane* (1912), 3 D.L.R. 645; *Hippisley* v. *Knee Brothers* (1905), 1 K.B. 1; *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802 at pp. 829 to 837; *Andrews* v. *Ramsay & Co.* (1903), 2 K.B. 635; *Shipway* v. *Broadwood* (1899), 1 Q.B. 369 at p. 373; *McPherson* v. *Watt* (1877), 3 App. Cas. 254. As to the effect of agents dealing with the property and burden of proof of disclosure see *Dunne* v. *English* (1874), L.R. 18 Eq. 524 at p. 533; *De Bussche* v. *Alt* (1878), 8 Ch. D. 286. On the general question of irregular dealings with contracts of this nature see *Barry* v. *Stoney Point Canning Co.* (1917), 55 S.C.R. 51 at p. 55. Greer cannot disassociate himself from the errors of those whom he adopts as his agents. If Thorndyke is Greer's agent he should look to Thorndyke for his commission: see *Peacock* v. *Crane* (1912), 21 O.W.R. 990.

Argument

A. D. Taylor, K.C., for respondent: The learned trial judge concluded Greer was the efficient cause of the sale. Thorndyke would never have come but for the connection: see *Astley* v. *Garnett* (1914), 20 B.C. 528; *Roray* v. *Nimpkish Lake Logging Co., Ltd.* (1919), 27 B.C. 64; *Prentice* v. *Merrick* (1917), 24 B.C. 432. The case of *Gibson* v. *Crick* (1862), 1 H. & C. 142, is considerably shaken by *Wilkinson* v. *Alston* (1879), 48 L.J., K.B. 733. The claim, I contend, was not vitiated by the conduct of the intermediate parties: see *Shipway* v. *Broadwood* (1899), 80 L.T. 11, and cases already cited; see also Bowstead on Agency, 6th Ed., p. 212, art. 67.

MacNeill, in reply.

Cur. adv. vult.

6th April, 1920. CLEMENT, J.

1919

Sept. 18.

COURT OF APPEAL

1920

April 6.

GREER v. GODSON

MACDONALD, C.J.A.: The action is for commission on the sale of a ship. The contract between the parties is contained in a letter dated 7th December, 1916, written by defendant to plaintiff, in which defendant said:

"In the event of you making a direct sale of this steamer at a price designated by us, we will pay you 5 per cent. of the net amount received. You will understand that we are not giving you the exclusive sale of this steamer, as we may receive offers direct and any such offers will be handled by us."

It was conceded by counsel that the price was afterwards designated as $250,000. The plaintiff employed as a sub-agent one F. R. Robertson, a Vancouver broker, who brought the fact that the ship was for sale to the attention of one Aldridge, a Seattle broker, who says that he "passed the matter up to" one Dorr, of Tacoma, a member of the American Mercantile Co., shipping and commission brokers. Dorr says that he interviewed one Ward, of the firm of Saunders, Ward & Co., Tacoma, ship and custom brokers, and passed on to him the information he, Dorr, had got from Aldridge.

Ward mentioned the matter to one Thorndyke, of the firm of Thorndyke, Trenholme Company, Seattle, brokers, and afterwards gave him some particulars concerning the ship. Thorndyke went to Vancouver and entered into an arrangement directly with the defendant, which resulted in his obtaining a purchaser for the ship, namely, J. M. Scott, a member of the Scott Shipping Agency, of Alabama. There was some criticism of Thorndyke's method of obtaining direct instructions from the defendant, but I am not concerned with the ethics of his conduct. The fact is, he was the broker who directly brought seller and buyer together.

It will be noted that the agency was created in December and it was not until the following August that Thorndyke and the defendant came into touch with each other. The several brokers above mentioned had, in the meantime, been making efforts to obtain a purchaser, but they were not, as I think, in any true sense of the word the agents of Godson, or even of Greer. Godson knew nothing about any of them except Robertson. The others, in order to make profit for themselves, had added $25,000 to the defendant's selling price with the intention of

CLEMENT, J.

1919

Sept. 18.

COURT OF APPEAL

1920

April 6.

GREER v. GODSON

taking this sum for themselves, or one of them, in case a sale should be effected through their endeavours. Aldridge, Dorr and Ward, and also Thorndyke, up to the time he met the defendant, were mere speculators offering another's property for sale at their own price or prices, without defendant's knowledge or consent.

There is a clear distinction betwen this case and *Wilkinson* v. *Alston* (1879), 48 L.J., Q.B. 733, where Brett, L.J. pointed it out and declined to say what the result ought to be in a case like the present one. *Gibson* v. *Crick* (1862), 1 H. & C. 142, though slightly distinguishable in its facts, is a case more in point, and I think supports the conclusion at which I have arrived in this case.

I do not think that any of these several brokers, other than Robertson, even supposed himself to be agent for the plaintiff, or that any one of them would have lifted a finger but as a broker in search on his own account of a ship for sale. The sale was, I think, not one which falls within the plaintiff's contract, even if his agency should be deemed to be a general and not a special one. But it was argued before us that what took place between the plaintiff and defendant after the plaintiff had become aware of Thorndyke's negotiations with defendant, amounted either to a new agreement to pay a commission on that sale should it be consummated, or to a request by defendant to plaintiff to assist him in carrying the transaction to a successful conclusion, which the plaintiff did under circumstances which entitled him to remuneration by way of *quantum meruit*. This submission is founded on the following evidence.

MACDONALD, C.J.A.

Defendant's negotiations with Thorndyke began on the 14th of August. He did not conceal this fact from plaintiff, and although there is evidence that the plaintiff opposed negotiations with Thorndyke, yet in the end, and after the plaintiff had made the claim that Thorndyke had been procured by his, the plaintiff's, connections, he insisted that if a sale should be made through Thorndyke, he felt that he was entiled to a commission.

The parties met on the 27th of August, and plaintiff's version of what then took place between them is as follows:

He said to defendant, referring to Thorndyke and Trenholme:

"Why, those are the same people I spoke to you about as having been sent up by my people and I have a letter in my office in connection with it."

He says defendant replied:

"That makes it easier for you and Thorndyke to talk together, or you might go down and see them, or you had better wire them."

But he says that on further consideration the defendant said:

"That is not necessary, we will let it rest in the meantime."

He says defendant also said:

"You see, I show you everything. I want you to be in on this, and there are the telegrams which have been exchanged in connection with it and I am keeping nothing from you, and I want to see this deal go through with you in it."

Defendant denies the above. He denies that there was any such conversation, but he does not deny that there was that meeting between himself and the plaintiff, and this brings me to the next circumstance of importance.

For some time prior to the date of this meeting, both plaintiff and defendant had been endeavouring to obtain the consent of the Canadian Government to a transfer, in case of sale of the ship, to Japanese registry. This was in view of negotiations being carried on for the sale of the ship to Japanese interests, and the only thing which stood in the way of the sale was the lack of such consent. These negotiations were brought about by the plaintiff, and had a sale been effected, he would have earned his commission. At said meeting defendant asked the plaintiff if he had heard from Mr. Clements, a member of the Canadian Parliament who was then in Ottawa, and who had been appealed to by the plaintiff to assist in obtaining the said consent. Defendant had on the 23rd of August, no doubt with the Scott sale in view, sent a telegram to the deputy minister of marine at Ottawa, in the following terms:

"Would you grant transfer to United States or France? Have expended very large sum of money on ship. Your wire causing me financial difficulties. Quick wire will be appreciated."

In these circumstances, then, the defendant got the plaintiff to sign a telegram to his friend, Mr. Clements, in the following words:

CLEMENT, J.

1919

Sept. 18.

COURT OF APPEAL

1920

April 6.

GREER v. GODSON

"August 28th, 1917. See Godson's wire to Johnston [deputy minister of marine] twenty-third. Did you receive my wire twenty-second? What progress making? Imperative have permission transfer to ally. No demand for this ship in local waters. Wire."

On the following day defendant received from the deputy minister this telegram:

"Your telegram August twenty-third if it will answer your purpose transfer to United States registry will be approved,"

and on the same day plaintiff received from Mr. Clements a telegram in these words:

"Godson's request to dispose of ship sanctioned a minute ago. Godson can only thank you and my special efforts."

Now this assent could only have the effect of putting an end to plaintiff's negotiations with the Japanese and enabling those of Scott to be brought to a successful conclusion, and I think the natural inference is that the plaintiff would not have become a party to bringing that about except in reliance on defendant's assurance that plaintiff should be "in on it," which could mean only, in the circumstances, that he should have his commission if that result were accomplished. The defendant's explanations of this phase of the case appear to me to be wanting in frankness, and I accept unhesitatingly the plaintiff's version of what occurred between them on that occasion. In other words, the fair inference from the evidence and circumstances to which I have referred is, that plaintiff was requested by the defendant to join him in carrying on the negotiations with Scott, through Thorndyke, to a successful conclusion, which meant the plaintiff's giving up any hope he had of consummating the Japanese sale. The sale to Scott could not be effected without the consent of the Government to the transfer of the ship to United States registry, and I think the defendant realized the value of the plaintiff's assistance to obtain that end, and held out to him, if not the express, at least the implied promise that he should be remunerated for those services on the basis of his original employment. I think, also, the fair inference is that it was the plaintiff's influence which brought about the consent to the transfer of the ship, but this is not very material.

MACDONALD, C.J.A.

I think paragraph 10 of the plaintiff's statement of claim sufficiently pleads such cause of action.

In my opinion, therefore, plaintiff is entitled to judgment for the reasons I have already stated, for the sum awarded him in the Court below.

The appeal should therefore be dismissed.

MARTIN, J.A.: I concur in the dismissal of this appeal.

GALLIHER, J.A.: I do not think this judgment can be maintained on the grounds stated by the learned trial judge in his reasons for judgment. I agree with the reasoning of the learned Chief Justice in that regard, and think *Gibson* v. *Crick* (1862), 1 H. & C. 142 is in point. On the other ground on which the Chief Justice has held plaintiff entitled to succeed, I am, though not absolutely free from doubt, concurring.

MCPHILLIPS, J.A.: This is an appeal from a judgment allowing to the plaintiff (respondent) a commission upon a sale of the S.S. "Bowler" for the sum of $260,000, the appellant being the owner of the ship, and the commission was allowed at 5 per cent. by Mr. Justice CLEMENT, before whom the action was tried without a jury.

The evidence is somewhat voluminous, but it can be said to establish a general employment, a continuous employment to effect a sale of the ship, and the plaintiff's services were accepted, authorized and taken advantage of by the defendant (appellant) throughout a long course of negotiation with several possible purchasers, in fact, were it not that difficulties of transfer of registry of the ship, a sale would have been accomplished to Japanese interests for a sum of $275,000, all the work of the plaintiff.

It may be said that the facts of the present case to a considerable extent are similar to those in *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614. There the efforts of the agent extended over two years, here for a year or more, and the principals were approached by parties with whom the agent had been negotiating, and a sale was made for a different consideration by the principals without the intervention of the agent, although advised against entering into the agreement of sale by the agent, who apparently had reason to believe

CLEMENT, J.

1919

Sept. 18.

COURT OF APPEAL

1920

April 6.

GREER v. GODSON

that he could have secured better terms. Here there is some evidence that the plaintiff rather discouraged at one time the defendant negotiating with Thorndyke, thinking it would seem that Thorndyke would not be able to produce a purchaser, yet the information that was given to Thorndyke, which brought him into contact with the defendant, arose from the active work of the plaintiff and others that he had associated with him, and in the end the purchaser, Scott, was obtained and the sale made by the defendant, the plaintiff's services being retained and accepted up to the culmination of the sale. I shall, with some detail, refer later to some of the salient facts upon which it may well be said that the plaintiff was the effective cause of the sale, which is so strenuously denied by the defendant. Lord Atkinson, in the *Burchell* case, *supra,* said at p. 624:

"It was admitted that in the words of Erle, C.J. in *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681, 'if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him.' Or in the words of the later authorities, the plaintiff must shew that some act of his was the *causa causans* of the sale (*Tribe* v. *Taylor* (1876), 1 C.P.D. 505, 510), or was an efficient cause of the sale (*Millar* v. *Radford* (1903), 19 T.L.R. 575)."

And at p. 626, Lord Atkinson further stated that:

"The referee found that the 'power of sale was a continuing power of sale.' By that presumably he meant that the agent's employment was 'a general employment,' in the sense in which Lord Watson in his judgment in *Toulmin* v. *Millar* (1887), 58 L.T. 96 uses those words. This means, however, that Burchell's contract was that should the mine be eventually sold to a purchaser introduced by him, he (Burchell) would be entitled to commission at the stipulated rate, although the price paid should be less than, or different from, the price named to him as a limit. The secret sale deprived him of the benefit of that contract. He lost his chance of earning this commission."

MCPHILLIPS, J.A.

It is clear to me, when all the facts are analyzed and sifted, that it was the plaintiff's direct agency that brought the purchaser to the owner, and it is not of necessity to earn the commission that the sale should be the immediate result of that agency (see *Bray* v. *Chandler* (1856), 18 C.B. 718; 107 R.R. 479; *Jeffrey* v. *Crawford* (1891), 7 T.L.R. 618; *Bayley* v. *Chadwick* (1878), 39 L.T. 429; *Beable* v. *Dickerson* (1885), 1 T.L.R. 654; *Walker, Fraser & Steele* v. *Fraser's Trustees* (1910), S.C. 222).

That the defendant in the present case acquired benefit from the services of the plaintiff is a point that cannot be open to any variation of opinion. The evidence is all the one way. The defendant accepted the active intervention of the plaintiff, and his valuable services and influence throughout the long course of dealing, having in view throughout the whole time the sale of the ship, the plaintiff's energies, time and money being directed, with the defendant's knowledge and continued co-operation, to the end that a sale be made of the ship.

Were it necessary to rely upon an implied contract to pay the plaintiff remuneration, the facts amply support liability upon the defendant to pay a commission to the plaintiff (see *Bryant* v. *Flight* (1839), 5 M. & W. 114; *Manson* v. *Baillie* (1855), 2 Macq. H.L. 80; *Turner* v. *Reeve* (1901), 17 T.L.R. 592).

It has been said that the real question to be answered when presented to a judge is: "Did the sale really and substantially proceed from the agent's acts?" (see *Wilkinson* v. *Martin* (1837), 8 Car. & P. 1). Upon the facts of the present case there can be but one view in my opinion, and that view is overwhelmingly that the effective cause of the sale was the energy, zeal and assiduity of the plaintiff, which resulted in producing the purchaser, smoothed all difficulties and made it possible to effectuate a sale of the ship. There was no revocation of the employment previous to sale, and remuneration may even be payable where that has taken place if the transactions are in their effect part of the transaction in which the agent was employed (see *Gibson* v. *Crick* (1862), 1 H. & C. 142; *Curtis* v. *Nixon* (1871), 24 L.T. 706; *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139; *Burton* v. *Hughes* (1885), 1 T.L.R. 207; *Barnett* v. *Isaacson* (1888), 4 T.L.R. 645; *Robey* v. *Arnold* (1897), 14 T.L.R. 39; *Prentis* v. *Merrick* (1917), 24 B.C. 432 at pp. 437-41).

It is attempted to defeat the plaintiff's claim by pressing the point that owing to the time the negotiations for sale were on, sub-agents of the plaintiff presumed unauthorizedly to increase the sale price, the excess price to be taken by the agents. There is no evidence that connects the plaintiff with any such inten-

CLEMENT, J.

1919

Sept. 18.

COURT OF APPEAL

1920

April 6.

GREER v. GODSON

tion, or that it met with his approval; there was an increased price stated over and above what the defendant stated he would sell for, but this was assented to by the defendant, and in any case, no breach of duty did take place even by the sub-agents of the plaintiff, and certainly nothing took place that could be said to be imputable to the plaintiff which would terminate the agency or affect the right of the plaintiff to sue for and recover the commission or remuneration for the services rendered. One circumstance to be remembered is this, that when the negotiations were pending and the defendant was dealing with Thorndyke-Trenholme Company, the plaintiff made it clear to the defendant that that firm was brought into the matter through his, the plaintiff's, connections, and later, and before the sale is made to Scott, the defendant utilizes the services of the plaintiff to get the Government of Canada's assent to the transfer of the ship to United States registry, an essential matter, as without this assent no sale to Scott was possible. The sale to the Japanese interests fell through only because of the non-assent of the Government of Canada to the transfer of the ship to Japanese registry. That the plaintiff was very instrumental in obtaining this assent is well demonstrated in the evidence. The sale to Scott was on the 10th of September, 1917, and on the 27th of August, 1917, the plaintiff wired to Mr. Clements, M.P., at Ottawa in the following terms: [already quoted in judgment of MACDONALD, C.J.A.].

MCPHILLIPS, J.A.

And on the same day the defendant was in receipt of a wire from Thorndyke-Trenholme Company making an offer from an American firm in Mobile, Alabama, of $250,000 for the ship and, of course, assent to transfer to United States registry was an essentiality. Now the plaintiff's wire to the deputy minister of marine of date 23rd August, 1917, referred to in the plaintiff's wire, reads as follows:

"Referring your wire twenty-second, collectors here in early spring advised that department would grant transfer to an ally, providing route was designated and owners named. For these particulars see my letter July 20th to O. Stanton. What are reasons for refusal? Would you grant transfer to United States or France? Have expended very large sum of money on ship. Your wire causing me financial difficulties. Quick wire will be appreciated."

Under date the 28th of August, 1917, the deputy minister wired the defendant as follows: [already quoted in judgment of MACDONALD, C.J.A.].

To indicate the extent of the plaintiff's services in obtaining this assent, it is only necessary to read the telegram of Mr. H. S. Clements, M.P., to the plaintiff of the same date, which reads: [already quoted in judgment of MACDONALD, C.J.A.].

It is also significant that upon that same date the defendant gets the offer of $260,000, which in the end is accepted. At this time and when the telegram of the 27th of August, 1917, above set out, was sent, the defendant stated to the plaintiff who he was dealing with, and we have the plaintiff saying:

"Now, what else occurred between you? After sending the wire I left the office and went back to my own office.

"Well, when was there any direct reference to Thorndyke & Trenholme? Oh, yes—well, at that time Mr. Godson informed me that he was figuring on selling the ship to American buyers. In the original instance I thought he wanted it transferred to the Japanese flag. That was the first case, but later on when he sent that telegram to Johnston he had it read 'United States, France or Japan.'

"Or to an ally—I think he used these words? Well, I put it that way in my telegram, but I think Mr. Godson's telegram read 'United States, France or Japan.' And then he drew out Thorndyke & Trenholme's card and he says: 'These are the people I am dealing with and expect to make the sale to.' And I said 'Why those are the same people I spoke to you about as having been sent up by my people and I have a letter in my office in connection with it.'

"You have what? I have a letter in my office from the American Mercantile Company advising me with regard to them. MCPHILLIPS, J.A.

"What did Mr. Godson reply to that? He says 'That makes it easy for you and Thorndyke to talk together, or you might go down and see them, or you had better wire them.' And then on reconsideration he said 'That is not necessary, we will let it rest in the meantime.'

"You will what? 'We will let it rest in the meantime.'

"And did he make any further statement that you can recollect? Oh, yes, he said 'You see, I shew you everything. I want you to be in on this, and there are the telegrams which have been exchanged in connection with it and I am keeping nothing from you, and I want to see this deal go through with you in it.'

Mr. *MacNeill*: What is that last again? 'I want to see the deal go through with you.'

"Mr. *Taylor*: At that time did he shew you any communication that he was having with Thorndyke, Trenholme & Company. He shewed me some telegrams."

Certainly, in view of the defendant's statement to the plaintiff, it is difficult to see how it is possible for the defendant

CLEMENT, J.

1919

Sept. 18.

COURT OF APPEAL

1920

April 6.

GREER v. GODSON

to now dispute liability to the plaintiff for commission and services rendered. "I want you to be in this." Can this mean other than that the plaintiff was continued in his employment and his services were being directly used to effectuate the actual sale made? (see *Wells* v. *Petty* (1897), 5 B.C. 353).

To further indicate the situation of matters and when it was that the defendant changed front as to the plaintiff's right to a commission on the sale, I would refer to that part of the plaintiff's evidence reading as follows:

"Now, did I understand your evidence to be as given in chief yesterday that up until the time and after the time of the telegram of September 12th, or 17th, which was supposed to be the date first—or September 12th, that you always considered that Godson did not intend to repudiate you in connection with this matter? Was that correct? No, I was under the impression that he did intend to do it right along, after the securing of the flag—which was secured about the 28th—the transfer of the flag.

"The 28th? That is, when we received the reply from Mr. Clements advising it had been arranged, and then Mr. Godson discontinued any negotiations with me at all, and he ignored me absolutely and continued his negotiation in a way which was apparently planned to eliminate me from the commission altogether.

"On August 28th? And subsequent to that. At the time he acquired the flag I thought everything was all right, and he said, 'it will be probably necessary for you to go down to Seattle to see Mr. Thorndyke,' and then right on top of that—but first he said, 'We have got to get the transfer of this flag,' and right at that time I sent this telegram at his suggestion from his office; that was the 27th, asking Mr. Clements to do everything possible to get the transfer."

MCPHILLIPS, J.A.

It is observable from the evidence last quoted that the defendant continued the plaintiff in all the negotiations relative to the sale which was ultimately made to Scott, as shewn by the agreement of sale of date the 10th of September, 1917. The period of time that the negotiations for sale took was some nine months. I do not think it necessary to in detail further scan or canvass the evidence. It is evident that the employment was a general one and the plaintiff was always associated with the efforts to effect a sale of the ship, and his employment by the defendant was a continuous one extending up to the day of sale. The sale being made, it cannot, in my opinion, be said that the plaintiff was not, upon the facts, the effective cause of the sale, and the defendant has benefited by and accepted the services of the plaintiff, all of which establishes the plaintiff's

right to the commission, and remuneration for services, which the learned trial judge has allowed, and it has not been established that the learned trial judge arrived at a wrong conclusion. On the contrary, I am of the opinion that he arrived at the right conclusion, and the judgment should be affirmed.

I would dismiss the appeal.

EBERTS, J.A. concurred in dismissing the appeal.

Appeal dismissed.

Solicitor for appellant: *A. H. MacNeill.*

Solicitors for respondent: *Taylor & Campbell.*

REX v. CONN *ET AL.*

Criminal law—Summary conviction—Appeal—Stated case—Game Act—Proof of sunrise and sunset—Possession of firearms—B.C. Stats. 1914, Cap. 33, Sec. 11(2).

Section 11(2) of the Game Act recites that "any person found between said hours [between one hour after sunset and one hour before sunrise] with head-lights of any description and firearms in his possession shall be guilty of an offence against this Act," etc. The accused (four men) while on their way home in an automobile on the 15th of November at about 10.15 p.m. were stopped by two policemen who searched the automobile in which they found four guns and two head-lights. The evidence of one of the policemen that 10.15 p.m. on the day in question was more than one hour after sunset and more than one hour before sunrise, was the only evidence as to the time of sunrise and sunset.

Held (MCPHILLIPS, J.A. dissenting), that the evidence was sufficient upon which to find that 10.15 p.m. was within the prohibited hours.

Held, further, *per* MACDONALD, C.J.A. and MCPHILLIPS, J.A., that the evidence of finding the head-lights and firearms in the automobile in which accused were riding without any other evidence of possession and without evidence as to who was owner of the automobile, was not

COURT OF APPEAL

1920

April 6.

REX v. CONN

sufficient upon which to hold that the head-lights and firearms were found in the possession of all of them.

Per MARTIN and GALLIHER, JJ.A.: That in the circumstances of the case the magistrate and the judge might reasonably conclude that the men were in possession of the firearms and head-lights.

The Court being equally divided the appeal was dismissed.

CRIMINAL APPEAL by way of case stated from the decision of BARKER, Co. J., dismissing an appeal from a conviction by the stipendiary magistrate at Nanaimo, for an infraction of section 11(2) of the Game Act. The following case was submitted for the opinion of the Court:

"On the 21st of November, 1919, informations were laid upon oath before stipendiary magistrate C. H. Beevor-Potts for that the above-named Thomas Conn, William Mossey, John Lewis and Robert Izatt, at 10.15 o'clock in the afternoon of Saturday, the 15th of November, 1919, at Fanny Bay, in the said County of Nanaimo, were unlawfully found between one hour after sunset and one hour before sunrise, to wit: 10.15 of the clock in the afternoon of the said 15th of November, 1919, with head-lights and firearms in their possession, contrary to the form of statute in such case made and provided.

"On the 27th of January, 1920, the said Thomas Conn, William Mossey, John Lewis and Robert Izatt came before me upon appeal and the said charge was duly heard by and before me in the presence of all the said parties, and after hearing the evidence adduced and the statements on oath of the said G. C. Mortimer and Robert Dawley, a Provincial constable, and upon hearing the respective solicitors for the Crown and the said Thomas Conn, William Mossey, John Lewis and Robert Izatt, I found the said Thomas Conn, William Mossey, John Lewis and Robert Izatt guilty of the said offence, but on my own initiative and with the consent of the solicitors for both parties, I refrained from pronouncing sentence, and request the direction of the Honourable Court of Appeal upon the following questions:

Statement

"(a) It was shewn before me that the said Thomas Conn, William Mossey, John Lewis and Robert Izatt were found by the said G. C. Mortimer and Robert Dawley driving upon the public road in an automobile about 2 miles south of Union Bay in the County of Nanaimo, and proceeding in the direction of their respective homes, about the hour of 10.15 p.m. on the 15th of November, 1919; that the said G. C. Mortimer having stopped the said automobile requested the said Thomas Conn, William Mossey, John Lewis and Robert Izatt to alight, which they did; that the said G. C. Mortimer then entered the said automobile and found therein four guns, three of which were standing up in the front of the said car, by the driver's seat, and one in the rear of the said car; that upon further search the said Mortimer found concealed in a gunny-sack, amongst provisions, a complete head-light with rubber tubing connecting the several parts thereof, and in the rear part of the car a similar head-light, except that the rubber tube thereof was missing. It was sworn by

said G. C. Mortimer (Mr. *Jeremy*, objecting to question) that 10.15 p.m. on the day in question was more than one hour after sunset and more than one hour before sunrise.

"(b) The solicitor for the said Thomas Conn, William Mossey, John Lewis and Robert Izatt desires to question the validity of said conviction, on the ground that it was erroneous in point of law and is in excess of jurisdiction."

The questions submitted are set out in the judgment of the learned Chief Justice.

The appeal was argued at Vancouver on the 6th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Statement

Miss *Paterson*, for appellants: Accused were found with the guns at 10.15 p.m. but they do not prove the time of sunset. The Court cannot take judicial notice of the time of sunset: see *Collier* v. *Nokes* (1849), 2 Car. & K. 1012; *Tutton* v. *Darke* (1860), 5 H. & N. 647 at p. 649. The gist of the offence is finding firearms and head-lights in the possession of the accused. There is no proper proof of possession: see Odgers on Common Law, 10th Ed., 334; Encyclopædia of the Laws of England, Vol. 10, p. 231; *Reg.* v. *John Wiley* (1850), 4 Cox, C.C. 412 at p. 414. There is nothing to shew who was driving the car or to whom it belonged: see *Smith's Case* (1855), Dears. C.C. 494; *Rex* v. *Berger* (1915), 84 L.J., K.B. 541; *Rex* v. *Orris* (1908), 73 J.P. 15. There are four men and four guns but this does not establish possession: see *Ramsay* v. *Margrett* (1894), 2 Q.B. 18; *Antoniadi* v. *Smith* (1901), 2 K.B. 589; *Rex* v. *Young* (1917), 24 B.C. 482; (1917), 3 W.W.R. 1066; *Rex* v. *Smith* (1916), 23 B.C. 197 at p. 201.

Argument

Arthur Leighton, for respondent: On the question of sunset, *Tutton* v. *Darke* (1860), 5 H. & N. 647 is not a precise decision on the question of evidence but rather on what constitutes sunset. The cases submitted on the question of possession are all founded on the particular circumstances of each case, none of them apply here. In *Rex* v. *Young* (1917), 24 B.C. 482, the evidence shews who was the owner. *Rex* v. *Berger* (1915), 84 L.J., K.B. 541 can also be distinguished.

Miss *Paterson*, in reply.

COURT OF APPEAL

1920

April 6.

REX v. CONN

MACDONALD, C.J.A.: The first question submitted to the Court is this:

"Was I right in admitting, as I did, the evidence of the said informant as to the time of sunrise and sunset on the said 15th of November, 1919?"

My answer to that question is yes.

The second question:

"Was I right in holding, as I did, that the said evidence so given is legal proof that the said Thomas Conn, William Mossey, John Lewis and Robert Izatt were so found between the hours of one hour after sunset and one hour before sunrise, without any further or other proof of the time of sunset and sunrise on the said day and in the said latitude?"

My answer to that is yes.

The third question presents greater difficulty, and it is this:

"Was I right in holding, as I did, that the head-lights and firearms found in the said automobile were in the possession of all of them, the said Thomas Conn, William Mossey, John Lewis and Robert Izatt, without any other evidence of such possession than that said head-lights and fire-arms were found in an automobile in which said accused were riding, and without any evidence as to who was the owner of the said automobile?"

Not without some hesitation, I would answer that question in the negative. There is no question about this, that if you find one person in, say, an automobile with a gun and a head-light contrary to the statute which governs this case, you might fairly infer—in fact, very properly infer—that that person was in possession of the gun and the head-light although he had not them in his hands or on his person. But it seems to me it is different where you find four men in an automobile and four guns and two head-lights in the same automobile. Now we are asked to find, without any proof as to who owned the guns or as to how they got there, or as to how these four men happened to be in the automobile, whether as passengers in a hired conveyance or otherwise, but from the mere fact of their being in an automobile in which there were four guns and two concealed head-lights, that they were guilty of a crime. Now I find it very difficult to draw such an inference. That is not the necessary and only inference. It is just as consistent with innocence as with guilt that the men, or one or more of them, were passengers in a stage driven by the other one; for aught we know three of them, or perhaps the whole four of them, knew nothing about those concealed head-lights; and yet we are asked to say that individually or collectively the men were

MACDONALD, C.J.A.

actually in possession of those. What was Thomas Conn in possession of, for instance? Can it be said from the circumstances which have been stated that Thomas Conn was in possession of four guns and two head-lights or of one gun and one head-light? The suspicion is that Thomas Conn was the owner of one gun, and he may or may not have been the owner or have known about the head-lights, but to infer that each man was in possession of one or more guns or of head-lights, from the scant circumstances which are set forth here, seems to me to be unwarranted.

MACDONALD, C.J.A.

Now then, the fourth question is practically the same question as the third, and has reference to the head-lights, and is susceptible of the same answer. In other words, I would answer the first two questions in the affirmative and the other two questions in the negative. The result is that the Court is equally divided on the question and there can be no order except dismissal.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the learned County Court judge arrived at a right conclusion when he affirmed the magistrate who convicted these men. I am in accord with what my brother GALLIHER said on this matter as to answering this question. The fact of possession is always a question of fact. Now it depends on the circumstances in each case. In the circumstances of this case (it is not necessary to elaborate my views which I have expressed during the argument) I find it impossible to reach the conclusion, reasonable in my opinion, with all deference to others, that the magistrate and the judge have not taken the right view, that is to say, that these men were in possession of these firearms; therefore he had a right to convict them.

GALLIHER, J.A.

GALLIHER, J.A.: I would answer all the questions in the affirmative. We have on our statute books a section which prohibits hunting at night—makes it an offence, under subsection (2) of section 11, Cap. 33 of 1914, to be found between certain hours with certain articles, namely, head-lights and firearms in your possession. In my view ownership has nothing to do with it. There is no connection between possession and

COURT OF APPEAL

1920

April 6.

REX v. CONN

GALLIHER, J.A.

ownership at all; and we have got, as I said during the argument, to take into consideration all the circumstances. Here the constable finds them at night during prohibited hours (which I think is clearly shewn, in fact I think it is so notorious that we can take judicial notice of it). We find all the combination necessary for an offence against this particular section of the Act. We find these men here, we find the implements in the car, in the confines of a motor-car, some of them standing up in front of the men, some behind. Now it is not necessary, in order to establish possession, that you should shew that a man is holding it to his bosom or to his shoulder or anything of that kind. When it is standing beside him in the car it can be in his possession just as it can in his hands. To my mind (in deference, of course, to what has been said by my brother the Chief Justice) there is a very strong *prima facie* case here, a case that calls on these men to explain. It is all very well to say these men might have been picked up or they might have just got on; the men were there. If they were picked up, it is not imposing any hardship on them to get up and free themselves, if they can. They are caught there, as I say, under the circumstances and with illegal implements in their hands at an illegal hour under the statute, and when you bring that home to them, then certainly, to my mind, without any hesitation whatever I say, the onus shifts and it is incumbent upon them to make some statement which proves or shews that they are innocent in the matter.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would answer all the questions in the negative. I think that there never was a clearer case (with all deference to the contrary opinion of my learned brothers), there never was a case so frail, in fact so unstable and insufficient as the case that I now see before me, especially when we find that the accused may go to gaol (which is the case here) for 60 days without the option of a fine. There was a time when people could shoot game with anything they saw fit. Then as time went on there were certain trammels put upon shooting. It is not against morality to shoot game, and, ordinarily speaking, game ought to be capable of being shot, except of course that birds and animals are entitled to

some reasonable protection, and should not be subject to extermination.

Now, were this a case where the accused were out hunting, actually out hunting and had guns, even under such circumstances as detailed here, and head-lights—concealed head-lights, there might be something in it to draw some deduction from; but they do not hunt from automobiles, and where is there any evidence whatever to connect these men with hunting; and when you turn to the statute itself, it says, first, that no person shall at any time hunt or kill any game birds or any member of the deer family between one hour after sunset and one hour before sunrise. Any person found between said hours with head-lights of any description and firearms in his possession shall be guilty of an offence against this Act.

It is quite consistent with innocence that three of the men at least were picked up, if not all, knew nothing whatever about the guns and the concealed head-lights, and yet they go to gaol for 60 days. It affronts one, it is abhorrent, as I consider, to the rules and principles of common sense, that, without more, the liberty of the subject is to be taken away and good citizens put into the category of criminals.

MCPHILLIPS, J.A.

The Crown was called upon to prove its case; and the genius of the British people is, that the Crown must make out its case. It is said that these men could have gone into the box and could have rebutted the charges as laid. That cannot be assented to; for the protection of the subject, the Crown must make out its case. Possession within the purview of the Act has not been proved. I would say possession would be possession in hunting or killing game, not in merely having the guns in a vehicle upon the highway.

The Court being equally divided the appeal was dismissed.

MURPHY, J. (At Chambers)

1919

Sept. 15.

COURT OF APPEAL

1920

April 6.

LYALL SHIPBUILDING CO. v. HEMELRYCK

THE WILLIAM LYALL SHIPBUILDING COMPANY, LIMITED v. VAN HEMELRYCK.

Practice—Contract—Foreign purchaser—Breach—Writ for service ex juris Marginal rule 64(e)—Place of payment under contract—Delivery—Attornment to jurisdiction.

On an application to set aside an order for leave to issue a writ and serve notice thereof on the defendant in France, the defendant applied for leave to cross-examine on the affidavit filed in support of the application for said order.

Held, that this was not a step in the action by which the defendant submitted to the jurisdiction and waived objection to the service.

Where it appears in a contract for the building of ships within the Province for a resident in a foreign country, that the ships should be delivered at the builder's yard within the Province, there is an implied obligation on the purchaser to accept delivery there, and failure to accept such delivery would constitute a breach of the contract within the Province justifying an order for service of a writ *ex juris* under marginal rule 64 (*e*).

Statement

APPEAL by defendant from an order of MURPHY, J. of the 15th of September, 1919, dismissing an application to set aside an order granting the plaintiff leave to issue a writ of summons against the defendant for service *ex juris* and for leave to serve notice thereof on the defendant at Paris, France. It appeared by the affidavit in support of the application to issue the writ made by the manager of the plaintiff Company, that the action was for damages for breach of contract in refusing to take delivery of six auxiliary sailing ships built in North Vancouver, the defendant being a Belgian who lived in Paris. The contract was brought about by correspondence between the parties and their agents, written between the 19th of July and the 4th of October, 1918, and the plaintiff proceeded to construct the vessels, a formal contract under seal being executed on the 7th of November, 1918. The contract price was $2,700,000, half of which was to be paid on the signing of the contract, and the balance as each vessel was completed, delivery to take place at the builder's yards. The first payment was never made and the armistice having been signed

shortly after the formal contract was executed, the defendant refused to make payment. The correspondence and formal contract were made exhibits to the affidavit in support of the application.

MURPHY, J. (At Chambers)

1919

Sept. 15.

COURT OF APPEAL

1920

April 6.

Armour, K.C., for the application.
Sir C. H. Tupper, K.C., contra.

15th September, 1919.

MURPHY, J.: I am of opinion that the application made by defendant, for leave to cross-examine on plaintiff's examination, constitutes a step in the action such as without appearance gives the Court jurisdiction: *Harris* v. *Taylor* (1915), 2 K.B. 580. If not, it is clear, I think, that it is impossible on this application to determine the merits of this action. Yet to grant this application virtually involves such determination. If one view of the various exhibits and of the statements in the impugned affidavit is taken, there was a contract, some part of which at least ought to be performed within the jurisdiction. Whether such view is correct or not cannot be satisfactorily determined except by a trial where the facts are so involved as they are here, as shewn by the great number of exhibits filed and the statements set out in the affidavit of Cook. The application is dismissed.

LYALL SHIPBUILDING CO. *v.* HEMELRYCK

MURPHY, J.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 3rd of December, 1919, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C. (*Ghent Davis*, with him), for appellant: Under marginal rule 100 we may move to set aside the writ without entering an appearance or a conditional appearance. We moved first and then applied to examine Cook on his affidavit in support of the application for service *ex juris*. The learned trial judge held that by so applying we voluntarily submitted to the jurisdiction, following *Harris* v. *Taylor* (1915), 2 K.B. 580. I say anything ancillary to the application allowing service comes within the application that is specially allowed: see *Firth & Sons* v. *De las Rivas* (1893), 1 Q.B. 768; *Keymer* v.

Argument

MURPHY, J. (At Chambers)

1919

Sept. 15.

COURT OF APPEAL

1920

April 6.

LYALL SHIPBUILDING CO. v. HEMELRYCK

Reddy (1912), 1 K.B. 215 at p. 219. The question as to whether there is the right to issue such an order can be tried, you must try the question of *forum*: see *Fowler* v. *Barstow* (1881), 20 Ch. D. 240 at p. 244; *Chemische Fabrik vormals Sandoz* v. *Badische Anilin und Soda Fabriks* (1904), 90 L.T. 733 at p. 734. Where you have no affidavits put in by the defendant the plaintiff's affidavits must be taken to be correct, and when we were refused cross-examination we went on with the argument. Part of the contract must be performed within the jurisdiction: (1) Place of payment where no specific place is fixed is where the creditor resides. (2) The breach alleged must be a breach of that part of the contract which must be performed within the jurisdiction. (3) If payment has to be made in any other place than within the jurisdiction the rule does not apply: see *Rein* v. *Stein* (1892), 1 Q.B. 753 at p. 757; *The Eider* (1893), P. 119 at pp. 126-8 and 131-2. The debtor must follow the creditor and where there is any doubt it should be resolved in favour of the foreigner: see *The Hagen* (1908), P. 189 at p. 201. In this case it can be shewn the payment was to be made in New York. The correspondence shews there was not a completed contract. There was a change in the terms of the contract formally drawn whereby it was to come into force on a certain payment being made, and this payment was never made. Both parties have a *locus pœnitentiæ*: see Halsbury's Laws of England, Vol. 7, p. 351, par. 722; *Love and Stewart* (*Limited*) v. *S. Instone and Co.* (*Limited*) (1917), 33 T.L.R. 475. I say the contract never came into force and, secondly, by its terms payments were to be made in New York, and if not in New York in Montreal. As to the contention of a breach of non-acceptance all the correspondence was from Montreal.

Argument

Sir C. H. Tupper, K.C., for respondent: The argument is based not on the affidavit but on the documents produced in the affidavit. The Lyalls complied with both contracts and went on building, waiving the condition. There is no right to cross-examine on a spent affidavit, used on a former application. There was no affidavit on the application appealed from. He made the application relying on one affidavit and he attorned to the jurisdiction when he applied to cross-examine. The condi-

tion was waived when they proceeded with the work and the Lyalls were bound. All we need do is shew a *prima facie* case and disclose a substantial question to be tried: see *Badische Anilin und Soda Fabrik* v. *Chemische Fabrik vormals Sandoz* (1903), 88 L.T. 490; (1904), 90 L.T. 733. Irrespective of place of payment, delivery is from Vancouver and this gives a cause of action. The contract by correspondence was confirmed and acted on: see *Fowler* v. *Barstow* (1881), 20 Ch. D. 240 at p. 244. As to his attorning to the jurisdiction by applying to cross-examine: see Piggott's Service out of the Jurisdiction, 64; *Fry* v. *Moore* (1889), 23 Q.B.D. 395; *Boyle* v. *Sacker* (1888), 39 Ch. D. 249; *Harris* v. *Taylor* (1915), 2 K.B. 580. If he does anything more than make his application he submits himself to the jurisdiction: see Piggott on Foreign Judgments and Jurisdiction, 1910, Pt. 3, p. 197. As to performance of the contract see *Comber* v. *Leyland* (1898), A.C. 524; *Crozier, Stephens & Co.* v. *Auerbach* (1908), 2 K.B. 161 at p. 167. On the question of discretion in granting an order see *Thomas* v. *Duchess Dowager of Hamilton* (1886), 17 Q.B.D. 592 at p. 596. We are not suing for payment but for breach of contract. As to what operates as delivery see Halsbury's Laws of England, Vol. 25, par. 356, p. 206; *Richards* v. *Hayward* (1841), 2 Man. & G. 574; 133 E.R. 875.

Argument

Davis, in reply: There can be no waiver of conditions without defendant's consent: see also *Johnson* v. *Taylor Brothers and Co. (Limited)* (1919), 36 T.L.R. 62.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.: I agree with my brother GALLIHER in dismissing the appeal.

MACDONALD, C.J.A.

GALLIHER, J.A.: This is an appeal from an order of MURPHY, J., refusing to set aside an order giving leave to the plaintiff to issue a writ of summons against the defendant for service *ex juris*. The order granting leave to serve the writ *ex juris* was made under marginal rule 64(*e*) of our Supreme Court Rules which is in these words:

GALLIHER, J.A.

MURPHY, J. (At Chambers)

1919

Sept. 15.

COURT OF APPEAL

1920

April 6.

LYALL SHIPBUILDING CO. *v.* HEMELRYCK

"Service out of the jurisdiction of a writ of summons or notice of a writ of summons or other document by which a matter or proceeding is commenced may be allowed by the Court or a judge whenever—

"(*e.*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction."

The breaches complained of as indorsed on the writ are:

"(a) Failure to take delivery at Vancouver in the Province of British Columbia of six auxiliary sailing ships, and

"(b) Failure to accept and pay for the said six auxiliary sailing ships."

The claim is based on a contract under seal between the plaintiff and defendant or in the alternative, upon cablegrams and correspondence between the plaintiff and the defendant and between the plaintiff's agents and defendant's agents, all of which are set out in the appeal book.

On this motion there is no contest that whether we take the written contract under seal or the correspondence and cablegrams, there was an agreement that the plaintiff should construct at his yards in North Vancouver, in the Province of British Columbia, the six ships in question for the defendant.

Sir Charles Tupper, for the respondent, objected that by reason of the defendant having applied to examine Cook on his affidavit filed on the application of service of the writ *ex juris* he had submitted to the jurisdiction of the Court that this was a step in the cause and waived any objection to the service. I cannot regard this as a step in the cause. Upon the application to set aside the writ the defendant would have been entitled to file an affidavit in answer within certain limits, that is, it must not be an affidavit which sets up his own case and which would really result in an argument on the merits, which was what occurred in *Boyle* v. *Sacker* (1888), 39 Ch. D. 249, cited by *Sir Charles.* The Court will not receive fresh facts from the defendant and so enter into the merits of the case: Piggot's Service out of the Jurisdiction, 51. What was proposed to be done by defendant here was not a step in the cause in the sense that it would constitute a bar, but something a proposed part of and to be used in connection with the application to set aside. None of the authorities cited by *Sir Charles* seem to me to support his contention. The point to be decided here is, do the facts as disclosed in the affidavit of Cook and the different exhibits bring the case within marginal rule 64(*e*)?

GALLIHER, J.A.

Before discussing this I have thought it better to quote the language of judges in the English Courts in cases laying down certain principles for guidance in applying their Order XI., r. 1(e), which is similar to ours.

In *Comber* v. *Leyland* (1898), A.C. 524 their Lordships thus express themselves: Lord Shand (p. 534):

"There is no right to serve out of the jurisdiction where the performance of the contract may be given either within the jurisdiction or abroad in the option of the party who has undertaken the obligation."

The Lord Chancellor, Lord Halsbury (pp. 528-9):

"In order to justify the exercise of this limited and exceptional power of issuing process to be served in a foreign country, you must shew that the performance of the contract must (although the word 'ought' is used in the rule that is what I understand it to mean) under the obligation of the contract itself be in this country."

Lord Herschell (p. 529):

"In order to justify the allowing service of a writ on a person outside the jurisdiction it is necessary to prove that according to the terms of the contract between the parties, some part of it at least ought to be performed within the jurisdiction in this sense, that the place for its performance, stipulated for either expressly or impliedly in the contract, is this country."

In *The Eider* (1893), 62 L.J., P. 65, Lord Esher, M.R. said:

"Where you have a case in which a payment may be made in either one of two places—namely, either abroad or in England—then the decision of *Bell & Co.* v. *The Antwerp, London, and Brazil Line* [(1890)], 60 L.J., Q.B. 270 comes in, and shews that the contract for payment, the breach of which is complained of, is not one which according to its terms, ought to be performed within the jurisdiction within Order XI., rule 1(*e*), for it is one which may be performed either within or out of the jurisdiction."

GALLIHER, J.A.

It has been decided that the performance within the jurisdiction need not necessarily be a performance for which there is an express condition in the contract between the parties. It is sufficient to bring it within the rule if upon a right construction of the contract and the circumstances it can be seen that the intention of the parties would warrant the conclusion that there was an implied term. Bearing in mind these principles, we have now to consider the position here. *Sir Charles* abandoned the point as to place of payment and the only remaining point under the indorsement on the writ is failure to accept delivery. As to delivery itself, I think it is clear, that it should be at Vancouver but the tender of delivery is, of course, one that the plaintiff would have to make.

MURPHY, J. (At Chambers)

1919

Sept. 15.

COURT OF APPEAL

1920

April 6.

LYALL SHIPBUILDING CO. v. HEMELRYCK

GALLIHER, J.A.

There is a clause in the written contract under seal as follows:

"The builders' obligation to insure shall cease as to each vessel upon delivery of such vessel to owner at builders' yard."

That, I think, would make the intention clear as to where delivery of possession would be made under that contract, but even if that contract could not be relied upon, I would have no hesitation in concluding that under all the circumstances of this case, delivery of possession should be made at Vancouver and not elsewhere. Then with delivery at Vancouver, I think it follows, in the absence of any stipulation to the contrary, that acceptance of delivery must be at the same place and as that would be something to be performed by the defendant within the jurisdiction, and as I am of opinon that such a condition can, under all the circumstances, be implied under the contract between the parties, the case, in my view, falls within the rule.

It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: This is an appeal from the order of MURPHY, J. dismissing the application of the appellant for an order setting aside the order of HUNTER, C.J.B.C. granting leave for the issue of a writ of summons for service *ex juris* and liberty to serve notice thereof at the City of Paris, France.

The action is one for damages for breach of contract in refusing and failing to take delivery of six auxiliary sailing ships, built at the North Vancouver, B.C., shipyards of the respondent. It would appear that a formal contract was entered into between the appellant and the respondent, being entered into in New York. The appellant, however, repudiates this contract. It was signed for him by one Ernest J. Honore, and whilst the appellant has stated that the contract is not his he would not appear though to deny that there was a contract for the construction and delivery of the ships, and it remains of course to be determined, if the action is allowed to proceed, what in fact constitutes the contract?

The appellant is a Belgian subject resident in France, the respondent being a company duly authorized to carry on business in Canada, with its head office for its business in British Columbia, at North Vancouver.

In regard to the formal contract, the total contract price was $2,700,000, $1,350,000, 50 per cent., to be paid at the time of the entering into same (this was not paid and the contract as a matter of fact was never delivered out to the respective parties but was held in a named depository awaiting said payment), the balance of 50 per cent. to be paid in instalments of $225,000 per vessel upon delivery of each vessel to the appellant at the respondent's yard at North Vancouver, B.C., the trials of machinery and speed of each vessel to be in the waters of the Straits of Georgia, B.C., *i.e.*, in Canadian waters. Payments were to be made at the Mechanics & Metals Bank in New York, in the United States of America.

Now, apart from the formal contract, it is alleged that there was a contract by correspondence contained in cables and letters, and the appellant throughout this correspondence does not deny the existence of a contract.

In *Love and Stewart (Limited)* v. *S. Instone and Co. (Limited)* (1917), 33 T.L.R. 475, Lord Loreburn, at p. 476, said:

"It was strongly in favour of the appellants that in the correspondence both parties spoke of a contract between them. . . . . It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of further terms. If that were the intention of the parties, then a bargain had been made, none the less that both parties felt quite sure that the formal document could comprise more than was contained in the preliminary bargain. . . . . It would be irrelevant to discuss the question how far other evidence, as, for example, of conversations, could be admitted, and would involve writing something like a treatise."

MCPHILLIPS, J.A.

I would think that in this case, so elaborately and ably argued upon both sides, that there is no necessity for entering into much detail. This is clear to my mind, that there was a contract to be performed in British Columbia and that the breach took place in British Columbia, and within marginal rule 64(*e*) (Order XI., r. 1). There is no question that the parties to the contract were *ad idem* as to the terms of the contract, and it was arranged with the Government of Canada by the respondent at the request of the appellant that each vessel should be capable of transfer to Belgian registry upon completion. With

MURPHY, J. (At Chambers)
1919
Sept. 15.
COURT OF APPEAL
1920
March 19.
LYALL SHIPBUILDING CO. v. HEMELRYCK
MCPHILLIPS, J.A.

regard to payment, the appellant agreed to pay the total contract price for each vessel to the respondent "at Vancouver as each boat is delivered," and other evidence to this effect could be referred to.

The learned counsel for the appellant in his very able argument submitted that the breach, if any, of the contract as attempted to be proved by the respondent established at best non-payment and that payment was to be in New York. With deference, I do not think this is shewn upon the evidence, in fact, in my opinion, the evidence discloses that payment was expressly to be at North Vancouver, B.C.; if I should be in error as to this, then payment was impliedly to be at North Vancouver, B.C., as the delivery of each vessel was to be there, and the transfer of flag to Belgian registry was to be there. This would import payment at North Vancouver, B.C. Assuredly it could not be expected that delivery would be made without payment. A great many authorities were referred to by the respective counsel in their very elaborate arguments, all being of great assistance, but a great deal of the labour that would otherwise have fallen upon one in giving a considered judgment upon this appeal is brushed away by the very recent decision of the House of Lords upon the very point to be considered, namely, in the case of *Johnson* v. *Taylor Brothers & Co.* (*Limited*) (1919), 36 T.L.R. 62. Lord Birkenhead, L.C. at p. 63, said:

> "The Legislature intended to prohibit the service of writs out of the jurisdiction in actions for breach of contract unless, according to the terms of the particular contract, it ought to be performed within the jurisdiction. Ought, then, the contract, according to its terms, to have been performed within the jurisdiction?"

Now, in the case before us, the vessels were to be built, and were in fact built, at North Vancouver, in British Columbia, the inspection thereof and trials thereof to be in the Straits of Georgia, in British Columbia, and the delivery of the vessels by the respondent to the appellant was to take place at North Vancouver, B.C., and the action is for breach of contract on the part of the appellant in refusing or failing to take delivery of the vessels and make payment therefor, all matters called for by way of performance in British Columbia, not elsewhere.

Such is the case as alleged by the respondent, and sufficiently

enough alleged to entitle, in my opinion, the order being made. The Court is in no way called upon now to pass upon the merits of the action; that remains for further determination in the Court below. Manifestly the present case is not one which could be said to be without the trite definition of the rule as stated by Lord Haldane in the case last referred to at p. 64 (Order XI., r. 1):

"What it did was, while leaving intact the old principle that by the law of England jurisdiction depended, broadly speaking, on presence within the jurisdiction, to enable the Court to give special leave for service out of the jurisdiction in certain circumstances. The Court might do so; in other words the Court had a new power which it was enabled to exercise in particular cases which seemed to it to fall within the spirit as well as the letter of the various classes of cases provided for. This appeared to his Lordship to entitle the Court to refuse to give such leave in an instance in which the proceeding, though for a breach within the jurisdiction and in the letter within the terms of the rule, was in the substance not so."

Here we have, it may be said, everything of "substance" to be performed within the jurisdiction.

I am not unmindful of the terms of the formal contract as to payments being made in New York, that contract though, the appellant claims, is not his, he nevertheless does not deny but admits the entry into a contract for the purchase of six vessels and there is ample evidence establishing that such a contract was entered into apart from the formal contract. Lord Dunedin, in the same case, at p. 64, is reported to have said:

"The spirit of the rule he took to be that when what the plaintiff wished really to complain of was the non-performance of something which the defendant ought to have performed within the jurisdiction according to the proper interpretation of the contract, he should be allowed to try that question here, notwithstanding that there might be some other acts which the defendant ought to have performed abroad. It seemed to his Lordship to follow that there must be substance in the breach."

Here certainly there was substance in the breach, six vessels are built and delivery is not taken thereof but they are left with the respondent with all the attendant responsibilities and expense attachable thereto, and the answer is apparently, "Your only *forum* for trial is the Court of the State of New York." It does not occur to me that that can be a sufficient answer in the present case. I would also refer to what Lord Atkinson said in the case last referred to, at p. 65:

"I do not understand that it is the whole of the contract that has to be performed within the jurisdiction. It is sufficient if some part of it is to

MURPHY, J. (At Chambers)

1919

Sept. 15.

COURT OF APPEAL

1920

March 19.

LYALL SHIPBUILDING CO. v. HEMELRYCK

be performed within the jurisdiction, and if there be a breach of that part of it within the jurisdiction; and that was the view taken by the Divisional Court in *Roby* v. *Snaefell Mining Company* [(1887)], 4 T.L.R. 148; 20 Q.B.D. 152, where the action was brought by a firm of engineers in Lincoln for the price of machinery erected in the Isle of Man."

And we have Lord Buckmaster, at p. 65, saying:

"It was not necessary to consider again the wording of the rule. Its effect was stated in the case of *Rein* v. *Stein* [(1892), 1 Q.B. 753] (*supra*), and the Courts had consistently followed that decision, as meaning that if any part of the contract was to be performed within the jurisdiction, the breach of that part brought into play the operation of the rule. Accepting this principle, there still remained the duty of examining whether this breach was the real matter of dispute."

In the present case "the real matter of dispute" consists in the refusal to accept delivery of the vessels. It is not the same action as one for the purchase price of the vessels. The appellant by his refusal to accept delivery of the vessels entitled the respondent to sue for such breach and that breach of contract unquestionably was a breach of contract within British Columbia—it was a term of the contract obligatory upon the appellant, *i.e.*, to be performed within the jurisdiction.

MCPHILLIPS, J.A.

It might well be that in this action brought for the breach of contract and other consequential relief in British Columbia, that other and different damages are recoverable than would be recoverable in the State of New York, and that this action is a distinct right of action capable of complete enforcement in this jurisdiction only. Be that as it may, I have come to the firm conclusion that the order originally made by the Chief Justice of British Columbia was rightly made and that Mr. Justice MURPHY arrived at the right conclusion in refusing to set the same aside.

I express no decided opinion as to whether the application for leave to cross-examine upon the affidavit filed made by the appellant constituted a step in the action, and amounted to an attornment of the jurisdiction. As at present advised, I am not of that opinion.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *Tupper & Bull.*

THE KOMNICK SYSTEM SANDSTONE BRICK MACHINERY COMPANY, LIMITED v. MORRISON.

MURPHY, J.

1919

Sept. 23.

COURT OF APPEAL

1920

April 6.

THE KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. v. MORRISON

Fraudulent conveyance—Intention to defeat creditor—Badges of fraud—Mala fides of purchaser—Consideration—Question of fact—Appeal—R.S.B.C. 1911, Caps. 93, and 94, Secs. 3 and 4.

In an action to set aside conveyances on the ground of fraud, but not so found by the trial judge, the Court of Appeal is a Court of rehearing, and should overrule the finding of the trial judge, if on full consideration of the case they come to the conclusion that the judgment was wrong.

That a purchaser does not come within the exceptions in section 4 of the Fraudulent Preferences Act it is not necessary to prove that he had actual notice of fraud. The Court may look at the whole of the circumstances surrounding the execution of the conveyance in concluding whether he was aware or should have been aware of the fraud.

APPEAL by plaintiff from the decision of MURPHY, J. dismissing an action, tried by him at Vancouver on the 18th, 19th and 23rd of September, 1919, to set aside and declare fraudulent and void two conveyances, one of the 2nd of November, 1918, from the B.C. Pressed Brick Company, Limited, to Katie Morrison of about three and one-half acres on Lulu Island, and the second of the 5th of November, 1918, from Nancy M. Trites (the B.C. Pressed Brick Company, Limited, being the beneficial owner thereof) to Katie Morrison of an acre of land adjoining the first-mentioned property. The plaintiff brought action in 1908 against the B.C. Pressed Brick Company to recover $22,500, the balance of the purchase-price ($45,000) of a brick-making plant constructed and installed by the plaintiff in said Company's quarters at Steveston, B.C. After a lengthy litigation the plaintiff recovered judgment for $29,866.25 and costs on the 5th of November, 1918 (see 26 B.C. 191). The land sold was the land upon which the brick-making plant was installed, the consideration on the sale being $2,000, and the defendant claimed the sale included land and improvements. It appeared from the evidence that one Philo Johnson, who was president of the B.C. Pressed Brick Com-

Statement

MURPHY, J.

1919

Sept. 23.

COURT OF APPEAL

1920

April 6.

THE KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. *v.* MORRISON

pany, was at the time a partner of the defendant in business in Vancouver and had formerly been her partner in the Yukon.

McPhillips, K.C., and *H. M. Smith,* for plaintiff.
Martin, K.C., and *Singer,* for defendant.

MURPHY, J.: I have listened carefully to the argument by Mr. *McPhillips,* but I am still convinced that this is essentially a case of fact. To find for the plaintiff here I would have to find that the B.C. Pressed Brick Company acted fraudulently or dishonestly in the sense that it sold this property with the idea of preventing the plaintiff from realizing on a judgment which the defendant Company expected would be given against it. I am unable to take that view on the facts. When the transaction is viewed in the manner which I think is the right manner in which to view it, I do not see that it is open to criticism. What was being sold, I find, was the four acres of land and the foreshore, carrying whatever rights that would give to the building and wharf erected on the foreshore. There was never any intention of selling the machinery. It was the land and whatever rights in the building went with the conveyance that the $2,000 was paid for. I think Miss Morrison probably had the idea she was getting the building. On the evidence, I am unable to say the price was an inadequate one. I am inclined to think it was fairly a good bargain under all the circumstances. If that is the correct view of the transaction, I think the whole cloud of suspicion disappears at once. Until I am forced by some higher Court to so hold, I certainly will not hold anyone guilty of dishonesty because acts that that person committed had legal consequences —assuming that the legal consequences are such as put forward here—of which that person is ignorant entirely. I cannot conceive of a person having *mens rea* based upon facts of which he has no knowledge. I think I must go this much further, although I do not usually do it, and state that Mr. Gallagher impressed me as an honest man, and I believe his evidence. If my view of the facts is correct, I think there is no question as to what the law is. I cannot find there was notice or knowledge on the part of this defendant that these people had

MURPHY, J.

entered into a scheme to defraud their creditors. As I say, I do not believe they did; at any rate, I do not feel convinced that they did, and if not so convinced, I certainly will not hold people guilty of dishonesty. Further, I do not think there is evidence here on which I could hold Miss Morrison had notice of any scheme to defraud. I, however, base my decision on the view I have taken of the transaction, and I do not think on the record it is a transaction that really calls for criticism. I will have to dismiss the plaintiff's case with costs.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 5th, 8th and 9th of December, 1919, before MACDONALD, C.J.A., MCPHILLIPS and EBERTS, JJ.A.

McPhillips, K.C., for appellant: The president of the B.C. Pressed Brick Company and the defendant had been partners in business for years and the whole property was sold to Miss Morrison for $2,000, when valued at over $60,000. My submission is that the evidence taken as a whole shews clearly a fraudulent transaction and that she knew the facts. It is not necessary to prove actual notice in words. There is constructive notice: see *Jones* v. *Gordon* (1877), 2 App. Cas. 616 at p. 625; Kerr on Fraud and Mistake, 4th Ed., 250 and 253; 5th Ed., 265 and 268. The Court will look at surrounding circumstances: see May on Fraudulent and Voluntary Dispositions of Property, 3rd Ed., 11; *In re Holland. Gregg* v. *Holland* (1902), 2 Ch. 360 at p. 372; *Ex parte Mercer. In re Wise* (1886), 17 Q.B.D. 290 at p. 298; *Koop* v. *Smith* (1915), 51 S.C.R. 554 at p. 560. The consideration is important in considering fraudulent intent: see Parker's Frauds on Creditors, pp. 87-8; *Bayspoole* v. *Collins* (1871), 6 Chy. App. 228; 40 L.J., Ch. 289; *Strong* v. *Strong* (1854), 18 Beav. 408. By the conveyance the Company could do no more business; this constitutes the act a fraudulent one: see *Edmunds* v. *Edmunds* (1904), P. 362 at p. 376; *Woodhouse* v. *Murray* (1867), L.R. 2 Q.B. 634 at p. 638; *Freeman* v. *Pope* (1870), 5 Chy. App. 538.

Argument

S. S. Taylor, K.C., for respondent: Under the Act they

MURPHY, J.
1919
Sept. 23.
COURT OF APPEAL
1920
April 6.
THE KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. v. MORRISON

must shew the Company was insolvent, which they have failed to do. Section 4 applies here and there is no evidence to shew that this was not a *bona fide* sale as far as the purchaser is concerned. They must shew *mens rea* and this they have failed to do. Shewing mere indebtedness is not sufficient. On the question of reversing the trial judge see *Khoo Sit Hoh* v. *Lim Thean Tong* (1912), A.C. 323 at pp. 325 and 332. The machinery was severed from the land, and I contend the price given by Miss Morrison was a fair value within the meaning of the Act.

McPhillips, in reply: There was no judgment in this case until the 5th of November, 1919, but prior to that they had no right to assume they were safe: see *Hopkinson* v. *Westerman* (1919), 48 D.L.R. 597.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal should be allowed. Counsel for the appellant enumerated some 14 badges of fraud which he submitted were to be found in or connected with the transactions sought to be set aside. While I do not find it necessary to consider these in detail to ascertain whether or not the number has been correctly stated, I am very fully convinced, on a perusal of the evidence of the defendant and her witnesses, coupled with the circumstances surrounding the transaction, that the sale and conveyances were the result of a fraudulent scheme, of which the defendant must have been fully aware.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal involves the consideration of facts relating to two deeds attacked by the appellant, a judgment creditor, it being alleged that the two deeds being conveyances of land are invalid, and should be set aside under the provisions of chapters 93 and 94 in the Revised Statutes of British Columbia, being made with the intent or purpose of defrauding the appellant of its just debt, the B.C. Pressed Brick Company, Limited, the vendors, being in an insolvent condition at the time unable to pay its debts in full, or on the eve of insolvency and with intent to defeat, hinder and delay the appellant, and upon the further ground that the considera-

tion, even if *bona fide* paid, cannot be deemed fair and reasonable, *i.e.*, was inadequate.

The learned trial judge dismissed the action, not being of the opinion that the deeds were capable of being attacked under the invoked statute law. I fully appreciate the responsibility that rests upon the Court of Appeal where fraud is alleged and not found by the learned trial judge, yet I am also aware that the Court is one of rehearing and the duty is one that this Court cannot absolve itself of by merely saying that fraud has been passed upon and not found by the Court below. The principle upon which the Court must proceed has been defined in *Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402, "not shrinking from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong." (Also see Collins, M.R., in *In re Moulton—Grahame* v. *Moulton* (1906), 22 T.L.R. 380 at p. 384, top first column, "responsibility of forming a judgment on the matters for ourselves."

Now, in my opinion, the present case is one which, with great respect, I cannot adopt the view arrived at by the learned trial judge. I have given careful attention to the evidence led at the trial from both sides, and it is borne clearly to my mind that the B.C. Pressed Brick Company, Limited, entered into a deliberate plan to divest itself of all its convertible property and thus render itself immune from all legal process and leave nothing exigible—it then being in insolvent circumstances—as upon the date of the challenged conveyances the Brick Company was indebted to the appellant in a sum exceeding $15,000, and later, on the 5th of November, 1918, three days later than the date of the first challenged conveyance and upon the date of the second challenged conveyance, the appellant in a then pending action was held to be entitled to recover against the Brick Company $26,996.25, with costs to be added thereto.

The respondent was so intimately connected in business relations with at least two of the directors of the Brick Company, the acting directors, too—Messrs. Gallagher and Johnson —that it becomes impossible to come to the conclusion that she was acting in a *bona fide* way in becoming the purchaser of the property covered by the conveyances. Rather would it

MURPHY, J.

1919

Sept. 23.

COURT OF APPEAL

1920

April 6.

THE KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. *v.* MORRISON

appear that instead of acting in any way through ignorance or error as to the true situation, that she was fully aware of the plan of action. There is ample evidence and flagrant *indicia* of the concerted course of procedure improper in all its phases, and the respondent assisted in the committing of a fraud. Further, one cannot wilfully shut one's eyes and be the instrument in the perpetration of a fraud. In truth, it would appear that the respondent lent herself to what, from one point of view, may well be said to be a simulated transaction, that is, that the intention of the parties was that the respondent should appear to be a purchaser for value of the property but that it was not in fact a real transaction, but one concocted to bring the property into what was deemed to be a safe port for the time being and prevent it being seized upon to satisfy an existing debt and one soon to take the form of a judgment debt capable of enforcement against the property of the Brick Company.

It is clear to demonstration that the sale effected was at a price merely to pay moneys to the directors that seemingly were not legal claims, and the sum dealt with as the purchase price bore no relation to the real value of the property disposed of. Witness the travesty of things. The respondent makes a first offer of $3,000, later an offer of but $2,000; the latter offer is accepted. Why the reduction? Because upon arithmetical computation it was found that $2,000 would be enough to close out things by way of gifts to the directors, with no care for the creditors. "Debts must be paid before gifts can be made": Lord Hatherley, L.C., in *Freeman* v. *Pope* (1870), 5 Chy. App. 538 at p. 540. Also see Malins, V.C., at pp. 544-5, in *Bulmer* v. *Hunter* (1869), 38 L.J., Ch. 543.

MCPHILLIPS, J.A.

There was plain intention written over the whole impeached transaction of defeating the claim of the appellant, it not being an indebtedness that the Brick Company felt it should pay, and evidently there was unwillingness to allow the law to take its course. That which was done was done unquestionably to defeat the arm of the law and to defeat the payment of a just debt. The course adopted was from one point of view (and apparently that which is strongly maintained) on the claimed footing of a *bona fide* sale at a correct value, the proceeds,

though, to go into the pockets of the directors of the Brick Company, not to go to the creditors. Further, it was money got in, not to carry on, but to go out of business and for the personal advantage of the directors, leaving nothing for the creditors (see Cockburn, C.J. in *Woodhouse* v. *Murray* (1867), 36 L.J., Q.B. 289 at pp. 291-3). Such a transaction cannot stand; it was a fraudulent contrivance and impeachable.

From another point of view, it was all a sham but thought to be of sufficient substance to effectively balk the creditors, and that which was ostensibly a sale, was not a sale at all, it was merely a method adopted to forestall any realization of the judgment debt if judgment went against the Brick Company, the respondent throughout it all being the willing instrument of the fraud; in fact, there is evidence sufficiently cogent from which to draw the inference that such was the transaction: note the fact that the certificate of title later goes not to the respondent, in whose name it is, but to Gallagher and later to Johnson. The respondent and Johnson are partners in business; their affiairs are much interwoven, extending over long years. It is inconceivable to think, considering the confidence evidently resposed in each other, that the respondent was not fully cognizant of the whole situation or wilfully shut her eyes with the means of knowledge of what was being done and permitted herself to be the instrument in a fraud.

Now, upon what principle does the Court act in cases such as the one before us? How will intent to defeat and delay creditors be discovered and established, and how will fraud be discovered? We are not left without authority upon these points. Vaughan Williams, L.J., in *In re Holland. Gregg* v. *Holland* (1902), 2 Ch. 360 at p. 372, said:

"I think that in each case you must look at the whole of the circumstances surrounding the execution of the conveyance, and then ask yourself the question whether the conveyance was in fact executed with the intent to defeat and delay creditors."

Then we have Lord Esher, M.R. in *Ex parte Mercer. In re Wise* (1886), 17 Q.B.D. 290 at p. 298, saying:

"If you want to find out the intention in a man's mind, of course you cannot look into his mind, but, if circumstances are proved from which you believe that he had a particular intention, you infer as a matter of fact that he had that intention."

MURPHY, J.

1919

Sept. 23.

COURT OF APPEAL

1920

April 6.

THE KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. v. MORRISON

The present case, as it presents itself to my view, wears all the badges of manifest fraud, and there was "manifest error" in the findings of the learned trial judge (see Anglin, J. in *Barron* v. *Kelly* (1918), 56 S.C.R. 455 at pp. 476-7).

I have not gone into the evidence in all its detail, in these my reasons for judgment, but a careful analysis of the evidence demonstrates that that which has been done is exactly that which cannot be done, it being against the policy of the law. It is difficult always to establish *mens rea*—intention of mind, perhaps, must always be more or less an unsolved riddle. It has been said, "Every mind is thus inscrutable to every other mind": Jevons, Political Economy, p. 15, but as we have seen we are not wholly without guide as to how we should proceed.

Proceeding to the inquiry, I am satisfied that there was intention in the present case, within the purview of the law, to defraud the appellant of its just debt. Further, that there was a state of insolvency at the time and the intention was to defeat, hinder and delay the appellant. Finally, there was inadequacy of consideration, and that the respondent was aware of all these facts, within the meaning of the law, unquestionably she had the means of knowledge and could not wilfully shut her eyes thereto. If she did, knowledge nevertheless must be imputed to her.

MCPHILLIPS, J.A.

The onus upon the evidence being shifted, as I consider it was, the respondent did not satisfactorily discharge the onus which rested upon her and establish that the conveyances were supportable and were not against the policy of the law.

I would allow the appeal. Judgment should be entered for the appellant in the terms of the prayer of the statement of claim, with all consequential relief.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellant: *McPhillips & Smith.*

Solicitors for respondent: *Gwillim, Crisp & MacKay.*

DONALD v. JUKES.

Chose in action—Guarantee—Assignment of debt—Notice—Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2(25).

Executors and administrators—Moneys owing administratrix in own right—Debtor assignee of debt of deceased—Set-off—R.S.B.C. 1911, Cap. 4, Sec. 99.

The defendant guaranteed payment of a debt due by another. After payment was due the debt and covenant of the guarantor were assigned to the plaintiff who gave notice of the assignment to the defendant but not to the primary debtor.

Held, that as there was a right of action against the surety who alone was sued, and as to himself the provisions of the Laws Declaratory Act were strictly complied with, the plaintiff should succeed.

The plaintiff was administratrix and sole beneficiary of the estate of her deceased husband who in his lifetime had given a mortgage with covenant to repay $11,500 advanced by the Pacific Mainland Mortgage & Investment Company. This company (after the assignment to the plaintiff of the debt sued on in this action) assigned the mortgage to the principal debtor. The defendant claimed the right of set-off against the plaintiff.

Held, on appeal (reversing the decision of MACDONALD, J., 26 B.C. 368), that although the moneys were loaned the primary debtor by the trustee of the real estate of the deceased husband, the evidence was conclusive that the money so advanced was in fact the private moneys of the plaintiff and a debt due from the estate cannot be set off as against her personal estate.

APPEAL by plaintiff from the decision of MACDONALD, J. of the 15th of May, 1919 (26 B.C. 368) in an action for the recovery of moneys under a guarantee. James C. Donald, who died on the 16th of October, 1913, made a will naming an executor not having power to act, and on the 28th of May, 1914, letters of administration were granted to his widow, the plaintiff, who was the sole beneficiary under the will, and one G. L. Edwards was appointed trustee of the real estate. One Arthur E. Jukes, a son of the defendant, borrowed $1,526.71 from G. L. Edwards, as trustee of said estate and by instrument of the 11th of August, 1914, A. E. Jukes covenanted to repay this sum on the 11th of August, 1915, and the defendant covenanted that in the event of A. E. Jukes failing to pay as

Statement

COURT OF APPEAL

1920

April 6.

DONALD v. JUKES

aforesaid he would pay said sum with interest at ten per cent. There was default in payment, and on the 10th of February, 1916, Edwards assigned the said indenture to the plaintiff with all rights, benefits and covenants therein contained. Notice of this assignment was given to the defendant but not to A. E. Jukes the primary debtor. During his lifetime J. C. Donald borrowed $11,500 from the Pacific Mainland Mortgage & Investment Company, to which company he gave a mortgage with the usual covenants on the 17th of March, 1913, to secure said indebtedness. This mortgage became due on the 11th of March, 1914, and was assigned by said company to A. E. Jukes on the 20th of September, 1918, it being still wholly unpaid. The defendant claimed the right to set off the amount of the debt of the plaintiff under the mortgage against the amount due from A. E. Jukes under the indenture of the 11th of August, 1914. The learned trial judge held that the plaintiff was entitled to recover the amount sued on but that proceedings should be stayed pending the taking of administration accounts and subsequent order as to set-off or otherwise.

Statement

The appeal was argued at Vancouver on the 10th and 11th of December, 1919, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

McPhillips, K.C., for appellant: Edwards was appointed trustee of the real estate by the Court but he was also Mrs. Donald's agent and, in fact, loaned Jukes her money. The document should properly have been drawn to her. Notice of the assignment was served on the defendant, and that is all that was necessary. If there was a set-off at all, it was against Edwards as trustee. The two questions are: (1) Was the money the plaintiff's personally? (2) Was the set-off one that could be raised against her in her personal capacity? The evidence is uncontradicted that it was her money that was loaned and the set-off can only apply to the estate.

Argument

Symes, for respondent: The estate included North Vancouver property in which Jukes was interested. Jukes could not pay and the estate had to look after his share, Jukes owing the estate for what was paid out on his behalf. Edwards assigned to Mrs. Donald as trustee and she can act in no other capacity

than that of administratrix: see *Bankes* v. *Jarvis* (1903), 1 K.B. 549. No notice of the assignment was made to the principal debtor: see *Stanley* v. *English Fibres Industries, Lim.* (1899), 68 L.J., Q.B. 839. It is a point in issue and the plaintiff must prove service under the Act: see Bullen & Leake's Precedents of Pleadings, 7th Ed., 65. Until they have given notice to the principal debtor the gift does not belong to them. A guarantor is a particularly favoured debtor: see Halsbury's Laws of England, Vol. 4, p. 3, par. 782; Vol. 15, p. 508, par. 955. The mortgage upon which set-off is claimed was purchased by the primary debtor and notice given to both the trustee and the administratrix: see *Bennett* v. *White* (1910), 2 K.B. 643.

Argument

McPhillips, in reply: It is not necessary to prove our right of action against the principal debtor: see Rowlatt on Principal and Surety, 262; *Carter* v. *White* (1883), 25 Ch. D. 666 at pp. 670 and 672. There was an equitable assignment: see *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1905), A.C. 454. On the question of notice see *Walker* v. *Bradford Old Bank* (1884), 12 Q.B.D. 511 at p. 517; *Dell* v. *Saunders* (1914), 19 B.C. 500; *The Canadian Bank of Commerce* v. *La Brash* (1918), 1 W.W.R. 8; Bullen & Leake's Precedents of Pleadings, 7th Ed., 692.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.: It is admitted by counsel for respondent that if it can properly be held that the moneys advanced to A. E. Jukes by Edwards were the moneys of the plaintiff, then subject to a question which I shall come to presently, plaintiff is entitled to succeed.

MACDONALD, C.J.A.

Now, her claim is that the moneys advanced as aforesaid were her own moneys. It is not in dispute that she had obtained a large sum of money under insurance policies on her late husband's life. It would appear, too, that she had advanced others of her own moneys to assist the estate of her late husband, which was a large one but burdened with obligations. The only suggestion of dishonesty in the transaction is that the assignment of the Jukes agreement by Edwards to the plaintiff

COURT OF APPEAL

1920

April 6.

DONALD v. JUKES

was preferential. There is some doubt about the solvency of the estate, but this is not an action to set aside the transfer, and I refer to these matters only as bearing upon the credibility of the plaintiff.

Edwards, who appears to be a credible witness, swears to the fact that though the instrument sued on describes the transaction as an advance made by him, as trustee, to Jukes, it was in reality not of the estate moneys, but plaintiff's own moneys which he advanced. The plaintiff herself gives clear and, as I think, truthful evidence that the investment was made of her moneys and for her benefit, and this evidence, upon which I rely, is to be found in her examination for discovery, put in at the trial by defendant's counsel. I conclude therefore that the moneys advanced to A. E. Jukes, the principal debtor, were hers and when the security therefor was assigned to her, it became hers in her own right and not as administratrix.

MACDONALD, C.J.A.

The other question referred to above arises owing to the absence of notice of the assignment to the principal debtor. Notice in conformity with section 2, subsection (25), of the Laws Declaratory Act, was duly given to the defendant, the surety. The plaintiff has, as she might do, sued the surety alone and as she has, as to him, strictly complied with the terms of said subsection, I think she is entitled to succeed.

With regard to the set-off, there can, I think, be no doubt that it cannot be raised against her. She acquired the chose in action long before the principal debtor acquired the set-off of which the defendant is endeavouring to take advantage.

The appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I do not think it necessary, under the Laws Declaratory Act, Sec. 2, Subsec. (25), that notice be given the primary debtor in order that the assignee may maintain an action against the guarantor whose liability has accrued at the date of assignment. He is then a debtor within the meaning of the Act.

The learned trial judge so considered it and gave judgment in favour of the plaintiff but allowed a set-off to the defendant to the amount of the judgment, holding that the moneys advanced to Jukes for the primary debtor were the moneys of

the Donald estate and not the personal moneys of Mrs. Donald. Mr. *Symes* admitted upon the argument that if these were Mrs. Donald's private moneys, the set-off could not be allowed. With respect, I have reached a different conclusion to the learned trial judge. That they were Mrs. Donald's private moneys is shewn by her examination for discovery put in by the defendant himself, apart altogether from Edwards's evidence, which is to the same effect but is objected to.

MCPHILLIPS, J.A.: This appeal, in my opinion, must succeed. With great respect to the learned trial judge, I cannot arrive at the conclusion which he did, save in respect to that portion of the learned judge's judgment in which he held that "it was not essential that the primary debtor should also receive notice of the assignment" to entitle the defendant being sued by the plaintiff.

With great respect to the learned trial judge, the fallaciousness of the further reasons for judgment arises through the inquiry into that which was not admissible or permissible, *i.e.*, the plaintiff suing in her individual capacity in respect to her own estate was called upon to go into matters of account of the estate of her late husband, of which she is administratrix. I can see no warrant for any such inquiry, and there was manifest error in the direction and requirement that the accounts be taken in this action. Here the plaintiff must be treated as an assignee for value of the debt sued for, the evidence is all one way, it was her money. What right is there to set up the fact that she is an administratrix of an estate that has nothing whatever to do with this indebtedness? If nothing else, it would be highly inconvenient and embarrassing to enter into this very irrelevant inquiry and it was not rightly open upon the pleadings.

MCPHILLIPS, J.A.

The plaintiff did not bring the action for the benefit of the estate of which she is administratrix, it cannot by any stretch of imagination be an action that could be classified as such, nor can it be said that she is other than the real plaintiff, no other person is to be the beneficiary, nor will the moneys, if recovered, be assets of the estate of which she is administratrix.

I would put the test—had the defendant been sued by

COURT OF APPEAL

1920

April 6.

DONALD v. JUKES

Edwards, would it have been possible to raise this set-off which is now attempted to be set up? Assuredly not. It is to be noted that Edwards was appointed by the Court trustee of the real estate of the late James Charlton Donald, and assuming for the moment that the moneys advanced were moneys held by Edwards as said trustee, would it be possible or equitable that by obtaining the assignment of a debt due by the late James Charlton Donald, the debt due to the trustee could be extinguished? It is only necessary to state this proposition to see its utter fallaciousness. It also calls up visions of a preferential position achieved as against other creditors of the estate and many matters of complexity and embarrassment.

Then, let us pursue the matter a little further. The plaintiff is entitled to enforce the debt sued for by virtue of the assignment made to her by Edwards; she sues in her individual capacity, she is in no way liable in respect of the debt attempted to be set off (nor was Edwards the assignor liable). That she is the administratrix of the estate of the late James Charlton Donald, who was the mortgagor and liable in respect of the mortgage debt attempted to be set off, matters not, that is a matter entirely foreign to the cause of action sued for here.

I do not find it necessary to in detail examine or refer to the many authorities that could be referred to but content myself by saying that the right of set-off exists only when in the same right, and that is not this case. In truth, the point is an elemental one in my opinion, and needs no particular authority. I might say, though, that the authorities that the learned trial judge refers to in his judgment, which, with great respect, are attempted to be distinguished, fully support the view I here express, and that may be again stated as being that the set-off cannot be admitted, the debt has no virtue or force whatever as affecting or meeting the debt sued for by the plaintiff in this action, and is not a debt which the plaintiff can be called upon to pay or acknowledge out of her own estate or capable of being said in this action as coming under the rules of equitable set-off or mutual credit.

MCPHILLIPS, J.A.

I would allow the appeal, the plaintiff to have judgment for the amount sued for, as allowed by the learned trial judge, but

wholly disencumbered of the set-off which was erroneously allowed, the plaintiff to have the costs throughout and of this appeal.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Abbott, Macrae & Co.*
Solicitors for respondent: *Wilson, Whealler & Symes.*

REX *EX REL.* DRYDEN v. MOULD.

Municipal law—By-law—Bringing infected animals into municipality forbidden—Ultra vires—R.S.C. 1906, Cap. 75—R.S.B.C. 1911, Cap. 46—B.C. Stats. 1914, Cap. 52, Secs. 54, 106—By-law of municipality of Saanich, No. 62, clause 35.

A by-law of the Municipality of Saanich provided that "no animal affected with any infectious or contagious disease shall be brought into the municipality."

Held, that the Municipal Act confers upon a municipality regulating powers only, that the by-law as passed is prohibitive in its effect and is *ultra vires.*

Per MCPHILLIPS, J.A.: If the Legislature intended to confer upon the municipal authority the power of prohibition and exclusion of animals suffering from infectious or contagious diseases it would have done so in apt language.

APPEAL by accused from the order of LAMPMAN, Co. J. of the 11th of November, 1919, dismissing an appeal from a conviction by the stipendiary magistrate at Victoria, for unlawfully bringing into the municipality of Saanich a cow which was affected with a contagious disease, contrary to clause 35 of by-law Number 62 of the Municipality of Saanich. In June, 1919, the cow was bought in Saanich by a resident of Victoria, who brought it into the City. In July following the cow was tested by the Provincial veterinary inspector, who pronounced her tubercular and ordered that she be destroyed.

Statement

COURT OF APPEAL

1920

April 6.

REX v. MOULD

The accused was then employed to destroy the cow and he took her to his place in Saanich for that purpose, where it was found by the veterinary inspector and later shot and burned. The accused was fined $5. He appealed on the ground that clause 35 of the by-law which read "no animal affected with any infectious or contagious disease shall be brought into the municipality," was *ultra vires*.

Statement

The appeal was argued at Victoria on the 12th and 13th of February, 1920, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Argument

Lowe, for appellant: The Dominion Act is the governing legislation, being the Animal Contagious Diseases Act, and any infraction is governed by that Act. They purport to pass this by-law under section 54, subsection (105) *et seq.*, of the Municipal Act (B.C. Stats. 1914). The only subsections of section 54 relating to animals are 39 to 47: see *French* v. *Municipality of North Saanich* (1911), 16 B.C. 106. The Dominion Act is *intra vires*: see *Brooks* v. *Moore* (1907), 13 B.C. 91. When the statute creates offences and provides for carrying out its provisions a by-law in relation to the same matter is bad: see *Mayes* v. *Thompson* (1902), 9 B.C. 249; *Rex* v. *Garvin* (1909), 14 B.C. 260; *In re Narain Singh* (1908), 13 B.C. 477; *Rex* v. *Macdonald* (1917), 28 Can. Cr. Cas. 311.

Harold B. Robertson, for respondent: The Dominion Act has no application and the title of the Provincial Act shews it is not intended to apply when there is a by-law; neither Act covers the point in question: see *Thomas* v. *Sutters* (1900), 1 Ch. 10 at pp. 16-17.

Lowe, in reply.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: In my opinion the Municipality had no power to pass clause 35 of by-law 62, under which conviction was had.

I would allow the appeal.

McPHILLIPS, J.A.: The appeal, in my opinion, should be allowed. A constitutional point was taken that the by-law No. 62, a by-law relating to Public Health of the Corporation of the District of Saanich, was *ultra vires* of the Municipal Council to enact, *i.e.*, that the field of legislation was occupied by Federal legislation, which displaced the Provincial legislation: see Animal Contagious Diseases Act, R.S.C. 1906, Cap. 75. The Provincial Act is in somewhat similar terms, entitled the Contagious Diseases (Animals) Act, R.S.B.C. 1911, Cap. 46. I do not find it necessary to pass upon this point as the decision I have come to renders it unnecessary. The challenged by-law is claimed to be supported by section 54, subsections 105, 106, 107, 108, 109, of the Municipal Act, B.C. Stats. 1914, Cap. 52. The learned counsel for the respondent very ably addressed his argument to the support of the validity of the by-law upon the authority given by the Municipal Act, and did not consider that the Federal or Provincial legislation in any way affected the by-law, *i.e.*, that it was *intra vires* not *ultra vires* of the Municipal Council to enact. With deference, I do not consider that the by-law is supportable by the Municipal Act, and a close analysis of the powers conferred, and an examination of the authorities, persuades me that the by-law is too extensive in its terms—it is prohibitive in its effect—the powers conferred are regulatory powers, not prohibitive powers. If the Legislature intended to confer upon the municipal authority the power of prohibition and exclusion of animals suffering from infectious or contagious disease, it would have been done in apt language, and without that apt language the by-law is incapable of being supported. Clause 35 of the by-law is in the following terms:

"No animal affected with any infectious or contagious disease shall be brought into the municipality."

This is absolutely prohibitive in its effect, and I find no warrant for its enactment. The learned counsel greatly relied upon certain expressions of Sir F. H. Jeune in the Court of Appeal of England in *Thomas* v. *Suters* (1899), 69 L.J., Ch. 27 at p. 30, where that eminent and distinguished judge said:

"If there were a difference between a by-law and a public Act of Parliament—I mean if a by-law declared something to be legal which the public law declared to be illegal, or *vice versa*—I agree that the by-law could

COURT OF APPEAL

1920

April 6.

REX v. MOULD

not be set up against the general law in that sense. . . . . It may be that the by-law goes beyond that, but I cannot myself see any real objection to the by-law, even if it does go somewhat beyond the Act of Parliament. The Act, speaking for the whole country, makes certain things illegal. It does not follow that a by-law speaking for a particular locality may not make some more stringent provisions with the same object."

The difficulty here, however, is that the Act of Parliament, the Municipal Act, does not declare that it is illegal to bring into a municipality any animal affected with any infectious or contagious disease, but we find the by-law so declaring. It might as well be contended that a by-law would be effective if it in terms excluded persons as well as animals. It is only necessary to state this proposition to see the extent of the contention made. It cannot be assumed or implied that the power to pass by-laws relative to health, protection or preservation, the heading appearing above subsection (105) *et seq.* authorizes any such drastic power of exclusion from the municipalities. It is not a power that would be attempted to be conferred by Parliament in other than positive and clear terms, so dislocating to the affairs of mankind and domestic life.

Upon the facts of the present case, we have an animal bought in the Saanich municipality taken into the City of Victoria, examined by the veterinary inspector and ordered to be destroyed. The animal was taken back into the municipality and there destroyed. In the absence of clear statutory enactment declaring it to be illegal to have proceeded in this way, and a by-law supportable upon such statute law, it is idle to contend that that which was done was an illegal act. I cannot, with respect, come to the same conclusion as LAMPMAN, Co. J. In his reasons for judgment the learned judge said:

MCPHILLIPS, J.A.

"Clause 35 of the by-law under which the information was laid enacted that 'No animal affected with any infectious or contagious disease shall be brought into the Municipality.' This enactment seems to me to be within the scope of the legislation under which it was passed. Power to prevent the spread would, I think, include power to prevent the importation."

On the contrary, it is clear to me, after a careful consideration of the whole matter, and attention given to the authorities, that the by-law must be held to be invalid and beyond the scope of the powers conferred by the Municipal Act. As I have already said, the by-law is prohibitive, not regulatory, and

prohibitive powers have not been conferred. That which has been attempted is, in its nature, totally exclusive and exceedingly drastic in its effect and would mean that a farmer once having taken an animal affected with disease beyond the confines of the municipality, in which he was resident, could not again bring the animal within the municipality, even for the purpose of its destruction. All that is necessary now to pass upon is the validity or invalidity of the challenged by-law, and as to that, I have no hesitation in saying that it is *ultra vires* of the Municipal Council and must be held to be invalid and illegal.

I think Lord Sumner's language in *Rex* v. *Broad* (1915), 84 L.J., P.C. 247 at pp. 254-5 is particularly applicable to the present case:

"The rule is well established that if by-laws 'involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules" —*per* Lord Chief Justice Russell of Killowen in *Kruse* v. *Johnson* (67 L.J., Q.B. 782, 785; (1898), 2 Q.B. 91, 99)."

MCPHILLIPS, J.A.

In the present case, the result must be, in my opinion, that the conviction be quashed, the by-law being, as to section 35 thereof, upon which the conviction was made, invalid, *i.e.*, section 35 of the by-law not being sustainable, it follows that the conviction cannot be upheld.

I would, therefore, allow the appeal, the appellant to have his costs here and throughout in the Courts below.

Appeal allowed.

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

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

COURT OF APPEAL

1920

April 6.

CLAMAN'S LIMITED v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Damages—Loss of goods in transit—Goods for sale in business—Damage to business—Measure of.

CLAMAN'S LIMITED v. CANADIAN PACIFIC RY. CO.

From a shipment of shirts from the manufacturer to a gentlemen's furnishing store, some of the shirts were lost in transit on the defendant's railway. On the trial, judgment was given allowing damages both for the value of the shirts lost and for depreciation in value of the incomplete line received.

Held, on appeal, reversing the decision of RUGGLES, Co. J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the plaintiff is entitled to recover only the actual value of the shirts lost.

Statement

APPEAL by defendant from the decision of RUGGLES, Co. J. of the 15th of October, 1919, in an action for damages for the loss of shirts in transit on the railway of the defendant Company. The plaintiff, carrying on the business of a gentlemen's furnishing store in Vancouver, ordered a consignment of two cases of shirts from the manufacturer at Kitchener, Ontario. On their arrival in Vancouver it was found the cases had been opened, a number of the shirts being lost and others soiled. The actual price of the shirts lost and soiled was $10.75, but the plaintiff claimed additional damages as the lot purchased contained a complete line of gentlemen's shirts and it was necessary to their business that they should receive such consignments intact and in complete lines in order to satisfy customers. The shirts lost were of the middle size, for which there was a greater demand, the number of the sales tapering off on higher and lower sizes, thus making the shirts actually received a job lot and of much less value, the manufacturer not being able to supply the depleted portion of the order. The defendant Company paid into Court the actual value of the shirts lost and soiled.

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

McMullen, for appellant: Respondent says the balance are not worth so much when the others are missing. The damages are the ordinary natural result of the pilferage: see Mayne on Damages, 8th Ed., 28; *Hadley* v. *Baxendale* (1854), 23 L.J., Ex. 179; *Gee* v. *Lancashire & Yorkshire Railway Co.* (1860), 6 H. & N. 211; *Horne* v. *Midland Railway Co.* (1872), L.R. 7 C.P. 583; (1873), L.R. 8 C.P. 131 at pp. 139-40.

R. M. Macdonald, for respondent: I contend this is direct normal damages and not indirect consequential damages. Broken lines are damaged *per se*: Carver's Carriage by Sea, 6th Ed., 932. The loss claimed is the reasonable and natural loss through present conditions of trade: see *Borries* v. *Hutchinson* (1865), 18 C.B. (N.S.) 445 at p. 451; *Chaplin* v. *Hicks* (1911), 2 K.B. 786. It is a question of the value of the goods to the owner: see *Acatos* v. *Burns* (1878), 3 Ex. D. 282 at pp. 291-2; *Brandt* v. *Bowlby* (1831), 2 B. & Ad. 932 at p. 939.

Argument

McMullen, in reply: He must shew the shipper in Kitchener made a bargain with the Canadian Pacific Railway Company.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.: I would allow the appeal and dismiss the action. The plaintiff's claim is that because six or seven shirts were stolen out of the consignment to them from Ontario, carried by the defendant, plaintiff is entitled not alone to the value of the lost articles but to special damages because the line of shirts was broken.

It is said that shirts are ordered in lines of 39 in a range of sizes. Six of the shirts stolen were of size 15. The claim is that because of this break in the range of sizes, the balance of the shirts were depreciated in value. This is a refinement in the art of damage claiming which may excite admiration in some minds, but which I think ought not to be encouraged to the confusion of common carriers. Had the shirts been duly received and put in stock and a customer had come in on the same day offering to buy half a dozen of size 15, I can hardly conceive of the plaintiff refusing to sell to him on the theory

MACDONALD, C.J.A.

COURT OF APPEAL

1920

April 6.

CLAMAN'S LIMITED v. CANADIAN PACIFIC RY. CO.

that to do so would cut down the value of the balance of the 39 shirts by 50 per cent., as they claim the loss of the stolen shirts did.

Something might be said also on the question of the remoteness of the claim, but I do not find it necessary to decide it.

MARTIN, J.A.: In my opinion the learned judge below has assessed the damages upon the proper principle. It is not a question as to what more or less remote damages, as the result of incomplete delivery, based upon course of conduct in prior dealings, or otherwise, might have been in the reasonable contemplation of the parties, but simply a question of the difference in value between a full trade "complete line" of 39 shirts of a special style shipped by the manufacturer over the defendant's railway and an incomplete line of only 32 shirts delivered by that railway to the plaintiff, because of loss in transit.

The undisputed evidence is that an incomplete line of this character can only be classed as a "job lot," because of the impossibility of supplying the missing items, and such job lots are of considerably less trade value than a full line for various reasons in selling such special lines which are fully set forth.

MARTIN, J.A. On the face of it, the evidence seems to me to be reasonable and consistent with one's own experience as a purchaser, and there is nothing strange in that the unsaleable proportion of a line of shirts or other standard lines should be greatly increased by the absence of the more saleable sizes. Of course, if the missing sizes could have been replaced from the manufacturer, or elsewhere in reason, the case would have been different (*British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499; 37 L.J., C.P. 235, wherein damages were claimed but disallowed for stoppage of a mill by a piece of machinery lost by the carrier), because then the element of incompleteness and consequent diminution in value would have been eliminated, but such not being the case, I am unable to say that the learned judge has erred in the amount he has awarded the plaintiff, *viz.*, the actual diminution in value between shipment and delivery.

GALLIHER, J.A. GALLIHER, J.A.: Apart from the written contract, where

the damages are limited and would not include the damages claimed for here, I do not find evidence to support any special contract. While there is evidence of former shipments consigned to the plaintiff reaching their destination over the defendant's line of railway having been tampered with and portions of them missing and that the defendant was aware of this, yet if it is enough to fix onerous consequences on the carrier there must not only be knowledge but evidence of assent to accept the contract on those terms.

Horne v. *Midland Railway Co.* (1873), L.R. 8 C.P. 139, Lush, J. at p. 145:

"It seems to have been accepted as the law from the case of *Hadley* v. *Baxendale* [(1854)], 9 Ex. 341; 23 L.J., Ex. 179 downwards, that where notice is given to the carrier of the special circumstances, and he consents nevertheless to carry the goods, without objection, he may be liable for the extraordinary damages arising out of such circumstances."

I agree however with the suggestion that the notice in such case can have no effect except so far as it leads to the inference that a term has been imported into the contract making the defendant liable for the extraordinary damages.

GALLIHER, J.A.

As Willes, J. says in *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499 at p. 509:

"The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."

The evidence here would not lead me to that conclusion, but if I were wrong in that, I would still say the plaintiff has not on its own shewing made out a case for the damages claimed.

MCPHILLIPS, J.A.: I would dismiss the appeal. It is plain to me on the special facts of this case that the carrier had express notice of the resultant damages that would ensue to the shipper in case there was loss or damage to the shipment. That being the situation, I have no difficulty in arriving at the same conclusion as RUGGLES, Co. J., the learned trial judge. As to the *quantum* of damages, that must always be a matter of some inexactitude. I cannot see that the damages as allowed are in any way excessive. The latitude accorded to the trial judge in assessing damages is well defined by Lord Moulton at p. 309 in *McHugh* v. *Union Bank of Canada* (1913), A.C. 299.

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

April 6.

CLAMAN'S LIMITED v. CANADIAN PACIFIC RY. CO.

I cannot, in the face of the evidence, follow or agree with the argument of the learned counsel for the appellant, that at most the damages should not exceed the value of the articles of which there was failure to deliver. I can quite believe, and it is reasonable to believe (and it is supported by the evidence) that shopkeepers must, to comply with the exigencies of trade, carry full not broken lines of goods, and to be without full lines would mean business loss and damage. It is idle to say that this cannot be, as at any time a customer might enter the shop and buy all the goods of a certain size. Here the goods were shirts of the usual and customary sizes carried by haberdashers. That is not the experience in the trade. There is an average of demand and it is well known, and stock is kept up to meet this average. That a shopkeeper should be out of the sizes that are usually called for is a detriment to business and means the loss of business.

The carrier is an insurer of the goods shipped and the failure to safely carry the shipment entails the payment of damages within the contemplation of the parties, and here there was express notice to the carrier of the damages that would ensue. It cannot be admitted that the carrier has in all cases a complete answer by saying, "it is true the shipment has been lost but here is the value of the articles missing, and more we will not pay," which is the stand taken by the carrier. That cannot be a complete answer in the present case. Further, it would mean that a business house might be destroyed in this way—a long distance from the source of supply, and the season's business lost as well as the goodwill of the business and its maintenance as a going concern. This view of things does not comport with common sense nor is it the law, in my opinion. The law must conform to the changed conditions (see Lord Shaw in *Attorney-General for Nigeria* v. *Holt & Co.* (1915), A.C. at p. 617) and take notice of distances, of inability to replace goods when lost, notably on the Pacific Coast. Goods of the class in question in this action were shipped at a point about 2,500 miles from Vancouver, and incapable of replacement at Vancouver or at any point possibly, save at the point of shipment, if even that were possible, as the season advanced,

MCPHILLIPS, J.A.

then there is the long delay of transit with the likelihood of losing the value of the goods by lateness of arrival.

It will be seen that many considerations enter into the question of what should reasonably be allowed as damages.

It follows that, in my view, it has not been shewn that the learned trial judge erred in the assessment of damages in the present case upon the special facts adduced at the trial, and they are not excessive or too remote (see *Simpson* v. *London and North Western Railway Co.* (1876), 1 Q.B.D. 274 at p. 277; *The Parana* (1877), 2 P.D. 118; *Wilson* v. *Lancashire & Yorkshire Railway Co.* (1861), 9 C.B. (N.S.) 632; *Jameson* v. *The Midland Railway Company* (1884), 50 L.T. 426; Brett, L.J. in *Acatos* v. *Burns* (1878), 3 Ex. D. 282 at p. 292, "the value of the goods to the owner").

EBERTS, J.A. would allow the appeal.

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

Solicitor for appellant: *J. E. McMullen.*
Solicitors for respondent: *Bird, Macdonald & Co.*

COURT OF APPEAL

1920

April 6.

GAUTHIER v. LETCHFORD AND SALTMARSH.

Contract—Option to purchase patented "glimmer"—Alternative option—Acceptance—Indefinite as to option accepted—Subsequent correspondence—Contract established.

GAUTHIER v. LETCHFORD

The defendants gave two 30-day options to the plaintiff for the purchase of an improvement in "head-light dimmers" for which a patent was about to be issued. By the first option the purchase price was $1,500 cash; by the second a cash payment of $1,000, with a five per cent. royalty on all sales. The plaintiff duly agreed to take up the option but did not specify which, his letter continuing to give directions to attach a draft for the purchase price to the patent papers when received, and forward from Winnipeg to Vancouver. The defendants acknowledged receipt of the acceptance, from which it appeared that they assumed it applied to the first option, and they suggested that owing to delay in the issue of the patent the plaintiff should start manufacturing at once. Some time later the plaintiff replied, stating he intended to start manufacturing as soon as possible. Shortly after this, and before the patent was issued, the defendants wired the plaintiff that he must pay $4,000 to secure the patent. An action for specific performance of the contract was dismissed.

Held, on appeal, reversing the decision of MURPHY, J. (MARTIN, J.A. dissenting), that assuming the plaintiff's acceptance did not distinguish between the alternative options, the defendants' acknowledgment identifies the first option as the one accepted, and the subsequent correspondence establishes the fact that the parties were at one as to this, and the plaintiff should succeed.

APPEAL by plaintiff from the decision of MURPHY, J., of the 9th of October, 1919, in an action for specific performance of an agreement for sale of certain patent rights. On the 24th of January, 1919, the parties entered into the following agreement:

Statement

"This agreement made in duplicate this twenty-fourth day of January, A.D. 1919, between Percy Horace Letchford and George Henry Saltmarsh both of the City of Winnipeg in the Province of Manitoba hereinafter called the Parties of the First Part, and John A. Gauthier of the City of Vancouver in the Province of British Columbia and hereinafter called the Party of the Second Part:

"WHEREAS the Parties of the First Part are the co-inventors of certain improvements in head-light dimmers for which a Canadian Patent has been applied for under application Serial No. 224285.

"NOW THIS AGREEMENT WITNESSETH as follows: The Parties of the First Part agree to sell to the Party of the Second Part complete controlling rights of the above-mentioned patent and patent without Royalty for the whole of the Dominion of Canada for the sum of fifteen hundred dollars ($1,500) cash on the following conditions:

"1. That the Parties of the First Part fulfill an order of two gross (288) pairs of original style metal dimmers which have been ordered by the T. Eaton Company of Winnipeg, Manitoba, and agree to cease such manufacture when this order is completed.

"2. That the Parties of the First Part give the Party of the Second Part an option of thirty (30) days from date of this Agreement to accept these terms, this agreement becoming null and void without notice in the event of the Party of the Second Part not closing this agreement within thirty days from the date of this Agreement.

"SIGNED SEALED AND DELIVERED "in the presence of "W. H. Parker." — "P. H. Letchford "G. H. Saltmarsh "John A. Gauthier."

On the same day the parties entered into an alternative agreement in writing, differing from the other in that it was a sale of controlling rights of the patent, the consideration being $1,000 cash and a 5 per cent. royalty on all sales. On the 14th of February, 1919, the plaintiff wrote an acceptance in the following terms:

"This is to notify you that I am taking up my option to purchase the Canadian Manufacturing rights in patent on head-light dimmers, application No. 224285. You will attach a draft to the patent papers, together with all documents in connection with same for examination and verification, through the Molson's Bank at Winnipeg, to the Molson's Bank at Vancouver, B.C. for the amount stipulated in said option dated at Winnipeg, Man. the 24th day of January, 1919. Would suggest you make draft at thirty days in order to allow sufficient time to examine and verify the documents."

Statement

On the 18th of February the defendants acknowledged receipt of acceptance, with thanks, and suggested that owing to the delay in getting out the patent the plaintiff may go on with the manufacturing of the glass dimmers upon depositing $750, being 50 per cent. of the purchase price. This was followed by letters from the defendants on the 13th and 14th of March in reference to delay in getting the patent from Ottawa, which was holding up the sale, but that the patent would be forwarded on the 29th of April. On the 8th of April the defendants sent a telegram to the plaintiff that in order to secure the patent he must send $4,000 immediately to their patent attorneys. The plaintiff immediately wired that he would insist on the original

COURT OF APPEAL

1920

April 6.

GAUTHIER v. LETCHFORD

agreement being carried out. The learned trial judge found there was never a completed contract and dismissed the action.

The appeal was argued at Vancouver on the 8th of January, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

J. H. Senkler, K.C., for appellant: The sale was of a patent glimmer on the lights of an automobile. My submission is the wording of the plaintiff's letter accepting is sufficient to identify it with the cash agreement. As to the words in the letter, "you will attach," etc., this should not be construed as a new term, as the plaintiff is a French-Canadian whose English is at fault; he was merely suggesting the most convenient way of carrying out the contract. At the trial they relied on *Oppenheimer* v. *Brackman & Ker Milling Co.* (1902), 32 S.C.R. 699, but it is distinguishable, as in that case certain terms were not agreed upon. There was no question as to terms here. The only question here is whether they had both agreed on the cash agreement and not the other, which included a royalty in part payment. My submission is that assuming the acceptance by the plaintiff does not identify the cash agreement, the subsequent correspondence shews they were in agreement as to which document they were referring to before the defendants attempted to evade the contract. As to the meaning of correspondence see *Love and Stewart (Limited)* v. *S. Instone and Co. (Limited)* (1917), 33 T.L.R. 475 at p. 476.

Argument

S. S. Taylor, K.C., for respondent Saltmarsh: The parties were never *ad idem.* The letter of acceptance would equally apply to the second agreement, and the defendants' letter of the 18th of February, identifying the cash agreement, was never accepted by the plaintiff. They must agree on all the terms or there is not a completed contract: see *Cole* v. *Sumner* (1900), 30 S.C.R. 379.

Craig, K.C., for respondent Letchford: The test is whether the plaintiff would be liable in an action for specific performance, and I submit there is nothing in the correspondence

whereby he could be held liable if the defendants had attempted to enforce the contract against him.

Senkler, in reply.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.: Assuming that the letter of the 14th of February was not an unconditional acceptance of the defendants' offer of the 24th of January, their letter of the 18th of February is, to my mind, a complete acquiescence in the altered terms contained in the said letter of the 14th of February. But it is said that because the defendants had made alternative offers, both dated 24th January, and since the said letter of the 14th of February did not distinguish between them, it constituted an acceptance of neither one nor the other of the said offers. This, I think, is true, but the said letter of the 18th of February supplies the necessary identification, and the subsequent correspondence between the parties clearly enough indicates that the parties were *ad idem.*

On a casual reading of the correspondence one might be led to think that letters and telegrams passing between them with reference to immediate manufacture of the patented article would indicate that a final agreement had not been come to, but to my mind this correspondence had to do with matters entirely collateral to the contract and formed no part thereof. Whether they finally agreed with regard to the collateral matters or not can, I think, make no difference. I think it must be taken to be the fair inference to be drawn from the correspondence and evidence that the defendants offered to sell to the plaintiff the "controlling rights," as they call them, for Canada in the said patent for $1,500 cash, that that was accepted, with this suggested variation, that the cash should be paid in Vancouver and not in Winnipeg, and that the documents of authority to use these controlling rights should be delivered in Vancouver and not in Winnipeg. Those changes are the only ones which can be suggested as being made in the acceptance of the 14th of February, and when the defendants acknowledged receipt of this letter with thanks, and proceeded to discuss matters as if

MACDONALD, C.J.A.

COURT OF APPEAL

1920

April 6.

GAUTHIER v. LETCHFORD

MARTIN, J.A.

the sale had been settled upon that basis, I think their minds and the plaintiff's had met, and as this was the only point argued before us, the appeal should be allowed.

MARTIN, J.A.: In my opinion the learned judge has reached the right conclusion, and I would only refer to the leading case in this Court upon the subject, confirming his view—*Oppenheimer* v. *Brackman & Ker Milling Co., Ltd.* (1902), 9 B.C. 343; 32 S.C.R. 699.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appeal must succeed, in my opinion. That there was a concluded contract come to between the parties, with great respect to the learned trial judge, who took a contrary view, seems to me to be incontrovertible. By beginning at the end of things, this is manifest.

How can it be contended for a moment that there was no contract come to when we have the letter of the 12th of April, 1919, confirming a telegram of the 11th of April, 1919, from Letchford and Saltmarsh to Gauthier, which reads as follows:

"You have not carried out your agreement with us of twenty-fourth January and are in default in payment of the money mentioned therein. We hereby give you one week from today to pay the cash and if cash is not paid us here within that time your agreement is at an end. This is final."

It would appear that two agreements were signed on the same date, somewhat different in terms, but not so dissimilar to really create any confusion or render it impossible to say that a contract was not entered into, and as to what was understood to be the contract as between the parties that is well evidenced by the agreement of the 24th of January, 1919, reading as follows: [already set out in statement.]

On the 14th of February, 1919, the terms of the agreement or option above set out were accepted. The acceptance was contained in a letter reading as follows: [already set out in statement.]

The reference to the manner of payment in my opinion, was not really the stating of any new term. It would be the duty of the vendors to produce the patent and assignment of the rights thereunder, to be delivered to the vendee upon payment of the $1,500. In any case, the vendors must be held to have

agreed to the terms of acceptance as stated. This is apparent from the letter of the vendors to the vendee of the 18th of February, 1919, which reads as follows:

"We beg to acknowledge receipt of your letter of the 14th inst. for which accept our thanks. We have just been to our attorney's and find from correspondence received that the patent for the head-light dimmer in question is allowed, but owing to the fact of the routine of entering, printing, etc., etc., we do not expect to receive the actual patent document before three or four weeks at the earliest.

"We enclose herewith letters received from Mr. Hastings of the Canadian Motorist showing that the Moonbeam dimmer is passed for Ontario, and also showing that there is an immediate market (*vide* letter dated February 12th par. 2) for the dimmer in Ontario.

"This correspondence is self evident, and as time is short we are willing for you to start immediate manufacture of these dimmers upon deposit by you of the sum of seven hundred and fifty dollars ($750.00) which is 50% of the purchase to our credit at the Royal Bank of Canada, Portage Avenue, Winnipeg.

"If you find that you cannot get on the market at such short notice with the glass dimmers, we would suggest that you arrange through us for our present manufacturer to supply the dimmers in metal finished in aluminum colour at a price to be submitted in quantities to be decided.

"We have instructed our attorney to rush things but as you know the Government Department moves slowly.

"Trusting to hear from you by return, we are," etc.

The suggestion that the vendor be at liberty to start manufacturing the dimmers upon deposit of $750 in no way affects matters, as it was not proposed as any new term of the contract, which admittedly must be considered as accepted. This is further punctuated by the letter of the vendors to the vendee of date the 13th of March, 1919, which reads as follows:

MCPHILLIPS, J.A.

"Further to our letter of the 18th we beg to state that we have again interviewed our attorney, the result being that we have sent a night wire, copy enclosed, to Ottawa to get quick action. We regret that there is so much delay in this matter, but we can only imagine that the Government Printers' strike has something to do with the delay. However, we are going after it strongly now, and mean to get satisfaction. We will keep you notified of the results as they mature. Assuring you of our sincerity in the matter, and our determination to get quick action, we are," etc.

It is not possible to fail to note the complete understanding and expressed good faith of the vendors at this time, when the final sentence of the above letter is read. Then we have the letter of the 14th of March, 1919, giving a copy of the wire from the Patent office. The letter and wire read as follows:

"Further to our letter of the 13th inst. we beg to enclose original copy of wire just received from the Commissioner of Patents. This is self-

COURT OF APPEAL

1920

April 6.

GAUTHIER v. LETCHFORD

explanatory, and in view of the issue in April, stated here officially, can you see your way clear to accept our proposition of the 21st Feb.? Trusting this will help you to close so as to make immediate manufacture, we are," etc.

"Your application head-light dimmers allowed today patent will be dated and mailed April 29th."

It will be observed that in this letter of the 14th of March there is no suggestion of there being no contract, but a reference merely to the proposition contained in the letter of the 18th of February, 1919, above set forth, as to manufacture before actual issuance of patent. Note how the matter is dealt with—suggestive of there being a contract: "Can you see your way clear to accept our proposition of the 21st Feb. ?"—meaning, of course, the down payment of $750 (one half of the full purchase price)—as against the vendors awaiting the patent issuing and the transfer thereof and the payment then of the $1,500. If there could be any doubt about what contract was accepted or come to, the statement in the letter of the 18th of February, 1919, puts this beyond question. Note the language: "We are willing for you to start immediate manufacture of these dimmers upon deposit by you of the sum of seven hundred and fifty dollars ($750) which is 50% of the purchase to our credit at the Royal Bank of Canada, Portage Avenue, Winnipeg."

MCPHILLIPS, J.A.

The plaintiff apparently was willing to make an effort, make an early start in the way of manufacture, as note his letter of the 17th of March, 1919, reading as follows:

"Mr. Parker has shown me the telegram you received from the Dept. of Patents, Ottawa, I will try very hard to start manufacturing the Moonbeam as soon as possible and will keep you posted. I am going to Victoria B.C. tonight to have the Provincial Government enforce the Anti-Glare Law and hope the Moonbeam will stand the test. As far as I am concerned I am positive they will. I will let you know on my return from Victoria. Will write you again in the next few days."

Then, on the 8th of April, 1919, this extraordinary telegram is sent by the defendants to the plaintiff:

"To secure patent you must wire four thousand dollars to our patent attorneys Fetherstonhaugh and Co. 36 Canada Life Building by three p.m. legal Winnipeg time Wednesday April ninth to be paid us in exchange for legal papers giving you full property and rights for the whole of Canada for our patent have several larger offers but giving you this chance in consideration of our connection with Parker this is final further corres-

pondence is unnecessary if money not here by above hour will close with party here this wire without prejudice."

It is at once apparent that good faith is at an end. What warrant is there for this demand of $4,000? It is an unconscionable demand and beyond understanding. It can be based on nothing that has gone before. Naturally the plaintiff replies in terms consistent with all that has gone before. The plaintiff's telegram is in these words:

"Replying your wire the eighth stop I will insist that you deliver the patent papers to me as agreed and as you were notified by registered letter stop My option covers the patent on dimmers that means the final papers stop If you attempt to dispose of this patent I will be compelled to apply for an injunction of restraint in order to protect my interests I am prepared to pay draft attached to official patent papers on delivery through your bank,"

to be followed by the letter confirming this telegram, which is set forth at the commencement of these reasons for judgment.

Now the patent was not to issue or to be dated before the 29th of April, 1919, yet this extraordinary demand of $4,000 was made to be paid on the 9th of April, 1919, and later, on the 11th of April, 1919, when the contract is acknowledged to be existent and the effort is to get out of it, the $1,500 is required to be paid, though, as we have seen, the patent was not to issue until the 29th of April, 1919. It is a matter for comment also that whilst a patent is assignable, it must be under seal to give the assignee the legal ownership and entitle him to sue in his own name for infringements, yet this money was demanded even before the issue of the patent (see *In re Casey* (1891), 61 L.J., Ch. 61; (1892), 1 Ch. 104).

MCPHILLIPS, J.A.

This conduct upon the part of the defendants exhibits bad faith, and the case is not one for the exercise of equitable principles. What was finally attempted was the exaction of payment of the $1,500 in a week from the 11th of April, 1919, and if not paid, then the contract was to be at an end. Was this a reasonable demand, or a reasonable notice? In my opinion it was not, and ought not to be given effect to. A contract is admitted, and the contract still stands. The plaintiff rightly commenced this action, having previously thereto had an interview with the defendant Letchford in Vancouver. Letchford, upon his examination for discovery, admitted that if he had been offered

COURT OF APPEAL

1920

April 6.

GAUTHIER v. LETCHFORD

the $1,500 in cash by the plaintiff he would have refused it. The plaintiff, in his evidence, stated that he told the defendant Letchford he had the $1,500 for him, but Letchford's answer was that he was selling the patent for $4,000. The plaintiff, in answer, said it was $1,500 that he (the plaintiff) was to pay him, but Letchford said the agreement was not worth the paper it was written on and that he would have nothing further to do with him (the plaintiff). The $1,500 was later paid into Court to the credit of this action.

MCPHILLIPS, J.A.

It is clear to me that the case is one in which specific performance of the contract is entitled to be decreed, the plaintiff to have judgment in the terms of the prayer as contained in the statement of claim. The judgment of the Court below should be reversed and the appeal allowed.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Senkler, Buell & Van Horne.*
Solicitors for respondents: *Craig & Parkes.*

CUSICK v. TAYLOR AND TAYLOR.

COURT OF APPEAL

1920

April 6.

CUSICK v. TAYLOR

Sale of land—Misrepresentation—Rescission—Improvements made by purchaser after entry—Acts of ownership.

The plaintiff purchased a house, made a substantial payment on account of the purchase price, entered into possession and made improvements, adding on a kitchen. She then brought action for rescission, on the grounds of misrepresentation as to the construction of the house, as to the dampness of the locality, and other matters. It was held by the trial judge that there was no fraud and the action should be dismissed, as the representations made were not material and the plaintiff exercised acts of ownership while in possession.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that the purchaser is not entitled to rescission, as she changed the character of the property by erecting an addition and could not restore the subject-matter of the contract.

Per MARTIN, J.A.: That a case for rescission was established. The question of *restitutio in integrum* is one of degree, varying with the circumstances. The vendor was not prejudiced by the addition, as the value of the premises was increased and restoration could be substantially carried out.

Per MCPHILLIPS, J.A.: That it was not a case for rescission, owing to the acts of the purchaser, but fraud was established and a new trial should be had to assess damages.

The Court being equally divided, the appeal was dismissed.

APPEAL by plaintiff from the decision of MORRISON, J., of the 28th of August, 1919, dismissing an action for damages or for rescission on the ground of misrepresentation with relation to an agreement for sale of land including a dwelling-house. The plaintiff, being manageress of a rooming-house, and desiring to purchase a house for her mother, who was an invalid, being rheumatic, purchased the house from the defendants. She alleges that representations were made by Taylor and his wife: (1) that it was double-boarded with paper between, when in fact on the outside there was only shingles and no paper; and (2) that the house was well built, when it was not; (3) that they had arranged for sewerage connections, when they had not and could not get the connections; (4) that electric-light connections could be made for $5, whereas it cost over

Statement

COURT OF APPEAL

1920

April 6.

CUSICK v. TAYLOR

$200; (5) there was representation that it was dry, whereas the ground was very wet and damp, in fact, swampy for a large portion of the year. The learned trial judge held the alleged misrepresentations were not material and dismissed the action.

The appeal was argued at Vancouver on the 18th and 19th of December, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

S. S. Taylor, K.C. (*Killam,* with him), for appellant: There are the five cases of misrepresentation. On going into possession we made certain improvements, putting on a kitchen. Improvements do not prevent our making restitution: see *Mauvais* v. *Tervo* (1915), 22 B.C. 207 at p. 217; Kerr on Fraud and Mistake, 4th Ed., 526.

Burnett, for respondents: Fraud must be pleaded: see *Barron* v. *Kelly* (1918), 56 S.C.R. 455. On the question of representation see *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1. As to waiver by repairs and improvements see *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171; *Lawrence's Case* (1867), 2 Chy. App. 412; *United Shoe Manufacturing Co. of Canada* v. *Brunet* (1909), 78 L.J., P.C. 101 at p. 103; *Clough* v. *The London and North Western Railway* (1871), 41 L.J., Ex. 17 at p. 23; *Vigers* v. *Pike* (1842), 8 Cl. & F. 562; 8 E.R. 220 at p. 253; *Murrell* v. *Goodyear* (1860), 1 De G.F. & J. 432; 45 E.R. 426; *Cook* v. *Waugh* (1860), 2 Giff. 201. Without fraud there can be no rescission: see *Alberta North West Lumber Co., Ltd.* v. *Lewis* (1917), 24 B.C. 564; see also *Clarke* v. *Dickson* (1858), El. Bl. & El. 148. The onus is on the plaintiff: see *Smith* v. *Chadwick* (1884), 9 App. Cas. 187 at p. 196; *Gagnon* v. *Nelson* (1915), 21 B.C. 356; 8 W.W.R. 907; *Dimmock* v. *Hallett* (1866), 2 Chy. App. 21.

Taylor, in reply: There cannot be waiver without knowledge: see Halsbury's Laws of England, Vol. 20, p. 743, par. 1765.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. There was no alternative claim for damages for deceit. The issue,

therefore, was rescission, and on this the plaintiff must fail, because she changed the character of the property by erecting an addition to the house and cannot restore the subject-matter of the contract.

MARTIN, J.A.: It is quite clear on the evidence that a case for rescission for misrepresentation has been made out in respect to the important statement that the house was double boarded throughout with heavy paper in between the boarding, and the defence of waiver has not, I think, been established.

But it is said that there can be no rescission because the parties cannot be restored to their original position owing to the fact that the plaintiff, before she discovered the deception, had made an addition to the premises by adding a small kitchen thereto, and made other slight internal alterations.

Now this question of *restitutio in integrum* is one of degree, varying with the particular circumstances, and the authorities shew that where the character or nature of the purchased property is not changed or destroyed, if the *restitutio* can be substantially carried out, that is sufficient: Kerr on Fraud and Mistake, 4th Ed., 366, 526; Halsbury's Laws of England, Vol. 20, p. 750, and cases there cited, particularly *Earl Beauchamp* v. *Winn* (1869), 4 Chy. App. 562; (1873), L.R. 6 H.L. 223. And see also *Lindsay Petroleum Company* v. *Hurd* (1874), L.R. 5 P.C. 221 at p. 240; 22 W.R. 492. Here, at the time of sale the house was not finished internally, and certain changes and alterations respecting the using and change of position of the existing bathroom and water-closet and kitchen were contemplated at the time of the sale, and that the male defendant should do that work, which involved structural changes. It is but a small step from this position, through the wall, into the small kitchen built against it, with the door cut through, and as the kitchen is well built, according to the evidence, not only are the defendants not prejudiced, but the value of the premises is increased. The principle that ought to guide us in this case is, I think, covered by the observations of Lord Chelmsford in *Earl Beauchamp* v. *Winn, supra,* p. 232 (L.R. 6 H.L.) as follows:

MARTIN, J.A.

"The respondent urges as a sort of preliminary objection to the claim

COURT OF APPEAL

1920

April 6.

CUSICK v. TAYLOR

of the appellant to have the agreement cancelled or set aside, that the subsequent dealings of the parties with the property prevent their being restored to their former position. For this reliance is placed upon a transaction respecting a warping drain, and the inclosure of the Bromley Commons, as rendering it impracticable to reinstate the parties in the full integrity of their former rights. If there existed a clear ground of mistake which in itself would have entitled the appellant to set the agreement aside, and there really had been that enormous disproportion between the value of the property which the late Earl thought he was giving in exchange, and that which really belonged to him, I should be unwilling to believe that equity would refuse its aid on account of transactions respecting the exchanged properties, which it would not be difficult to adjust so as to place the parties in a position in which they would receive little or no prejudice from what had been done after the exchange."

That was said in a case where there had been for several years "possession given accordingly . . . . and acts of ownership . . . . exercised by the parties on the properties so exchanged": *per* Lord Justice Giffard, 4 Chy. App. 566, who went on to hold that nevertheless it was "possible to replace the parties in that which was substantially their original position." Lord O'Hagan, in the same case in the Lords, p. 251, also considers the matter from the point of "their substantial restoration to their original positions." In the case at bar there is nothing to "adjust" so as to relieve the defendants from a position of prejudice, because the addition has been to their benefit. The cost of the kitchen was $160, and of certain other internal finishing work and additions, $70, in all, $230 expended by the appellant on the premises, but as I understand her counsel, all that he asked for was the return of the various sums paid on the agreement, with interest, and the cost or reconveyance, to which she is clearly entitled, and so I have not considered the other expenditure. If I have misunderstood her counsel's attitude, I shall be glad to be so advised before entry of judgment.

MARTIN, J.A.

I have not said anything about damages consequent upon deceit, because though damages for misrepresentation were asked for in the prayer, yet the case set upon the pleadings is only one of innocent misrepresentation, so I confine myself to that: *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 51 L.J., Ch. 113, 45 L.T. 485; *Newbigging* v. *Adam* (1886), 34 Ch. D. 582, 55 L.T. 794; *Whittington* v. *Seale-Hayne* (1900), 82 L.T. 49; *Goldrei, Foucard & Son* v. *Sinclair* (1917), 87 L.J.,

K.B. 261; (1918), 1 K.B. 180; and *Barron* v. *Kelly* (1918), 56 S.C.R. 455; (1918), 2 W.W.R. 131.

It follows that the appeal should be allowed.

GALLIHER, J.A.: This appeal should, in my opinion, be dismissed. I think the learned trial judge came to the right conclusion under all the circumstances of the case.

MCPHILLIPS, J.A.: With great respect to the learned trial judge, I cannot come to the conclusion that there was no fraud proved in this case. It may well be, and that is my opinion, that it is not a case where rescission can be decreed owing to the taking possession, acts of ownership, the changing, alterations and additions made to the house.

When knowledge came to the plaintiff of the fraud practised, *i.e.*, that the house in its construction was not double boarded, with heavy paper throughout between the boards (which was the express and definite representation), no further payments were made by the plaintiff, and she called attention to this by advising the defendants' agent and asked him to go and look at the house and satisfy himself in the matter. It cannot be denied that the representation was made and that it was false. The property was placed for sale with the agent by the defendants, and the agent was expressly authorized to make this representation, which was false to the knowledge of the defendants, the house being constructed by the defendants, Spencer Taylor being a carpenter by trade, also an architect and builder. In view of this, manifest fraud has been established, and were it not for the taking over of the property and alterations thereto, and the attendant facts surrounding the disclosure of the fraud, and that there was some discussion as to some allowance to be made for the defective condition of the house, and the further fact of continued occupation of the premises, the case would be one for rescission. The representation in the present case has especial features of recklessness, I might say features of cruelty, as it was made clear that the house was to be occupied by a very old lady in delicate health, and warmth was essential, all of which was known to the defendants. Nevertheless, a shell of a building was repre-

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

April 6.

CUSICK v. TAYLOR

sented as double boarded and heavily papered, the lack of which was undiscoverable to the eye. Some evidence would go to shew that the defective state of the house should have been discovered earlier, but as to this, all that can be said is that the plaintiff is driven to the action of deceit and not entitled to rescission, *i.e.*, in the result, the case is to be looked at as one of election to affirm the contract, with the right of action for deceit.

The well known maxim and the effect of fraud on a contract is *Ex dolo malo non oritur actio.* It cannot, though, be said that the fraud absolutely vitiates the contract. The fraud of course would prevent any right of action upon the contract as against the party defrauded. The party defrauded, though, may elect to ratify and confirm the contract or the Court may say, upon the facts, he has so elected, but he may also sue for such damages as the fraud has occasioned (see *White* v. *Garden* (1851), 10 C.B. 919, 927; *Stevenson* v. *Newnham* (1853), 13 C.B. 285; *Barron* v. *Kelly* (1918), 56 S.C.R. 455).

MCPHILLIPS, J.A.

There can be no question in the present case that the fraudulent misrepresentation that the house was double boarded and papered throughout and therefore a warm house, was what induced the plaintiff to enter into the contract. It was the principal inducement (see *per* Blackburn, J. in *Kennedy* v. *Panama, &c., Mail Co.* (1867), L.R. 2 Q.B. 580 at p. 587); *Derry* v. *Peek* (1889), 14 App. Cas. 337; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187).

It follows, for the foregoing reasons, that the judgment should be reversed and a new trial had to assess the damages to which the plaintiff is entitled upon the basis of an election to confirm the contract and to hold the defendants responsible for such damages as the fraud has occasioned (the alternative cause of action sued for in the action), the appeal to be allowed with costs throughout to the appellant, inclusive of the costs of the first trial.

The Court being equally divided, the appeal was dismissed.

Solicitors for appellant: *Killam & Beck.*
Solicitors for respondents: *Daykin & Burnett.*

THE ROYAL BANK OF CANADA v. COUGHLAN.

COURT OF APPEAL

1920

April 6.

ROYAL BANK OF CANADA v. COUGHLAN

Mortgage of freehold—Stone cutting machinery installed—Fixtures—Included in security.

Upon a property on which the plaintiff held a mortgage was installed a stone-cutting plant equipped for the purpose of cutting and dressing building stone. The parts included an air compressor, travelling gantry, crane, gang-saw, stone-planing machines, electric motors, shafting, pulleys and belting, air-pipes and valves.

Held, MACDONALD, C.J.A. dissenting in part (affirming the decision of CLEMENT, J.), that the parts were fixtures and part of the realty and were covered by a mortgage on the land as against the assignee for the benefit of the creditors of the mortgagor.

APPEAL by defendant from the decision of CLEMENT, J., of the 25th of April, 1919, in an action for a declaration that certain machinery and plant are fixtures and part of the freehold premises and passed to the plaintiff as mortgagees under and by virtue of their mortgage, as against the defendant, the assignee for the benefit of the creditors of the mortgagors. The articles in question are part of a plant equipped on the mortgaged premises to cut and dress building stone, and are described by numbers in the judgment below. Statement

The appeal was argued at Vancouver on the 7th and 8th of January, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

M. A. Macdonald, K.C., for appellant: The mortgage was for $100,000. One Macdonald, a contractor, bought the lot in 1911 and gave a mortgage to the Bank in 1912. Some of the material was put on the lot before the mortgage, and some after, Macdonald having assigned to the defendant in 1915. A number of the articles were used off the premises, some at the Parliament Buildings in Victoria, and some at the Court House in Vancouver. The onus is on the party who alleges a chattel belongs to the realty: see *Dominion Trust Co.* v. *Mutual Life Assurance Company of Canada* (1918), 26 B.C. Argument

COURT OF APPEAL

1920

April 6.

ROYAL BANK OF CANADA v. COUGHLAN

237 at p. 241, where the cases are collected. A tenant has a higher position than a mortgagee. A 20-ton electric travelling gantry was installed after the mortgage that can be easily moved and is the same as rolling stock, which is chattel. It was not a stone-cutting yard when the mortgage was given, and there are other articles equally movable, such as a gang-saw: see *Keefer* v. *Merrill* (1881), 6 A.R. 121; *McCausland* v. *McCallum et al.* (1882), 3 Ont. 305; *Hutchinson* v. *Kay* (1857), 23 Beav. 413.

Argument

Alfred Bull, for respondent: The shed is a substantial building. These articles finally came to rest in the stone-yard and were then permanently affixed. Those not imbedded in concrete are firmly affixed to the premises. It is stronger than *Dominion Trust Co.* v. *Mutual Life Assurance Company of Canada* (1918), 26 B.C. 237. The question is one of permanency: see *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174.

Macdonald, in reply.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal, but only as to the following items: No. 5, gang-saw with wooden frame; No. 6, stone-planing machine made by Anderson; No. 7, stone-planing machine made by Patch.

I think there is nothing in the evidence to shew an intention to make these machines a permanent part of the realty. They rested on the ground by their own weight and upon their own frames, without any actual attachment to the realty.

Having regard to the manner in which the assignor's business had been carried on and machines moved about from place to place, the fact that they were assembled on the land in question and used there is not in itself sufficient to indicate an intention to make these particular machines part of the freehold. With respect, I do not understand how the learned judge could draw a distinction in respect of the attachment between these three items and No. 8, the circular diamond stone-sawing machine.

The appellant should have the costs of the appeal to the

extent of his success as above stated, and the respondent the costs in respect of those items upon which the respondent has succeeded.

MARTIN, J.A.: This appeal raises the question of fixtures, always a difficult one, in regard to which it was said in *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, 41 L.J., C.P. 146, approved in the leading case of *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174 at p. 180:

"There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, *viz.* the degree of annexation, and the object of annexation?"

After carefully examining the evidence in the light of the *Haggert* case, *supra,* and particularly that portion of it cited by the learned judge below (1919), 2 W.W.R. 382), I find so great a difficulty in saying that he has reached a wrong conclusion that I do not feel justified in disturbing his judgment, and, therefore, the appeal should be dismissed.

MCPHILLIPS, J.A.: This appeal raises a question of considerable nicety, one that has been very greatly canvassed in recent years but now rather well settled, that is, as to what constitutes "fixtures." No doubt the term has been used with different meanings, and the right to retain upon the freehold or the right of removal therefrom differs as between tenant and landlord and as between mortgagor and mortgagee.

The particular articles or fixtures in question in the present case consist of what may be generally termed as the plant of a stone-yard, equipped to cut and dress building stone, and in particular, air compressor, travelling gantry crane, gang-saws, stone-planing machines, electric motors, shafting, pulleys, belting, air-pipes and valves, in the main all very heavy in weight, and requiring special concrete or timber foundations thereunder, although possible of removal without serious, if any in some cases, disturbance to the freehold or structures in which same are placed or housed. All the property in question claimed by the Bank to be fixtures and not capable of being

COURT OF APPEAL

1920

April 6.

ROYAL BANK OF CANADA v. COUGHLAN

legally removed by the defendant, is situate upon lands mortgaged to the Bank, the premises being a stone-yard, and operated until recently as such by the mortgagors, the defendant being the assignee for the benefit of the creditors of the mortgagors. Some of the machinery was in place at the time of the giving of the mortgage and other portions thereof were put in place thereafter, but all form part of a completed whole, and whilst trade machinery, yet trade machinery placed upon the premises in the equipment of a modern and up-to-date stone-yard as understood in the trade.

The Bank, as mortgagee, became possessed by conveyance of the equity of redemption in the lands upon which the machinery is situate, and is also entitled to the lands under a decree of foreclosure absolute. It may be said that the mortgage, besides the usual and customary covenants, contains this provision:

"It is agreed that any erections, buildings or improvements hereafter put upon the said premises shall thereupon become fixtures and be a part of the realty and form a part of this security."

The contention of the defendant is that the Bank is not entitled to the machinery under its mortgage or as owner of the freehold, that the machinery cannot be said to be fixtures but trade machinery, and removable as such, that the machinery was not placed on the mortgaged premises for the permanent or substantial improvement of the land, but merely temporarily and as chattels, and is capable of removal without injury to the freehold, any buildings in which placed being merely shelter for the machinery.

MCPHILLIPS, J.A.

Now the learned trial judge has held as to all the machinery in question in this appeal that it forms part of the freehold premises mortgaged to the Bank, of which premises the Bank is now the absolute owner, and that the machinery and fixtures are the property of the Bank. With this holding I entirely agree.

Mr. *Macdonald,* the learned counsel for the appellant, in a very able argument, marshalled all the evidence and dealt in detail with all the machinery, where placed and how placed and where previously used, and submitted that in the carrying out of building contracts, notably the Parliament Buildings in Vic-

toria and the Court House in Vancouver, even the largest articles of machinery were taken to the building site and operated there, and that in ordinary course such would be the continued course of procedure, and that their situation upon the mortgaged premises was and could only be said to be of a temporary character, and the facts rebutted the contention of the Bank that the machinery could be said to be fixtures. With all deference to the argument advanced, I consider that the machinery in question, in view of all the facts, may be rightly said to be in its location affixed to the freehold, actually affixed in some cases, and in others affixed within the purview of the law although resting by its own weight, forming, in completeness, a modernly established stone-yard, which was the security held by the Bank by way of mortgage, and of which the Bank became the absolute owner.

It is true that the old rule as defined by the maxim *quicquid plantatur solo solo cedit* has been greatly relaxed, and though fixtures have been held to be removable, such as trade fixtures, ornamental and domestic fixtures, on the other hand, where the fixtures are in their nature of a special character, being by custom or necessity a part of the freehold in the carrying on of a particular trade, and giving the premises a particular value, and by the owner so intended and mortgaged as such, different considerations arise, and the case is in no way similar to that of tenant and landlord. Here it is as between mortgagor and mortgagee. I had occasion in *Dominion Trust Co.* v. *Mutual Life Assurance Company of Canada* (1918) [26 B.C. 237], 3 W.W.R. 415 at pp. 420 to 434, to refer to many of the authorities bearing upon this point, and the present case may be said to be an analogous one, and in accordance with the *ratio* there defined, the machinery here in question would not be capable of removal as against the mortgagee or the owner of the freehold (see *Elwes* v. *Maw* (1802), 2 Sm. L.C. 189; 3 East 28; *In re Samuel Allen & Sons, Limited* (1907), 1 Ch. 575; 76 L.J., Ch. 362; *Hobson* v. *Gorringe* (1896), 66 L.J., Ch. 114; (1897), 1 Ch. 182; *Reynolds* v. *Ashby & Son, Limited* (1902), 72 L.J., K.B. 51; (1903), 1 K.B. 87; *Lyon & Co.* v. *London City and Midland Bank* (1903), 2 K.B. 135;

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

April 6.

ROYAL BANK OF CANADA v. COUGHLAN

72 L.J., K.B. 465; *Kilpatrick* v. *Stone* (1910), 15 B.C. 158; *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174 at p. 182).

No question, in my opinion, arises as to the absence of a bill of sale. No necessity for a bill of sale, or registration as a bill of sale could be successfully contended for in the present case. Here the fixtures or trade machinery passed with the mortgage of the freehold as incidental thereto and as incidental to the later conveyance (*In re Yates. Batcheldor* v. *Yates* (1888), 38 Ch. D. 112; 57 L.J., Ch. 697).

MCPHILLIPS, J.A.

It may be well and properly said, upon all the facts of the present case and in the light of the authorities, that the Bank has an unassailable position, and is entitled to the machinery in question and fixtures as being the owner thereof. I would affirm the judgment under appeal. It therefore follows that in my opinion the appeal should be dismissed.

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

Solicitor for appellant: *M. A. Macdonald.*
Solicitors for respondent: *Tupper & Bull.*

REX *EX REL.* WADDELL v. LAM JOY.
REX *EX REL.* WADDELL v. SAM BOW.

COURT OF APPEAL

1920

April 15.

Practice—Costs—Certiorari—Appeal—Costs of Crown.

In *certiorari* proceedings the Court has power to grant costs in favour of the Crown.
Regina v. *Little* (1898), 6 B.C. 321 approved.

REX v. LAM JOY

REX v. SAM BOW

APPEALS by defendants from an order of MORRISON, J., of the 21st of October, 1919, refusing a rule for a writ of *certiorari* to remove to the Supreme Court a conviction by the police magistrate of the Township of Richmond in that the accused unlawfully did work or labour in connection with his ordinary calling on Sunday in contravention of the Lord's Day Act.

Statement

On the appeal coming on for argument at Victoria on the 9th of February, 1920, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A., counsel for appellants abandoned the appeal, and on the 12th of February counsel for respondent raised the question of costs.

R. L. Maitland, for respondent: When an appeal from the refusal of *certiorari* is quashed for want of jurisdiction, the Crown is entitled to costs: see *Hendryx* v. *Hennessey* (1893), 3 B.C. 53; *Regina* v. *Little* (1898), 6 B.C. 321; *In re Narain Singh* (1908), 13 B.C. 477; *Rex* v. *Ferguson* (1916), 26 Can. Cr. Cas. 220; *Rex* v. *Bennett* (1902), 5 Can. Cr. Cas. 456; *Regina* v. *Starkey* (1891), 7 Man. L.R. 262.

Argument

Luxton, K.C., contra: Section 576 of the Criminal Code is the authority for the rules made in 1906 (see British Columbia Supreme Court Rules, 1912, p. 307), and no provision is made in the rules for costs.

Maitland, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A. would dismiss the appeals without costs.

GALLIHER, J.A.

GALLIHER, J.A.: Mr. *Wilson* for the appellants in each of

COURT OF APPEAL

1920

April 15.

REX v. LAM JOY

REX v. SAM BOW

GALLIHER, J.A.

the above cases abandoned the appeal and the only question remaining was as to whether respondent was entitled to costs.

The appeal was from an order of MORRISON, J., refusing a rule for a writ of *certiorari* to bring before the Supreme Court a conviction against the appellants for a breach of the Lord's Day Act, Cap. 153, R.S.C. 1906.

In *Regina* v. *Little* (1898), 6 B.C. 321, the old Full Court laid down the rule of practice in this Province that the Court has power to grant costs in favour of the Crown if asked for. That was a conviction under the Coal Mines Regulation Act, Cap. 138, R.S.B.C. 1897. WALKEM, J., refused the writ of *certiorari* and an appeal was taken to the Full Court and was dismissed with costs. This was followed by the Full Court in *In re Narain Singh* (1908), 13 B.C. 477 at p. 481. In England and Ontario the Courts have held to the same effect. Following these decisions I hold this Court has power to grant costs, but under the circumstances of this case I would not give costs.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I agree that these appeals be quashed and without costs.

Appeals quashed without costs.

Solicitor for appellants: *W. F. Brougham.*
Solicitors for respondent: *Maitland & Maitland.*

LAIRD v. LAIRD. HENDRY v. LAIRD.

COURT OF APPEAL

1920

April 6.

LAIRD v. LAIRD

Divorce—Judgment—Seizure under execution—Outside claimant—Interpleader—Appeal—Jurisdiction.

The Court of Appeal has jurisdiction to hear an appeal from a judgment in an interpleader issue arising out of a seizure by the sheriff of the property of a co-respondent under an order against him for costs in a divorce action.

APPEAL by plaintiff Hendry from the decision of MACDONALD, J., of the 6th of May, 1919, on an interpleader issue. The defendant had obtained judgment in a divorce action, including costs against the co-respondent, and seized an automobile in the possession of the co-respondent under a writ of *fieri facias*. The plaintiff claims that at the time of the seizure the automobile belonged to him. The automobile was at one time the property of George Maltby, the co-respondent, but the plaintiff claims that on the 13th of January, 1919, the car was purchased for him by Thomas Maltby, the co-respondent's brother, this being prior to the execution but while the divorce action was proceeding. The facts are set out fully in the judgment of the trial judge in 27 B.C. 217.

Statement

The appeal was argued at Vancouver on the 12th and 13th of January, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

J. A. Russell, for appellant.

Rubinowitz, for respondent, raised the preliminary objection that the Court had no jurisdiction to hear the appeal. This is a matter that arises out of a divorce action and there is no appeal. By the Act of 1870 all the laws of England existing on the 19th of November, 1859, were made law in British Columbia. The Divorce Court in England was created by Imperial Act in 1857 and is in force here: see *S*—— v. *S*—— (1877), 1 B.C. (Pt. 1) 25; *Sheppard* v. *Sheppard* (1908), 13 B.C. 486. The interpleader issue was directed and tried while the divorce action was pending: see Rayden's Practice and Law

Argument

COURT OF APPEAL

1920

April 6.

LAIRD v. LAIRD

in the Divorce Division, 146; Halsbury's Laws of England, Vol. 16, p. 579; *O'Shea* v. *O'Shea and Parnell* (1890), 15 P.D. 59. There is no jurisdiction: see *Brown* v. *Brown* (1909), 14 B.C. 142.

Argument

Russell, contra: The case of *Scott* v. *Scott* (1891), 4 B.C. 316, decides there is no appeal in a divorce action. This is not such a case. One Hendry claims the goods seized under an order in the divorce action, and he asks for an order directing an issue. The issue arises out of Hendry's claim to the property. It does not arise in a divorce action. There is therefore an appeal.

Rubinowitz, in reply.

Judgment was reserved and argument on the merits was adjourned until the April sittings of the Court.

6th April, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would overrule the preliminary objection, which is founded upon the fact that the judgment on which the execution was issued was a judgment in a divorce action. The submission in support of the objection is, that as there is no appeal to this Court from a decree in divorce, there cannot be an appeal from the judgment in an interpleader issue arising out of seizure by the sheriff of the property of the co-respondent to answer an order against him for costs. That submission, I think, is unsound. The right given to the sheriff to interplead is quite independent of the character of the action in which the execution was issued, and the issue is quite distinct from the issues in such an action. The contest here has nothing to do with marital rights. It would be unfortunate if in a case like the present one, the party feeling aggrieved should have to go to the Privy Council for relief.

We have no Divorce Court corresponding to the English Divorce Court; the Supreme Court has jurisdiction in divorce as in all other causes. This Court has already heard an appeal precisely similar to this one, *Francis* v. *Wilkerson* (1918), 2 W.W.R. 956.

It is true that the precise point here was not raised there, but the question of the jurisdiction of the Supreme Court gener-

ally was adverted to by my brother MARTIN in his reason in that case.

My view is not, I think, in conflict with the decision of the Full Court in *Brown* v. *Brown* (1909), 14 B.C. 142. The order there appealed from was one granting *interim* alimony, a matter of marital rights, while here it is not such, but merely one of execution, a matter of procedure for the recovery of a sum of money awarded, with which the Divorce Act has nothing to do.

It is hardly necessary in this connection to refer to *Scott* v. *Scott* (1891), 4 B.C. 316, as that was an appeal from the divorce decree itself, and anything said by the Court not applicable to the facts of the case may be treated as *obiter dicta.*

MACDONALD, C.J.A.

It is, I think, too late in the day to question the decisions which decide that an appeal will not lie to this Court from decrees of divorce and matters cognate thereto, but I am strongly of opinion that we ought not to restrict beyond the logical result of those cases the jurisdiction of this Court to hear appeals where the question in issue is not one of marriage or divorce, but is one which the Supreme Court may take cognizance of independently of any jurisdiction conferred upon it by the Divorce Act, and which, without trenching on Dominion jurisdiction, the Province may legislate upon.

The appeal should therefore be heard.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal by one Hendry from an order made on the trial of an interpleader issue, at the instance of the sheriff, under rule 850, wherein the said Hendry was plaintiff and the respondent David Laird was defendant, whereby it was adjudged that a certain Ford motor-car which had been seized by the sheriff as being the property of one Maltby under an execution against said Maltby, issued on a judgment for costs recovered against him by said Laird as co-respondent in a divorce action against Laird's wife, was not his property, but that of said Laird.

At the outset, in view of the decisions of the old Full Court in *Scott* v. *Scott* (1891), 4 B.C. 316, and *Brown* v. *Brown* (1909), 14 B.C. 142, 10 W.L.R 15, which are binding on us, we directed that the question of our jurisdiction to hear this

COURT OF APPEAL

1920

April 6.

LAIRD v. LAIRD

appeal should be argued, which was done. It was submitted that the divorce jurisdiction in this Province derived from the Imperial Act of 1857 (as set out in said decisions and in *Sheppard* v. *Sheppard* (1908), 13 B.C. 486; affirmed in *Watts and Attorney-General for British Columbia* v. *Watts* (1908), A.C. 573, 77 L.J., P.C. 121) is a separate and distinct one from the ordinary one of the Supreme Court, and though the proceedings are carried on in that Court, yet, nevertheless it is a distinct and separate division of the Supreme Court in which the said jurisdiction can alone be exercised, a sort of a Court within a Court, as it were, and that from beginning to end, from the filing of the petition to the complete realization or working out of any judgment given therein, an appeal from any order made in the exercise of that special jurisdiction lies to the Privy Council only. It is pointed out that the interpleader summons herein and the order and issue made and directed thereunder, and proceedings taken thereupon are all entitled: "In the Supreme Court of British Columbia. In Divorce and Matrimonial Causes," as authorized by the Divorce Rules, but, of course, that does not advance the matter, because it does not depend upon the manner in which a party chooses to entitle his proceedings, but upon the authority for so doing.

If it were not for the two said decisions, I should entertain no doubt in respect of our jurisdiction to hear this appeal, but

MARTIN, J.A.

there are expressions in them which do tend to support the said submission against it, though in my opinion they should be regarded as *obiter dicta*. Nor, even if they are not, does it follow that they should logically be extended to cover the present case, because, as Lord Chancellor Halsbury pointed out in the House of Lords in *Quinn* v. *Leathem* (1901), A.C. 495, 70 L.J., P.C. 76, in the following well known passage, "every lawyer must acknowledge that the law is not always logical at all" (p. 506):

> "Now, before discussing the case of *Allen* v. *Flood* [(1897), 67 L.J., Q.B. 119], (1898), A.C. 1, and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The

other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. My Lords, I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision in the case of *Allen* v. *Flood*."

Applying these principles to the said decisions, I am of opinion that the former decided only (as regards the point now in question) that the Full Court, and hence this Court, "has no appellate jurisdiction in a cause of dissolution of marriage," p. 318, and the latter, that the same Court has none in the case of an *interim* order for alimony, or, of course, as directly flowing therefrom, in decrees or orders of a similar nature. To my mind said decisions should not be expanded beyond these limits, and proceedings subsequent to judgment must be considered as they may arise in their various aspects. It may be, as is often the case, that the line of demarcation is not clear or easy to define, but I have no hesitation in holding that where a judgment has been obtained in the exercise of the divorce jurisdiction, the holder of it may invoke those ordinary remedies in the ordinary Courts for its realization in the various ways which are given to the holders of judgments by, *e.g.*, such statutes as the Execution Act, Cap. 79, R.S.B.C. 1911; the Arrest and Imprisonment for Debt Act, Cap. 12; and the Attachment of Debts Act, Cap. 14; and that the various orders which may be made in the course of working out judgments, however originating, under those statutes, by way of trials of issues or otherwise, are appealable in the ordinary way. That view covers the present case, for there is no distinction in principle between the appeal from an issue tried under section 12 of the Attachment of Debts Act, or section 29 of the Execution Act, and the interpleader issue directed at the instance of the sheriff which is now under consideration or an appeal under section 7 of said Execution Act.

MARTIN, J.A.

It follows that, in my opinion, we have jurisdiction over this appeal, and the hearing of it should proceed.

McPHILLIPS, J.A. concurred.

MCPHILLIPS, J.A.

Preliminary objection overruled.

Solicitor for appellant: *J. A. Russell.*
Solicitor for respondent: *I. I. Rubinowitz.*

COURT OF APPEAL

1920

Jan. 28.
April 6.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA

DOMINION TRUST COMPANY AND GWYNN v. ROYAL BANK OF CANADA.

Practice—Order for examination de bene esse—Clause included providing for application to rescind—Right of appeal—Evidence—De bene esse—Discretion of judge—Appeal—Marginal rule 487.

The defendant obtained an order to examine a witness *de bene esse* which included a clause "that the plaintiff may at any time not less than two weeks before the date of trial apply to discharge this order."

Held, that there was the right of appeal from the order without first resorting to the Court below under said clause.

In an action by the liquidator attacking the right of the Bank to hold certain securities deposited with or pledged to the Bank by the Company prior to its winding-up, an order was made allowing the Bank to examine *de bene esse* its superintendent of branches while temporarily in British Columbia, but having his residence in Montreal, he having been the local manager at the time the facts at issue arose.

Held, on appeal (affirming the order of MURPHY, J.), that the judge had power to make the order under marginal rule 487 and there was no ground upon which the Court could interfere with his discretion as exercised.

APPEAL by plaintiffs from an order of MURPHY, J., of the 5th of November, 1919, on an application of the defendant Bank for leave to examine M. W. Wilson, superintendent of branches of the defendant Bank, *de bene esse*. Mr. Wilson had been manager of the Vancouver branch of the Bank at the time the facts at issue between the parties arose, and the grounds for the application were, that it would be most inconvenient to Mr. Wilson and work a hardship on the Bank if he be required to remain in Vancouver more than two months, as his headquarters are in Montreal, and it would be impossible for him to attend the trial without inconvenience, hardship and serious expense. The order, after the usual recital granting the application, included the following clause: "and it is further ordered that the plaintiff may apply at any time not less than two weeks from the date upon which this action is entered for trial to discharge this order.

Statement

COURT OF APPEAL

1920

Jan. 28.
April 6.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA

The appeal was argued at Victoria on the 28th of January, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Wilson, K.C., for appellants.

Alfred Bull, for respondent, raised the preliminary objection that the plaintiff must first apply under the clause (set out in statement) to discharge the order, and that until this is done there is no appeal. This Court will not take over the duty of the Court of first instance: see *Hudson's Bay Company* v. *Hazlett* (1895), 4 B.C. 351; *Black* v. *Dawson* (1895), 1 Q.B. 848. The case of *Varrelmann* v. *Phœnix* (1894), 3 B.C. 143, was overruled by the *Hudson's Bay Company* case, *supra.* They must first adopt the course reserved by the order.

Argument

Wilson was not called on.

MACDONALD, C.J.A.: We are all of one opinion that the preliminary objection must be overruled. I am not sure of, and therefore I express no opinion as to the power of the learned judge below to make a reservation of the kind. I have no doubt about this in the case of judgments, since the Judicature Act. After the judgment is drawn up and entered, a judge has no power to interfere with the order at all, except under the "slip" rule, or under certain rules as applied before the Judicature Act. I should rather think it is not good practice to insert reservations of the kind, where arguments have been heard and material produced on both sides. But so far as I wish to express an opinion now, I confine it to this: that even if the learned judge had the power to make the reservation, in the circumstances of this case, I do not think we ought to lay it down as a rule of practice in this Court that the person complaining of that order must go back to the learned judge below to have his order reviewed before he can make an appeal to this Court. I think such a review would be in any case inconvenient, if not unjust, and I have never heard of it before, and that is the reason why I should not do as Mr. *Bull* desires us to do. I do not think the cases to which we have been referred, *Hudson's Bay Company* v. *Hazlett* (1895), 4 B.C. 351, and *Black* v. *Dawson* (1895), 1 Q.B. 848, are in point, because where the

MACDONALD, C.J.A.

COURT OF APPEAL

1920

Jan. 28.
April 6.

DOMINION TRUST CO. *v.* ROYAL BANK OF CANADA

MARTIN, J.A.

MCPHILLIPS, J.A.

Argument

order complained of is an *ex parte* order, the rules give a right to apply to the judge who made the order to review what he did. There is express power given him to review, and there is a reason why it should be reviewed in the presence of both parties before it should come to the Court of Appeal.

MARTIN, J.A.: I am of the same opinion, that a clause of this kind should not be inserted in an order of this description. His jurisdiction to do so is, I think, very questionable indeed. But as I am in accord with what the Chief Justice has said as to what we ought to do, that is, hear this appeal, I shall refrain from saying anything further.

MCPHILLIPS, J.A.: In my opinion the preliminary objection cannot prevail. I can understand that if an order was made upon terms and a judge acting in that way, and some provision is contained in an order that amounts to a term imposed for some good reason, that the party against whom that term is imposed agrees thereto, there might be difficulty. But Mr. *Bull* admits he is not in a position to press any such point.

Preliminary objection overruled.

Wilson, on the merits: This action is to recover certain securities and for an account, some of the sureties having been received in violation of the Winding-up Act. Mr. Wilson is the only one who has personal knowledge of these matters, as he was local manager at the time. He should, therefore, be examined at the trial: see Daniell's Chancery Practice, 8th Ed., 562. This man is an officer of the Bank. He is the defendant's servant and under its control. As to a witness going abroad, it only applies when he is not under control: see *Barton* v. *North Staffordshire Railway Co.* (1887), 56 L.T. 601; *Stewart Iron Works Co.* v. *B.C. Iron, Wire and Fence Co.* (1914), 20 B.C. 515.

Bull: Marginal rule 487 authorizes such an order as this: see *Warner* v. *Mosses* (1880), 16 Ch. D. 100 at p. 102; *Butterfield* v. *The Financial News* (1889), 5 T.L.R. 279; *Hunt* v. *Roberts* (1892), 9 T.L.R. 92; *Delap* v. *Charlebois* (1892), 15 Pr. 142. This case is stronger than *Cranstoun* v. *Bird* (1896),

5 B.C. 140. As to the distinction made when the plaintiff or defendant is applying see *Ross* v. *Woodford* (1894), 1 Ch. 38 at p. 42; *New* v. *Burns* (1894), 64 L.J., Q.B. 104. All we have to shew is that it would be a great inconvenience and hardship for witness to be compelled to attend the trial. As to the form of the order see Chitty's King's Bench Forms, 14th Ed., 333.

Wilson, in reply: On the material, the order should not have been made: see Seton's Judgments and Orders, 7th Ed., Vol. 1, p. 102. The chief ground for examination *de bene esse* is that the witness is old.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.: I do not think I should be justified in interfering with the discretion exercised by the learned judge who made the order appealed from. I think he had power to make it, Order XXXVII., r. 5, but it is a power to be exercised with much caution.

MACDONALD, C.J.A.

In this case, the exercise of the power may be justified by the fact that the witness resided out of the jurisdiction and might have been examined *de bene esse.* He came here temporarily, and in the circumstances the order may reasonably be said to have been necessary for the purposes of justice, though had I been the judge in the first instance, I might have thought that as this witness was an exceptionally important one, his presence at the trial was desirable.

MARTIN, J.A.: In my opinion the order for the examination *de bene esse* of this witness (on behalf of the defendant, be it remembered) was rightly made, and the case is fully as strong in principle as *Cranstoun* v. *Bird* (1896), 5 B.C. 140, though of course the facts are not identical.

MARTIN, J.A.

In *Stewart Iron Works Co.* v. *B.C. Iron, Wire and Fence Co.* (1914), 20 B.C. 515, we were dealing with a witness in the employ of the plaintiff, and I was of opinion that there were not enough facts on which the judge below could draw the necessary inference, but here they are present, and so we should not interfere with the discretion exercised, because there has

COURT OF APPEAL

1920

Jan. 28.
April 6.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA

been no "misapprehension in an important part of the case." Even under the old practice under 1 Wm. IV., ch. 22, sec. 4, the materials here would have been sufficient to support the order (which is practically based upon the necessity of the witness leaving the jurisdiction without delay and returning to his duties at the Bank's head office in Montreal), as is shewn by the authorities collected in Archbold's Q.B. Practice (1866), Vol. 1, p. 331, and the point taken as to the form of the order respecting the admission of the depositions at the trial is one of discretion purely under rule 487, and moreover is exactly covered by the same very high authority at p. 335, same volume, wherein it is said:

MARTIN, J.A.

"The order directing the examination sometimes provides that an affidavit made by the attorney for the party on whose behalf the witness is to be examined, of his (the attorney's) belief that the witness is beyond the jurisdiction of the Court, shall be sufficient evidence on the trial of his being so."

It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appeal in my opinion, should be dismissed.

Appeal dismissed.

Solicitor for appellants: *A. Whealler.*
Solicitor for respondent: *Alfred Bull.*

NANTEL v. HEMPHILL'S TRADE SCHOOLS LIMITED *ET AL.*

COURT OF APPEAL

1920

April 15.

New trial—Action dismissed before plaintiff's case is closed.

If it appears to the Court of Appeal that plain error of law and miscarriage of justice has taken place upon the trial judge dismissing an action before the plaintiff's case is closed, a new trial will be ordered.

NANTEL v. HEMPHILL'S TRADE SCHOOLS LIMITED

APPEAL by plaintiff from the decision of CLEMENT, J., of the 17th of October, 1919, in an action for damages for injuries sustained in an automobile collision. The plaintiff, who was a French Canadian and spoke English imperfectly, was a pupil at the defendant school learning automobile driving. On the afternoon of the 2nd of January, 1919, the instructor ordered out a Cadillac car putting one of the pupils, a French Canadian, named Pierce, in the driving seat. He took along the plaintiff, also a Belgian and a Russian, two other pupils. Pierce was ordered to drive up the hill on Granville Street towards Shaughnessy Heights and the plaintiff was ordered to watch the rear axle owing to some defect that arose during the afternoon, and by orders he was standing on the axle to observe it. As they went up the hill they overtook a one-horse delivery wagon and as it would not get out of the way the driver turned to the right to pass it. In so doing he collided with a car run by a Japanese coming down the hill at an excessive rate of speed. The plaintiff was thrown from the car and severely injured. Before the plaintiff's case was finished the learned trial judge came to the conclusion that the cause of the accident was the Japanese car running at an excessive speed and dismissed the action.

Statement

The appeal was argued at Victoria on the 9th of February, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

S. S. Taylor, K.C., for appellant: The plaintiff was obeying instructions in standing where he was at the time of the

Argument

COURT OF APPEAL

1920

April 15.

NANTEL v. HEMPHILL'S TRADE SCHOOLS LIMITED

accident, and it was the duty of the instructor to see that the car was run safely in the hands of a competent driver when on a street where they were liable to come in contact with other cars.

W. B. Farris, for respondents: The Japanese was coming down hill at 45 miles an hour, and the trial judge found the accident was due to the Japanese. This finding should not be disturbed.

Taylor, in reply.

15th April, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. There should be a new trial.

MARTIN, J.A.

MARTIN, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion, the proper disposition of the appeal is to direct a new trial. The learned trial judge saw fit to dismiss the action before the plaintiff's case was closed, and in doing this, with all due respect, I think there was error in law and plain miscarriage occurred. Evidence was adduced at the trial of a *prima facie* case of negligence requiring the Hemphill's Trade Schools Limited to discharge the burden of shewing that the negligence was not its negligence, and that burden was not discharged—in truth there was no opportunity to do so in consequence of the course adopted by the learned trial judge. Had the plaintiff's case been closed and the evidence, as to *quantum* of damages been introduced, medical and other testimony, the case would have warranted the entry of judgment for the plaintiff, but as damages have to be assessed, the interests of justice would seem to require, looking at the whole case, the direction that a new trial be had between the parties. Here the defendant owed a duty to the plaintiff even greater than that owing by a master to his servant, and even were the present case one of that character, the evidence, as adduced at the trial, shews that the driver of the truck was not selected with due care, but was wholly incompetent and should not have been entrusted with the driving of the truck, nor should the plaintiff have been sent out with such an incompetent person in charge of the truck.

The onus must rest on the defendant to shew that the driver of the truck was in fact fitted to discharge the duties which he was put to discharge. The defendant's duty to the plaintiff (a pupil for instruction) was to safeguard the pupil from injury in every reasonable manner (see *Cormack* v. *School Board of Wick and Pulteneytown* (1889), 16 R. 812, 813, 814; *Crisp* v. *Thomas* (1890), 63 L.T. 756; *Williams* v. *Eady* (1893), 10 T.L.R. 41), and when the pupil was under the direction of officials of the Company, it was the duty of the Company to see to it, as in the present case, that the driver of the truck was of proved and known efficiency. On the other hand, the evidence, as adduced at the trial, on the part of the plaintiff, was that the driver of the truck, with whom the plaintiff was instructed to go, was, to the knowledge of the Company, absolutely inefficient, and it is reasonable to believe, upon all the facts (of course the defence was not gone into) that the proximate cause of the accident arose from the incapacity of the driver of the truck. The onus was upon the Company to shew that the driver of the truck was of proved and known efficiency or that the accident was not occasioned by the inefficiency of the driver of the truck but was because of the negligence of the driver of the other car which collided with the car in which the plaintiff was, there being no incompetency or contributory negligence on the part of the driver of the Company's truck. *Jones* v. *Canadian Pacific Railway* (1913), 83 L.J., P.C. 13 is an authority which may be usefully looked at, although that case involved the breach of a statutory duty. In considering the question of legal liability in the present case, it is well to note that Lord Atkinson, in the *Jones* case, deals with the question at large and apart from the statutory duty (see at pp. 18, 19, 20, 21, 22). The question of common employment would not be open, in my opinion, or available to the Company. In any case, were it open, any such defence would be defeated by evidence which was adduced in the present case, that the driver of the truck with whom the plaintiff was sent out was not selected with due care (see Lord Watson in *Johnson* v. *Lindsay & Co.* (1891), A.C. 371; 61 L.J., Q.B. 90). The appeal should be allowed and a new trial be had between the

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

April 15.

NANTEL v. HEMPHILL'S TRADE SCHOOLS LIMITED

parties, the costs of the first trial to abide the event of the second trial, the appellant to have the costs of the appeal.

New trial ordered, Martin, J.A. dissenting.

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

COURT OF APPEAL

1920

April 6.

REX v. SALLY

REX v. SALLY.

Criminal law—Summary conviction—Appeal—Swearing in of stenographer not on record—Evidence of—Affidavit of magistrate—Admissibility—B.C. Stats. 1915, Cap. 59, Sec. 37; 1916, Cap. 49, Sec. 55.

If on appeal from a conviction by a magistrate it does not appear on the record that the stenographer officiating at the trial before him was sworn, an affidavit of the magistrate that she was duly sworn may be received in evidence.

Per MACDONALD, C.J.A.: The fact that the stenographer was sworn (although desirable) need not appear on the face of the record, and the affidavit of counsel that as far as he had observed the stenographer had not been sworn as required by section 37 of the Summary Convictions Act simply proves she was not sworn in open Court, which is not required, and does not make out even a *prima facie* case that she was not sworn before entering upon her duties.

Per MARTIN, J.A.: An objection that the stenographer was not sworn under said section is not one going to the jurisdiction.

Statement

APPEAL by accused from the decision of MORRISON, J. refusing to quash a conviction under the Prohibition Act. On the hearing of the appeal an affidavit made by counsel who appeared for the accused at the hearing before the magistrate was read stating that the stenographer who took the evidence before the magistrate was not a Court stenographer and that so far as he had observed said stenographer had not been sworn before taking the evidence. An affidavit of the magistrate was read in answer in which he stated that he had sworn the stenographer before the trial commenced.

COURT OF APPEAL

1920

April 6.

REX v. SALLY

The appeal was argued at Vancouver on the 7th of January, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

R. L. Maitland, for accused: The accused was sentenced to twelve months' imprisonment owing to previous conviction. There are two branches to the appeal: (1) the stenographer taking the evidence was not sworn, and (2) the first conviction was not proven. On the first ground, that the stenographer was not sworn, this goes to the jurisdiction. Section 37 provides the stenographer must be sworn: see *Rex* v. *Limerick, Ex partie Dewar et al.* (1916), 44 N.B. 233. Counsel for the defence swore the stenographer was not sworn. The magistrate makes an affidavit that she was sworn but does not say when he administered the oath. The record should contain a statement that the stenographer was sworn. You cannot support a defective record by an affidavit: see *In re Robert Evan Sproule* (1886), 12 S.C.R. 140; *Rex ex rel. Johnson* v. *James* (1918), 2 W.W.R. 994; *Rex* v. *Crooks* (1911), 4 Sask. L.R. 335 at p. 338; *Rex* v. *Harris, ib.* 31; *Regina* v. *Fuller* (1844), 2 D. & L. 98; *Rex* v. *McGregor* (1905), 11 B.C. 350; *Rex* v. *Brown* (1917), 28 Can. Cr. Cas. 208; *Regina* v. *Hogarth* (1893), 24 Ont. 60. That the default goes to the jurisdiction see *Rex* v. *Limerick, Ex parte Dewar et al., supra*; *Rex* v. *Knight* (1919), 3 W.W.R. 529; *Rex* v. *L'Heureux* (1908), 8 W.L.R. 975; *Rex* v. *Johnston* (1912), 22 Man. L.R. 426; *Dierks* v. *Altermatt* (1918), 1 W.W.R. 719.

Argument

Carter, for the Crown: On the question as to reception of magistrate's affidavit see Paley on Summary Convictions, 8th Ed., 450; *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417 at p. 443; *Ex parte Blewitt, re The Justices of Shropshire* (1866), 14 L.T. 598; *Rex* v. *Book* (1915), 25 Can. Cr. Cas. 89. The objection that the stenographer was not sworn does not go to the jurisdiction: see *Rex* v. *Bosak* (1916), 26 Can. Cr. Cas. 374; *Rex* v. *Jackson* (1917), 29 Can. Cr. Cas. 352 at p. 362. These objections cannot be taken as *certiorari* is taken away by section 55 of the Prohibition Act.

Maitland, in reply.

Cur. adv. vult.

COURT OF APPEAL

1920

April 6.

REX v. SALLY

6th April, 1920.

MACDONALD, C.J.A.: The appellant relies upon an affidavit of counsel who appeared for her at the trial to the effect that the stenographer, not being the official Court stenographer, had so far as he had observed not been sworn in accordance with the statute in that behalf. This affidavit simply proves that the stenographer had not been sworn in open Court. The statute does not require that she should be, and in my opinion the affidavit aforesaid does not make out even a *prima facie* case that she had not been sworn before entering upon her duties. But we have the affidavit of the magistrate which proves that the oath had been administered to the stenographer by him before the trial commenced. The only objection taken to this affidavit was that it was improper to admit it, but I can see no impropriety in doing so in this case. In several of the cases to which we were referred affidavits of magistrates were admitted without criticism on the score of propriety. They were not always acted upon because they related to matters which the Courts thought ought to have appeared upon the face of the record. While I think it would be well that the fact should be made to appear on the face of the record, that the stenographer had been duly sworn, yet I do not think that is a detail which should necessarily so appear. I can see no objection to the affidavit of a magistrate when put forward to prove the simple fact of the administration of the oath. This is a very different case from *Rex* v. *Limerick, Ex parte Dewar et al.* (1916), 44 N.B. 233, and cases decided upon like facts. In these cases the stenographer had not been sworn at all, whereas in this she was sworn, and it was only the fact which had to be proven.

MACDONALD, C.J.A.

Counsel for the Crown conceded that the sentence should be reduced to imprisonment for six months, and this reduction is now ordered.

I would dismiss the appeal.

MARTIN, J.A.: With respect to the objection that section 37 of the Summary Convictions Act, Cap. 59 of 1915, has not been complied with in that the stenographer was not sworn, I am of the opinion that apart from the question of the admissibility

MARTIN, J.A.

COURT OF APPEAL

1920

April 6.

REX v. SALLY

of the affidavit of the presiding magistrate in reply to that of the solicitor, this is not an objection which, on this section at least, goes to the jurisdiction, sharing the view taken by the Chief Justice therewith in *Rex* v. *Jackson* (1917), 40 O.L.R. 173, 12 O.W.N. 315.

The other objections clearly do not go to the competency of the magistrate's Court and so *certiorari* will not lie, being prohibited by section 55 of chapter 49 of 1916 [British Columbia Prohibition Act].

MARTIN, J.A.

It is conceded by the Crown counsel that the sentence should be reduced to six months' imprisonment.

McPHILLIPS, J.A. concurred in the result.

MCPHILLIPS, J.A.

Appeal dismissed.

Solicitors for appellant: *Maitland & Maitland.*
Solicitor for respondent: *W. D. Carter.*

COURT OF APPEAL

1920

April 15.

ESQUIMALT & NANAIMO RAILWAY CO. v. WILSON AND MCKENZIE

ESQUIMALT & NANAIMO RAILWAY COMPANY v. WILSON AND McKENZIE, THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA AND THE GRANBY CONSOLIDATED MINING, SMELTING & POWER COMPANY LIMITED.

Practice—Interrogatories—Relevancy—Officer of company—Marginal rule 347—B.C. Stats. 1904, Cap. 54; 1917, Cap. 71.

An action was brought for a declaration that a Crown grant for certain lands containing coal within the railway land belt of the plaintiff Company issued to the defendants under the Settlers' Rights Act is null and void in so far as it purports to grant the minerals, for an injunction to restrain the defendants from mining the property, for wrongful trespass, an inquiry as to the coal extracted and its value, and damages. The defendant, the Granby Consolidated, by *mesne* conveyances, obtained title under said Crown grant. Pursuant to an order of the Court the plaintiff delivered interrogatories to the defendant Company: (1), as to whether the officer of the defendant company had made necessary inquiries so as to be in a position to answer; (2), as to the agreement between the Company and an intermediate purchaser under the Crown grant; (3), as to the *status* of a certain counsel appearing on behalf of a person not a party to the

COURT OF APPEAL

1920

April 15.

ESQUIMALT & NANAIMO RAILWAY CO. v. WILSON AND MCKENZIE

action at the inquiry before the Governor in Council as to the issue of the Crown grant in question and as to an alleged agreement between said third party and the defendant Company as to said lands; and (4), full particulars of the coal mined from said lands by the defendant Company.

Held, on appeal (reversing the decision of GREGORY, J.), that the interrogatories were irrelevant to the issue in the action and oppressive and that they ought not to be allowed.

Per MCPHILLIPS, J.A.: When the parties elect to go to trial pending a judgment in an interlocutory appeal, the appeal should be struck out, as a decision would be abortive.

Statement

APPEAL by defendants Wilson and McKenzie and the Granby Consolidated Mining, Smelting & Power Company from an order of GREGORY, J., of the 20th of December, 1919, granting an application that the defendant Company file a further affidavit more fully and sufficiently answering certain interrogatories delivered by the plaintiff pursuant to an order of the Court. The action is for a declaration as to the title to section 2 and the east 60 acres of section 3, range 7, Cranberry District, British Columbia. Under the Settlement (B.C. Stats. 1884, Cap. 14), the Province granted to the Dominion a certain tract of land (which included the ground in dispute) to aid in the construction of a railway from Esquimalt to Nanaimo. On the plaintiff Company undertaking to build the railway the Dominion granted it the said lands by way of subsidy. There was expressly excluded from the area covered by said grant such portions thereof as were then held under Crown grant, lease, agreement for sale or other alienations from the Crown, Indian reserves, land reserved for school purposes, settlements and Naval or Military reserves. On the 4th of December, 1890, the Esquimalt and Nanaimo Railway Company granted to one Joseph Ganner the surface rights of the land in dispute, expressly reserving to itself the coal and other minerals therein specified, and the right of entry for the purpose of mining and taking the minerals. Joseph Ganner died on the 26th of September, 1903, and Charles Wilson and Angus D. McKenzie were appointed his executors. Joseph Ganner's executors sold to a certain Bing Kee the rights acquired by Joseph Ganner from the plaintiff under the grant of the 4th of December, 1890. The Settlers' Rights Act was passed in 1904, providing that

upon application within 12 months from the coming into force of the Act to the Lieutenant-Governor in Council by any settler shewing that he occupied and improved land within the railway belt prior to the Settlement Act, 1884, such settler should receive a Crown grant for said lands. The amending Act in 1917 (B.C. Stats. 1917, Cap. 71) extended the time within which a settler could apply until the 19th of May, 1918. Joseph Ganner's executors then applied to the Lieutenant-Governor in Council for a grant in fee simple of the lands in question, claiming that Ganner, as a "settler," was entitled to such grant, and after hearing, a Crown grant was issued on the 15th of February, 1918, to Wilson and McKenzie, as trustees for the Ganner estate, in pursuance of the Act. On the 18th of February, 1918, the said trustees conveyed the lands to one Harry W. Treat, who on the same day conveyed to the Granby Consolidated Mining, Smelting & Power Co., Ltd. The Settlers' Rights Act Amendment Act, 1917 (B.C. Stats. 1917, Cap. 71), was, upon the petition of the Esquimalt and Nanaimo Railway, disallowed by order of the Governor-General in Council on the 30th of May, 1918. The action was for a declaration that the Crown grant issued on the 15th of February, 1918, was null and void in so far as it purported to grant (a) the coal and other minerals, and (b) that part of the surface rights upon which the plaintiffs were entitled to exercise acts of ownership or rights of easement, and for an injunction. After obtaining title the defendant Company immediately commenced mining operations and spent large sums in operating and developing the property. The interrogatories were ordered to be answered by the secretary of the defendant company. The appellants submitted that the following questions were not material or relevant:

Statement

"2. How long have you held that position?

"3. Have you made all necessary enquiries and examined all books, letters, copies of letters and documents, so as to put yourself in a position to answer correctly the questions set out in these interrogatories?"

"10. Did the defendant Company have any agreement with the said Treat whereby the said Treat was to obtain surface rights or interest in the said lands in question in this action and to convey the same to the defendant Company? If so, give full particulars of the said agreement."

"20. On the hearing of the 9th of February, 1918, before the Lieutenant-

COURT OF APPEAL

1920

April 15.

ESQUIMALT & NANAIMO RAILWAY CO. v. WILSON AND MCKENZIE

Statement

Argument

Governor in Council did not Mr. L. G. McPhillips, K.C., appear for one Bing Kee?

"21. Was not Mr. L. G. McPhillips then a member of the firm of McPhillips & Smith and were not that firm solicitors for the said Bing Kee?

"22. Was it not agreed on prior to the 9th of February, 1918, by the defendant Company and the said Bing Kee or by their respective solicitors on their behalf that if a Crown grant was issued in respect of the lands in question in this action, it should be issued to the defendants Wilson and McKenzie and that the question of right thereto or title as between Bing Kee and Wilson and McKenzie should be fought out afterwards? If so, give full particulars of said arrangement.

"23. Was not such arrangement made by Mr. S. S. Taylor, K.C., or his firm on behalf of the defendant Company?

"24. If the arrangement as set out in interrogatory 22 is not the arrangement made between Bing Kee or his representative and the defendant Company and its representative, what arrangement was made between the said Bing Kee and the defendant Company or their representatives with reference to the hearing of the 9th of February, 1918, before the Executive Committee as to the Crown grant being issued to Wilson and McKenzie?"

"32. If the answer to the last interrogatory is yes, state number of tons mined and how much taken in each month and the various kinds taken, the cost of mining said coal and the cost of transporting such coal from the mine to the pit head, the value of such coal at the pit head, the amount for which said coal was sold at the pit head or at the point of sale and the cost of transporting from the pit head to the point of sale if not sold at the pit head?"

"36. In what months and years were improvements or developments made or money expended on or in the lands in question in this action and in what amounts? And what were such improvements or developments?"

The appeal was argued at Victoria on the 12th of February, 1920, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellants: The question is as to the materiality or relevancy of the questions. The subject-matter of the action is as to the validity of the grant under the Act of 1917, (1) whether the Act is *ultra vires*; (2) the effect of disallowance of the Act, and (3) whether assuming the disallowance avoided the grants, the conduct of the Company standing by and allowing the Granby Company to spend money on the property would prevent the Esquimalt and Nanaimo Railway from raising the question of title. The action was commenced a day or two before the Crown grants were issued. One party cannot obtain from the other by interrogatories matters which it is not incum-

bent on the latter to prove: see *Kennedy* v. *Dodson* (1895), 1 Ch. 334 at p. 341. Questions 32 and 36 are oppressive and are not material at this stage. This is an action for a declaration of title: see *Parker* v. *Wells* (1881), 18 Ch. D. 477 at pp. 482-3; *Brydone-Jack* v. *Vancouver Printing and Publishing Co.* (1911), 16 B.C. 55; *In re Howel Morgan* (1888), 39 Ch. D. 316 at p. 321.

Harold B. Robertson, for respondent: The purpose of questions 20 to 24 inclusive is to shew that at the time of the hearing before the Lieutenant-Governor in Council the defendant Company knew of all the facts as to our claim. They are setting up estoppel and that they are purchasers for value in good faith. The defence is they purchased for value in good faith from Treat and the answers to these questions should shew this is not the case. As to questions 32 and 36, the disallowance petition was given effect on the 30th of May, 1918, and it is material to know what was taken out of the property before and after that date by the Granby Company. After disallowance we are entitled to the value of the coal taken at the pit head. As to what is embodied in marginal rule 347 see *Rasbotham* v. *Shropshire Union Railways and Canal Company* (1883), 24 Ch. D. 110 at p. 112.

Argument

Mayers, in reply.

Cur. adv. vult.

15th April, 1920.

MACDONALD, C.J.A.: I would allow the appeal. The questions were irrelevant.

MACDONALD, C.J.A.

GALLIHER, J.A.: I would allow the appeal. As to interrogatories 2 and 3: an officer of a company answering interrogatories is presumed to have acquainted himself with all the facts. The matter has been dealt with in the English cases and also in our own Court in *Brydone-Jack* v. *Vancouver Printing and Publishing Co.* (1911), 16 B.C. 55.

GALLIHER, J.A.

Number 10 and Nos. 20 to 24, inclusive, are, in my opinion, irrelevant to the issues raised on the pleadings. Number 32 and No. 36 (in so far as it is not already answered) do not

COURT OF APPEAL

1920

April 15.

ESQUIMALT & NANAIMO RAILWAY CO. *v.* WILSON AND MCKENZIE

MCPHILLIPS, J.A.

call for answers at the present stage. It would entail considerable labour and expense and may never be required.

If the Granby Company succeed there will be no necessity, while on the other hand if the plaintiffs succeed, a reference will have to be ordered and the matters called for now determined.

MCPHILLIPS, J.A.: The appeal was one from an interlocutory order and pending the appeal the action has been tried. The decision of the appeal, no matter how decided, would be wholly abortive and without effect—there in fact remains nothing but a question of costs. When the parties elect to go down to trial with an interlocutory appeal standing for judgment, it would seem to me that no duty rests upon this Court to determine the appeal. The appeal should be struck out of the list, and no costs should be allowed (see *Fawcett* v. *C.P.R.* (1901), 8 B.C. 219).

Appeal allowed.

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

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

STODDARD v. SHIELDS LUMBER COMPANY LIMITED AND SHIELDS.

COURT OF APPEAL

1920

April 15.

STODDARD v. SHIELDS LUMBER CO.

Company law—Debentures—Right of recovery on—Trust deed—Conditions—Notice—Guarantee.

One of a series of bonds issued by a company and secured by a trust deed by way of mortgage referred to the trust deed "for a particular description of the terms and conditions thereof on which said bonds are issued and secured and for a description of the nature and extent of the security therefor and the rights of the bondholders with regard to such security." The trust deed recited that no bondholder "shall have the right to institute any proceeding in equity of any character or kind for the foreclosure of this indenture or for the execution of the trusts hereof, or for the appointment of a receiver, or for any other remedy under this mortgage or deed of trust or the lien hereby created or otherwise without first giving notice in writing to the trustee of default having been made," and it further recited that no bondholder "shall institute any suit, action or proceeding in equity for the foreclosure hereof or for the appointment of a receiver, or for the collection of any of the money evidenced by such bonds or coupons otherwise than upon the terms and conditions and in the manner herein provided." In an action to recover principal and interest on a bond against the Company and against S. as guarantor the holder obtained judgment although he had not given notice of default to the trustee.

Held, on appeal, *per* MACDONALD, C.J.A., and MCPHILLIPS, J.A., that want of notice to the trustee was sufficient to debar a right of action by a bondholder against the Company, but that action was maintainable against one who had guaranteed payment of the bond.

Rogers & Co. v. *British and Colonial Colliery Supply Association* (1898), 68 L.J., Q.B. 14 followed.

Per MARTIN and GALLIHER, JJ.A.: That an action by a bondholder for payment, not being a proceeding in equity or against the security, such as referred to in the provisions of the trust deed, could be brought without first giving notice of default to the trustee.

The Court being equally divided, the appeal was dismissed.

APPEAL by defendants from the decision of CLEMENT, J. of the 2nd of June, 1919, in an action against the Shields Lumber Company Limited, to recover principal and interest due under a bond dated the 2nd of June, 1913, and payable on the 1st of June, 1917, and against the defendant James C. Shields, as guarantor. The bond was one of a series issued by the defendant Company on the 2nd of June, 1913, and

Statement

COURT OF APPEAL

1920

April 15.

STODDARD v. SHIELDS LUMBER CO.

secured by a trust deed by way of mortgage. Each bond contained a reference to the trust deed as follows:

"To which mortgage or deed of trust reference is hereby expressly made for a particular description of the terms and conditions thereof on which said bonds are issued and secured, and for a description of the nature and extent of the security therefor."

Article XXI. of the trust deed is as follows:

"It is hereby declared and agreed as a condition upon which each successive holder of all or any of said bonds, and all or any of the coupons for the interest of said bonds, receives and holds the same, that no holder or holders of any of said bonds or coupons shall have the right to institute any proceeding in equity, of any character or kind, for the foreclosure of this indenture, or for the execution of the trusts hereof, or for the appointment of a receiver, or for any other remedy under this mortgage or deed of trust or the lien hereby created, or otherwise, without first giving notice in writing to the trustee of default having been made and continued as aforesaid, ... And it is also agreed that no holder or holders of any of the said bonds, or any of the said interest coupons intended to be hereby secured, shall institute any suit, action or proceeding in equity for the foreclosure hereof, or for the appointment of a receiver, or for the collection of any of the money evidenced by such bonds or coupons otherwise than upon the terms and conditions and in the manner herein provided."

Statement

The action was brought without giving notice that default had been made to the trustee. By memorandum in writing of the 2nd of June, 1913, the defendant James C. Shields guaranteed payment of the principal money and interest secured by the bonds. The learned trial judge gave judgment for the plaintiff against both defendants.

The appeal was argued at Vancouver on the 19th of December, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. H. MacNeill, K.C. (*Baird,* with him), for appellants: Under the bond and the trust deed, the trustee must be notified of action: see *Rogers & Co.* v. *British and Colonial Colliery Supply Association* (1898), 68 L.J., Q.B. 14. As to the right to sue being qualified by the terms of the trust deed see Halsbury's Laws of England, Vol. 5, p. 382, par. 632. Demand for payment must be made: see *Thorn* v. *City Rice Mills* (1889), 40 Ch. D. 357; *Re Escalera Silver Lead Mining Company (Limited)—Tweedy* v. *The Company* (1908), 25 T.L.R. 87; *In re Harris Calculating Machine Company.*

Argument

Sumner v. *The Company* (1914), 1 Ch. 920; *Rickaby* v. *Lewis* (1905), 22 T.L.R. 130; Palmer's Company Precedents, 11th Ed., Pt. III., pp. 30, 292 and 295-6. As to Shields as guarantor, he being a favoured debtor it is necessary to shew that a cause of action has arisen.

W. C. Brown, for respondent: Notice of default is not necessary: see Halsbury's Laws of England, Vol. 15, p. 487, par. 923. This is a negotiable bond and is not affected by the conditions on the trust deed: see *Venables* v. *Baring Brothers & Co.* (1892), 3 Ch. 527 at p. 537. As to its negotiability see *Edelstein* v. *Schuler & Co.* (1902), 2 K.B. 144 at p. 155. We are entitled to judgment but not to enforce the judgment against the security held by the trustee. The *Rogers* case is different as there it says "any action" not as here "action in equity."

Argument

MacNeill, in reply, referred to Maclaren on Bills and Notes, 10th Ed., 272; *Hill* v. *Heap* (1823), 25 R.R. 791; *Keith* v. *Burke* (1885), 1 Cab. & E. 551.

Cur. adv. vult.

15th April, 1920.

MACDONALD, C.J.A.: The plaintiff sued upon a bond, one of a series issued by defendant Company secured by a trust deed by way of mortgage. The individual defendant guaranteed payment of the bond. I am of the opinion that the conditions precedent to the plaintiff's right to recover his claim against the defendant Company were performed with one exception. This condition is imposed in the following manner: The bond refers the holder to the trust deed "for a particular description of the terms and conditions thereof on which said bonds are issued and secured," thus incorporating with the bond the conditions of the trust deed so far as the above words are effective for that purpose.

MACDONALD, C.J.A.

Article 21 of the trust deed declares that no bondholder shall have the right to institute any proceedings for foreclosure of the trust deed, or for the execution of the trusts thereof, or for the appointment of a receiver, or for any other remedy under the trust deed, or the lien created thereby, or otherwise, without first giving notice to the trustee. The said article contains a

COURT OF APPEAL

1920

April 15.

STODDARD v. SHIELDS LUMBER CO.

further provision, partly a repetition of the above, reciting that it is agreed that no bondholder shall institute proceedings for foreclosure or for the appointment of a receiver or for the collection of any of the moneys evidenced by such bonds other than upon the terms and conditions and in the manner herein specified.

This language seems to me to be sufficient to debar a right of action by the bondholder otherwise than in conformity with the conditions set forth in the bond, namely, the giving notice to the trustee. This seems to me to be even a stronger case in defendants' favour than was *Rogers & Co.* v. *British and Colonial Colliery Supply Association* (1898), 68 L.J., Q.B. 14, wherein it was held by Bruce, J. that the action could not be maintained in absence of notice to the trustee.

MACDONALD, C.J.A.

As regards the guarantor, I think his liability to the plaintiff arose when default was made in payment of the bond and that as to him there is no obstacle in the plaintiff's way such as stands in his way in respect of the defendant Company. The judgment against him should therefore not be disturbed. But as regards the defendant Company, the appeal should be allowed.

MARTIN, J.A.: In my opinion the learned judge below took the correct view of this case on the particular wording of the documents, and, therefore, the appeal should be dismissed. The language of prohibition here, when carefully examined, is very different from that in *Rogers & Co.* v. *British and Colonial Colliery Supply Association* (1898), 68 L.J., Q.B. 14, 79 L.T. 494, on which the appellants relied. There the clause read:

MARTIN, J.A.

"The holder hereof shall not commence any action or take any proceedings to enforce the security," etc. (and there are other differences), and the *ratio decidendi* is based thereupon.

The language in the case at bar is confined to any proceedings in equity of any character or kind, for the foreclosure of this indenture, or for the execution of the trusts hereof, or for the appointment of a receiver, or for "any other remedy under this mortgage or deed of trust or the lien hereby created, or otherwise, without first giving notice in writing to the trustee of default. . . . ."

All these are equitable proceedings to which the trustee must be a party, or at least have notice of. There is also a subsequent clause to a like effect which, in my opinion, does not enlarge the matter because it is also restricted to "proceedings in equity," but if there is anything in the said decision which is in conflict with this view (though I think not) upon the different language, then with respect, I am not in accord with it, and as it is in no way binding upon this Court, it ought not to be followed.

MARTIN, J.A.

GALLIHER, J.A.: In the bond itself reference is made to the trust deed in these words:

"To which mortgage or deed of trust reference is hereby expressly made for a particular description of the terms and conditions thereof on which said bonds are issued and secured, and for a description of the nature and extent of the security therefor."

And when dealing with the rights of the bondholders the words are limited to "rights with regard to such security." The words "such security" refer to the security in the deed of trust. Then, turning to the deed of trust, in Article XXI. we find this language:

"It is hereby declared and agreed as a condition upon which each successive holder of all or any of said bonds, and all or any of the coupons for the interest of said bonds, receives and holds the same, that no holder or holders of any of said bonds or coupons shall have the right to institute any proceeding in equity, of any character or kind, for the foreclosure of this indenture, or for the execution of the trusts hereof, or for the appointment of a receiver, or for any other remedy under this mortgage or deed of trust or the lien hereby created, or otherwise, without first giving notice in writing to the trustee of default having been made and continued as aforesaid."

GALLIHER, J.A.

My view of that language is that what follows after the words "any proceedings in equity" is all linked up with such proceedings and is in respect of proceedings against the security, nor do I think any different conclusion should be reached from the following language in the same article:

"And it is also agreed that no holder or holders of any of the said bonds, or any of the said interest coupons intended to be hereby secured, shall institute any suit, action or proceeding in equity for the foreclosure hereof, or for the appointment of a receiver, or for the collection of any of the money evidenced by such bonds or coupons otherwise than upon the terms and conditions and in the manner herein provided."

Appellants relied upon the case of *Rogers & Co.* v. *British and Colonial Colliery Supply Association* (1898), 68 L.J.,

COURT OF APPEAL

1920

April 15.

STODDARD v. SHIELDS LUMBER CO.

GALLIHER, J.A.

Q.B. 14. In that case, the condition was indorsed on the bond and Bruce, J. held that the action to recover £105 due on the bond was not maintainable as the plaintiffs had not complied with the condition. The words in the condition were:

"The holder hereof shall not commence any action or take any proceedings to enforce the security hereby created . . . ."

"The security hereby created," I think, means the bond, while in the case at bar the security referred to is the trust deed, and in that the cases may be distinguishable, but if not, I cannot (as I interpret Article XXI.), with every respect, follow that case.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I cannot, with great respect, arrive at the same conclusion as that arrived at by the learned trial judge. It is clear to me that the respondent, a debenture-holder, was precluded from bringing an action until the required steps were taken by him as set forth in the trust deed. The trust deed suspends the debenture-holder's right to proceed, a condition being contained therein postponing the debenture-holder's right to enforce his security until such time as the trustees, after notice, fail to take steps to protect the interests of the debenture-holders, and it has been held that this is a valid condition (see *Rogers & Co.* v. *British and Colonial Colliery Supply Association* (1898), 68 L.J., Q.B. 14; 79 L.T. 494). The requisite notice was not given by the respondent. It is true that ordinarily, where the principal is due and default has taken place in payment, the debenture-holder is entitled to commence an action to enforce the debentures by foreclosure or sale, unless it be that his right to sue is qualified by a condition in the trust deed, and that condition is in the trust deed that calls for consideration in the present action, that is, the right not only to enforce the debentures by foreclosure or sale, but the right to "institute any suit," "or for the collection of any of the money evidenced by such bonds or coupons otherwise than upon the terms and conditions and in the manner herein provided." Therefore the right to sue at all and for any relief is conditional. Turning to the trust deed, it is seen that the condition precedent to any action is the giving of notice to the trustees of the deed to protect the debenture-holders, and it is only after the lapse of the stated

period, the trustees failing to take steps to protect the interests of the debenture-holders, that action might be brought. The condition is a reasonable one, as otherwise mere default in payment would precipitate a possible flood of actions against the Company, with the likely happening of bankruptcy ensuing, whilst on the other hand, the debenture-holders giving notice as required enables the trustees to take all proper steps to protect them and safeguards the Company from a multiplicity of actions. The trust deed is in a form now generally in use and well understood in the flotation of debentures, and the terms are designed to not only protect the interests of the debenture-holders but to also give some reasonable time and protection to the Company in case default in payment does take place. Of course, it is not the province of the Court to deny any enforceable right that the litigant may have, but if there be restraint of enforcement until something is done, it is incumbent upon the Court to require due compliance with the agreed upon condition. It has been found in practice that a personal judgment against a company, in respect to moneys due and in default, is seldom asked, because usually, as in the present case, all the property and assets stand charged by the security—different considerations, of course, may arise if it be the case of a sole debenture-holder.

MCPHILLIPS, J.A.

It is to be noted that North, J. in *Hope* v. *Croydon and Norwood Tramways Company* (1887), 34 Ch. D. 730, a case where the plaintiff was suing on behalf of himself and all other holders of mortgage bond, applied for payment of the total amount of the bonds, only made a declaration that the debenture-holders were entitled to stand in the position of judgment creditors. It follows that the action was prematurely brought as against the Company and the judgment as against the Company should be set aside. As to the defendant Shields, the guarantor, the judgment should stand. The appeal, therefore, in my opinion, succeeds in part and fails in part.

The Court being equally divided the appeal was dismissed.

Solicitor for appellants: *W. J. Baird.*
Solicitor for respondent: *W. C. Brown.*

MACDONALD, J.

1919

Dec. 16.

COURT OF APPEAL

1920

April 6.

ROSEBERY SURPRISE MINING COMPANY, LIMITED v. THE WORKMEN'S COMPENSATION BOARD. CUNNINGHAM v. THE WORKMEN'S COMPENSATION BOARD. STANDARD SILVER LEAD MINING COMPANY, LIMITED v. THE WORKMEN'S COMPENSATION BOARD.

Costs—Workmen's Compensation Board—Unsuccessful party—Liability for costs—"Servant an agent of Crown"—Crown Costs Act, R.S.B.C. 1911, Cap. 61—B.C. Stats. 1916, Cap. 77, Secs. 30, 34, 56, 60 and 74.

ROSEBERY SURPRISE MINING CO. v. WORKMEN'S COMPENSATION BOARD

CUNNINGHAM v. THE SAME

STANDARD SILVER LEAD MINING CO. v. THE SAME

The Workmen's Compensation Board is a corporation created by statute to carry out public purposes and the members thereof are appointees of the Lieutenant-Governor in Council. The Board is an agent of the Crown and comes within the purview of the Crown Costs Act (McPHILLIPS, J.A. dissenting).

In re Land Registry Act and Scottish Temperance Life Assurance Co. (1919), 26 B.C. 504 applied.

APPEALS by plaintiffs from that portion of the judgment of MACDONALD, J., of the 16th of December, 1919, directing that the appellants were not entitled to costs on certain *certiorari* proceedings against the Workmen's Compensation Board. The plaintiffs, as employers, moved for writs of *certiorari* to remove into the Supreme Court orders obtained by the Board in the County Court of West Kootenay at Nelson on the 30th of September, 1918, for payment of a certificate of assessment whereby the plaintiffs were ordered to pay certain sums. The employers operated mines on Slocan Lake. They had collected from the 1st of October, 1917, to the 1st of August, 1918, one dollar per month from their employees, retaining it from their wages for medical aid and hospital accommodation, this practice having been in vogue for a long time in the Province, and continued for some time after the Workmen's Compensation Board came into operation by arrangement between the employers and the Board. In July, 1917, the employees endeavoured to effect a change, and later the Board gave notice cancelling the arrangement with the employers and issued certificates of assessments against the plaintiffs as from the 1st of

Statement

October, 1917, and filed same in the County Court of Kootenay under the Act, whereby they became orders for payment of the amount assessed. The plaintiffs applied for writs or *certiorari*, which were granted, without costs.

MACDONALD, J.

1919

Dec. 16.

COURT OF APPEAL

1920

April 6.

Hamilton, K.C., for plaintiffs.
J. E. Bird, for defendant.

16th December, 1919.

MACDONALD, J.: Upon the settlement of the order, the question of costs being allowed against the Board was sought to be argued. I had, without any argument or question being raised, already dealt with this matter in my reasons for judgment. Notwithstanding this fact, I think, under authorities referred to in Holmested & Langton, 4th Ed., 1138, I can still consider this point. Also see *Kimpton* v. *McKay* (1895), 4 B.C. 196, and *Canadian Land Co.* v. *Municipality of Dysart et al.* (1885), 9 Ont. 495 at p. 513.

ROSEBERY SURPRISE MINING CO. *v.* WORKMEN'S COMPENSATION BOARD

CUNNINGHAM *v.* THE SAME

STANDARD SILVER LEAD MINING CO. *v.* THE SAME

This question of costs against the Board was referred to by CLEMENT, J. in *Canadian Pacific Ry. Co.* v. *Workmen's Compensation Board* (1919) [27 B.C. 194 at p. 199], 1 W.W.R. 1068 at p. 1072, as being debatable.

The Board claims exemption from payment of costs under the Crown Costs Act, Cap. 61, R.S.B.C. 1911. I think the Board is an agent of the Crown and that the Act applies. See as to agency of Board, *Murphy* v. *City of Toronto* (1917), 41 O.L.R. 156 at p. 168.

MACDONALD, J.

It follows that while the Board has by its actions compelled the applicants to resort to these proceedings, it escapes payment of costs. The order should be so settled. Applicants apply for leave to appeal. I doubt if consent is necessary, as above decision as to costs is not a matter of discretion, but one of principle. However, to remove any doubt, I give leave.

From this decision the plaintiffs appealed. The appeal was argued at Victoria on the 9th of February, 1920, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Luxton, K.C., for appellants: The question is whether an order can be made for costs against the Board. Does the Crown

Argument

MACDONALD, J.
1919
Dec. 16.
COURT OF APPEAL
1920
April 6.
ROSEBERY SURPRISE MINING CO. v. WORKMEN'S COMPENSATION BOARD
CUNNINGHAM v. THE SAME
STANDARD SILVER LEAD MINING CO. v. THE SAME

Costs Act apply? The Board filed its certificate under section 34 of the Act and issued execution for the amount of the assessment. This the judge held was irregular. My submission is the Board is not "an agent or servant of the Crown." Section 74 of the Act shews the Crown Costs Act should not apply. This is an independent body acting apart from the Crown.

S. S. Taylor, K.C., for respondent: The rule is the Crown does not pay costs except by special direction: see *Rex* v. *Special Commissioners of Income Tax; Ex parte Dr. Barnardo's Homes* (1919), 35 T.L.R. 684 at p. 685; 36 T.L.R. 123; *Johnson* v. *Regem* (1904), A.C. 817 at pp. 823-4. As to the application of the Act see *In re Land Registry Act and Scottish Temperance Life Assurance Co.* (1919), 26 B.C. 504; *In re Gardiner and District Registrar of Titles* (1914), 19 B.C. 243; *Workmen's Compensation Board et al.* v. *Canadian Pacific Railway Company* (1919), 36 T.L.R. 3. It was within the purview of the Act. See also *In re Sid. B. Smith Lumber Co., Ltd.* (1917), 25 B.C. 126.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This case, I think, is governed by our decision in *In re Land Registry Act and Scottish Temperance Life Assurance Co.* (1919), 26 B.C. 504.

In *Rex* v. *Special Commissioners of Income Tax, Ex parte Dr. Barnardo's Homes* (1919), 35 T.L.R. 687, the King's Bench Division, consisting of the Lord Chief Justice, Mr. Justice Darling and Mr. Justice Bray, express opinions which, at least inferentially, support the conclusion to which we had come in the above-mentioned case. They were there considering the common-law rule that the Crown neither pays nor accepts costs, and they pointed out that this rule only applies to the Crown in the proper and strict sense of the word, but not to the officers, servants or agents of the Crown. Our Crown Costs Act expands the common law rule by extending it to the officers, servants and agents of the Crown.

The only distinction of note between this case and the *Scottish Temperance* case, *supra*, is that the Workmen's Compensation Board is a corporation. It is, however, created by statute

to carry out public purposes, and the members of the Board are the appointees of the Lieutenant-Governor in Council. A corporation may, I think, be agent for the Crown. The Board is, therefore, within the purview of the Act.

I would, therefore, dismiss the appeal, but there can be no costs.

GALLIHER, J.A.: I think the appeal should be dismissed. The Legislature has created the Board a body corporate with functions largely judicial for carrying out the purposes of the Act. In exercising these functions the restrictions (if we may call them such) placed upon the Board are to be found in sections 48, 49 and 50 of the Act. Section 48 provides that all moneys and securities collected and belonging to the accident fund shall be in the custody of the minister of finance and shall be accounted for as part of the consolidated revenue fund of the Province. No moneys collected or received on account of the fund shall be expended or paid out without first passing into the Provincial treasury and being drawn therefrom. The Board must submit to the auditor-general each month an estimate of the amount necessary to meet the current disbursements from the fund during the succeeding month, and when this is approved by the auditor-general the amount is paid to the Board and has to be accounted for to the auditor-general. The auditor-general has to approve of the investment by the Board of the surplus moneys. These investments have to be made in the joint names of the minister of finance and the Board. Section 49 provides that the accounts of the Board shall be audited by the auditor-general or an auditor appointed by the Lieutenant-Governor in Council. Section 50 provides for the making of an annual report by the Board to the Lieutenant-Governor and the laying of the report before the Legislature. Shortly, these provisions give to the Government supervision over the moneys collected by the Board for the accident fund, also the custody of same, control of investment of surplus funds, and to a certain extent, control as to payment out. Then sections 56 to 60 inclusive deal with the constitution of the Board, the appointment of its members, the duration of their term of office, their salaries, etc. (It is to be noted that these

MACDONALD, J.

1919

Dec. 16.

COURT OF APPEAL

1920

April 6.

ROSEBERY SURPRISE MINING CO. *v.* WORKMEN'S COMPENSATION BOARD

CUNNINGHAM *v.* THE SAME

SILVER LEAD MINING CO. *v.* THE SAME

GALLIHER, J.A.

MACDONALD, J.
1919
Dec. 16.
COURT OF APPEAL
1920
April 6.
ROSEBERY SURPRISE MINING CO. v. WORKMEN'S COMPENSATION BOARD
CUNNINGHAM v. THE SAME
STANDARD SILVER LEAD MINING CO. v. THE SAME

salaries are paid out of the consolidated revenue fund.) The whole question here is: Is the Board, the Crown, or the officer, servant or agent of and acting for the Crown, within the meaning of the Crown Costs Act, Cap. 61 of R.S.B.C. 1911, so as to preclude the Court from giving costs for or against them? Mr. *Taylor,* counsel for the respondent, relied solely on that Act. In England the old rule that costs were not given for or against the Crown has been somewhat modified in late years. Our Act is wider than the English Rule of Law, in that the words "officer," "servant," or "agent" are included. Now, although the Board cannot be said to be the Crown, which was the view taken in *In re Wood's Estate* (1886), 31 Ch. D. 607 at p. 621, still if they can be said to be the "officer," "servant," or "agent" of the Crown they come within our Act. That point was decided in our own Court in *In re Land Registry Act and Scottish Temperance Life Assurance Co.* (1919), 26 B.C. 504. We there held that a district registrar of titles is an officer of the Crown, and refused costs.

On that point I think there is no difference in principle between that case and the present. I see no reason why a body corporate cannot be the servant or agent of the Crown.

MCPHILLIPS, J.A.: The appeals in the three cases have relation only to the question of costs, Mr. Justice MACDONALD being of the opinion that "the Board is an agent of the Crown" and that the Crown Costs Act, Cap. 61, R.S.B.C. 1911, applies, section 2 thereof reading as follows:

"2. 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."

MCPHILLIPS, J.A.

The learned judge referred to, and evidently relied upon, a judgment of Mr. Justice Clute in *Murphy* v. *City of Toronto* (1917), 41 O.L.R. 156 at p. 168, where that learned judge said, when considering the Ontario Act (4 Geo. V., c. 25), very similar in its terms to the British Columbia Act (B.C. Stats. 1916, Cap. 77)—the Ontario Act is somewhat different though in its arrangement. I have not compared the Acts section

by section, but the Acts cannot, in all respects, be said to be the same. Then I do not see any provision, such as we have (added by Workmen's Compensation Act Amendment Act, 1918, Sec. 5) that compensation to workmen and dependants "shall apply to any employment by or under the Crown in right of the Province . . . . (as) if the employer were a private person." Even apart from the amendment that we have and with great respect to Mr. Justice Clute, I cannot agree "that the Workmen's Compensation Board is in a sense a branch of the Government." It would certainly be anomalous that the Board should have the power to adjudicate as against the Crown and at the same time be, as it has been held by Mr. Justice MACDONALD, within the terminology of section 2 of the Crown Costs Act, *i.e.*, within "Crown or any officer, servant or agent of and acting for the Crown." The Workmen's Compensation Board has been created by statute a body corporate (Sec. 56, Cap. 77, B.C. Stats. 1916). It is true this same provision is in the Ontario Act, but I do not observe that Mr. Justice Clute took this point into consideration, but be that as it may, it is clear to me that the Workmen's Compensation Board is not the Crown, nor the officer, servant or agent of the Crown. It would certainly be a very invidious position for the Board to be in when adjudicating as against the Crown that in so doing it would be the Crown acting as judge in its own cause. It is only necessary to state this proposition to have immediately repelled any idea that the Workmen's Compensation Board can be said to be in any manner representative of the Crown. To discharge its functions with acceptation to the public, and within the purview of the statute, it must be disassociated in every way from the Crown or the direction of the Crown, and that is the plain intention of the Legislature. It is significant that in the recent case of *Workmen's Compensation Board* v. *Canadian Pacific Railway* (1919), 88 L.J., P.C. 169, their Lordships of the Privy Council, in advising His Majesty that the judgment appealed from should be reversed and the action dismissed, also advised that the appellants, the Workmen's Compensation Board, should have their costs of the appeal and in both the Courts below. It is true the point was not taken, but eminent

MCPHILLIPS, J.A.

MACDONALD, J.

1919

Dec. 16.

COURT OF APPEAL

1920

April 6.

ROSEBERY SURPRISE MINING CO. *v.* WORKMEN'S COMPENSATION BOARD

CUNNINGHAM *v.* THE SAME

STANDARD SILVER LEAD MINING CO. *v.* THE SAME

counsel appeared in the appeal, and when the magnitude of the costs is considered it would seem unthinkable that the point (if point there be) should have been overlooked. I venture to remark, extra-judicially, that should it be determined that the Workmen's Compensation Board is not subject to the payment of costs, the Legislature should, at the earliest moment, correct such an anomaly. It might well be that some employer or employee might be carried as far as the Privy Council only to find, if successful, that no costs could be imposed against the Workmen's Compensation Board. Certainly the statute would not be equitable in its application to employer or employees that the Workmen's Compensation Board should not be liable for costs. That the Board, where successful, receives no costs does not satisfactorily meet the justice of the matter. It is therefore, with great respect to the learned judge, and all contrary opinion, my view, that the Workmen's Compensation Board does not come within the purview of the Crown Costs Act, and that the Workmen's Compensation Board is liable to pay costs. It follows, in my opinion, that the appellants were entitled to costs on the *certiorari* proceedings as against the Workmen's Compensation Board, the appeal to be allowed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Hamilton & Wragge.*
Solicitor for respondents: *E. N. Brown.*

THE STANDARD BANK OF CANADA v. McCROSSAN.

MURPHY, J.

1919

Dec. 5.

COURT OF APPEAL

1920

April 6.

THE STANDARD BANK OF CANADA *v.* McCROSSAN

Banks and banking—Guarantee to bank—Securing advance to company—Signed with others—Condition verbally stipulated—Subsequent release of assets of company—Waiver.

Pleadings—Amendment at trial—Must be written and placed on record.

The defendant, with a number of other persons, signed a guarantee to secure the account of a company with the plaintiff Bank. An action on the guarantee was dismissed on the ground that when signing it the defendant verbally stipulated to the local Bank manager as a condition of its use against him that certain notes on which he was liable as an indorser should be paid out of the funds to be advanced, which was not done.

Held, on appeal, affirming the decision of MURPHY, J. (McPHILLIPS, J.A. dissenting), that parol evidence of the condition under which the guarantee was signed is admissible, that the decision turns on the credibility of the parties and witnesses, and on the evidence there is no ground for disturbing the finding of the trial judge.

Bell v. *Lord Ingestre* (1848), 12 Q.B. 317 followed.

Per MACDONALD, C.J.A.: If the pleadings are amended at the trial, the party applying for the amendment should forthwith place it distinctly on the record in writing.

[Affirmed by Supreme Court of Canada.]

APPEAL by plaintiff from the decision of MURPHY, J., in an action tried by him at Vancouver on the 1st to the 3rd of December, 1919, to recover $5,000 on a guarantee. The facts are that in January, 1914, the Burrard Publishing Company, formed for the purpose of publishing the "Daily Sun," a Vancouver newspaper, was indebted in the following sums: an overdraft of $105,000 to the plaintiff Bank; $10,000 to the Bank of Montreal; $15,000 to a Miss Douglas on a promissory note; $13,000 to the Powell River Paper Company, and $3,000 to the Eastern Townships Investment Company. The plaintiff refused to make further advances, and the friends of the Company coming together, 28 of them signed a round robin in which they severally guaranteed (each for different amounts) in all $104,500 to the Company and the Bank, for the due payment of the Company's indebtedness to the Bank. The Bank then agreed to make further advances up to $150,000. Mc-

Statement

MURPHY, J.

1919

Dec. 5.

COURT OF APPEAL

1920

April 6.

THE STANDARD BANK OF CANADA v. MCCROSSAN

Statement

Crossan signed the round robin for $5,000. The Bank subsequently demanded payment of the guarantors and all but three paid. The defendant raised the defence that he signed the guarantee only on condition that the two notes of $15,000 and $10,000 above set out, and upon which he was an indorser, should be paid out of the moneys obtained on the strength of the round robin, McCrossan's evidence as to this being corroborated by J. A. Russell, who was present when the round robin was signed. There was no written memorandum whatever as to this condition, and when the Bank pressed McCrossan on his guarantee, his answer by letter raised other grounds whereby he considered he was relieved from the guarantee, but did not mention this condition, which was subsequently raised. On the 13th of July, 1915, he had signed as a guarantor an approval of a sale of the assets of the Burrard Company to the Sun Publishing Company, this company being formed to take over and carry on the publication of "The Sun" newspaper. His answer to this was that he signed as an accommodation, and without prejudice to his claim for exemption from liability on the guarantee. The trial judge found that the defendant's signature to the guarantee was given subject to the condition that the two notes above mentioned should be paid, and he dismissed the action.

S. S. Taylor, K.C., and *F. G. T. Lucas*, for plaintiff.
Craig, K.C., and *Harper*, for defendant.

5th December, 1919.

MURPHY, J.

MURPHY, J.: I find no agency established between the Bank and Mr. Russell. Indeed, this point was not urged by counsel for defendant in his address. I likewise find no breach of agreement was committed by the Bank in reference to the $50,000 line of credit to be given the Burrard Publishing Co. for discounting trade paper. It is true some of the notes given to the Bank to make up the $15,000 which was to have been secured by the Company did pass through the trade discount account. There is no evidence, however, that this reduced the line of credit for trade paper discount purposes below $50,000. What evidence there is goes to shew that these notes were so

utilized because no further trade paper acceptable to the Bank was available for discount. Mr. Perkins says he would have expanded the limit of $50,000 had acceptable trade paper been forthcoming, and his evidence is borne out by the bank account filed, which shews he did in fact do so during several months of 1914. The case, therefore, in the first instance, narrows down to two questions: Did the alleged interview between Mr. McCrossan and Mr. Perkins, in reference to the signing of the guarantee, take place, and, if so, what is its legal effect? I hold this interview proven. There are many circumstances that render it inherently probable, but I am not concerned to analyze them, as I have the fact sworn to by both Mr. McCrossan and Mr. Russell, and I accept their evidence. I think Mr. Perkins's memory has failed him in this connection. But it is said, granting the fact of the interview, Mr. McCrossan's own account of it makes out no defence. The test seems to be, did any interest in the McCrossan guarantee pass to the Bank when it was handed over, or did the Bank only acquire an interest therein when, and only when it had seen to the payment of the Bank of Montreal and the Douglas notes: *Bell* v. *Lord Ingestre* (1848), 12 Q.B. 317. I have carefully considered the excerpts of Mr. McCrossan's evidence furnished me, and which both counsel for plaintiff and defendant agree contain all that he said relevant to the determination of this question. My conclusion thereon is that the Bank was to acquire no interest in the McCrossan guarantee until it has seen to the payment of the two notes. Admittedly the Bank did not see to such payment. The fact that they were long subsequently paid by some party wholly unconnected with the Bank is, I think, irrelevant to this issue. It is argued that Mr. McCrossan's language shews the Bank did acquire an immediate interest in the guarantee because (if I understood counsel aright) it was to be utilized in part, at any rate, in raising funds to take up the two notes and, therefore, the stipulation as to their payment was a condition subsequent. Mr. McCrossan, purporting to give, as nearly as possible verbatim, what he said, used the following language in his evidence:

MURPHY, J.

"I said 'I am prepared to sign this (meaning the bank guarantee form), on the distinct condition of your seeing that the two notes, the Bank of

MURPHY, J.

1919

Dec. 5.

COURT OF APPEAL

1920

April 6.

THE STANDARD BANK OF CANADA v. MCCROSSAN

Montreal note and the Douglas note, are paid out of advances to be raised from this guarantee. I want it distinctly understood that if they are not paid this does not go. You understand that,' and with that Perkins nodded a sort of approval and I took up the pen and filled in the body of the guarantee, including the amount and the date, and signed it in the presence of Mr. Russell who was sitting in a chair right next, and I handed it to Mr. Perkins in his own office in the Standard Bank. There was not the slightest chance for misunderstanding. I went there for one purpose only, as I was from the start reluctant to go on it. I only went on it to relieve myself from a much heavier liability. Mr. Perkins was familiar with the matter and knew that the notes were not paid. I would have been a fool to sign without taking the precautions which I went down for that one purpose to see that those notes were to be paid."

Stress is laid on the words "on the distinct condition of your seeing that the two notes, the Bank of Montreal note and the Douglas note, are paid out of advances to be raised from this guarantee." I think when the passage is read as a whole, and when all the facts known to Mr. McCrossan and Mr. Perkins are kept in mind, the words "this guarantee" referred to, and was understood by both of them to refer to, not the document Mr. McCrossan was about to sign, but to the guarantee to be furnished, or already then furnished, to the Bank to the extent at least of $95,000. It is clear the two notes could not be taken up by any advance based on the McCrossan guarantee, for it was for $5,000 only, whilst the notes aggregated $25,000. In the following sentences, "I want it distinctly understood that if they are not paid this does not go," Mr. McCrossan was, I think, referring to the documents he was about to sign. The ambiguity, if there is one, is cleared up in the following question and answer:

MURPHY, J.

"Knowing what Mr. Perkins has sworn in that subject have you any doubt about your evidence? None whatever. I was emphatically clear that the condition attached to the use of the guarantee was that those notes were to be paid out or it could not be used. I did not have to go on the thing, I dictated the terms. I did not wait for Perkins to ask me to go on, I did the dictating of the terms on which I signed the guarantee. As a matter of fact, at the last minute I nearly refused to sign that. Mr. Hugh Fraser did."

I therefore hold that up to this state the Bank's action fails. But it is said Mr. McCrossan, by writing the letter, Exhibit 10, has destroyed this ground of defence. It was first said that this operated as a waiver, but, in argument, counsel for the Bank stated its effect was more in the nature of estoppel. A

question of fact arises, which, if found in defendant's favour, is, I think, decisive if admissible as evidence. Mr. McCrossan says he signed this letter to oblige Mr. Perkins, who was having difficulty in getting in touch with a sufficient number of guarantors for his purpose, but expressly stipulated that his so doing must be taken to be without prejudice in any question of liability on his guarantee. Mr. Perkins controverts this. I accept Mr. McCrossan's version. The probabilities are, I think, strongly in favour of his being correct. It is a fair inference, I think, from evidence, that Mr. McCrossan was sufficiently conversant with the financial affairs of the Burrard Publishing Company to be aware that the sure result of the sale assented to by Exhibit 10 taking place would be that the Bank would be forced to have recourse to the guarantees to protect itself against loss. He also knew that he was still liable on the two notes aggregating $25,000. Under these circumstances, if I am right in my first conclusion, as to his carefully protecting himself against what was then only a contingent liability, it would seem probable that he would be at least as careful when he had cause to know that the guarantee must in the near future be called in by the Bank. Political zeal is urged as a reason for his not so acting, but considering his course of conduct up to this date (if I am right in my view with regard to it), I cannot think that a sufficient reason for believing he would consent to assume what was a fairly heavy financial obligation which he must almost inevitably be called upon to meet in full. If this conclusion is sound, and if the evidence is admissible, I do not see that Exhibit 10 affects the case. In my opinion, such evidence is admissible. It does not vary, add to, or contradict the written document. If Mr. McCrossan was attempting to dispute that he did agree to the sale, then I agree the rule would apply. But it is the Bank that is endeavouring to utilize Exhibit 10 for another purpose altogether from that for which, on the face of it, it appears to have been given. Clearly, I think oral evidence admissible to meet this situation. The action is dismissed.

MURPHY, J.

From this decision the plaintiff appealed. The appeal was

MURPHY, J.

1919

Dec. 5.

COURT OF APPEAL

1920

April 6.

THE STANDARD BANK OF CANADA v. MCCROSSAN

argued at Victoria on the 2nd of February, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

S. S. Taylor, K.C., for appellant: McCrossan was a director and solicitor for the Publishing Company. Russell got these men to sign the round robin in order that the paper could carry on. McCrossan's evidence as to the alleged condition is not admissible as against the guarantee. After the round robin in December, 1914, a new company was formed called the Sun Publishing Company, and McCrossan signed a release of the assets of the Burrard Company to the Sun Publishing Company. He said he signed this "without prejudice." But first, he cannot be allowed to say this on the ground of repugnancy; and second, no matter what he said, he admitted his position as a guarantor. The evidence is not admissible as to the condition under which he guaranteed: see *The Commercial Bank of Windsor* v. *Morrison* (1902), 32 S.C.R. 98; *Mutual Life Assurance Co. of Canada* v. *Giguere, ib.* 348; *Dunsmuir* v. *Loewenberg, Harris & Co.* (1900), 30 S.C.R. 334. This is not a collateral antecedent contract: see *Bristol Tramways, &c., Carriage Company, Limited* v. *Fiat Motors, Limited* (1910), 2 K.B. 831 at p. 838. The learned trial judge referred to *Bell* v. *Lord Ingestre* (1848), 12 Q.B. 316. McCrossan cannot set up this condition in face of the fact that he and Russell were seeking the Bank; they wanted more money and the Burrard Company went to the Bank. McCrossan drew up the round robin. One Hepburn was to distribute the money, so that the Bank could not make the payment, and the money was obtained for the purpose of carrying on for a year, which could not have been done if these notes were first paid. McCrossan is a lawyer, and no lawyer would do business in this way. He knew the local manager could not agree to this condition. On the 13th of July, 1915, McCrossan, as a guarantor, secured an approval of a sale of the Burrard Company's assets to the Sun Publishing Company. He says he did this without prejudice, but he cannot be heard to say this.

Argument

Craig, K.C., for respondent: At this time the Burrard Company owed the Bank over $100,000. The Bank was worrying as much as the Company, and was anxious to get the round

robin signed. The evidence as to the condition under which defendant signed the round robin is admissible: see *Bell* v. *Lord Ingestre* (1848), 12 Q.B. 317; *Pym* v. *Campbell* (1856), 6 El. & Bl. 370; *Gudgen* v. *Besset, ib.* 986; *Wallis* v. *Littell* (1861), 11 C.B. (N.S.) 369. The condition was not performed although subsequently the two notes were paid: see *Molsons Bank* v. *Cranston* (1918), 44 O.L.R. 58. Now as to waiver, an amendment was made at the trial.

[MACDONALD, C.J.A.: We have pointed out on other occasions in this Court that if there was any amendment to be made at the trial, the parties applying for the amendment should get it distinctly on the record in writing. These loose amendments are very embarrassing to the Court. I am pointing this out because we have had occasion so often to speak of the manner in which amendments have been made during the trial.]

On the question of the effect of the document see *Lee* v. *The Lancashire and Yorkshire Railway Company* (1871), 25 L.T. 77; *Bank of Australasia* v. *Palmer* (1897), A.C. 540; *Cox* v. *Bruce* (1886), 18 Q.B.D. 147; *Sproule* v. *Murray* (1919), 45 O.L.R. 326; *Sheehan* v. *Mercantile Trust Co. of Canada Limited, ib.* 422 at p. 430. While the advance of $150,000 had to be authorized by the head office, the details were left to Perkins.

Argument

Taylor, in reply: This verbal arrangement is contrary to the whole scheme. The subject of exceptions is set out in Leake on Contracts, 6th Ed., 423-4.

Cur. adv. vult.

6th April, 1920.

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

The evidence of the defendant as to the condition upon which he signed the guarantee sued on is as follows: [already set out in the judgment of MURPHY, J.]

MACDONALD, C.J.A.

And again:

"I was emphatically clear that the condition attached to the use of the guarantee was that those notes were to be paid or it could not be used."

Some argument turned on the meaning of the last sentence, but I interpret the words to mean that the defendant made it emphatically clear to Mr. Perkins that the conditions attached

MURPHY, J.

1919

Dec. 5.

COURT OF APPEAL

1920

April 6.

THE STANDARD BANK OF CANADA v. MCCROSSAN

to the use of the guarantee was that those notes were to be paid. Mr. Russell says, "he" (the defendant) "told Mr. Perkins in the most positive way that he would sign it on the distinct understanding and condition that the moneys forthcoming were to be used to pay off those two notes." The denial of this evidence is not very emphatic, but the denial is of little importance in view of the fact that the learned trial judge accepted the above as the truth.

The defendant's story of why he insisted on the condition aforesaid is entirely reasonable. He, with a number of others politically interested in the fortunes of the Vancouver "Sun," a newspaper published by the Burrard Publishing Company, Limited, had before this time indorsed two promissory notes of the said company, payable, one to the Bank of Montreal for $10,000, the other to a Miss Douglas for $15,000. These were overdue, and I think the evidence shews that they were pressing obligations. Before, therefore, committing himself to a fresh obligation on account of the company, he demanded as a condition thereto that these two notes should be retired.

It was suggested in argument by appellant's counsel, that it was absurd to suppose that the appellant would accept respondent's obligation to pay $5,000 with a condition attached that the appellant should pay off an indebtedness of $25,000 for which the respondent was liable. But this suggestion overlooks the fact that the notes held by the Bank of Montreal and Miss Douglas were indorsed by a large number of others than the respondent, and that the amount which he might be called upon to pay by reason of his said indorsement might be very much less than the sum of $5,000, and also that these others were giving guarantees similar to the one in question.

MACDONALD, C.J.A.

It was also submitted by appellant's counsel that respondent's subsequent conduct was inconsistent with the defence which he now sets up. He signed the document, in which he was described as a "guarantor," approving of the sale of the Burrard Company's assets, but he has sworn, and the learned judge has found, that he did this without prejudice to any defence which he might have to set up against the guarantee.

To my mind, the decision of this case turns on the credibility

of the parties and the witnesses, and after careful consideration of the evidence, I am unable to say that the learned trial judge came to a wrong conclusion. I think he came to the right conclusion.

MURPHY, J.
1919
Dec. 5.

COURT OF APPEAL
1920
April 6.

MARTIN, J.A.: In this case I think the learned judge has reached the right conclusion, therefore the appeal should be dismissed.

THE STANDARD BANK OF CANADA v. MCCROSSAN

MCPHILLIPS, J.A.: The respondent was sued upon a guarantee in writing for the sum of $5,000, given to the appellant in respect to the indebtedness that might be due and owing to the appellant by the customer, the Burrard Publishing Company, Limited. The form of guarantee may be said to be the usual bank guarantee, and to secure to the Bank any ultimate balance due to the Bank. The appeal is taken by the Bank from the judgment of Mr. Justice MURPHY, who dismissed the action upon the ground that the guarantee was executed upon a condition, which was that the Bank was to see that a certain indebtedness upon which the guarantor (the respondent) was liable would be discharged. The indebtedness was by way of the indorsement of certain negotiable paper by the guarantor, also being indebtedness of the Burrard Publishing Company, Limited, and that by reason of non-performance of this condition the Bank was disentitled to recover upon the guarantee.

The evidence is very voluminous, but, in my opinion, the case is indeed a simple one, and the documentary evidence is all in favour of the Bank, and the Bank should succeed upon this appeal. The attempt is made, upon parol evidence, to destroy the efficacy of the guarantee, which I do not consider, upon the special facts of the case, is permissible, nor do I consider the parol evidence at all within the bounds of probability when all the attendant circumstances are taken into consideration. It would take too long to, in detail, elaborate all the evidence, but it may be generally stated that the whole transaction was one that had to be arranged with the head office of the Bank, as I note it was not an arrangement that was left to be dealt with, or decided, by the local manager at Vancouver, and this was well known to the guarantor. The local manager

MURPHY, J.

1919

Dec. 5.

COURT OF APPEAL

1920

April 6.

THE STANDARD BANK OF CANADA v. MCCROSSAN

merely carried out the instructions given to him by his principals (the Bank) from the head office, and the guarantor knew and understood, and it was made plain to him, the conditions upon which the Bank would make further advances, and the guarantee of respondent and others was essential to obtain further advances to the Publishing Company. It is significant to also note that the respondent (the guarantor) was the solicitor as well as a director of the Publishing Company and the active agent in behalf of the Publishing Company to obtain the further advances from the Bank. After the lapse of three years, the respondent repudiates his liability to the Bank, and during this time the assets of the Publishing Company have, with his assent, passed to another company. The facts sworn to by the respondent, and agreed with by Mr. Russell, who was in company with the respondent when the guarantee was signed, are that in the presence of Mr. Perkins, the local manager of the Bank, the respondent stated, before signing the guarantee, that two certain promissory notes, upon which he was liable as indorser, being representative of indebtedness of the Publishing Company for $10,000 and $15,000 respectively, would be paid out of the further advances to be made to the Publishing Company upon the security of the respondent's guarantee as well as that of others. I here set out the evidence of the respondent, when giving his evidence, under examination-in-chief. Mr. Perkins, the local manager of the Bank, is the person he is referring to:

MCPHILLIPS, J.A.

"He wanted me to sign the individual guarantee stating that I was one of the last ones and it was rather holding up the deal and wanted me to sign. I demurred, and I said that I wanted to see Mr. Perkins before I would sign that, that I wanted to put it squarely up to him as to payment of these two notes. With that Mr. Russell said: 'Come on down to the Bank.' So we went down to the Bank together and I saw Mr. Perkins in Mr. Russell's presence, and I put it up flatly to him and as that is more or less the crux of the matter I will endeavour to give the conversation in as nearly as accurate language as I can do it, certainly the effect of it. I said 'I am prepared to sign this (meaning the Bank guarantee form) on the distinct condition of your seeing that the two notes, the Bank of Montreal note and the Douglas note, are paid out of the advances to be raised from this guarantee. I want it distinctly understood that if they are not paid this does not go. You understand that,' and with that Perkins nodded a sort of approval and I took up the pen and filled up the body of the guarantee including the amount and the date and signed it in the

presence of Mr. Russell who was sitting in a chair right next, and I handed it to Mr. Perkins in his own office in the Standard Bank. There was not the slightest chance for misunderstanding. I went there for one purpose only, as I was from the start reluctant to go on it. I only went on it to relieve myself from a much heavier liability. Mr. Perkins was familiar with the matter and knew that the notes were not paid. I would have been a fool to sign without taking the precautions which I went down for that one purpose to see that those notes were to be paid.

"And Mr. Russell was there when that took place? He was there when the conversation took place.

"Now was there any chance for you to be mistaken about that? Not the slightest.

"Mr. *Taylor*: This is cross-examination.

"Mr. *Craig*: I might mention that Mr. Perkins on the examination for discovery swears that he had not seen you until long after the guarantee was signed. He swears that I did not see Mr. Russell until he gave him his cheque.

"Knowing what Mr. Perkins has sworn in that subject have you any doubt about your evidence? None whatever. I was emphatically clear that the condition attached to the use of the guarantee was that those notes were to be paid or it could not be used. I did not have to go on the thing, I dictated the terms. I did not wait for Perkins to ask me to go on, I did the dictating of the terms on which I signed the guarantee. As a matter of fact, at the last minute I nearly refused to sign that. Mr. Hugh Fraser did.

"Mr. *Taylor*: I understand that is subject to my objection, my Lord, as to this varying a written document.

"The Witness: I am not attempting to vary.

"Mr. *Taylor*: It is your counsel, not you. You are a witness this time.

"Mr. McCrossan: I am sorry, my Lord, I have never been in the box before."

Now, I do not propose to enter into any mathematical calculations as to the liabilities of the Publishing Company, or its pressing liabilities which have to be met, but it is clear and beyond question that the further advances obtained from the Bank upon the respective guarantees were obtained to discharge pressing liabilities, and made to keep the Publishing Company on foot, and the respondent's efforts were all in that direction, and it would not appear that the $10,000 and $15,000 notes were being pressed at or about the time of the advances, and it is clear that if these notes were paid at the time of the further advances the available moneys derived would be practically exhausted—the facts demonstrate the idle contention made, or that there is any probability in what is stated. It might well be said that, at most, if the respondent's story of what took

MURPHY, J.

1919

Dec. 5.

COURT OF APPEAL

1920

April 6.

STANDARD BANK OF CANADA v. MCCROSSAN

place with Mr. Perkins was to be accepted, that a collateral contract was entered into whereby the Bank agreed to see to the retirement of the two notes, and that the action of the respondent might have been for a breach of a collateral contract, but that is not this action, nor do I say that it would be sustainable. The learned counsel for the respondent took two positions in the argument at this bar, firstly, he strongly insisted that the guarantee was in escrow with the local manager, and secondly, that it was given subject to a condition not performed, and therefore not enforceable. This is clear: the Bank would accept nothing but the usual bank guarantee; that was the decision of the head office and well known to the respondent; he was advised of this. Further, this was known to Russell, and the extraordinary contention is, that with all this knowledge, and the giving of the guarantee in the usual form, the Bank has now to have imposed upon it a condition nowhere to be found in the document. It is inconceivable that any such condition was agreed to, and Mr. Perkins, the local manager, denies the respondent's story throughout, and the respondent's conduct rebuts in the strongest way any such condition being agreed to. The long delay and subsequent acknowledgement of his guarantee to the Bank (although it is attempted to weaken this by saying that whilst he outwardly and openly admitted the guarantee to the Bank and his associate guarantors he privately advised Mr. Perkins that he repudiated it) is a circumstance that cannot be overlooked in weighing the evidence. The Bank was in no way anxious to make these new advances, in fact, was prepared to accept its loss, but the propulsion was all from the Publishing Company, and the respondent was the most active in the matter to obtain the further advances. All that is alleged has such a badge of improbability (without otherwise describing it) that it is impossible, with respect, to agree with the conclusion of the learned trial judge.

MCPHILLIPS, J.A.

To well indicate what the position was, it is only necessary to read the terms of the trust deed entered into by Hepburn, as trustee, to which the Bank and the guarantors were parties, the respondent being one of the guarantors. It is there recited

that the Bank would not make the further advances save on the terms therein mentioned, one being that the written guarantee was to be in Form No. 1, L.F. (the usual Bank guarantee), and Hepburn was to be sole manager of the funds realized upon the guarantees, and to act in concert with the Bank. Not a word is set forth that out of these moneys there is first to be discharged no less a sum than $25,000 upon which the repondent alone was personally responsible (the moneys were only obtainable upon the collective guarantee), but what is put forward is that the respondent, giving a guarantee for $5,000, is to be discharged of a debt of $25,000, and his fellow-guarantors are to contribute in the payment of it. Again we have a circumstance of great improbability; all these matters are pertinent when weighing the evidence. The truth is, that the whole transaction of obtaining the further funds would have been illusory, and frustrated at the outset, if any such agreement had been come to. Then, is it reasonable to find that such was agreed to? I find it impossible to so conclude. The respondent knew that the notes he contends should have been paid were not paid, and allowed three years to elapse before he repudiates his liability. It is true he says that he spoke to Mr. Perkins on occasions about the matter, but even that was after a long lapse of time. There came a time when it was necessary to carry out a sale of the assets of the Publishing Company, and the assent of the guarantors thereto was asked for by the Bank, and what do we find the respondent doing? He, along with his fellow-guarantors, addresses the Bank in the following terms:

"The undersigned guarantors of the indebtedness of the Burrard Publishing Company Limited, hereby approve of the sale of the assets of the said Company to E. C. Sheppard for Forty thousand Dollars gross, made up of cash to Bank $24,281.62 and preferred claims $15,718.38."

It is true he says that he signed it without prejudice, protecting himself, as he states, by a telephone message, so advising Mr. Perkins. This, however, is denied by Mr. Perkins, and at this stage let me say, that quite apart from any contention made by the respondent, the contract the respondent made was with the Bank direct, not a contract made with the agent of the Bank within the scope of his agency. It was well known to the respondent that the whole transaction was one beyond

MURPHY, J.

1919

Dec. 5.

COURT OF APPEAL

1920

April 6.

THE STANDARD BANK OF CANADA v. MCCROSSAN

the authority or scope of agency of the local manager, Mr. Perkins, and it is impossible for the guarantor to build anything upon the alleged agreement with the local manager, even if any such contract could be said to be established.

Now in this case, unquestionably, the burden of proof was upon the respondent; the guarantee is to the Bank. The Bank made the advances upon the security of the guarantee, and it was for the respondent to displace the legal effect of the guarantee. That burden of proof, in my opinion, the respondent has failed to discharge. Here we have a solicitor and director of a company actively negotiating with a Bank for advances to be made to prevent the insolvency of a company of which he is a solicitor and director, and in connection therewith finds that he must get the assent of the head office of the Bank; the head office states its terms, *i.e.*, it must have the usual Bank guarantee upon the usual form; the guarantee is given in this form, and the advances made. When called upon to pay under the guarantee it is alleged that the guarantee is without legal effect because of some condition not being performed, a condition never made known to the Bank at all, and to which it was not a party. Even if agreed to by the local manager it would have been valueless upon the facts of the present case, but it is denied, and all the probabilities are against any such agreement being made (*Banbury* v. *Bank of Montreal* (1918), 119 L.T. 446, Lord Parker of Waddington at p. 471, Lord Wrenbury at p. 475). Here we have the delivery of the guarantee to the Bank, and if anything what is contended for is to vary the written contract by parol evidence, that is, to, in effect, insert a provision that the guarantee is to be of no effect unless the two notes for $10,000 and $15,000 be first paid.

MCPHILLIPS, J.A.

In passing, it may be remarked that before this action was brought the notes were, in fact, paid, it is true not out of the funds advanced to the Publishing Company upon the guarantees, but was that even the agreement sought to be set up? Assuredly the main object was to so finance the Publishing Company that insolvency would be prevented and the debts to be paid were the pressing debts, not to go and voluntarily pay off that which was not pressing, and there is no evidence that

the two notes were ever in the category of pressing debts. Here we have a written guarantee acted upon by the Bank, and what evidence is there to vitiate or render it voidable or void? It cannot be suggested or supported that there was any fraud practised upon the respondent by the Bank, and failing the establishment of that, it is idle to attempt to deny the legal effect of the guarantee.

The guarantee, upon the evidence in the present case, was to take effect when given—even the contention of the respondent does not prove otherwise; the moneys were to be advanced—they were advanced. The payment of the two notes was something to be done at a later time. The case is not within the proposition as put by Anson on Contract, 14th Ed., 316:

"It may also be shewn by extrinsic evidence that a parol condition suspended the operation of the contract. Thus a deed may be shewn to have been delivered subject to the happening of an event or the doing of an act. Until the event happens or the act is done the deed remains an escrow, and the terms upon which it was delivered may be proved by oral or documentary evidence extrinsic to the sealed instrument.

"In like manner the parties to a written contract may agree that, until the happening of a condition which is not put in writing, the contract is to remain inoperative."

At best, if established, all that the respondent can effectively claim is this—there was a collateral contract that the notes should be paid, and if he suffered any damages by reason thereof they would be recoverable, or possibly, the guarantee would not be enforceable if the notes were outstanding and unpaid, but the fact is that when this action was commenced they were not outstanding, but paid, and it is evident no damages have been suffered.

The present case, rightly viewed, is supported by *Pym* v. *Campbell* (1856), 6 El. & Bl. 370, approved in *Pattle* v. *Hornibrook* (1897), 1 Ch. 25. There Erle, J. at pp. 373-4 said:

"The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to shew it was conditional: and if that had been so it would have been wrong. But I am of opinion that the evidence shewed that in fact there was never an agreement at all. . . . . The parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion: but, if it be proved that in fact the paper was signed with the

MURPHY, J.

1919

Dec. 5.

express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible."

COURT OF APPEAL

1920

April 6.

THE STANDARD BANK OF CANADA v. MCCROSSAN

Here the attempt is to vary the terms of the guarantee and the evidence is not admissible. It is idle to consider, upon the facts of the present case, that there never was a guarantee. I am, therefore, of the opinion that the appellant should have been given judgment upon the guarantee, the respondent not establishing any defence to the action which could be given effect so as to vitiate the guarantee and render it void or voidable in law.

I would, therefore, allow the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Lucas & Lucas.*
Solicitors for respondent: *McCrossan & Harper.*

COURT OF APPEAL

1920

April 15.

KIDSTON v. STIRLING & PITCAIRN, LIMITED. STIRLING & PITCAIRN, LIMITED v. KIDSTON.

Evidence—Written contract—"Market price"—Parol evidence as to meaning of—Admissibility.

KIDSTON v. STIRLING & PITCAIRN, LTD.

STIRLING & PITCAIRN, LTD. v. KIDSTON

Parol evidence of what the parties meant by the words "market price" as used by them in a written contract purporting to embody the entire agreement between them on the subject, is not admissible, but when one of the parties asserts that he did not get the "market price" for his goods according to the contract, this is a question of fact, and parol evidence may be received bearing on the question of fact.

Statement

APPEALS by defendants Stirling & Pitcairn, Limited, from the decision of CLEMENT, J. of the 18th of September, 1919, in two actions that were consolidated and tried together. Messrs. Stirling and Pitcairn, who previously had carried on a fruit-brokerage business at Kelowna, B.C., formed a company

in 1911, called Stirling & Pitcairn, Limited, for the purpose of carrying on the business on a larger scale, and entered into arrangements with the Bankhead Orchard Company, Limited, the Edgett Ranch and Kelowna Land & Orchard Company, Limited (the three being known as the "Affiliated Orchards"), whereby the Company was to take the whole of their crop in each year at the market price, the said Orchards agreeing to take over a portion of the stock in Stirling & Pitcairn, Limited. In May, 1914, Kidston desiring to become allied to the "Affiliated Orchards," entered into a written agreement to sell his whole crop to the Company for seven years, it being recited in the agreement that "the purchase price shall be the market price of such fruit in each year." Kidston at the same time agreed to purchase 50 shares in Stirling & Pitcairn, Limited, at $120 a share, the par value of the shares being $100 each, he agreeing to pay a premium of $20 on each share. He paid down $30 a share and agreed to pay $22.50 a share on the first of May of each of the four following years. The 50 shares were allotted to him and he made the yearly payments in the three following years. He became a director of the Company in August, 1914. The Company had a sliding scale of the charges made on all fruit received from the Affilated Orchards, and this scale was brought to the attention of Kidston prior to his contract with the Company but was not mentioned in his contract. Kidston continued under the contract until the Fall of 1917 when he brought action for an account of all fruit delivered the Company and for payment of the amount due on the taking of said accounts, and for a declaration as to his *status* as a shareholder. The Company had charged the first $30 payment for stock with the $20 premium and he claimed that the payment should have been divided proportionately between the par value of the stock and the premium, in which case his proportion of the dividends would be increased. On the 4th of August, 1919, the Company brought action against Kidston for specific performance of the contract. The actions were consolidated and tried by CLEMENT, J. at Vancouver on the 16th to the 18th of September, 1919. He gave judgment for Kidston and dismissed the Company's action.

Statement

The appeal was argued at Vancouver on the 15th, 16th and

COURT OF APPEAL

1920

April 15.

KIDSTON v. STIRLING & PITCAIRN, LTD.

STIRLING & PITCAIRN, LTD. v. KIDSTON

17th of December, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers (*Colquhoun,* with him), for appellants: The point is whether the purchaser is entitled to specific performance of the contract for sale. There were five members of Stirling & Pitcairn, Limited. Stirling and Pitcairn themselves did not have orchards, but the other three each owned large fruit farms. In 1913 Kidston had an arrangement by which he sold his fruit direct to Stirling & Pitcairn. He then told them he would not sell any more unless he was put on the same basis as the others. In 1914, the contract was made whereby he sold all his fruit and delivered it to the Company and the Company paid the purchase price. In July, 1919, Kidston refused to supply any more fruit to the Company. The Company then applied for and obtained an *interim* injunction. The trial was of both cases. Pooley ran the Company. There were the three affiliated orchards and Kidston wanted the same benefit as the others. He took shares and became a director. The trial judge found there was no contract. I submit there was a contract and Kidston received $110,000 and was paid until the end of 1918. There was a sliding scale as to purchase and the understanding was that the sliding scale should be used in case it was required (Sale of Goods Act, section 2), on the question of the right to specific performance: see *Holyroyd* v. *Marshall* (1862), 10 H.L. Cas. 191 at pp. 208-9; *Metropolitan Electric Supply Company, Limited* v. *Ginder* (1901), 2 Ch. 799.

Argument

Reid, K.C. (*W. H. D. Ladner,* with him), for respondent: As to there being a contract in the matter of "market price" see *Stuart & Co.* v. *Kennedy* (1885), 13 R. 221. This case is the same. The sliding scale did not apply and was never put into operation. The contract was ambiguous and not exact, and both parties agreed that "market price" in the legal sense of the term was not what was contracted for. As to what is reasonable remuneration is a question of fact. After their action in putting him off the board it is inequitable that they should have specific performance. On the question of injunction see *Fothergill* v. *Rowland* (1873), L.R. 17 Eq. 132; *W. L. Macdonald & Co.* v. *Casein, Ltd.* (1917), 24 B.C. 218.

Mayers, in reply: The only point material is the question of sliding scale and the only evidence upon which he relies is that of Kidston, but this is not true. At every meeting the sliding scale came up for discussion and Kidston had something to say about it. He had the fullest knowledge of the sliding scale and its application. On the question of information see *Metropolitan Electric Supply Company, Limited* v. *Ginder* (1901), 2 Ch. 799; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523. Pitcairn had been allotted 50 shares in the Company at $120 a share, but he had only paid $30 per share, the balance remaining unpaid.

Cur. adv. vult.

15th April, 1920.

MACDONALD, C.J.A.: The contract extending over a period of seven years for the sale of fruit is in writing. The price to be paid for it "shall be the market price of such fruit in each year." This is the only term of the contract which counsel could suggest to be wanting in conclusiveness. It could not very well be made more specific, since the price of fruit would vary from year to year.

Plainitff has, however, interpreted this term in his particulars when he says that the words "market price" was understood between the parties to be the average price realized by the defendants from all sales made in each year by the defendants of each grade and variety of fruit, less the expense properly incurred in handling the same and a reasonable commission on the sale of the fruit.

MACDONALD, C.J.A.

Parol evidence of what the parties meant by the language used by them in a written contract purporting to embody the entire agreement between them on the subject is not admissible, but as I view it, it is not a question of interpretation at all, it is a question of fact to be proven by the plaintiff when he asserts that he did not get the "market price" for his fruit. The plaintiff's statement may therefore be taken as evidence bearing on this question of fact. The defendants' counsel accepted that statement as correct and the question therefore is reduced to one of evidence of the amounts received by the defendants from sales of fruit from year to year and the further question of

COURT OF APPEAL

1920

April 15.

KIDSTON v. STIRLING & PITCAIRN, LTD.

STIRLING & PITCAIRN, LTD. v. KIDSTON

MACDONALD, C.J.A.

what is to be deemed a reasonable commission. There is, therefore, in my opinion, no ambiguity in the contract, nor is it void for uncertainty. The prices realized from the sale of the fruit should not be difficult to prove and what is a reasonable commission is just as capable of proof as what is a reasonable wage or current wage in case of a hiring where no wage is mentioned. What is a reasonable commission must be decided as one of the factors in "market price."

There is evidence that a scale was used by the defendants, called the "sliding scale," for fixing the cost of handling the fruit and the profit which they should receive from the business, but it appears not to have been strictly applied, the defendants claiming that they have deducted for their profits less than the scale would have entitled them to. If the plaintiff gave his assent to the application of this scale, then while that may not be admissible as evidence to add to the written contract, yet, it is evidence of the reasonableness of the commission or profit which the defendants have deducted from their returns to the plaintiff.

Exhibit 66 furnishes evidence that one week before the contract was entered into, the defendants sent a copy of the sliding scale to the plaintiff with the intimation that it was effective "amongst our affiliated orchards," that is to say, the defendants' other customers. The plaintiff is, therefore, in error when he says in Exhibit 18 that he had no definite knowledge of this scale. He says he never agreed to its use, but I do not find that he protested at the time against it being a fair one.

On the same point Exhibit 13 may be looked at in which, referring to the season of 1914, defendants, speaking of deductions for profit, say that it is based on the sliding scale and gives them approximately a 10 per cent. profit. In his answer to this letter the plaintiff makes no comment upon the deduction for profit, but asks for information upon two other matters therein mentioned. Exhibits 36 and 38 relate to the season of 1915, in which reference is again made to the sliding scale.

In this case it should be observed that the defendants took the risk arising from loss or destruction of fruit delivered to them, and this, having regard to the nature of the products marketed, may well have been considerable.

No doubt plaintiff was from year to year grumbling and asserting that he was not getting all he was entitled to, but it appears to me that in a business such as these parties were engaged in, it was incumbent upon him to take a firm stand if he thought his rights were being infringed and not to allow the alleged wrong to be continued from year to year until the term of the contract had nearly expired.

The relationship between the parties is contractual, not fiduciary. They used the word "commission" as meaning profit. The plaintiff therefore is not entitled to an accounting in the proper sense of the word, but as counsel for the defendants, speaking of the footing upon which plaintiff should be paid for his fruit, made this statement: "Once that has been settled it is a matter of accounting and it will either go to the registrar or the parties will perform the arithmetical computation themselves." I take it that that course should be adhered to.

A question was also raised concerning some sales of small lots of fruit which were not treated by the defendants on the same basis as the car lots. I think the plaintiff's contention as to these is the correct one, and that they should be treated in the manner of other shipments.

The cost of handling and marketing is a question of fact, capable of proof before the registrar or referee. The amount which should be allowed to defendants as profit or commission is one which must be decided by the Court itself. In deciding this question, I think it entirely fair to both parties to apply the sliding scale as evidencing what I think both parties recognized as the fair criterion to be applied in ascertaining defendants' profit or commission, at all events it is the only one which the evidence supplies. I do not say that the plaintiff in terms assented to the application of the sliding scale or that it can be looked upon as in the nature of a contract between the parties, but on all the facts, I think the Court may look to the conduct of the parties in reference to this scale and say that the profit therein provided for would be a reasonable profit.

MACDONALD, C.J.A.

The plaintiff further claimed that he, as a shareholder in defendant Company, was denied dividends to which he was entitled. He was allotted 50 shares at a premium of $20 per

COURT OF APPEAL

1920

April 15.

KIDSTON v. STIRLING & PITCAIRN, LTD.

STIRLING & PITCAIRN, LTD. v. KIDSTON

MACDONALD, C.J.A.

share. He paid $1,500 on account of these shares, and the defendants appropriated two-thirds to the shares and one-third to the premium. Apart from any other question affecting the issue and in the absence of appropriation by the plaintiff, assuming that he had the right to appropriate, the appropriation by the defendants in the way above stated was, I think, within their rights.

I think, therefore, the judgment should be set aside and that the action should go back for trial on the basis above indicated. Costs of the appeal should follow the event and the costs in the Court below should be disposed of in that Court.

Consolidated with this action was another action in which the defendants in this action were plaintiffs and the plaintiff in this action was defendant. It was an action brought for specific performance of the contract above-mentioned, and for an injunction restraining its breach by the defendant therein. It was dismissed by the trial judge, and that judgment is in appeal before us consolidated with the above appeal. An *interim* injunction was issued in that action and was obeyed by the defendant, and as it remained in force, as I understand the matter, until last year's fruit crop was dealt with in accordance with the agreement of the parties, the question so far as the injunction is concerned, has become only one of costs, but in order to decide that question of costs, and notwithstanding that Mr. *Mayers* stated at our bar that he did not intend to press for an order for specific performance, I think I must in effect decide whether the action was well founded or not.

The injunction was one form of an order for specific performance and if the facts of the case did not warrant an action of that kind, then the action was rightly dismissed and the judgment below should not be interfered with. At present we do not know whether there has been a breach by the fruit company of the contract or not, which could be set up as an answer to an action for specific performance; there was a threatened breach by Mr. Kidston, and that was, I think, sufficient to warrant the injunction. The contract was of a specific nature extending over a term of years, and is one which I think falls within a class in which the Courts will grant specific performance.

I think the subject-matter falls within section 66 of the Sale

of Goods Act, and were specific or ascertained goods. The action therefore, in my opinion, was rightly brought and ought not to have been dismissed.

The costs form part of the costs of appeal.

I do not think I am called upon to say whether the action ought now, in view of the statement of Mr. *Mayers,* to be dismissed or not, that is a matter with which I think this Court is not concerned, but must be decided by the said Court as a part of the consolidated actions; its decision may be influenced by the result of the first action.

MARTIN, J.A.: During the argument we stated that there was a contract in force and that by the course of dealing and admissions in evidence "market price" was defined, and there were to be deducted therefrom the total costs and expenses and also a reasonable profit, as set out in the particulars, which could be determined by a reference, so the contract would be complete; but furthermore, if the sliding scale were to be applied, it became part of the contract, which was then complete in all respects.

The matter must, in my opinion, be settled on its strict legal aspect, and I have come to the conclusion that the sliding scale should be applied *ab initio.* That portion of the scale however which deals with the charge for handling is inconsistent with the definition of "market price," as being "less the expense properly incurred in handling," etc., so in this respect is inapplicable and the latter definition should prevail.

MARTIN, J.A.

The case was clearly one, I think, for an injunction to compel specific performance for the year 1919, which is all that is asked for at present by the appellant Company.

As to the shares, which sold for $120 per share, being at a premium of $20 per share, Kidston paid only $30 thereon, which left a balance due of $90, because $20 was properly appropriated in the usual way to the immediate payment of the premium in full, in the absence of any agreement to the contrary.

With respect to Kidston's complaint that he was not re-elected a director, I have only to say that, in my opinion, it was a

COURT OF APPEAL

1920

April 15.

KIDSTON v. STIRLING & PITCAIRN, LTD.

STIRLING & PITCAIRN, LTD. v. KIDSTON

proper course to take seeing that his private interest and that of the Company were in conflict, in which situation he could not be expected to discharge his corporate duties to the satisfaction of the shareholders.

The appeal, therefore, succeeds and so the costs follow the event; the defendant had to come to this Court for relief from the decision below based upon the erroneous view that there was no contract. The result is that the judgment below should be vacated and the trial should be continued for the purpose of the necessary reference or other working out of the contract we think existed as above interpreted.

GALLIHER, J.A.

GALLIHER, J.A.: I am agreeing in the judgment of the Chief Justice.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the appeals be allowed, a new trial to be had to take the accounts upon the basis of the market price, as defined by Mr. Kidston, which upon the appeal was taken to be the true basis for the taking of the accounts, coupled, however, with the utilization of the sliding scale which, in my opinion, upon the facts, should be the overriding scale where necessary. The contract is established and should be specifically performed, but as counsel for the appellants have only asked for a decree of specific performance covering the year 1919, I would limit the decree to 1919 without prejudice to any further proceedings to compel specific performance for later breaches (if any). I have not thought it necessary to go over in detail the evidence, which is somewhat voluminous. I content myself by saying that it is without hesitation I find that there is an enforceable contract, and it was right and proper that an injunction should have been issued to restrain the delivery and sale of the fruit to other than the appellants. I am not satisfied that there has been any breach of the contract upon the part of the appellants which would render it proper to refuse specific performance—in truth there is no such evidence. A breach to bring about a refusal of specific performance must be serious and wilful, and this is wholly absent. On the other hand we have the respondent threatening and attempting to commit what, if accomplished,

would have been a most serious and wilful breach of the contract, only restrained by the injunction.

The appeals should be allowed.

EBERTS, J.A. would allow the appeals.

Appeals allowed.

Solicitors for appellants: *Cowan, Martin & Gurd.*
Solicitors for respondent: *Cochrane & Ladner.*

COURT OF APPEAL

1920

April 15.

KIDSTON *v.* STIRLING & PITCAIRN, LTD.

STIRLING & PITCAIRN, LTD. *v.* KIDSTON

REX v. THE CORPORATION OF THE CITY OF VICTORIA.

COURT OF APPEAL

1920

April 6.

REX *v.* CITY OF VICTORIA

Constitutional law — Criminal code — Municipal corporation — Common nuisance—Procedure by indictment—Destruction of bridge and neglect to restore—Liability—Criminal Code, Secs. 221, 223 and 1015.

An indictment preferred by the grand jury under section 221 of the Criminal Code charged that the defendant Municipality destroyed a bridge connecting two streets within the City and neglected to restore it and thereby did commit a common nuisance. The indictment was quashed by the trial judge (CLEMENT, J.), who dismissed all proceedings thereon out of the Court as being a civil matter and not cognizable by the grand jury or by the Court of Assize.

A motion to the Court of Appeal for leave to appeal from refusal to reserve a case was dismissed.

Per MACDONALD, C.J.A.: The offence charged is, under section 223 of the Code, a non-criminal, common nuisance, and therefore, a civil wrong *ab initio*, the procedure in which is reserved to Provincial jurisdiction under section 92(14) of the British North America Act.

Per MARTIN, J.A.: There was no "unlawful act or omission to discharge a legal duty" under section 221 of the Code, as the Municipality had simply neglected to repair the bridge, whereby it became unsafe and part had to be removed, and it was under no legal obligation to repair it, so that the proceedings in the Assize Court were futile.

APPEAL by the Attorney-General from the decision of CLEMENT, J., refusing to reserve a case upon the trial of an indictment for unlawfully pulling down and failing to restore a certain bridge connecting Store Street and Bay Street in the Statement

COURT OF APPEAL

1920

April 6.

REX v. CITY OF VICTORIA

Statement

city of Victoria. Questions of law arising as to whether or not (1), the trial should proceed and a verdict on the facts have been found by a jury of twelve persons; and (2) whether or not the indictment should have been dismissed from the Supreme Court of British Columbia as being a civil matter and not a criminal matter. The grounds of appeal were: (a) that the learned trial judge erred in holding that the proceedings for the unlawful obstruction of a highway did not lie by indictment but must be taken by way of *mandamus;* (b) That the learned trial judge should have proceeded to call twelve jurymen and hear and determine the matters in the said indictment set out.

The appeal was argued at Victoria on the 27th of January, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Argument

F. A. McDiarmid, for appellant: The learned judge below followed *Toronto Railway* v. *Regem* (1917), 86 L.J., P.C. 195 (overcrowding case), holding that under section 223 it ceased to be a criminal matter and became a civil one. The indictment is laid as "obstruction of the highway," and comes under the last part of section 221. It is a criminal offence at common law, and there must be some declaration by Parliament that it does not operate, and under section 223 there is no restriction until after conviction. The element of criminality disappears only after conviction, and the overcrowding case so decides. Under the old practice there would be criminal procedure and *mandamus* would not lie: see *The Queen* v. *The Trustees of the Oxford and Witney Turnpike Roads* (1840), 12 A. & E. 427. As to procedure after conviction see *Rex* v. *Portage La Prairie* (1905), 10 Can. Cr. Cas. 125.

Harold B. Robertson, for respondent: The authorities are clear that where after a conviction nothing can be done, that is, when the proceedings are abortive, the Court will not proceed. Leave to appeal should not be lightly granted: see *Toronto Railway* v. *Regem* (1917), 86 L.J., P.C. 195, and *Rex* v. *Lai Ping* (1904), 11 B.C. 102. The Court cannot enforce abatement. They cannot order the restoration of the bridge. There are the three objections: (1) There is no remedy; (2) even if

there were, the City could pass a by-law; and (3) there was five years' delay. As to the section not applying to a corporation see *The King* v. *The Severn and Wye Railway Company* (1819), 2 B. & Ald. 646; *Regina* v. *Victoria Park Co.* (1841), 1 Q.B. 288. The Court will not do useless things: see *Ex parte Nash* (1850), 15 Q.B. 92; *Rex* v. *Incledon* (1810), 13 East 164; Broom's Legal Maxims, 8th Ed., 209; *Tuck* v. *Victoria* (1892), 2 B.C. 179 at p. 185; *Rex* v. *Axbridge Corporation* (1777), 2 Cowp. 523; *Reg.* v. *Rev. A. Wilson and Others* (1880), 43 L.T. 560; *Von Mackensen* v. *Corporation of Surrey* (1915), 21 B.C. 198 at p. 203. The fact is the bridge was dangerous and the City tore it down, intending to rebuild, but the people would not support the by-law. I say this is non-feasance, but even in case of misfeasance there is no power to compel restoration.

Argument

McDiarmid, in reply: The cases are collected in Tremeear's Canada Criminal Law, 1919 Ed., pp. 221-3, as to whether the laws of customs have been swept away. [He also referred to *The Attorney-General* v. *Cleaver* (1811), 18 Ves. 211 at p. 221; *Attorney-General* v. *Staffordshire County Council* (1904), 74 L.J., Ch. 153; *Rex* v. *Pappineau* (1725), 2 Str. 686; *The King* v. *Stead* (1799), 8 Term Rep. 142; *Regina* v. *Great North of England Railway Co.* (1846), 9 Q.B. 315; *The Queen* v. *Birmingham and Gloucester Railway Co.* (1842), 3 Q.B. 223; *Rex* v. *Angelo* (1914), 19 B.C. 261; *Rex* v. *Lai Ping* (1904), 11 B.C. 102.]

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The Corporation of the City of Victoria was indicted for a common nuisance of the character described in section 223 of the Criminal Code, which reads:

"Anyone convicted upon any indictment or information for any common nuisance other than those mentioned in the last preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgment may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right."

In *Toronto Railway* v. *Regem* (1917), 86 L.J., P.C. 195, the Privy Council reviewed the judgment of the Ontario Courts, where it was held that a person guilty of a nuisance

COURT OF APPEAL

1920

April 6.

REX v. CITY OF VICTORIA

alleged to be of the character aforesaid could be prosecuted in the Criminal Courts to conviction. though the proceedings thereafter should be as for a civil wrong. Their Lordships rejected this construction of the section and held, as I understand their judgment, that such an offence would be a civil wrong *ab initio*. At p. 199 their Lordships say:

"The effect of this section is, in their Lordships' opinion, to leave indictment as a method of procedure for trying the general question whether a common nuisance to the detriment of the property or comfort of the public, or by obstruction of any right other than one affecting life, safety, or health, which is common to all His Majesty's subjects, has been committed, but it does deprive a conviction on indictment in these cases of its criminal character. The method of indictment is at times used in English law as a convenient one for trying a civil right; and the section of the Canadian statute appears to give recognition to this use of the method, and to deprive it of any result in criminal consequences."

And again at p. 201:

"The wrong done is therefore, in their Lordships' opinion, only a civil wrong. That indictment should be recognized in a statute as a method of trying a civil right is nothing new."

Their Lordships gave as an example section 1 of the English Evidence Act, 1877.

It does not appear to have been called to their Lordships' attention that section 92 of the British North America Act, subsection (14), reserves for the exclusive jurisdiction of Provincial Legislatures "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." Procedure in criminal matters is reserved to the Dominion, in civil matters to the Province.

MACDONALD, C.J.A.

Their Lordships' decision turned entirely upon the question as to whether the wrong complained of in that appeal was or was not a public nuisance. They held that it was not a public nuisance but a private wrong, and therefore held that the demurrer ought to have been allowed. Their reference to procedure under an indictment for a civil wrong was therefore *obiter dicta*. Had their Lordships' attention been directed to said section 92, subsection (14), and the language quoted had then been used with that section in mind, I should not have found it easy or agreeable to arrive at a conclusion inconsistent with what their Lordships have said, although what they have

said was merely *obiter,* but in the circumstances it seems to me to be my duty to decide this case as the law governing it seems to demand. I think, therefore, the learned trial judge was right in the course which he adopted in quashing the indictment.

MARTIN, J.A.: This is a motion under section 1015, the Criminal Code, for leave to appeal from the refusal of Mr. Justice CLEMENT to reserve a question for this Court arising upon an indictment preferred by the grand jury under section 221 of said Code, which he quashed, and dismissed all proceedings thereon out of the Court as being a civil matter and not cognizable by the grand jury or by the said Court of Assize.

The indictment charged that the defendant Corporation did pull down and destroy a certain bridge on a public highway within its boundaries (connecting two streets across an arm of the waters of the harbour) and neglected and refused to restore, repair and open for public traffic the said bridge,

"and thereby did commit and does continue to commit a common nuisance by which the public were and are obstructed in the exercises and enjoyment of a right common to all His Majesty's subjects, to wit, the free right of passage in, over and upon said public highway," etc.

The appellant submits as a deduction from the Privy Council decision in *Toronto Railway* v. *Regem* (1917), A.C. 630, 86 L.J., P.C. 195, 29 Can. Cr. Cas. 29, that section 223 of the Code applies only after conviction, and up to that stage the proceedings are criminal, but I do not so read the judgment of their Lordships, because it is said at pp. 638-9:

MARTIN, J.A.

"This is not a criminal case within the meaning of s. 1025, which purports to limit the prerogative, but is in reality a question of civil right. . . . . The point turns on the construction of s. 223, and their Lordships think that, although the section preserves indictment and information as modes of procedure in the cases with which alone it deals, those relating to the property or comfort of the public, and to obstruction of rights common to the King's subjects other than those dealt with in s. 222, it divests the breach of duty so tried of any criminal character. The section provides than any one convicted under it is not to be deemed to have committed a criminal offence, and goes on to preserve the possibility of such consequential proceedings or judgments as may be taken or had under the existing law, not for the punishment of the person convicted, but for the abatement or remedy of the mischief done by the nuisance to the public right. The wrong done is therefore, in their Lordships' opinion, only a civil wrong. That indictment should be recognized in a statute as a method of trying a civil right is nothing new. . . . . Their Lordships think that it was competent to the Parliament of Canada . . . . to declare that what might previously have constituted a criminal offence should no longer do so, although a procedure in form criminal was kept alive."

But moreover, that case differs essentially from the one at

COURT OF APPEAL

1920

April 6.

REX v. CITY OF VICTORIA

bar, wherein there has been no conviction, and we have quite a different question to consider, not raised before the Privy Council, because it was objected before the learned judge below as well as before us that all the proceedings in the Assize Court were futile and a waste of public time and money because there was, under section 221, "no unlawful act or omission to discharge a legal duty" on the part of the Corporation, which, on the admitted facts, had simply neglected to repair the "bridge or highway" whereby it fell into such a ruinous and unsafe condition that part of it, "to wit, all the swing of the said bridge or highway," had to be removed in October, 1914, and it has since remained in that condition of non-repair. Since there is no legal obligation to repair this highway (*Von Mackensen* v. *Corporation of Surrey* (1915), 21 B.C. 198, 8 W.W.R. 541), the case chiefly relied upon by the appellant's counsel, *Attorney-General* v. *Staffordshire County Council* (1904), 74 L.J., Ch. 153; (1905), 1 Ch. 336, wherein such a statutory duty was imposed, has no application (see *per contra Reg.* v. *Great Western Railway Co.* (1893), 62 L.J., Q.B. 572, 69 L.T. 572), and I was unable to ascertain during the argument exactly or inexactly what relief was expected to be given by any Court. On the facts as stated to us, it is clear to me that no relief of any kind could be obtained if the proceedings in the Assize Court below had been allowed to go on, and therefore the learned judge was right in putting a stop to them at the outset, because no Court will allow itself to be made a party to abortive proceedings, and those which were attempted to be invoked herein would have led only to a waste of public money, time and machinery—*Lex nil frustra facit,* Broom's Legal Maxims, 8th Ed., 209-10; or, as Lord Ellenborough, C.J. put it in *Rex* v. *Incledon* (1810), 13 East 164 at p. 166 (12 R.R. 313), "the Court will never do any thing in vain"—and *Cf. Rex* v. *Axbridge Corporation* (1777), 2 Cowp. 523; *Reg.* v. *Rev. A. Wilson and others* (1880), 49 L.J., Q.B. 870, 43 L.T. 560; *Tuck* v. *Victoria* (1892), 2 B.C. 179 at p. 185; *Voigt* v. *Groves* (1906), 12 B.C. 170, 2 M.M.C. 357.

MARTIN, J.A.

It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion, the proceedings are unwarranted, not supported but displaced by the provisions of the Criminal Code, and not now open under the Common Law.

Appeal dismissed.

CAINE v. THE CORPORATION OF THE DISTRICT OF SURREY, STEVENSON AND COTTON.

COURT OF APPEAL

1920

April 6.

CAINE v. CORPORATION OF SURREY

Statute, construction of—Municipal Act—Crown grant—Right to "resume" reserved for road purposes—Exceptions—Land for more convenient occupation of buildings—B.C. Stats. 1914, Cap. 52, Sec. 325; 1915, Cap. 46, Sec. 11; 1916, Cap. 44, Sec. 16.

Upon the defendant Corporation being about to resume portions of the plaintiff's lands under section 325 of the Municipal Act, which contains a proviso "that no such resumption shall be made of any lands on which any buildings may be erected or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings," the plaintiff brought action and obtained a perpetual injunction restraining the defendant from entering upon the lands containing an outbuilding with adjoining garden and orchard.

Held, on appeal, affirming the decision of CLEMENT, J. (MCPHILLIPS, J.A. dissenting), that in determining whether land is in use "for the more convenient occupation" of a building, regard must be had to the uses to which a building is put. A driveway is for the more convenient occupation of a house, and so is a barnyard for a stable or barn. The question is one of fact whether it was so used in each case, and an element to be considered is whether the land is withdrawn from the larger purposes of the farm, such as growing of grain and depasturing of cattle, etc., and kept for use in connection with house and farm buildings.

[Affirmed by Supreme Court of Canada.]

APPEAL by defendant Corporation and A. F. Cotton, from the decision of CLEMENT, J., of the 10th of March, 1919 (reported 27 B.C. 23), in an action to restrain the Municipality from resuming occupation of certain portions of the plaintiff's lands for road purposes under section 325 of the Municipal Act, which provides that a district municipality may resume any part of lands reserved in any Crown grant for making roads, canals, etc., with the proviso "that no such resumption shall be made of any lands on which any buildings may have been erected or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings." The Municipality claims the right to take possession under the resumption by-law, or in the alternative, by expropriation proceedings. The plaintiff claims the land on

Statement

COURT OF APPEAL

1920

April 6.

CAINE v. CORPORATION OF SURREY

which the Corporation proposes to build a road was used by him for gardening purposes and for an orchard, and is excluded from resumption by the Act, in answer to which the defendants say the plaintiff put in the barn and raised vegetables and fruit for the purpose of obstructing road construction. It was held by the trial judge that the Municipality was precluded by the Act from taking the land in question.

Statement

The appeal was argued at Vancouver on the 8th, 9th and 12th of January, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

McQuarrie, for appellants: The Crown reserves one-twentieth of all lands for roads. We are entitled, first, under the resumption by-laws registered in July, 1918, and approved by order in council, and, secondly, we passed an expropriation by-law. We were supposed to interfere with the barnyard, the buildings, and the garden. The barn was not completed until October, 1918, after notice of resumption had been given and the defendants Stevenson and Cotton, under authority of the Municipality, commenced to fence the road. There was no orchard or trees of any kind, only a few stray blackberry bushes, anything done in the direction of an orchard or barnyard only being done for blocking purposes. The delay was due to negotiations. We offered $200 and he wanted $400.

Argument

Sir C. H. Tupper, K.C., on the same side: The learned judge said we were driven to the resumption by-laws, but my submission is we have both remedies. The word "house" is distinguished from "building," as "house" includes more land than that upon which it actually stands: see *Steele* v. *Midland Railway Co.* (1866), 1 Chy. App. 275; Encyclopædia of Forms and Precedents, Vol. 7, p. 76; Vol. 9, pp. 116-7; *Smith* v. *Ridgway* (1866), L.R. 1 Ex. 331 at pp. 333-4. There is in fact no garden here. As to lands being "resumed" see Halsbury's Laws of England, Vol. 10, p. 442. Notice in the Gazette is sufficient and the lands are *ipso facto* resumed by the notice: see *Colless* v. *Minister for Lands* (1899), A.C. 90 at p. 96. The word "otherwise" is controlled by "garden" under the *ejusdem generis* rule, as to which see *Attorney-General* v. *Seccombe* (1911), 2 K.B. 688 at p. 703; *In re Samuel* (1913),

A.C. 514 at p. 525; *In re Clark* (1898), 2 Q.B. 330 at pp. 335-6; *Johnson* v. *The Edgware, &c., Rail. Co.* (1866), 35 Beav. 480 at p. 485; *Williams* v. *Golding* (1865), L.R. 1 C.P. 69. The rule is generally referred to in Halsbury's Laws of England, Vol. 27, p. 145. As to what includes an orchard see Elliott on Roads, 2nd Ed., par. 476a; *Ex parte Hammond in re Hammond* (1844), 14 L.J., Bk. 14. As to what is a market-garden see *Falkner* v. *Somerset and Dorset Railway Co.* (1873), L.R. 16 Eq. 458. We could enter without notice under the Act: see *Harding* v. *Corporation of Cardiff* (1881), 29 Gr. 308; *Stonehouse* v. *Corporation of Enniskillen* (1872), 32 U.C.Q.B. 562; *Blomfield* v. *Rural Municipality of Starland* (1915), 9 Alta. L.R. 203; *Hanna* v. *City of Victoria* (1916), 22 B.C. 555 at pp. 558-60. We did all that was required, and were justified in entering without notice: see *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339 at p. 352. Although we rely on resumption, we reserve the right under expropriation: see Kerr on Injunctions, 5th Ed., 120-1. As to granting an injunction in such a case see *Emsley* v. *North Eastern Railway Co.* (1896), 1 Ch. 418. A public body proceeding irregularly will not be enjoined: see *Dominion Iron and Steel Company, Limited* v. *Burt* (1917), A.C. 179 at pp. 183 and 186; *Sandon Water Works and Light Co.* v. *Byron N. White Co.* (1904), 35 S.C.R. 309. Other cases on the question of election and as to the effect of the resumption clause are *Samson* v. *The Queen* (1888), 2 Ex. C.R. 30 at pp. 32-3; *Raymond* v. *Regem* (1916), 16 Ex. C.R. 1; *The King* v. *Power*, *ib.* 104; (1918), 56 S.C.R. 499; *The King* v. *Farlinger* (1917), 16 Ex. C.R. 381.

Argument

S. S. Taylor, K.C., for respondent: First as to the expropriation by-law as held by the trial judge, this is not a genuine proceeding. Section 325 of the Act limits us to compensation for improvements only, and they proceed to resume in order to avoid paying for the land. There were no plans, no notice, and no payment of money into Court, and to carry out By-law No. 158 they have not complied with sections 362 and 370 of the Act. They have elected to enter by resumption under By-law No. 161. You cannot put a right of way where there

COURT OF APPEAL

1920

April 6.

CAINE v. CORPORATION OF SURREY

is a building, and where a garden is for the convenient occupation of a building it should not be included in the road allowance. The road is put in solely for the benefit of Stevenson, who has a ranch on both sides of us and wants a road adjoining the two.

Tupper, in reply: It is not open to them to say the road is not needed for public purposes: see *Wijeyesekera* v. *Festing* (1919), A.C. 646; *Kemp* v. *The South Eastern Railway Company* (1872), 41 L.J., Ch. 404.

Cur. adv. vult.

6th April, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant was not in possession under the expropriation by-law. The notice submitted as a notice to treat under that by-law was not, in my opinion, such, but was a notice that appellant would "resume" the land in question pursuant to its By-law No. 161, and pay the damage applicable to such a proceeding. The appellant can, therefore, justify his entry on the lands, if at all, only under said By-law 161, and as I agree with the conclusions, and with the reasons therefor, of the learned trial judge, I need only say that I would dismiss the appeal.

In this result I refrain from dealing with that branch of the case which has to do with the *bona fides of the* Municipal Council, upon which I have formed an opinion on the facts in evidence not at all favourable to them.

MARTIN, J.A.

MARTIN, J.A.: As I agree substantially with the view taken by the learned trial judge, I shall content myself with observations upon two points only. First, with respect to the far-reaching question of the power of resumption conferred by section 325 [of the Municipal Act, 1914, Cap. 52] I am of the opinion that the important word "gardens" should not be held to mean in this country, as was strongly urged upon us, supported by English authorities, only acres inclosed by walls, fences, etc., for it is an open and notorious fact that even in our own cities there are innumerable gardens fronting on the streets which have no inclosure towards the highway, but simply a boundary curb (and often not even that between the

grass and the pavement), as is indeed the case in the spacious garden which on all sides surrounds the Parliament Buildings in Victoria. There are, of course, various kinds of gardens, such as kitchen or flower, or tree, etc., or nursery, which vary in size and kind in urban or suburban residences, or farms or cattle or chicken ranches, etc.

"Garden" is a wide and historically popular word, and the first one of which we have authentic information, from holy writ, was "planted" by the Almighty, "Eastward in Eden" (ii Gen. 8), and He "took the man, and put him into the Garden of Eden to dress it and to keep it" (15); it was a tree garden, for in it grew "every tree that is pleasant to the sight, and good for food; the tree of life also in the midst of the garden, and the tree of knowledge of good and evil;" nothing else is mentioned as growing in it, and though it was watered by four rivers and guarded by cherubim and a flaming sword, after Adam and Eve were ejected, there is no word of any wall or other inclosure surrounding it.

Second, a difficult question arose under said section 325 of the Municipal Act, B.C. Stats. 1914, Cap. 52, regarding the exception against the resumption of lands "which may be in use as gardens or otherwise for the more convenient occupation of any such buildings. The language is open, doubtless, to extremes of construction in either direction, as illustrated by counsel at the Bar, but broadly and simply it means, I think, that if there are buildings upon "the whole [area] of the lands granted as aforesaid" (here originally 160 acres), which are subjected to the power of resumption, then any part of that land which is "in use as gardens or otherwise for the more convenient occupation of . . . . such buildings" is excluded from resumption.

MARTIN, J.A.

As to whether or not the use of a piece of land as "a garden or otherwise" is a "convenient occupation" in connection with any "building," or the many buildings of a farmstead or otherwise, that is a matter of fact dependent upon the circumstances of each case.

The appeal, I think, should be dismissed.

COURT OF APPEAL

1920

April 6.

CAINE v. CORPORATION OF SURREY

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal raises a very important question in reference to the authority of municipalities, under the Municipal Act (B.C. Stats. 1914, Cap. 52), in respect to the establishment of roads. It would appear that two by-laws were passed by the appellant Corporation, No. 158, entitled the "Wade Road By-law, 1918" (an expropriation by-law), and No. 161, entitled the "Wade Road Resumption By-law, 1918." These by-laws would appear to have been regularly passed, and no proceedings were taken to quash the same (see sections 177, 178, 179 and 181 of the Municipal Act). The learned trial judge, in his judgment, held that, notwithstanding these by-laws, the appellants were trespassers in entering upon the lands, being a strip of land 16½ feet in width, to be used as part of a public road established by the appellants. The usual statutory notices were given, and I cannot see that any valid exceptions have been at all made out as against the by-laws, nor need any of the steps be examined into, save the one question that has been strenuously argued and given effect to by the learned trial judge, and that is that the Wade Road Resumption By-law (No. 161) is illegal, invalid or ineffective in that it offends against section 325 of the Municipal Act, as the area attempted to be resumed is land within the purview of that section and reserved from resumption, the section reading as follows:

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

The learned trial judge granted a perpetual injunction against the appellant, the Municipal Corporation, from proceeding to resume the lands under and pursuant to By-law No. 161 (Wade Road Resumption By-law) and from making and establishing a road designated "the Wade Road," and from doing any act to resume the lands described in the by-law under or in pursuance of section 325 of the Municipal Act. The Municipal Corporation appeals against this judgment and justifies under both by-laws. The learned trial judge, in a considered judgment, gave the following reasons for the conclusion he had come to: [The judgment is here set out in full: see 27 B.C. 23.]

It will be seen that the learned trial judge does not interfere with the expropriation proceedings or attempt to in any way declare their invalidity, and in default of that by-law being declared invalid (it being duly proved), I cannot, with great respect, agree with the learned trial judge in his holding that the appellants were guilty of trespass, as complete justification for entry upon the lands is maintainable under the Wade Road By-law, 1918 (No. 158). It is true that there is apparent inconsistency between expropriation and resumption, yet I know of no authority which prevents justification under either by-law (see *Samson* v. *The Queen* (1888), 2 Ex. C.R. 30 at pp. 32-3; *Dominion Iron and Steel Company, Limited* v. *Burt* (1917), A.C. 179 at pp. 183, 184, 185, 186; also see *Power* v. *Regem* (1918), 56 S.C.R. 499). However, possibly this is not an important matter in view of the opinion to which I have come, and that is, that the Wade Road Resumption By-law (No. 161) is a valid by-law, and completely justifies the entry upon the lands. The expropriation by-law would afford ample justification for the entry upon the lands and the respondent would be left to his remedies under the Municipal Act, which constitutes the code in the matter, and only in exceptional cases does the Court interfere by injunction (see *Corporation of Parkdale* v. *West* (1887), 56 L.J., P.C. 66, Lord Macnaghten at p. 72; *Saunby* v. *City of London Water Commissioners and City of London* (1905), 75 L.J., P.C. 25, Lord Davey at p. 27).

MCPHILLIPS, J.A.

Now, in pursuance of the Municipal Act (section 325), the appellants, the Municipal Corporation, obtained the approval of the resumption by-law. The approval was by order in council, and is in the following terms:

"2015 DEPUTY CLERK: EXECUTIVE COUNCIL.

"CERTIFIED COPY OF A REPORT of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 5th day of July, A.D. 1918.

"TO HIS HONOUR,

"THE LIEUTENANT-GOVERNOR in Council.

"The undersigned has the honour to report for the consideration of the Council:

"Petition from the Council of The Corporation of the District of Surrey for the approval pursuant to section 325 of the Municipal Act of By-law No. 161 of the said Corporation, being a by-law to resume certain lands

COURT OF APPEAL

1920

April 6.

CAINE v. CORPORATION OF SURREY

as therein set out and described, for making and establishing a road designated 'The Wade Road':

"AND TO RECOMMEND that the said by-law be approved in so far as it relates to lands which, in the original grant from the Crown were made subject to a reservation for the purpose of making roads, canals, bridges and towing pathes.

"AND THAT a certified copy of this Minute, if approved be transmitted to McQuarrie, Martin, Cassady & Macgowan, Solicitors for the said Corporation at New Westminster, B.C.

"DATED this 4th day of July, A.D. 1918.

"JOHN OLIVER,
"PRESIDING MEMBER OF THE EXECUTIVE COUNCIL."

With great respect to the learned trial judge, I cannot agree that the lands taken under the Resumption By-law come within the exception as contained in the Municipal Act (section 325). It is common ground that there are no buildings upon the land, and upon no stretch of imagination, with every respect to all contrary opinion, can it be said, upon a perusal of the evidence, that any portion of the land is in use as gardens. I might remark here that the respondent attempted to, and woefully failed, in establishing anything which could justify it being said that there are "gardens" upon the land in question, and it is perhaps unnecessary to in detail refer to this evidence—it could be severely animadverted upon. It is clear that no gardens exist upon the lands. There remains, then, only the consideration whether the land to be resumed can be said to come within the further language of the section (325)—"or otherwise for the more convenient occupation of any such buildings." Nothing has been shewn in evidence to establish inconvenience of occupation in any of the buildings. They can be enjoyed, occupied and made use of, so far as I can see, without any interference whatever; the road does not run between the buildings; there is no severance of the land by the establishment of the road. In truth, I cannot see any foundation whatever for the contention that there would be any disturbance of occupation whatever. There certainly is no present occupation of the land that would be inconvenienced, and the legislation would not appear to be at all addressed to the future, if even future inconvenience could be successfully apprehended. That the right of resumption is absolute cannot be gainsaid. All Crown grants contain the provision which is contained in

MCPHILLIPS, J.A.

the Crown grant which is the root of title to the land in question in this action. It reads as follows:

"PROVIDED NEVERTHELESS, that it shall at all times be lawful for Us, Our heirs and Successors, or for any person or persons acting in that behalf by Our or their authority to resume any part of the said lands which it may be deemed necessary to resume for making roads, canals, bridges, towing-pathes or other works of public utility or convenience; so nevertheless that the land so to be resumed, shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption shall be made of any lands on which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings."

It is not the province of the Court to legislate, and if the intention was that all land within a certain radius of all buildings was to be incapable of resumption, the Legislature could have used apt words to carry out any such intention, but it is not so expressed, and the extent of the inhibition must be gathered from the language alone. It would not be difficult, if one were to embark upon a vision of what would be a possible inconvenience, to so expand the meaning as to render the resumption power absolutely nugatory. The matter is one that calls for the application of principles of construction that are well known, such as would be applied in the construction of any deed or other writing, *i.e.*, a reasonable construction is to be given—the words are to be understood in their plain, ordinary, and popular sense (*M'Cowan* v. *Baine* (1891), A.C. 401, 408). I cannot persuade myself that the learned trial judge arrived at the right conclusion in holding that the particular land in question was in use for the more convenient occupation of the buildings adjacent or near to the established road. It was shewn that the land to be resumed was needed to continue in due course and without a jog the road already existent up to the land in question, and it is reasonable, unless there be intractable statute law to the contrary preventing, that the road should be extended in a direct line. Whilst there may be latitude of construction, the words of the statute (section 325) are subject to the restriction that they in their ordinary meaning carry out the sense sought to be put upon them (*per curiam, Ford* v. *Beech* (1848), 11 Q.B. 852-866). In view of this rule, I cannot, with respect, adopt the view taken by the learned trial judge. Further, it may be said that the words following

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

April 6.

CAINE v. CORPORATION OF SURREY

"gardens" will be construed as only *ejusdem generis* with the word "gardens." In this view, the evidence wholly fails to establish any user which would inhibit resumption. The language of the statute admitting of resumption at large to the extent of one-twentieth of the whole of the lands granted by the Crown grant, save in the excepted cases, and the evidence failing, as in my opinion it does, the establishment of a case within the exception, the argument of inconvenience is without force. If it be that injustice ensues, that is a matter for the law-making authority, not the Court. Upon the facts of the present case I see no evidence whatever of injustice. Roads are essential in the development of any country, and the Legislature, in its wisdom, and with proper regard to economy and future administration, provided for eventualities and safeguarded the municipal authority from undue exactions upon the part of the owners of land for compensation for rights of way for roads. Were this not foreseen, the retarding of settlement would be greater than it now is, and would leave settlers without roads of necessity, owing to the extensive outlay consequent upon expropriation proceedings and purchase of land for road purposes. It may be assumed that roads will not be unduly established, and if established, it reasonably may be assumed as well that they are roads of benefit and advantage to the adjoining lands. The allowance of capricious objection to resumption would be destructive of the declared public policy of the Legislature, and the present action is an objection of that character and is wholly without merit. In these days the municipal corporations have the advice and guidance of competent civil engineers in the laying out of roads, which is also the case in the unorganized sections of the country where the roads are opened up and constructed by the Provincial Government, and there is reasonable guarantee that lands will not be resumed in excess of the statutory reservation in all Crown grants. Of course, if that should be, the Court may always be appealed to in all proper cases, but this is not one of that class. Then it is to be noted that in all cases of resumption there must be obtained the approval of the Lieutenant-Governor in council (section 325), which, as we have seen, was obtained in this case. The

MCPHILLIPS, J.A.

respondent cannot be heard to question the wisdom or necessity for the establishment of the road (see *Wijeyesekera* v. *Festing* (1919), 88 L.J., P.C. 52).

It follows that, in my opinion, the judgment under appeal should be reversed, the action dismissed, and the appeal allowed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *McQuarrie, Martin, Cassady & Macgowan.*

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

RADOVSKY *ET AL.* v. CREEDEN & AVERY, LIMITED.

Contract—Sale of Manchurian white beans—Sale by description—Sample subsequently asked for by purchaser—Bank guarantee for purchase price—Breach—Measure of damages.

The defendants entered into contracts with the plaintiffs to supply "Manchurian white beans hand picked." The defendants in Vancouver were to have the beans brought from Japan and forward them to the plaintiffs in Montreal. Subsequently the plaintiffs asked for a large sample for sale purposes, and the defendants asked for a bank guarantee in Vancouver for the full payment of beans upon shipment from Vancouver, to which plaintiffs replied that the sample must first be obtained. Upon the arrival of a shipment from Japan the defendants would not forward until a bank guarantee for the shipment was obtained, but the plaintiffs demanded that proof of the beans being of Manchurian origin should first be provided their agents in Vancouver; this was never done. The defendants then sold the beans to other parties. The plaintiffs succeeded in an action for damages for breach of contract.

Held, on appeal, affirming the decision of MURPHY, J. (MARTIN, J.A. dissenting), that the sale was by description, the sample subsequently furnished being for sale purposes and not operating in the way of forming a new contract. The contract provided that the beans were to be "Manchurian white beans hand picked." The burden was on the defendants to establish this fact, and having failed in this, they were liable in damages for the difference between the market price of such beans and the contract price at the time of the breach.

COURT OF APPEAL

1920

April 15.

RADOVSKY v. CREEDEN & AVERY

Statement

APPEAL by defendants from the decision of MURPHY, J., reported (1919), 27 B.C. 303, in an action for damages for breach of contract. The plaintiffs, who are merchants in Montreal, entered into two contracts with the defendants, who are commission merchants in Vancouver, for the purchase of beans. The first was on the 17th of November, 1916, whereby the defendants agreed to sell the plaintiffs 115 tons of Manchurian white beans, hand picked, for $7.90 per 100 pounds, shipment from Vancouver in January, 1917; and the second was entered into on the following day for 150 tons at $8.25 per 100 pounds, shipment in December and January following. On the same day the plaintiffs asked the defendants by letter to send a large sample of the beans to be used in distribution for trade purposes. Two days later the defendants wired the plaintiffs asking that their bank wire the defendants' bank in Vancouver, guarantee, in reply to which the plaintiffs wired that they must receive samples for approval before wiring guarantee. Later, however, they agreed by letter to pay for each shipment on arrival in Vancouver and upon approval of their inspectors in Vancouver. The plaintiffs' inspector in Vancouver required proof of the beans being of Manchurian origin. This was not forthcoming, and the result was the beans that arrived in Vancouver were sold to others by the defendants.

The appeal was argued at Vancouver on the 12th and 15th of December, 1919, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Mayers, for appellants: There are three points: (1) whether the contract for sale was by description or by sample; (2) whether the parties acted in such a way as amounted to repudiation; (3) if there was default, whether there was any proper evidence of damages. Originally the purchase was by description, but later the purchasers demanded a sample, which was furnished, and the vendors demanded a credit in Vancouver for the whole of the purchase price, but they did not establish the credit. We advised them we were ready to ship a car, but they would not establish a credit in Vancouver and insisted on acceptance in Montreal. He says origin is the whole matter

in controversy, relying on the commission evidence taken in Montreal, and that no objection was taken on the hearing, but this Court can refuse to accept it: see *Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13; Annual Practice, 1920, p. 1090. If they are entitled to relief, and I submit they are not, the measure of damages is the difference between the market price and the contract price at the date of the breach: see *Allan* v. *McLennan* (1916), 23 B.C. 515.

Griffin, for respondents: The market had been overrun by Burmese beans and dealers were afraid of them as they were dangerous to the health. He says it was a sale by sample by subsequent arrangement, but the evidence does not substantiate this, as the sample was obtained for sales purposes and does not deal with the contract. The whole dispute arose over the question of whether they were of Manchurian origin. On the question of guarantee it does not apply here, as the goods were not sold on a guarantee basis. As to the Sale of Goods Act see Ker & Pearson-Gee, 89; *Nichol* v. *Godts* (1854), 10 Ex. 191; *Peters and Co.* v. *Planner* (1895), 11 T.L.R. 169. On the question of measure of damages see *Brown* v. *Muller* (1872), L.R. 7 Ex. 319 at p. 322.

Argument

Mayers, in reply: The plaintiffs recognized they had to give a guarantee and did give one that was not satisfactory: see *Wright's Case* (1871), 7 Chy. App. 55 at p. 59.

Cur. adv. vult.

15th April, 1920.

MACDONALD, C.J.A.: I agree with the learned trial judge.

Had the origin of the beans, a sample of which was sent to the plaintiffs, been shewn to be Manchurian, I think I should have come to a different conclusion on the question of damages. There would in such case have been no damages, as the evidence shews that in February and March beans answering to sample, but not originating in Manchuria, could be bought for less than the contract price.

MACDONALD, C.J.A.

By arrangement between counsel prior to the trial, the origin of the beans in dispute was not gone into. Now, while I think that the sale was one by description and not by sample,

COURT OF APPEAL

1920

April 15.

RADOVSKY v. CREEDEN & AVERY

MACDONALD, C.J.A.

yet a sample was sent to the plaintiffs, and as I understand the correspondence, the plaintiffs were willing to accept beans answering this sample provided they were shewn to be of Manchurian origin. In other words, while the sale was by description, and while the beans might not answer the description, the plaintiffs had assented to their being taken as answering the description subject only to proof of Manchurian origin, and had that been an issue at the trial, and had it been proven by defendants, I think, on the evidence of plaintiffs' witnesses, Griffiths and Disher, no damages could be recovered.

The defence is that on the evidence and in the circumstances there had been no breach of contract and that defendants were not bound to tender any beans. In this, I think they failed.

MARTIN, J.A.: This case, in the way in which I regard it, is a simple one.

The plaintiffs, carrying on business in Montreal, purchased from the defendants in Vancouver, 265 tons of "Manchurian white beans, hand picked." This was a purchase of chattels by description, but according to the course of the trade, the description was so general that it could be answered by many different varieties of beans. Such a description, as the plaintiffs' expert, Disher, admitted at the trial in answer to the Court, meant practically nothing, because "it might cover seven varieties of beans." This wide choice of beans was a great advantage to the defendants, but that was the bargain. Then the plaintiffs, feeling the business necessity of a more definite description of the beans, in order to re-sell them, telegraphed to the defendants on November 20th, as follows:

MARTIN, J.A.

"Express immediately substantial quantity representing both lots beans. Impossible booking further until we receive samples. Wire if complying."

On the same day the defendants telegraphed in reply:

"Sample expressed tonight. Have your Bank wire Imperial Bank guarantee."

The sample was a 25-pound one, forwarded by the express company, and was received by the plaintiffs about November 28th or 29th. More than a week after these samples had arrived and the plaintiffs had ample opportunity to inspect and test them, they returned, on December 6th, the signed contract,

called "Confirmation Form," duly accepted, which the defendants had forwarded to them for formal acceptance in their letters of November 17th and 18th.

There is no doubt about the reason why the plaintiffs required these sample beans, for it appears by the said telegram and by their letter of November 18th, wherein they say:

"We also desire a large sample of the beans which we require for mailing to our trade and sell the beans if possible to arrive."

So the situation was simply this, that the defendants, knowing the plaintiffs were dealing with the beans, and required a sample for the purposes of the plaintiffs' re-selling contracts, agreed to and did send him the samples, the result being that in such circumstances the defendants and plaintiffs both pinned themselves down to the understanding and agreement that the contract was to be discharged with beans according to the sample furnished. The sale, therefore, by mutual agreement, and to further their individual interests, was changed from one by description to one by sample, and in such circumstances it would be impossible for either of the parties to retire from that position, which, as I have said, was brought to a head when the plaintiffs accepted and returned the contract, which had been kept for consideration pending the arrival of the samples.

MARTIN, J.A.

This disposes of the whole case, in my opinion, and it is unnecessary to consider any other feature of it, as regards bank guarantee or otherwise, because, in my opinion, the minds of the parties were *ad idem* when the plaintiffs returned the formally accepted contract. Either there was no modification of the contract at all between the parties or the original contract was in force, which only called for "Manchurian white beans hand picked," and this loose description, as the plaintiffs' own evidence shewed, as above, could be answered by any one of seven different varieties, including that tendered by the defendants in satisfaction, and, therefore, there has been no breach by them.

It follows that the appeal should be allowed and judgment entered in favour of the appellants.

GALLIHER, J.A.: Upon the hearing I was prepared to dismiss this appeal, and further consideration has not altered my views.

GALLIHER, J.A.

COURT OF APPEAL

1920

April 15.

RADOVSKY v. CREEDEN & AVERY

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: This appeal presents some features of complexity, but, upon a close analysis, I think, upon the facts, was a sale by description. The sample subsequently furnished was not the making of a new contract and a sale by sample but merely indicating the general appearance and size of the beans contracted to be supplied. The fundamental matter, in my opinion, was that the beans were to be Manchurian white beans, and when it was insisted upon by the respondents that what was meant was beans of Manchurian growth and origin, the appellants agreed to this, and promised to establish this fact to the satisfaction of the respondents, which was never done, and in the end the appellants plainly committed a breach of the contract, by repudiating it and failing to supply the beans contracted to be supplied. Mr. *Mayers* very ably, and very persuasively presented the appeal in the light of, first a contract by description, later by sample, with the further term that the respondents were called upon and had agreed to put up a bank guarantee in Vancouver covering the whole amount of the purchase, and that the failure to establish the credit admitted of the appellants repudiating the contract. With deference, I do not consider that position made out. Mr. *Griffin*, in a very careful argument for the respondents, has made it clear to me that the learned trial judge arrived at the right conclusion. It was shewn, on behalf of the appellants, that the description was capable of being covered by no less than seven varieties of beans, and the respondents, feeling in embarrassment, wished a sample, and a sample was furnished, and the contention is that from that time on it was a sale by sample, capable of being completed by the delivery of beans in accordance with sample, and the contention of the appellants was that the breach of contract was on the part of the respondents in refusing to accept beans up to sample. It cannot be gainsaid that what the parties really split upon was the establishment of the origin of the beans, *i.e.*, that the beans were what, in the contemplation of the parties they were contracted to be, "Manchurian White Beans," and, in my opinion, the appellants failed utterly in shewing, upon the facts of the present case, that they were ready and willing at all times to deliver the beans contracted to be

supplied. Then, as to the requirement contended for by the appellants, of a bank credit for the whole purchase price, this is untenable. It never was the contract, it was never the agreement between the parties, it was a demand made by the appellants which the respondents were not called upon to accede to. The correspondence between the parties makes it abundantly clear that although a sample was, after the contract was entered into, furnished by the appellants to the respondents, there never was any receding from the position the respondents always insisted upon, that was, that the beans were to be of Manchurian origin. The appellants did not, when the point was pressed by the respondents that the origin should be established, contend that origin was not a matter of contractual obligation, but explained that, if shewn, it would render them liable to pay duty thereon to Japan, which had not been done. This circumstance, in itself, does not demonstrate a high plane of business morality, and cannot be viewed with other than disapproval by this Court. It does not conform with that comity which should not only exist between nations, but that observance of the law of nations which should always actuate people in business life engaged in foreign trade transactions. There should be probity in this as in all other matters. The discussion of this matter of origin culminated in the appellants writing the respondents the letter of the 2nd of January, 1917, which reads as follows:

"We are today in receipt of your favour of the 26th ultimo, and note with pleasure that you are quite willing to accept beans like sample which we sent you which are Manchurian hand picked small white beans.

"We wrote you some days ago in connection with this matter and at that time we explained to you why we did not want to acquaint the customs with the fact that these beans came from Manchuria, however, we have gone into this matter rather fully and we find that the duty on beans coming into Japan from Manchuria is very small and we will only have to pay duty on the amount of the Japanese duty which amounts to about $1.50 per ton and we have decided that we will absorb this ourselves and on all shipments coming in we will prove that the country of origin is Manchuria. We cannot only prove it in this manner but also through correspondence and we think that everything will be to your entire satisfaction.

"Apparently from your letter you are afraid of getting some beans that will not cook, no doubt having in mind the old Rangoon beans which caused so much trouble throughout the Dominion a few years ago. Now we assure you that we know all about the old Rangoon beans and that we would not handle them under any circumstances. We have sold thousands of tons

COURT OF APPEAL.

1920

April 15.

RADOVSKY v. CREEDEN & AVERY

of these Manchurian small white beans and they have given every satisfaction.

"The trouble is that the bean originally was a Rangoon bean that has been grown in Manchuria by the Japanese. They are called under several names, some people call them Burma, some Chenson and some call them Indian. We much prefer to call them Manchurian small white beans as we think it gets away from any thoughts of the old Rangoon bean.

"We expect that we will be shipping you the first part of your order within the next couple of weeks; we therefore ask you to instruct Messrs. Martin & Robertson to be on hand to make the examination."

Later we have the letter of January 10th, 1917, from the appellants to the respondents, which reads as follows:

"We are today in receipt of your night lettergram of the 9th instant, and are very much surprised at your action in trying to cancel part of your contracts, and as stated in our previous letters our contracts are very clear and if it really came to a 'show down' we are not compelled to adhere to your wishes and prove the origin of these beans, however, to facilitate matters we are prepared to lose a little money and pay the extra duty which we are compelled to and prove to you beyond a doubt that these beans are the product of Manchuria. We fully expect you to take the full delivery and to arrange with Messrs. Martin & Robertson to give the necessary documents so as our drafts can be paid here.

"We regret any trouble or inconvenience that has been caused but cannot see that the fault lies with us and all we want to do is to carry out our part of the contract and to adhere to your wishes as far as it is possible to do so.

"We expect to receive a wire from you stating that everything will be satisfactory. We do not wish to have any hard feelings or to take any drastic steps to protect our interests."

MCPHILLIPS, J.A.

Then there was a telegram also on this date from the appellants to the respondents, which reads as follows:

"Can accept no cancellation of any part of your contracts. We are prepared to prove beyond a doubt the origin of the beans. Expect to be making shipment your first hundred and fifteen tons latter part of this month."

Finally the appellants sent to the respondents the following night lettergram and letter, which constituted the repudiation upon the appellants' part of the contract. They read as follow:

"February 5, 1917.

"You have not replied our letter tenth January nor have you put up Bank guarantee covering your full purchases. We will not ship any part your orders until you advise you are going to accept your full purchases and put up bank guarantee covering them fully. This is final."

"February 7, 1917.

"Herewith we enclose you confirmation of our night lettergram of the 5th inst., and as we have not heard anything further from you in connection with this matter we take it for granted that you are not going to comply with our request and we are therefore reselling the beans and as far as we are concerned the matter is closed."

It might rightly be said that the appellants were wrong in two particulars—there was failure in proving the origin of the beans, and an unwarranted demand for a too extensive bank guarantee. Certainly, if there should be any doubt about the appellants being required to prove origin of the beans, there is no shadow of a doubt that a bank guarantee covering the whole purchase price was not a matter of contract. The term of contract with respect to payment was "Payment cash in Vancouver." This is clear from the terms of contract as confirmed and accepted, which reads as follows:

"Messrs. The Universal Importing Co.,
"Montreal, Que.

"We confirm having sold you the following goods: 115 tons Manchurian White Beans hand picked packing in 100 lb. bags gross for net $7.90 per 100 lbs. F.O.B. cars duty and war tax paid Vancouver. Confirming our acceptance of today of your firm order of today. Shipment from Vancouver in January, 1917. Delivery on arrival. Payment cash in Vancouver. Terms net.

"ACCEPTED
"Universal Importing Co.
"A. S. Radovsky."

"TERMS OF SALE

"1. Any alteration in the import duty or other taxes that may be made subsequent to the date of this acceptance to be for buyer's account.

"2. Subject to any changes in insurance or freight rates effective at time of shipment.

"3. In the event of shipment or delivery of the goods or any portion thereof being delayed by causes beyond seller's control, known as 'Force Majeure,' no liability to attach to sellers, and the time for the shipment or delivery to be extended accordingly.

"4. Any claim for alleged damages, difference in quantity, quality, specification, etc., to be notified to the sellers within 48 hours after tendering delivery.

"5. In the event of goods or any part of them being lost at sea, or destroyed before delivery, the sale to be void to the extent of such portion as may be lost or destroyed.

"6. If requested by purchaser, the seller shall provide a certificate, attested before competent authority, to cover the conditions appearing in clauses 2 and 3.

"CREEDEN & AVERY, LTD.
"Per M. Avery."

MCPHILLIPS, J.A.

It is a matter for remark also that it would seem that even apart from the failure to prove the origin of the beans, the appellants failed to deliver beans in accordance with the sample. It is idle to contend that the sample agreed to be furnished was in any way linked up with or formed the consideration for the

COURT OF APPEAL

1920

April 15.

RADOVSKY v. CREEDEN & AVERY

giving of a bank guarantee for the full purchase price. It is only necessary to refer to the two following telegrams as indicating what the extent of the bank guarantee was to be:

"Montreal, Que.,
"November 29, 1916.

"Creeden & Avery, Limited,
"Vancouver, B.C.

"Bank would guarantee for payment of individual shipments at Vancouver provided certificate of inspection would be attached to documents your offer Blue Peas Daifucu Beans too high for this market quote Kumamoto White Beans earliest shipment.

"Universal Importing Co."
"November 30, 1916.

"Universal Importing Company,
"Montreal, Que.

"We will attach Government inspection certificates to all drafts. Have your Bank wire Bank guarantee to Imperial Bank Vancouver at once. We offer subject to being unsold further hundred tons May June from Japan seven seventy-five fob cars Vancouver. Wire promptly as these are under offer elsewhere.

"Creeden & Avery, Ltd."

In this connection also it is to be noticed that when the bank guarantee for the full purchase price was called for, the respondents immediately disagreed with the contention made, and wrote a letter in the following terms:

"We beg to acknowledge receipt of your letter of the 9th inst., and contents noted.

MCPHILLIPS, J.A.

"Referring to your last paragraph, where you state that we make arrangements for credit to cover the balance of our order, as these were the terms, you state the goods were sold at. If we remember right your terms were payment cash against documents in Vancouver, which we will abide by.

"It appears to us that there is no necessity in tying up $50,000 now, when payments are to be made only when the goods arrive in Vancouver. We will pay for each shipment as it arrives, after same has been inspected, according to previous arrangements, by the firm of Martin & Robertson.

"We are, however, not very well satisfied in noting that you are shipping only seven hundred and fifty bags at present, as it will then leave too many bags for one shipment in January. You will please let us know more definitely, how many shipments we are to expect and the quantity of each. We would prefer if the entire lot could be divided into three shipments of equal quantities, at intervals of three weeks."

Then there was an interval of time of some forty days, then followed the telegram of the 26th of January, 1917, demanding credit for entire purchase price. This telegram reads as follows:

"Universal Importing Company,
"Montreal, Que.

"We will give you the desired information immediately we have your assurance that you will take your full order and that a confirmed bankers' credit is established covering your entire purchase, otherwise we refuse to ship you any part of your order. Up to the present we have received no reply to our letter tenth.

Creeden & Avery, Ltd."

In passing, it may be said in the interval of time—the forty days—the bank guarantee limited to each shipment had been supplied, and the appellants had billed through to the respondents a car of beans.

Unquestionably there was failure upon the part of the appellants to comply with the terms of the contract in the supply of the beans contracted for, and it is clear that the beans loaded at Vancouver and passed upon by Messrs. Martin & Robertson for the respondents were rightly rejected by the respondents as not being in compliance with the contract (see *Peters and Co.* v. *Planner* (1895), 11 T.L.R. 169, 170). There was clear and apparent failure upon the part of the appellants to carry out the contract, to be followed later by the quite unjustifiable repudiation of contract. The result in law, of course, must follow, that is, the respondents are entitled to damages for the breach of the contract (R.S.B.C. 1911, Cap. 203, Sec. 65(3)).

MCPHILLIPS, J.A.

Now the question is, were the damages rightly assessed? I cannot see any error in the method of assessment adopted by the learned trial judge. In *Brown* v. *Muller* (1872), L.R. 7 Ex. 319 at p. 321, the principle is stated by Kelly, C.B.:

"Now the proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed."

The manner in which damages have to be assessed, and the assessment of them generally, received consideration by Lord Moulton in *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309.

It follows that, in my opinion, the judgment of Mr. Justice MURPHY should be affirmed, that is, that the appeal should be dismissed.

Appeal dismissed, Martin, J.A. dissenting.

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

COURT OF APPEAL

1920

May 12.

BANK OF VANCOUVER v. NORDLUND

BANK OF VANCOUVER v. NORDLUND *ET AL.*

Practice — Appeal — Order whether final or interlocutory — Order setting aside the writ and judgment—Marginal rule 648a.

A final order is one made on such an application or proceeding that for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation.

An order setting aside the writ and the judgment signed in default of appearance in an action against a partnership firm is an interlocutory and not a final order.

APPEAL by plaintiff from an order of MORRISON, J., of the 4th of February, 1920, setting aside the writ and judgment signed in default of appearance in an action against a partnership firm on the ground that the case was not within marginal rule 648a. The appellant sought to give, without special leave, further evidence, as upon an appeal from an interlocutory order under marginal rule 868. The respondent contended that the order appealed from was final and not interlocutory. The order in question set aside not only the judgment which had been entered in default of appearance by the members of the partnership, but also set aside the writ of summons itself.

Statement

The appeal was argued at Vancouver on the 12th of May, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant.

R. M. Macdonald, for respondents, raised the preliminary objection that the appeal was not an interlocutory one, since it was an appeal from an order necessarily final. The order not only set aside the judgment, but also set aside the writ of summons and, therefore, the whole matter is finally disposed of and the rights of the parties definitely determined: see *Bozson* v. *Altringham Urban Council* (1903), 1 K.B. 547; *Isaacs & Sons* v. *Salbstein* (1916), 2 K.B. 139. These cases overrule *Salaman* v. *Warner* (1891), 1 Q.B. 734, which will be relied upon by the other side.

Argument

Mayers: It is true that *Salaman* v. *Warner* has been adversely commented upon in *Bozson's* case, cited by the respondents, but the principle in *Salaman* v. *Warner* has been accepted by this Court, and that principle is therefore not affected by subsequent variations of the practice of the Court of Appeal in England. *Salaman* v. *Warner* was followed in *Ward* v. *Clark* (1895), 4 B.C. 71; *Edison* v. *Edmonds* (1896), *ib.* 354; *Koksilah* v. *The Queen* (1897), 3 B.C. 600 at p. 605; *Chilliwack Evaporating & Packing Co.* v. *Chung* (1917), 25 B.C. 90; (1918), 1 W.W.R. 870. The principle, therefore, is too well established by its acceptance in this Court to be shaken by vacillations in the practice of the Court of Appeal in England, and, judged by that principle, the order under appeal is clearly not final, since if the application upon which that order was founded had been refused, the rights of the parties would not necessarily have been finally determined. For instance, the order might simply have set aside the judgment and allowed the parties to proceed with the action.

Argument

MACDONALD, C.J.A.: In my opinion the order is an interlocutory one. It is conceded by Mr. *Macdonald,* quite properly, that but for the mere circumstance of there being a judgment which is capable of being set aside, the order may clearly be an interlocutory order. That is to say, if judgment had not been entered in the action by default, and a motion had been made to set aside the writ, Mr. *Macdonald* concedes that that order would be an interlocutory order. Starting from that common ground between the parties, what difference does it make as to the nature of that order, that there happens to be a judgment which is not final, that is, a judgment which, under the rules, can be set aside in the very Court in which it was obtained. To my mind it makes no difference. If it did, we would have this extraordinary result. If in this case, where the notice of motion was not only to set aside the writ, but to set aside the judgment, the Court had refused to set aside the writ and then proceeded to dispose of the motion to set aside the judgment, there would be some moments during which that order to set aside the writ would be final, but the moment the order to set aside the judgment was made it would be inter-

MACDONALD, C.J.A.

COURT OF APPEAL

1920

May 12.

BANK OF VANCOUVER v. NORDLUND

locutory. Such a result would be absurd. One must test the question as to whether the order, either setting aside or refusing to set aside the writ is final, and one way to test it is to consider whether it will be final without reference to something else which may affect it. In this view of the case, I think the order was an interlocutory order and Mr. *Mayers* is entitled to that benefit.

MARTIN, J.A.

MARTIN, J.A.: I agree that this is an interlocutory order, and that view is very largely supported by the decision in the case of *Chilliwack Evaporating & Packing Co.* v. *Chung* [(1917), 25 B.C. 90].

GALLIHER, J.A.

GALLIHER, J.A.: I must say that I sometimes experience considerable difficulty in arriving at a conclusion as to what is really a final order and what is an interlocutory order under certain conditions, but I think the reason the Chief Justice has given is pretty conclusive, and I agree with him that it is an interlocutory order.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The point is left in a considerable maze, but I think the best way to dispose of the matter, when it gets into that condition, is to understand what our basic jurisdiction is, and that is the administration of justice. And when I find, as in this case, that there has been nothing determined, and the point of law raised is not a disposition of the rights of the parties, because that question is still to be litigated, it would seem to me it would be a scandal in our jurisprudence if proceedings such as these were held to be final and impossible of change or alteration. Every aspect is interlocutory.

Preliminary objection dismissed.

Solicitors for appellants: *Taylor, Mayers, Stockton & Smith.*
Solicitors for respondents: *Bird, Macdonald & Co.*

WILGRESS v. RITCHIE.

BARKER, CO. J.

1920

Jan. 27.

COURT OF APPEAL

April 29.

WILGRESS v. RITCHIE

Animals—Wanton abuse and maltreatment of dog—Sheep Protection Act—Dog unlicensed within sheep protection district—Gross cruelty—Construction of statute—B.C. Stats. 1917, Cap. 57, Sec. 3.

Section 3 of the Sheep Protection Act cannot be invoked by the defence in an action for damages for the wanton abuse and maltreatment of an unlicensed dog within a protected district resulting in the dog's death, where such act is not *bona fide* and within the intention of the statute. In a case where two constructions may be put upon a statute, one reasonable and the other unreasonable, the Court will give effect to the former and have regard to the intention of the Legislature in passing the Act.

APPEAL by plaintiff from the decision of BARKER, Co. J., in an action tried by him at Nanaimo on the 26th of November, 1919, for $250 damages for beating, abusing and injuring a bitch at Northfield, B.C., in consequence of which the animal had to be destroyed. The dog, being a valuable bench animal and unlicensed under the Sheep Protection Act, strayed from the plaintiff's residence across the road into the yard of the defendant, who, taking it by the collar, beat it with a heavy stick, breaking a bone in one of its hind legs and inflicting other severe wounds. He then let the animal go, throwing stones at it as it ran home. It received the attention of a veterinary surgeon, but two weeks later had to be destroyed. The defendant, on the trial, amended his dispute note by pleading section 3 of the Sheep Protection Act, Northfield being within a sheep district.

Statement

V. B. Harrison, for plaintiff.
Cunliffe, for defendant.

27th January, 1920.

BARKER, Co. J.: I find as a fact that defendant was the cause of the injury to the dog, on account of which it had to be killed. Value of dog is $250. I find that defendant is protected by the Sheep Protection Act, B.C. Stats. 1917, Cap. 57, Sec. 3. Although he did not kill the dog outright, or possibly did not intend to kill, it seems to me that that section,

BARKER, CO. J.

BARKER, CO. J.

1920

Jan. 27.

which protects a man for killing a dog outright in a sheep district, will protect him for a less injury which may not kill the dog outright.

COURT OF APPEAL

April 29.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 29th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

WILGRESS v. RITCHIE

V. B. Harrison, for appellant: The defendant denies doing the act complained of, and although the evidence shews there were no sheep at or near Northfield, and the defendant does not attempt to maintain that there were, he nevertheless pleads section 3 of the Sheep Protection Act. We say, first, that the Act does not give the right to kill unlicensed dogs regardless of circumstances, and as sheep were not in jeopardy in this case, the Act does not apply. Secondly, even if he were entitled to kill the dog, he did not do so, but proceeded to abuse and maltreat it by beating and stoning it to such an extent that it had to be killed. Thirdly, he swore he was away and knew nothing about the dog. To be protected by the Act after his so swearing would be placing a premium on perjury: see *Adcock* v. *Murrell* (1890), 54 J.P. 776.

Argument

Cunliffe, for respondent: Section 3 of the Act provides that any person may kill any dog which he finds within any portion of the Province to which the Act applies if there is not attached to its collar a licence-tag. This gives an absolute right to kill, and there is no prescribed method. The greater offence of killing would include the lesser of wounding. Northfield is a protected district. Section 4 of the Act provides that the Act may be pleaded in an action for damages. It is not necessary, in order to excuse the defendant, to prove there were sheep there or that he acted in the premises to protect sheep; the Act gives an absolute right to kill an unlicensed dog regardless of circumstances.

Harrison, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. This is one of the most painful cases that has come before this Court in a long time. It would indeed be a very great pity if a man could

be allowed to wantonly abuse in a most brutal fashion any dog which does not carry a tag. Here the man who committed this brutality pledged his oath in the box that he was not there at all, did not do it at all, although other witnesses saw him do it. It would indeed be unfortunate if people were encouraged in the belief that they could do such things and escape penalty. Apart from the criminal law, fortunately there is the civil law which provides a remedy for persons suffering loss. The dog was found to be worth $250 by the learned judge below, and there is no reason why the plaintiff, who suffered that loss, should not have that amount made good by the defendant. He is not entitled to any sympathy whatever, in my opinion, whether his prosecution be criminal or civil. No doubt a person is entitled in some circumstances to kill a dog within a sheep district. If the dog were chasing sheep, for instance, no one would question his right, but this man did not do it from a sense of duty or in good faith. He did it wantonly, contrary to the letter of the law, and contrary to the spirit of the law. He must therefore suffer the consequences by paying the judgment of $250, with costs here and below.

MACDONALD, C.J.A.

MARTIN, J.A.: I base my judgment upon the legal principle that where there are two constructions of a statute open, one reasonable and the other unreasonable, it is our duty to give effect to the former. This is an Act for one specific purpose, that is to say: for the better protection of sheep. In my opinion it cannot be invoked for the destruction of dogs thereunder unless the act complained of is done under a *bone fide* conviction within the intention of the statute. In other words, a statute for the protection of sheep cannot be converted into a statute for the perpetrating of brutality. I am not at all in sympathy, however, with people who allow dogs to run about, chasing and destroying sheep. In this case I agree that the judgment below should be vacated and judgment entered for the plaintiff.

MARTIN, J.A.

GALLIHER, J.A.: I would allow the appeal and enter judgment for the plaintiff for the amount claimed. I quite agree with the remarks of the Chief Justice in regard to the wanton

GALLIHER, J.A.

BARKER, CO. J.

1920

Jan. 27.

COURT OF APPEAL

April 29.

WILGRESS v. RITCHIE

cruelty which the evidence discloses in this matter before us. I want it distinctly understood that I am fully in accord with what has been said.

McPHILLIPS, J.A.: I am of opinion the appeal should be allowed. In allowing the appeal and reversing the judgment of his Honour Judge BARKER we are only reversing his opinion on a question of statute law, not upon the facts. In regard to the statute (it is called the Sheep Protection Act), I am entirely in agreement with what my brother MARTIN has just said. We must pay attention to the intention of the Legislature. It is not to be forgotten, as Jessel, M.R. said in *In re Bethlem Hospital* (1875), L.R. 19 Eq. 457 at p. 459:

"Such a thing as construing an Act according to its intent, though not according to its words."

This appeal brings to the attention of the Court a wanton and cruel beating and maiming of a dog, a despicable act against all proper instincts of humanity, and it is attempted to get shelter and immunity by pleading a statute designed to protect sheep, but here we have no evidence whatever that the plaintiff was in the act of protecting sheep or even that in contemplation. It is idle to say that the plaintiff's cruelty can be excused in this or any other way.

MCPHILLIPS, J.A.

In *The Duke of Buccleuch* (1889), 15 P.D. 86 at p. 96, Lindley, L.J. said:

"You are not to attribute to general language used by the Legislature, in this case any more than any other case, a meaning that would not only carry out its object, but produce consequences which to the ordinary intelligence are absurd. You must give it such a meaning as will carry out its objects."

You must give it a meaning consistent with the objects Parliament intended.

I agree with what the Chief Justice has said, that this is one of the most painful cases that has come before this Court, and I trust the annals of the Court will never again contain such a painful case.

Appeal allowed.

Solicitor for appellant: *V. B. Harrison.*
Solicitor for respondent: *F. S. Cunliffe.*

WELCH v. SCOTT.

COURT OF APPEAL

1920

April 26.

WELCH v. SCOTT

Conversion—Carriage of goods—Haulage charges—Possessory lien—Where possession parted with—Local custom.

The defendant hauled a piano, under contract, from one house to another. He took the piano from the dray on a piano-truck into the house, left it in a room and brought the truck back to the verandah when a dispute arose as to carriage charges. He then went back into the house and placing the piano on the truck took it away claiming a possessory lien on the piano for his charges. An action for wrongful conversion was dismissed.

Held, on appeal, reversing the decision of GRANT, Co. J., that the defendant lost his lien when he parted with possession of the piano and he cannot by retaking it become again vested with the lien.

APPEAL by plaintiff from the decision of GRANT, Co. J., dismissing an action for wrongful conversion. The plaintiff hired the defendant to move furniture, including a piano, from her former residence in Point Grey to a new place about five blocks distant. The piano was taken from the dray into the new house on a piano-mover and left in a room, the piano-mover being taken out and left on the verandah. A dispute then arose as to the amount to be paid for removal of the furniture and the defendant brought back the piano-mover from the verandah and removed the piano, claiming a possessory lien on the piano for the amount claimed. The plaintiff claimed the charge arranged for was $3.25 per hour for actual service in carrying goods, whereas the defendant claimed the service was to count from the time the team left the barn until its return. The piano was held for a charge of $14. The defendant claimed there was a recognized usage or custom in his business prevalent in the locality that if the claim for carriage is not paid, the carrier is entitled to claim a possessory lien on one or more of the articles carried. The learned trial judge dismissed the action.

Statement

The appeal was argued at Vancouver on the 26th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

COURT OF APPEAL

1920

April 26.

WELCH v. SCOTT

Mellish, for appellant: The distance was five blocks and they wanted to charge $14. My submission is they had given up possession. In order to have a possessory lien they must be in actual and lawful possession: see Hall on Possessory Liens, 22 and 23; Halsbury's Laws of England, Vol. 19, p. 29, par. 46. The contract had not been concluded when the piano was taken: see Halsbury's Laws of England, Vol. 19, p. 3, par. 3.

Argument

Dickie, for respondent: There are two questions: first, proof of local usage or custom that he had a lien on the goods, which was proved; second, the right to retention under the lien, the submission being the piano was never delivered: see *Wilson* v. *Kymer* (1813), 1 M. & S. 157; Halsbury's Laws of England, Vol. 19, p. 6.

Mellish, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. I am not going to put it upon the ground of this so-called local usage, which, as my learned brother GALLIHER expressed it, might be better called a local combination. I am going to put it upon the other ground, that assuming there was such a usage, still, the possession was parted with by the truck-owner, who cannot retake possession or become again vested with the lien which he lost, having parted with possession of the article. But Mr. *Dickie* complains that because the evidence in the Court below is not before us, he is at a very great disadvantage. If I thought that that was really so, that the interest of his client was prejudiced, I should be very loath indeed to allow this appeal, but when we consider that there is assumed in his favour the existence of local usage contended for (which I should properly characterize as absurd if I were called upon to express an opinion of it), and we find in the dispute note his client's account of what happened when the piano was delivered at the house, no injustice, I think, need be feared. He cannot complain if we take his own statement of what took place. It is suggested that this has been supplemented by evidence, but it could not be supplemented without amendment, and no amendment has been made. On looking at his own dispute note, I would draw the inference that if he had such a lien as he claims, he lost it by losing pos-

session of the piano, which he cannot retake afterwards. On that ground I would allow the appeal. Costs follow the event.

I want to add this, that it would, under ordinary circumstances, be a scandal that a case involving only $14 should come before this Court, but there is in this case some justification, perhaps, because of the high-handed manner in which the respondent took the goods of the appellant and carried them away.

There will be an order for a new trial on the question of damages for conversion. We have already declared there was a conversion. That is not open on the new trial.

MACDONALD, C.J.A.

MARTIN, J.A.: I am of the same opinion. I simply add that no application to amend was made. The defendant's admission stands, and on that admission I think he is out of Court.

As to this usage among truck-owners, who claim a lien on goods moved, that does not come before this Court, but I think that "absurd" would be a mild term to apply to it.

MARTIN, J.A.

GALLIHER, J.A.: I would allow the appeal. I would allow it on the ground that there was no lien, never was a lien. If a dozen or a hundred persons can come together and create a lien by some secret arrangement among themselves which the public know nothing about, then there would be no need for legislation along such lines. There not having been a lien, it could not very well be lost.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I think the appeal should be allowed. Upon the statement of facts no lien was sustainable. That being the case, the learned judge in the Court below, with all deference, should not have held that a lien existed. Claims by way of lien must always be treated *strictissimi juris,* and certainly the conduct of the defendant is not to be commended, and might well have given rise to a breach of the peace.

MCPHILLIPS, J.A.

Appeal allowed.

Solicitor for appellant: *A. J. B. Mellish.*
Solicitor for respondent: *E. A. Dickie.*

COURT OF APPEAL

1920

April 27, 29.

CAMPBELL v. CLEUGH

CAMPBELL v. CLEUGH.

Judgment—Wages—Preference claim—Execution Act, R.S.B.C. 1911, Cap. 79, Sec. 7.

Parties — Application to add — Moneys under execution paid over before judgment.

H. C. obtained judgment against a mining company, execution issued and the sheriff went into possession. J. C., a labourer, then applied for an order under section 7 of the Execution Act that $310, due him for wages be held by the sheriff in preference to the claim of the execution creditor. Owing to J. C. having charged in his account for the days on which he attended as a witness for his employer on the trial brought by H. C. his evidence was discredited and his application refused.

Held, on appeal, MCPHILLIPS, J.A. dissenting, that there was error in making the fact that the wage-earner claimed wages while attending as a witness for his employee, a basis for discrediting his evidence, that there was ample evidence that he was employed and performed the services as claimed and was entitled to the preference given by the Act.

The moneys were in the hands of the sheriff for distribution when the application under section 7 of the Act was made in the Court below. Upon its dismissal an application for stay was refused and the sheriff paid over the money to satisfy H. C.'s judgment before the hearing of this appeal.

An application that a term be inserted in the judgment that H. C. repay the money to the sheriff was refused.

APPEAL from an order of RUGGLES, Co. J., of the 18th of February, 1920, dismissing an application by one Campbell, a wage-earner, under section 7 of the Execution Act. In March, 1919, one Cleugh brought action against the Placer Development Company and obtained judgment. Execution issued and the sheriff of the County of Yale went into possession of the Company's property on the 7th of June, 1919. Campbell claimed he entered the employ of the defendant Company on the 1st of December, 1918, and $310 was due him in wages from the 20th of March, 1919, to the 7th of June following, when the sheriff went into possession. The learned trial judge held that as Campbell claimed wages for certain days in March when he was attending the trial of Cleugh against the Company

Statement

in Vancouver as a witness for the defence, his evidence should not be believed, and dismissed the application. Campbell appealed.

The appeal was argued at Vancouver on the 26th and 27th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Housser, for appellant: We are entitled to preference under section 7 of the Act. The evidence establishes Campbell was hired for this work and performed it. The fact that he was at a trial as witness for his employer should not deprive him of payment and is not a ground for disbelieving him.

Argument

Bucke, for respondent: That Campbell attended a trial was not the only ground upon which the learned judge concluded he should not be believed. This is a clear case where the judge's finding on the evidence should not be disturbed by the Court of Appeal.

MACDONALD, C.J.A.: The appeal should be allowed. With every respect for the learned County Court judge, I think he took an entirely erroneous view of this case. There seems to be no question on the evidence that this plaintiff was engaged by the Company as a watchman to look after a mining property, which was not being operated in the winter owing to the depth of snow and the conditions of the weather, and that he was promised $5 a day for each day spent on the property, or in connection with his employment. Now it is suggested that the claim which he is now making is a fraudulent claim. The employer admits the justice of the claim. He admits that this man was engaged as stated; that he made his reports from month to month of the number of days he worked; there is no dispute between the employer and the employee that he had earned the money which he is claiming. That being so, the only possible ground of objection in a proceeding of this kind, where the employee claims a preference under the Execution Act, the only possible defence that could be set up to that, or at least, the only defence that could be set up on the facts of the case, is that his claim is a fraudulent claim. There are some discrepancies in his evidence, it is true. But

MACDONALD, C.J.A.

COURT OF APPEAL

1920

April 27, 29.

CAMPBELL v. CLEUGH

that is one of the ear-marks of truth. A well-told tale would contain very few discrepancies, but a truthful witness will very often make some apparent contradictions. In respect of these discrepancies there has been no opportunity given him to explain. If it were really intended to drive home the charge of fraud, one would expect counsel to cross-examine accordingly and make good the charge, which in this case has not been done. The mere fact that this person was a witness here for two or three days, during which time he is claiming wages, is not at all remarkable. The learned judge was, I think, in error in making that fact the basis of his judgment. But even if it were admissible, and even if it were in evidence—which it is not—I see no reason why an employee should not be paid his wages while he is attending Court as a witness for his employer.

MACDONALD, C.J.A.

Looking at the whole case as I have endeavoured to view it, there does not seem to be any doubt (and there is no doubt in my mind) that the claim is a just claim and the applicant is entitled to the preference under the Act, which he claims in his proceedings.

MARTIN, J.A.

MARTIN, J.A.: I agree.

GALLIHER, J.A.

GALLIHER, J.A. agreed in allowing the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same view. We are in as good a position as his Honour was in the Court below to determine this question upon discovery evidence taken before the registrar, not before the learned judge.

As far as I can see from the record before me, this man was an employee of the Company. The Company must do its business. It employed this man, admits it owes these wages to him; a very strong case would have to be made to displace that. To think that the Company would enter into a fraudulent conspiracy with this man whereby his wages should be stated at an improper figure, so as to embarrass this judgment creditor, is a deduction which it is impossible to draw from the evidence we have before us. The appeal should be allowed. The wages constitute a prior claim by virtue of the statute and *pro tanto* displace the debt of the judgment creditors.

EBERTS, J.A.: I have nothing to add to what has been said by my learned brothers, and I would allow the appeal.

Appeal allowed.

COURT OF APPEAL

1920

April 27, 29.

CAMPBELL v. CLEUGH

MOTION to the Court of Appeal by the appellant that a term be added to the order of the Court that the moneys that had been in the hands of the sheriff under the execution and were paid by him to Cleugh upon dismissal of the motion from which this appeal was taken, be refunded to the sheriff. Heard on the 29th of April, 1920, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Statement

Housser, for the motion: The moneys were in the sheriff's hands under the execution in the Cleugh action when I moved in this matter. When judgment was given against me I applied for a stay but this was refused, and the moneys were paid by the sheriff to Cleugh. My submission is I should have judgment against Cleugh: see *Davies* v. *McMillan* (1893), 3 B.C. 72; *Rodger* v. *The Comptoi D'Escompte de Paris* (1871), L.R. 3 P.C. 465; 40 L.J., P.C. 1.

Argument

Bucke, contra.

MACDONALD, C.J.A.: I think the motion must be dismissed. This case comes before us to settle the judgment, seeking to get a term inserted that the money be repaid to the sheriff, or rather, asking that the money be repaid to the plaintiff, whose money it is not at present.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree.

MARTIN, J.A.

GALLIHER, J.A.: I would come to the same conclusion, for reasons which have been stated during the argument. I do not want to give advice to counsel, but it does seem to me that the parties can save themselves expense of further litigation by realizing the position of affairs.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of opinion that the order should be made. The Legislature has laid down in no uncertain terms what is the policy of the law where there are wages due within

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

April 27, 29.

CAMPBELL v. CLEUGH

MCPHILLIPS, J.A.

the purview of the statute. The claims for wages have a preferential position, and the fund is a fund to first satisfy the claims for wages.

This Court has held that the money is the money of the wage-earner. Now it is suggested that this Court is powerless to effectuate its judgment. The result would be that this wage-earner, by the procedure adopted, loses his just claim. I cannot agree that the Court is powerless. It is the duty of the Court to see that no injury is occasioned suitors, and there is the highest authority, notably the Privy Council, to that effect. The order made below and acted upon, paying the money out to the solicitor, is one I cannot approve. Further, we have before us now the solicitor (acting in his capacity as counsel) to whom the money was paid. It is fitting, in my opinion, to enquire of counsel if the money has been paid over. Here an act of the lower Court has taken place which defeats the wage-earner in his priority of right which Parliament has given him. Two things have been done here which should not have been done. One is the improper order, *i.e.*, the manner in which the money was paid out of Court, and the other is that under the frame of the order an officer of the Court received the money and we do not know whether the money has been paid over or not, and upon these facts it is suggested that the Court is powerless in the matter. In my opinion, we should order the money to be restored. It is deplorable, with all respect to contrary opinion, that the resultant effect is that no order for restitution issues. Such an order, in my opinion, is not only permissible, but in the furtherance of justice, and the order should, in my opinion, make all proper directions for restitution of the money paid out, and when paid back and into Court the money would rightly be payable out to the wage-earner, the sole established claim.

EBERTS, J.A.

EBERTS, J.A. would dismiss the motion.

Motion dismissed, McPhillips, J.A. dissenting.

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

Solicitors for respondent: *H. W. Bucke & Co.*

IN RE IMMIGRATION ACT AND SANTA SINGH.

COURT OF APPEAL

1920

April 27.

IN RE IMMIGRATION ACT AND SANTA SINGH

Domicil—East Indian—Domicil of origin—Acquiring fresh domicil in Canada—Return to place of original domicil for five years—Return to Canada—Immigration Act—Deportation—Can. Stats. 1910, Cap. 27, Sec. 2; 1911, Cap. 12, Sec. 1; 1919, Cap. 25, Sec. 2, Subsec. (1) (iii).

One, Santa Singh, an East Indian, came to British Columbia in December, 1907, leaving his family in India. Shortly after his arrival he started working in a sash and door factory where he remained until he returned to India in October, 1914, having acquired some property in the meantime. He went to India to attend the wedding of his son, intending to remain for about a year and a half, but his son's fiancee died before he arrived and owing to war conditions, his family required his assistance, and he did not return to Canada until the 20th of October, 1919. The Board of Inquiry under the Immigration Act, after a hearing, decided he had lost his Canadian domicil under subsection (1) (iii) of section 2 of the 1919 amendment to the Immigration Act, as he had resided out of Canada for a year before his return and ordered his deportation. An application for a writ of *habeas corpus* was dismissed.

Held, on appeal, reversing the decision of MORRISON, J., that the 1919 amendment of the Immigration Act which was assented to on the 6th of June, 1919, is not retrospective or retroactive and as Santa Singh returned within one year from the passing of the Act the section does not apply and he should be released.

APPEAL by Santa Singh from the order of MORRISON, J. of the 21st of January, 1920, on an application for a writ of *habeas corpus*. Upon Santa Singh returning to Canada on the 20th of October, 1919, he was refused entry by the Immigration authorities and ordered to be deported, and an appeal to the authorities at Ottawa was refused. Santa Singh came to Canada in December, 1907. After being in Vancouver for over three months he started working as a labourer in a sash and door factory, where he remained until he returned to India on the 20th of October, 1914. In the meantime he purchased property in the vicinity of Vancouver. He returned to India for the purpose of attending his son's wedding, intending to stay for a year and a half, but his son's fiancee died before he arrived. War conditions changed his plans, and his family

Statement

COURT OF APPEAL

1920

April 27.

IN RE IMMIGRATION ACT AND SANTA SINGH

requiring his assistance, he remained longer than he first intended, and his son later marrying another woman, further delayed his return. Upon the refusal of the authorities at Ottawa to intervene on his behalf he applied for a writ of *habeas corpus,* which was refused.

The appeal was argued at Vancouver on the 9th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

R. M. Macdonald, for appellant: Subsection (1)(iii) of section 2 of the 1919 amendment to the Immigration Act must be interpreted. The Act was not made retrospective: see Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., 414. As long as he returns within one year from the passing of the 1919 Act he retains his domicil. Domicil is defined in section 1 of Cap. 12, Can. Stats. 1911, being an amendment to section 2(*d*) of the Act of 1910; see also *In re Margaret Murphy* (1910), 15 B.C. 401.

Bird, on the same side: The Board found he had lost his domicil. This is a negative finding that he had a domicil, and he is a property owner here. On the question of evidence establishing domicil see *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435 at p. 445.

Argument

Reid, K.C., for respondent: His origin was India, where his family resided. He was here nearly seven years when he went back: see *Re Munshi Singh* (1914), 20 B.C. 243. Length of time does not enter into question of domicil: see *In re Patience. Patience* v. *Main* (1885), 29 Ch. D. 976. He may have domicil here when there is sufficient evidence of his intention to change his domicil. In this case he goes to his domicil of origin for five years: see Dicey's Conflict of Laws, 2nd Ed., 119 and 122; *Winans* v. *Attorney-General* (1904), A.C. 287. If he is away more than a year and comes back after the Act is in force he comes within the section and is excluded: see Maxwell on Statutes, 5th Ed., 358; *Jopp* v. *Wood.—Smith* v. *Jopp* (1865), 2 De G.J. & S. 323.

Macdonald, in reply: *Jopp* v. *Wood* is not accepted: see Westlake's Private International Law, 5th Ed., 367.

Cur. adv. vult.

27th April, 1920.

COURT OF APPEAL

1920

April 27.

IN RE IMMIGRATION ACT AND SANTA SINGH

MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): In the matter of Santa Singh, an appeal which we heard some days ago and reserved judgment. It becomes necessary to dispose of it without delay because Santa Singh is in custody, being detained for deportation. In my opinion, the order for his deportation was wrong. Shortly I may state my reasons now. I think, in view of the fact that the Board, by their resolution, have declared that he had lost Canadian domicil, they in effect found that before he went to India he had acquired Canadian domicil. The Board having seen the witnesses, I think we should not be justified in interfering with that conclusion. That is to say, that before he went to India he had acquired a Canadian domicil. That leaves only to be decided the effect of the recent statute of 1919. In my opinion that statute is not retrospective or retroactive and it does not affect this case, Santa Singh having returned within the year from the passing of the statute. He should therefore be released.

MARTIN, J.A.

MARTIN, J.A. (oral): I have, I might say, some doubt about this matter, but it is not sufficient to justify me in dissenting from the finding of my learned brother.

GALLIHER, J.A.

GALLIHER, J.A. (oral): With regard to the statute of 1919, while it is arbitrary in this sense that it defines the manner in which a British subject may lose his domicil in Canada, it involves also the question of whether it is really in its nature retroactive legislation. I am of the view that it should not be regarded as such. Now I have some doubt about considering or not considering the question of whether he ever had Canadian domicil, and I might say, although not deciding the matter, I might come to the conclusion if I were called upon to decide, that he had never acquired Canadian domicil as a matter of fact. However, the Board have found so. In effect that has been their finding, and it has been confirmed upon appeal to Ottawa, and having so found, I have some diffidence in considering that question. As I say, I am not free from doubt on that part of the case, but for the reasons I have stated, I think probably it would be better for us to take that as so considered. In the result then, the order for deportation should be set aside.

COURT OF APPEAL

1920

April 27.

IN RE IMMIGRATION ACT AND SANTA SINGH

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: The applicant for the writ of *habeas corpus* and for release from custody is a native of India, a British subject by birth, who came to Canada in 1907, being regularly admitted to Canada at that time. He resided in British Columbia for six years and eight months and purchased land at Point Grey, near to the City of Vancouver. He left Canada to return to India for one purpose only, to be present at the marriage of his son. He was longer away than at first intended owing to the fact that the lady his son was to marry died, but later his son did marry. His going to India took place on October 20th, 1914, and, at the time of leaving he left a power of attorney with a friend in Vancouver, and left with a Government official his photograph, intending to return, which intention he claims he never abandoned. Unquestionably, Canadian domicil was acquired by the applicant, and it is to be observed that that was admitted by the Board which has ordered deportation, as the finding of the Board is that the domicil has been lost (see *In re Margaret Murphy* (1910), 15 B.C. 401, MARTIN, J.A. at p. 404). This Canadian domicil was acquired before the passage of Cap. 12, Can. Stats. 1911, an Act to amend the Immigration Act, and in any case, upon the facts, in my opinion, the applicant was merely resident without Canada for a special or temporary purpose. Further, the applicant returned to Canada within one year of the passage of the Immigration Act, Can. Stats. 1919, Cap. 19, and I am not of the opinion that the Act of 1919 has retroactive effect. The apt words one would expect to find, especially where it is a matter of *status* that is claimed to be affected, are absent. The applicant has sworn to his Canadian domicil, and his intention negativing any intention to abandon or take up his domicil of origin. The language of the Judge Ordinary in *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435 at pp. 444-5 may be applied to the facts of the present case:

"The Court must not take his word as conclusive proof of the fact, and if there are circumstances in the case which tend to shew that what he says is not true or likely to be true, they may influence the conclusion at which the Court would arrive. Therefore the question is here not so much whether the circumstances of his English residence tend to prove English domicile as whether the man swearing to his intention to create an English domicile, there are such circumstances on the other side as warrant the

Court in throwing over his oath and disbelieving him. I am not aware that there are any such circumstances."

Mr. *R. L. Reid,* in a very able argument, laid great stress upon the fact that the applicant was a married man with a wife and children in India, and that in returning to India to his wife and children was in itself the strongest evidence of intention to resume his domicil of origin, but this circumstance, of which I think judicial notice can be taken, is not to be forgotten, that for a long time there has been exhibited a strong public opinion that Canada should admit the wives and children of natives of India to Canada, and not continue the long and unnatural severance of true family conditions as now exist, and it would look as if possibly that time is near at hand. In any case it may be fairly assumed that this applicant, and many others, still hope for the accomplishment of this long deferred boon, and that returning to India and rejoining his wife and family cannot be taken as other than a visit, not an abandonment of the acquired Canadian domicil. Mr. *Reid* relied upon *In re Patience. Patience* v. *Main* (1885), 29 Ch. D. 976, as supporting his contention that it must be taken that the applicant, upon the facts, had resumed his domicil of origin, but the words at the end of Mr. Justice Chitty's judgment at p. 984, it would seem to me, support the applicant's contention in the present case:

MCPHILLIPS, J.A.

"It would be difficult to say that he had any home in England, although, as I said in the early part of my judgment, it may be considered that, if there was an intention shewn by any other acts on his part, such as the purchase of land, if he had a family bringing the family here, buying a grave, or any other circumstance, even a slight circumstance, then I should have been warranted in coming to a different conclusion."

Here we have the buying of land and inhibition against bringing the family here, which, as I have said, is an inhibition that from year to year is expected to be removed. I cannot, upon the facts of the present case, conclude that there has been any abandonment of the acquired Canadian domicil, the domicil of choice of the applicant, and without that, the domicil of origin cannot be assumed to have been resumed. *Winans* v. *Attorney-General* (1904), 73 L.J., K.B. 613 was also greatly relied upon, but, with deference, I cannot see the applicability when we have here the declared and sworn intention of the

COURT OF APPEAL

1920

April 27.

IN RE IMMIGRATION ACT AND SANTA SINGH

applicant and surrounding circumstances. Here we have to remember there was a change of domicil. It is an admitted fact, therefore, the onus has shifted, and the onus is upon the Crown, asserting a change of domicil, to establish it. The return to the domicil of origin is explained, and it does not amount to abandonment of Canadian domicil. Finally, again reverting to the Act of 1919, Cap. 25, Sec. 2, Subsec. (1)(*d*)(iii), which reads as follows:

"(iii) Notwithstanding anything contained in the preceding subparagraph (ii), when any citizen of Canada who is a British subject by naturalization, or any British subject not born in Canada having Canadian domicile, shall have resided for one year outside of Canada, he shall be presumed to have lost Canadian domicile and shall cease to be a Canadian citizen for the purposes of this Act, and his usual place of residence shall be deemed to be his place of domicile during said year."

It is strenuously contended that this legislation is determinative of the matter and that it is retroactive in its effect, and that the effect of the statute is to destroy the Canadian domicil. I cannot agree with this contention. I construe this provision as being operative in the future, not retroactive in its effect. Here the applicant has been accorded a Canadian domicil, he has an acquired *status,* and I would adopt the language of the Lord Chancellor in *The Duke of Newcastle* v. *Morris* (1869), 40 L.J., Bk. 4 at p. 10:

"Unless those privileges are specially struck at by Act of Parliament, I should be content to rest my view of this case upon that ground."

MCPHILLIPS, J.A.

(Also see *Rex* v. *Fong Soon* (1919), [26 B.C. 450]; 1 W.W.R. 486 at p. 493). In *Lauri* v. *Renad* (1892), 3 Ch. 402 at p. 421, Lindley, L.J. said:

"It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

"In *Mohammad Abussamad* v. *Kurban Husein* (1903), L.R. 31 Ind. App. 30, 37, Lord Lindley said: 'It is not, however, in accordance with sound principles of interpreting statutes to give them a retrospective effect'": Craies's Statute Law, 2nd Ed., 347.

It follows that, in my opinion, the appeal should be allowed. The deportation order as made by the Board was without jurisdiction, and the applicant, Santa Singh, was, and is, entitled to

a writ of *habeas corpus* and should be forthwith released and discharged from custody, being entitled to re-enter Canada without restraint.

Appeal allowed.

Solicitors for appellant: *Bird, Macdonald and Company.*

Solicitors for respondent: *Bowser, Reid, Wallbridge, Douglas & Gibson.*

PAISLEY v. LEESON DICKIE GROSS & COMPANY LIMITED AND CRAWFORD.

Bulk Sales Act—Sale in bulk—Stock-in-trade, fixtures and buildings—Sale of fixtures and buildings not within Act—B.C. Stats. 1913, Cap. 65.

In an action by a creditor of the vendor for a declaration that the transfer and sale of the stock-in-trade, fixtures, buildings and other appurtenances of a general store is fraudulent and void on the ground that the purchaser did not demand and secure a statutory declaration from the vendor setting forth a list of her creditors and the amounts owing them as required by section 2 of the Bulk Sales Act, the sale was declared void by the trial judge as in contravention of the Act.

Held, on appeal, *per* MACDONALD, C.J.A., that as to the sale of the stock-in-trade and fixtures the appeal should be dismissed but that the sale of the buildings does not come within the purview of the Act.

Per GALLIHER and MCPHILLIPS, JJ.A.: That the stock-in-trade only comes within the purview of the Act and that with regard to the sale of the fixtures and buildings the appeal should be allowed.

APPEAL by defendants, Leeson Dickie Gross & Co., from the decision of MURPHY, J. (reported *ante*, p. 18), in an action for a declaration that the sale and transfer of the stock-in-trade, fixtures and building, known as the Ioco General Store, made by the defendant Bella Crawford to the defendants Leeson Dickie Gross & Co. is fraudulent and void under the Bulk Sales Act. Bella Crawford carried on business in a store built by her husband on land to which they did not have any title. In the course of business she purchased goods from the defendants and after a time gave a chattel mortgage and an

Statement

COURT OF APPEAL

1920

April 23.

PAISLEY v. LEESON DICKIE GROSS & CO.

assignment of the book debts to the defendants to secure her indebtedness. Her debt to the defendants gradually increased, and on the 10th of September, 1917, she made a transfer of the stock-in-trade, fixtures and building to the defendants. The evidence of the officers of the defendants was that she estimated her other debts at from $70 to $80, and the defendants assumed these debts and allowed $800 to Bella Crawford's husband for the building. The plaintiff is the mother of Bella Crawford, and claims that her daughter is indebted to her in the sum of $694, and in the arrangement between Bella Crawford and the defendants nothing was said as to her indebtedness to her mother. The defendants did not demand or obtain from Bella Crawford a statutory declaration setting forth a list of her creditors as required under the Bulk Sales Act. The learned trial judge gave judgment for the plaintiff as against Bella Crawford for the amount of her debt and declared the sale to the defendants void as against the plaintiff and the unsatisfied creditors of Bella Crawford.

Statement

The appeal was argued at Vancouver on the 22nd and 23rd of April, 1920, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Armour, K.C., for appellants: We say there was no sale at all. Leeson Dickie Gross & Co. merely took over the business, undertaking to pay the $80 of debts and agreeing to allow Bella Crawford any surplus if there were any. In any case the judgment should only go as far as to deal with the stock-in-trade. It should never cover the building or trade fixtures. The stock-in-trade does not include fixtures. Section 6 does not create a separate situation. It must be considered with section 2 and the other sections: see *Peart Bros. Ltd. et al.* v. *McDonald Co. Ltd. et al.* (1917), 10 Sask. L.R. 6.

Argument

Raines, for respondent: As to the other creditors they paid some and took assignments. There was a transfer made that brought it within section 6 of the Act.

Armour, in reply: The whole arrangement was for the purpose of preventing Bella Crawford from running away with the proceeds.

MACDONALD, C.J.A.: I would dismiss the appeal except in so far as it may affect the ownership of the building. The sale by Bella Crawford of her stock of goods, wares and merchandise to the defendants was, in my opinion, null and void under the Bulk Sales Act. As to whether the fixtures can be said to be part of the stock of goods, wares and merchandise is a matter upon which we have not been assisted by the citation of any authority, and I must say I have some doubt in respect of it.

As to the building, of course it is perfectly clear and is conceded on each side that it could not be within the meaning of the Bulk Sales Act. This leaves only the question of costs. The judgment appealed from purports to set aside the sale of the building. That was not a sale by Bella Crawford to the defendants, because she was not the owner, but by her husband, who is not a party to these proceedings.

The result then is the three points in this case are decided as follows: We decided unanimously that the sale of the goods, wares and merchandise, apart from the fixtures, was a sale which contravened the provisions of the Bulk Sales Act. My learned brothers find that the fixtures are not included within the purview of the Act, so I will just add a word to what I said before. I have considerable doubt about that, and will just say, this, that my doubt arises in this case, not by reason so much of the character of the goods, but the fact that the business was sold as a whole, that is, the stock-in-trade and fixtures were sold as a going concern, therefore the fixtures might be held to be within the Act, although by themselves not treated as part of the stock-in-trade. As to the building, we all agree that the learned judge was in error. The judgment sets aside the sale from Bella Crawford to the defendants of the merchandise, not the fixtures and not the building; and the costs follow the respective events.

MACDONALD, C.J.A.

GALLIHER, J.A.: I would allow the appeal in part. I agree with what the Chief Justice has said except in one particular, and that is I do not consider the fixtures as any part of the stock of goods, wares and merchandise. I really do not think

GALLIHER, J.A.

COURT OF APPEAL

1920

April 23.

PAISLEY v. LEESON DICKIE GROSS & CO.

there is anything further I need add. The appeal will be allowed in part, and the costs will follow the respective events.

MCPHILLIPS, J.A.: I am clearly of the opinion that the Bulk Sales Act has reference only to goods, wares and merchandise for the purpose of trade, to be disposed of in the way of the business carried on, and therefore anything that would not be so included would not be affected by the statute at all. I would consider that Leeson Dickie Gross & Company Limited were found to have taken over the Ioco General Store, because the decree reads: "It is further adjudged and declared that the sale by the defendant Bella Crawford to the defendants Leeson Dickie Gross & Company Limited of the Ioco General Store is void as against the plaintiff."

I do not think there was any intention to evade the statute in any illegal way. It is perfectly permissible to evade the statute if the evasion is straightforwardly done, that is, it is permissible to evade the statute by legal means and not by unconscionable trickery. I do not think there was any unconscionable trickery intended here at all, and apparently at the time of the sale it was thought that there was no contravention of the statute. Taking all the facts together, though, it seems to me there was contravention of the statute, that is, that there was a sale within the purview of the Act. The *modus operandi* of carrying out the sale after all is a mere incident but one which oftentimes is the key that opens and makes clear that which was done. It is not necessary that one man should hand another man a certain sum of money to bring about a sale—consideration may take many forms. The transaction that took place was a sale. Of course, when there is a sale found within the purview of the Act, it is a fraudulent or void sale, the statute uses those words, it does not mean necessarily any moral turpitude. My view, though, is that the sale only covered the goods, wares and merchandise, not the building and certainly not the trade fixtures.

MCPHILLIPS, J.A.

Appeal allowed in part.

Solicitors for appellants: *MacGill & Coady.*
Solicitor for respondent: *F. N. Raines.*

WELCH v. GRANT.

COURT OF APPEAL

1920

April 20.

WELCH v. GRANT

County Court—Judgment—Appeal—Judge's notes of proceedings at trial —R.S.B.C. 1911, Cap. 53, Secs. 91, 121 and 130.

There is no duty cast upon a judge of the County Court to take notes of the evidence on the trial of an action.

On an application to a judge of the Supreme Court under section 130 of the County Courts Act, it was ordered that a judge of the County Court furnish a copy of his notes taken on the trial of an action for use on appeal to the Court of Appeal.

Held, on appeal, reversing the decision of MORRISON, J., that as it appeared from the learned judge's statement that his notes were so imperfect and fragmentary that they would not only be of no use but misleading to the Court of Appeal, it is not in the interests of justice that such an order should be made.

APPEAL by defendant from the order of MORRISON, J., of the 15th of March, 1920, wherein it was ordered that his Honour Judge GRANT furnish or permit to be furnished the plaintiff a copy of the notes of evidence and proceedings taken down by him on the trial of an action wherein Catherine Welch was plaintiff and Fred. E. Scott was defendant. The action was dismissed. The plaintiff appealed, and on her solicitor applying to the learned trial judge for a copy of his notes taken on the trial he refused to give them. On application to a judge of the Supreme Court under section 130 of the County Courts Act, it was ordered that a copy of the notes should be furnished the plaintiff. Statement

The appeal was argued at Vancouver on the 14th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Dickie, for appellant: Section 91 of the County Courts Act deals with evidence and is a Code for the taking of evidence in the Court below. There is no duty cast on the judge to take the evidence down. His notes are private memoranda and he need not produce them: see *Baudains* v. *Liquidators of Jersey* Argument

COURT OF APPEAL

1920

April 20.

WELCH v. GRANT

Banking Company. Ex parte Baudains (1888), 13 App. Cas. 832.

Mellish, for respondent: Section 121 of the County Courts Act reads the Supreme Court Rules into the Act. If he has taken notes it is his duty to give them: see marginal rule 875(*c*) of the Supreme Court Rules; *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629.

Argument was adjourned until the 20th of April, when judgment was delivered.

MACDONALD, C.J.A. (oral): The question is as to whether or not the learned County Court judge should be ordered, as he was, by Mr. Justice MORRISON, to furnish a copy of his notes for use in the appeal. The learned judge has stated that his notes are so imperfect and fragmentary as to be of no use to the Court of Appeal and the parties to the appeal, but on the contrary, would be merely misleading, and as I understand, he finds himself unable to supplement them and make them intelligible. It would therefore be idle, in these regrettable circumstances, to make any order.

The County Court judges are not, by statute, required to take notes of the evidence in cases before them. This seems to me to be a pity, since the County Court is the Court in which costs are supposed to be kept down, and if it comes to this that in every County Court case, or in a considerable number, a stenographer must be employed, the costs of litigation in County Courts will be increased to such a degree as to defeat the purpose for which such Courts were created.

MACDONALD, C.J.A.

However, as the law stands at present, County Court judges are not, at all events in express words, required to take notes, but even if the judge had been required to do so, we must accept his statement that his notes are unintelligible and misleading, and that being so, the interests of justice would not be advanced by allowing the order made by Mr. Justice MORRISON to stand. In this view of the case, I am not called upon to consider whether, had proper notes been taken by the County Court judge, an order could be made in the Supreme Court, such as was made in this case, or whether such an order could

only be made, after notice of appeal had been given, by this Court itself.

That a judge of the Supreme Court, in a proper case, may make an order in the nature of a *mandamus,* directed to a judge of an inferior Court, under the section of the Act in question, cannot be doubted; there is nothing new in this state of the law. The section merely simplifies the exercise of a power which has been in existence for a very long time.

I cannot help emphasizing what I have already intimated, that it is indeed anomalous that while the Justices of the Supreme Court, sitting in *Nisi Prius,* are required, when necessary, to take notes of the evidence, there is no such provision in our statutes in respect of the County Courts, the very Courts in which one would expect that notes would be taken, to obviate the expense of employing stenographers.

MACDONALD, C.J.A.

MARTIN, J.A.: This is an appeal by his Honour Judge GRANT from an order of a judge of the Supreme Court, Mr. Justice MORRISON, purporting to be made under section 130 of the County Courts Act, R.S.B.C. 1911, Cap. 53, whereby his Honour Judge GRANT, a judge of the County Court of Vancouver, was ordered to

"furnish or permit to be furnished to, or a copy taken by A. J. B. Mellish, Solicitor for Catherine Welch, of the notes of evidence and proceedings taken down by him on the trial before him on the 15th day of September, 1919, of the action wherein Catherine Welch aforesaid (married woman) was plaintiff and Fred E. Scott was defendant."

On December 19th, 1919, the plaintiff's (respondent's) solicitor wrote to the learned judge saying that he had "entered in the County Court registry and the Court of Appeal registry a notice of appeal" from his Honour's judgment and asking permission to make a copy of his notes taken at the trial to put in the appeal books which he was making up for this Court. In reply his Honour wrote the next day declining to allow the notes to be copied because they "would in no way be of value to the Court of Appeal as they are only very fragmentary"; whereupon the plaintiff moved, on December 23rd, under said section 130 for the order above mentioned.

MARTIN, J.A.

Section 130 provides:

"No writ of *mandamus* shall issue to a Judge or an officer of the Court

COURT OF APPEAL

1920

April 20.

WELCH v. GRANT

for refusing to do any act relating to the duties of his office, but any party requiring such act to be done may apply to the Supreme Court, upon an affidavit of the facts, for an order or summons calling upon such Judge or officer of the Court, and also the party to be affected by such act, to shew cause why such act should not be done; and if after the service of such order or summons good cause shall not be shewn, the Supreme Court may, by order, direct the act to be done, and the Judge or officer of the Court, upon being served with such order, shall obey the same on pain of attachment; and, in any event, the Supreme Court may make such order with respect to costs as to it shall seem fit."

In construing this section it must be considered on the same principles as the writ of *mandamus* for which it is substituted, and it must be carefully scanned, because anything that has the appearance of the application of what may be called the "mailed fist" to judges of an inferior, or indeed any, tribunal is greatly to be deprecated and should only be resorted to when no other course is open.

At the outset it is obvious that the section cannot be invoked unless the judge has refused "to do any act relating to the duties of his office," *i.e.*, that there is some duty that he has not discharged. The duty he is alleged in this case not to have discharged is refusing to allow a copy of his notes of the trial to be taken, but that assumes that it is part of his duty to take such notes, and obviously, unless there is such a duty he cannot be proceeded against. The respondent's counsel relies on the combined effect of section 121 of the County

MARTIN, J.A.

Courts Act and Supreme Court Rule 875 (*c*) as covering the situation. Section 121 provides:

"The rules, orders, and statutes from time to time regulating appeals from the Supreme Court to the Court of Appeal shall govern the practice and procedure upon similar appeals from a County Court."

Rule 875 (*c*) provides:

"Where, on appeal to the Court of Appeal, oral evidence taken or rulings made in the Court below has or have to be considered, and a report of the same has not been made by an official stenographer, or, if made, cannot be procured, it shall be the duty of the appellant, or of his solicitor, to apply to the Judge appealed from for a copy of his notes, for the use of the Court appealed to; and in case default is made in this respect, and the hearing of the appeal has, in consequence, to be adjourned, the appellant shall be liable for the costs occasioned by the adjournment, unless it is otherwise ordered by the Court for special reasons."

This Supreme Court rule relates only to trials before a judge of that Court and is based upon the assumption that the

judges of the superior Courts do take notes, as doubtless has been their practice from legal time immemorial, long before the days of shorthand or official stenographers, so that course has become a recognized part of their duty, hence their notes in England still form the groundwork of an appeal (*Rymill* v. *Neal* (1886), 2 T.L.R. 879), and that duty has in this Province been embodied in the statute law and is now imposed by section 49 of the Supreme Court Act, R.S.B.C. 1911, Cap. 58, which declares that:

"The Judge presiding at any trial shall make, or cause to be made under his supervision, full notes of the verbal testimony adduced at such trial, and of all exceptions or objections made or taken at such trial; and such notes shall be read by the Judge, or by the Registrar of the Court . . . ."

And section 50 provides that such notes shall be "filed of record in the cause," where there was no official stenographer employed. The taking of notes is clearly not a matter within the expression "regulating appeals" in section 121, *supra,* and there is no provision similar to section 50 in the Act respecting County Courts, which are on a very different plane from Courts of original jurisdiction, coming as they did into a recent and statutory existence in their modern form in England only in 1846, and exercising a necessarily inferior jurisdiction, which (though of constantly increasing importance) is very often exercised in minor matters and, until recently at least, in a more or less informal way in this Province, as I can speak from my own experience when for many years it was part of my duty as a judge of the Supreme Court to exercise also the jurisdiction of a County Court judge, not only in Victoria where there was then no County Court judge, but in all parts of the Province from Kootenay to Cassiar, when I was upon circuit, and though it was my own practice to take notes in all contested cases, yet I have the best of reasons for believing that some of my brethren did not do so and I never heard it suggested that there was any such duty cast upon them. And it sometimes happens that a case which at first appears to be simple and not requiring notes to be taken may become more complicated as it develops, or the reverse might be the case, and therefore the judge might only begin to take notes at that stage which seemed to him to make it necessary to do so, which

MARTIN, J.A.

COURT OF APPEAL

1920

April 20.

WELCH v. GRANT

might not occur until towards the close of the trial, in which case the notes would be of a very incomplete character for the purposes of appeal, but quite sufficient for the purposes of the trial judge: an illustration of this is to be found in *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629, wherein the learned judge took notes of the evidence for the plaintiff's case only, and we held that, as I put it in my judgment, since the notes were defective

"in essentials . . . . . it would be hopeless to attempt to set aside this judgment, which depends on findings of fact."

It was held by the Privy Council in *Baudains* v. *Liquidators of Jersey Banking Company* (1888), 13 App. Cas. 832, that where it is not the duty of a judge to take notes those that he does take are "mere private memoranda for the assistance of his own memory" which "might be misleading to the last degree."

It follows that on this ground alone the learned judge herein has not failed to perform the alleged duty and so the order against him should not have been made.

But in addition there are two other reasons (not raised below nor here) why this mandatory order should not have been granted, *viz.*: (1) That if granted it would be nugatory or ineffectual in its results; and (2) That there is another appropriate and adequate remedy open.

MARTIN, J.A.

As to the former, it is clear that no benefit whatever could result from the order because we have the statement of the only person who is qualified to speak on the point, *viz.*, the trial judge, that his fragmentary notes would be of "no value" to this Court. Who is to controvert that statement and how is it to be done? What, then, is the use of making an order that something useless must be done? That is why the appeal became "hopeless" in the *Stancliffe* case, *supra*; and as Lord Ellenborough, C.J. put it in *Rex* v. *Incledon* (1810), 13 East 164 at p. 166 (12 R.R. 313) "the Court will never do any thing in vain"; and see *Rex* v. *City of Victoria* (1920), [28 B.C. 315 at p. 320] 2 W.W.R. 948 at p. 951, and the cases there cited.

Then as to the latter point: Once an appeal gets before this Court under sections 9 and 15 (5) of the Court of Appeal Act, R.S.B.C. 1911, Cap. 51, a new situation arises, because the

matter of our relations with learned judges below comes within our practice, or to use the expression of Lord Chief Justice Mansfield in *Rex* v. *Gray's Inn* (1780), 1 Doug. 353 at p. 354, the relatively "ancient and usual way of redress" for anything that is wanting (and can be "redressed") for the hearing of the appeal. In that case it was held that a *mandamus* to compel the admission of the applicant to the degree of barrister would not lie, because the proper remedy was the "ancient course of applying to the twelve judges" as visitors. Now in relation to the County Court judges it is the "ancient and usual way" of this Court and the old Full Court (I speak from long experience, this being my twenty-second year of judicial service), on the rare occasions when we have required assistance from those judges in relation to appeals from them, to communicate with their Honours and ask them to furnish that assistance, whether it be in the way of giving us their reasons for judgment, or their notes, or in any other respect, and I have never known any one of those learned judges to fail to furnish us with every assistance in his power. Justice could have been and can be done in this matter and the state of affairs ascertained in a most convenient and appropriate and decorous manner, according to our said custom and it is highly undesirable that any action should be taken against any judge below, which might have even the appearance of dragooning him into an invidious position and forcing him to appeal from it. I have no reason to doubt that if his Honour had been asked by this Court to give us the required assistance he would have continued to do so as heretofore, if within his power. Such being the case, and that convenient, adequate, inexpensive and decorous remedy being open to any party interested, it should have been resorted to, and I can only express surprise that another method should have been adopted which is not in accordance with the best interests or traditions of the administration of justice.

MARTIN, J.A.

This being my view of the matter it is not necessary to consider the objection that under said sections 9 and 15 (5), the learned judge appealed from had no jurisdiction to grant the order, though the objection is undoubtedly one of substance.

COURT OF APPEAL

1920

April 20.

WELCH v. GRANT

GALLIHER, J.A. (oral): As I understand this matter, the learned County Court judge was applied to by counsel to furnish his notes for the use of the Court of Appeal, and refused. Then the appellant applied, under section 130 of the County Courts Act, to a judge of the Supreme Court for an order, directing the County Court judge to send up his notes for use in the Court of Appeal. I, like my brothers who have preceded me, do not find it necessary to decide as to the power of a Supreme Court judge to order the notes up in such a case, although I may say, while not deciding that, as at present advised, I think he has power.

Now then, we turn to the Court of Appeal Rules (Order LVIII., r. 11(*c*)), and there a duty is imposed upon the person appealing in a case where a stenographer's notes have not been taken, or where they cannot be found, to apply to the judge below to have sent to us his notes for the use of the Court of Appeal. That is what I understand was done in the first instance in this case, and apparently under this rule of the Court of Appeal is quite a proper proceeding, and moreover, if he does not apply to the judge below before he comes to the Court of Appeal, and has to have an adjournment in consequence of not applying, and the notes are not before the Court, and the Court requires them, then he has to pay the costs of that adjournment, so that I think that it is abundantly clear that he should in the first instance apply to the judge below. However, what the learned County Court judge has said is, that his notes were fragmentary and, if anything, would be inclined to mislead the Court rather than be of any assistance. We cannot tell how much evidence was taken down, and how much was left out, so that really he is the best judge of that, and under those circumstances, I think, assuming that the power was in the Supreme Court judge below, or assuming that the power is in this Court, in the circumstances I think the County Court judge should not have been ordered to send up the notes. The appeal should be allowed.

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): In my opinion the appeal should succeed. I have given the matter careful attention, and in passing I might remark that it is regrettable that these proceedings

should have been taken, considering the ill-health of his Honour and his being on leave of absence.

The proceeding by way of *mandamus* or analogous thereto is always an extraordinary one, and in the present case was quite unwarranted. There is no duty under the statute cast upon the County Court judge at all to take notes, and in that respect the statute law differs from the statute in England. Section 120 of the English Act reads that,—

"At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter."

Those familiar with the County Courts Act of British Columbia and the source from whence it is drawn, and also the rules of the County Court, are cognizant of this fact that our Act and our rules are all founded upon the English statute and rules. In fact, many of the sections of the Act are absolutely the same word for word, but our Legislature refrained from enacting that the judge should take notes, and the absence of this provision is significant. Therefore, there is no requirement in British Columbia for the learned judges of the County Courts to take notes. In any case, the learned judge makes an answer which is complete in itself. When we come to the question of propriety, Lord Justice Bramwell said even under the English statute in *Morgan* v. *Rees* (1881), 6 Q.B.D. 508 at p. 513:

MCPHILLIPS, J.A.

"Whether if the point was properly taken the judge could be allowed to say he did not take a note, or whether he could be made then to sign the note he may have taken."

The judge thought, under the statute, that in making an answer which was reasonable, as the learned judge did here, nothing further would be done. It is to be remembered that we are on the same plane and exercise the same jurisdiction as the Court of Appeal in England. What the Court of Appeal in England did in an analogous matter is exactly what we should do. In 28 Sol. Jo. (1884), at p. 708 we find this:

"Appeal—Oral evidence in Court below—Copy of Judge's notes. . . . . In a case of *Hemberow* v. *Frost*, before the Court of Appeal on the 25th ult., a question arose as to copies of the judge's notes of oral evidence at the trial. The appellant had bespoken a copy, and it had been delivered by the judge's clerk; but no copy had been supplied for the use of the

COURT OF APPEAL

1920

April 20.

WELCH v. GRANT

Court. There were some differences between the judge's notes and those of counsel, and their Lordships sent for the original notes. Baggallay, L.J., said that copies of the judge's notes had not been supplied as the rules pointed out. Any judge might, of course, exercise his discretion as he thought fit with regard to furnishing copies of his notes to the parties. The Court of Appeal, in the recent case of *Weston* v. *Sherwell* (*ante*, p. 688), declined to order a copy of the judge's notes, which had been furnished to them, to be supplied to the appellant. The appellant should apply to the judge or his clerk for a copy of the notes."

And at page 688:

"In a case of *Weston* v. *Sherwell*, on the 22nd inst., an application was made to the Court of Appeal for directions that a copy of the judge's notes of oral evidence taken at the trial and furnished to the Court of Appeal might be supplied to the appellant for the use of his counsel on the hearing of this appeal. Rule 11 of order 58 provides [that is our rule] that 'When any question of fact is involved in an appeal, the evidence taken in the Court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows: (*b*) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the Court may deem expedient.' The Court (Baggallay, Cotton, and Lindley, L.JJ.) refused the application. Baggallay, L.J., said the judge's notes were furnished to the Court of Appeal confidentially, and the Court had no authority to give copies of them to the parties."

So the position is this: the judge is under no statutory requirement to take notes. Even in England the Court would not compel a judge to sign the notes when he makes a reasonable answer. Here there is no requirement at all to do it. There are several other cases which say that the correct practice is to apply to the secretary of one of the judges of the Court of Appeal, who would then, under the proper rule, communicate with the County Court judge. Unfortunately we are not supplied with secretaries, but we would, if called upon, make the application, and, following out what my brother MARTIN has said, there is judicial propriety in so doing.

MCPHILLIPS, J.A.

I again say the proceedings taken were most unwarranted, not being supported by one tittle of authority, statutory or otherwise, and should never have been commenced. In the interests of justice it might well be pointed out, and this Court time and time again has so advised the profession, that if engaged in the County Court in a case of such importance that there will likely be an appeal, then it is counsel's duty to see that a stenographer is present. If the case is important enough for an appeal, counsel's duty is not discharged (and I say that

with deference) by relying upon the judge's notes, which at best must be an incomplete record of the evidence.

The parties here have brought themselves into this difficulty with the decisions of this Court open before them. Nevertheless an attempt has been made to compel the County Court judge to return notes stated by him to be fragmentary and useless, and default in so doing means attachment, and if given effect to would carry with it some amount of opprobrium. It is truly unfortunate that these steps should have been taken.

I would allow the appeal, with costs.

Appeal allowed.

Solicitors for appellant: *Dickie & De Beck.*
Solicitor for respondent: *A. J. B. Mellish.*

IN RE NEW LULU ISLAND SLOUGH DYKING DISTRICT.

Dyking—Drainage—Assessment—Divided into classes according to benefit —B.C. Stats. 1913, Cap. 18, Secs. 29 and 30.

Where improvements are prepared within a district formed under the Drainage, Dyking, and Development Act the assessment for the work should not be at a flat rate but the land should be divided into various classes according to the benefit to be derived from the work.

APPEAL by certain residents of the New Lulu Island Slough Dyking District from the decision of the Court of Revision confirming a plan and assessment roll as originally formulated by the dyking commissioner of the district. A very large proportion of the residents of the district were heard for and against the plan and assessment. The facts are set out fully in the reasons for judgment. Argued before CAYLEY, Co. J. at Vancouver on the 24th to the 30th of September, 1919.

Statement

M. A. Macdonald, K.C., for appellants.
F. R. Anderson, for Board of Commissioners.

20th May, 1920.

CAYLEY, Co. J.: The dyking district in question comprises some 28 sections of land, an area of some nine square miles. The land is flat, the fall being some three feet from north to south and two and a half feet from east to west, so that all the water drained by the various sloughs and ditches may be said to accumulate towards the south-west corner, and there to find

Judgment

CAYLEY, CO. J.

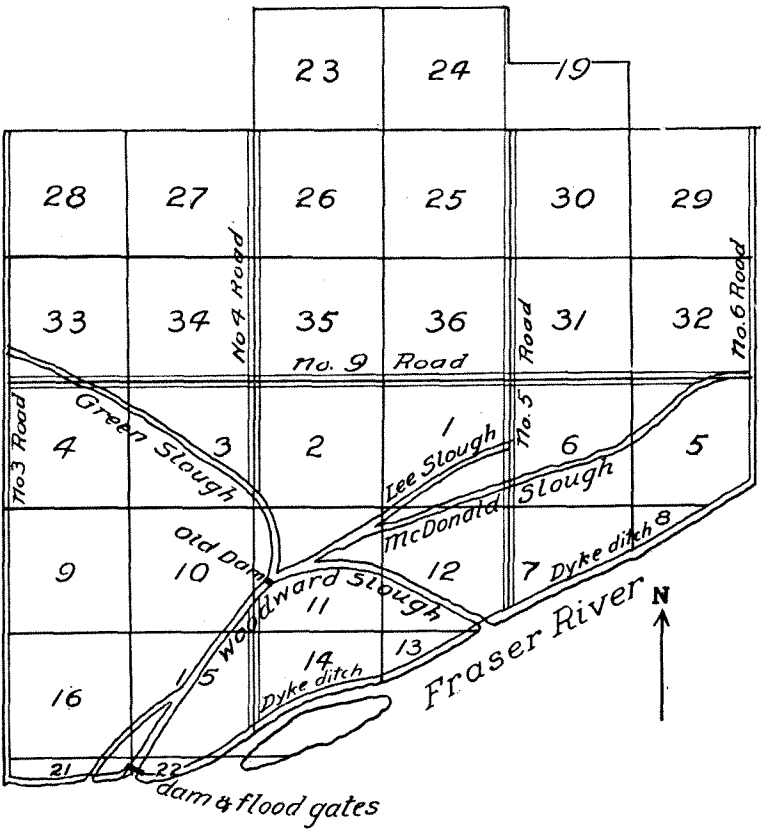
1920

May 20.

IN RE NEW LULU ISLAND SLOUGH DYKING DISTRICT

Judgment

an outlet through gates into the Fraser River, the outlet operating to run off the water only when the tide has reached a certain low level. With land lying so flat and low it is evident that the water is never completely drained off. The petition of the majority, who formulated the scheme submitted to the residents for approval, did not contemplate a new system of drainage, but an improvement of the system as it stood, and had stood for a number of years, by deepening some of the ditches and by cleaning out all the ditches and watercourses which it was contended had silted up during the years and prevented the surface water from being run off as speedily as was desired in the spring of the year. The system of ditches and watercourses may be further described for the purpose of this appeal as consisting of five main watercourses and a number of feeding ditches, running for the most part from north to south, and one ditch part east to west along what is known as "No. 9 Road." The following rough sketch may illustrate this:



The appeal was, in respect of the plan in the first instance, and the greater part of the evidence concerned itself with the plan finally adopted at a meeting of the ratepayers. I cite the petition as originally presented.

"The petition of the undersigned humbly sheweth:

"1. That your petitioners constitute a majority in value of the owners of the lands comprised within the area known as the New Lulu Island Slough Dyking District.

"2. That your petitioners are desirous of having the said lands reclaimed and improved by drainage by the execution of the following works: By having the sloughs connecting with the Fraser River through Sections 21, 16, 15, 10, 11 and 12, Block 3 North, Range 6 West and Green's Slough from Woodward's Slough to its intersection with No. 9 Road, cleaned and deepened, constructing ditches on Number 4 Road from the Slough to the Northern boundary of the district and on Number 5 Road from the canal at the River to the Northern boundary of said district and the cleaning of a portion or all of the canal ditch on the inside of the dyke from No. 5 Road to the dam at the slough, and replacing the box in the vicinity of Woodward's slough.

"And your petitioners as in duty bound shall ever pray."

The evidence shewed that this petition had been drawn up and circulated by the more active spirits in the movement, and I may well suppose that the specific manner in which the work to be done was outlined was due to the influence of three or four residents who had a well-defined idea of what they wanted. The majority who signed the petition would naturally follow the lead thus given, some signing because they were distinctly favourable, others because they thought something should be done, but not having any clear ideas as to what it should be.

Judgment

I take it that a petition so definite in its specifications of the work to be done constituted a direction to the engineer who was afterwards called in to assist, and the fact is that Col. Tracey, the engineer so called in, did, with one slight exception, follow these specifications. His evidence on the point was that he did not feel himself bound by the specifications of the petition, but while this would be true within limits, it is contrary to practice not to be guided by one's employers as to the main features.

A fair proportion of the improvements sought for was opposed by an active minority of residents in the southern part of the district, and these residents were those whose lands would be specially affected by the work proposed in the southern portion, namely, the east and west branches of Woodward Slough

CAYLEY, CO. J.

1920

May 20.

IN RE NEW LULU ISLAND SLOUGH DYKING DISTRICT

and the dyking ditch. I take it that the claims of this minority to be heard with attention are especially strong on this account, and I came to the conclusion, after having heard the views of practically all the residents, that the main question came down to this: Was the active minority in the north, who thought that their drainage would be improved by cleaning out (and perhaps in part deepening) Woodward Slough and the dyke ditch, to have the right to dictate (because they had secured the votes of an indifferent majority) on the subject of Woodward Slough and the dyke ditch, to the other minority whose lands actually abutted on that slough and ditch and who would be specially affected thereby? I thought not; but, of course, there still remained the question, should the minority in the south be allowed to obstruct a work which as a whole would be of benefit to the whole district? I thought on this point that, if it were mere obstruction, the southern minority should not obstruct.

It therefore became a question of whether this work on the Woodward Slough and the dyke ditch was necessary and advisable work, or whether it might not be postponed until a period subsequent to the completion of the other work, when the advisability of further work, that is, the proposed work on Woodward Slough and the dyke ditch might then commend itself alike to both the northern and the southern representatives. Two additional engineers were called in to advise, and I had the benefit of the extended views of Mr. C. E. Cartwright, C.E., and Mr. C. H. Hope, C.E., in addition to those of Col. Tracey. As to these, Col. Tracey had made a special study of the conditions, and his opinion had great weight with me. Mr. Cartwright and Mr. Hope had made, in comparison with Col. Tracey, a much less particular examination, but they were both engineers of so high a standing and so independent of any personal interest in the decision that I could not, without violence to equitable consideration, disregard their united opinion that the work on Woodward Slough (with the exception of the removal of an obstruction on West Woodward Slough called "the dam") and on the dyke ditch was at this time unnecessary. Two opposing inclinations in the engineers' evidence disclosed themselves. Col. Tracey's view, backed by the petitioners'

Judgment

opinion, was that the removal of mud and detritus in the Woodward Slough and the dyke ditch would promote a "flow" of the water; the other view, represented by Mr. Cartwright and Mr. Hope, was to the effect that a "flow" could not be expected on virtually flat land, and that the emission of water through the "gates" was more in the nature of lowering the level of a cask than of giving outlet to a stream. I had to consider then the view of those whose lands abutted on Woodward Slough and the dyke ditch. It was apparent that if the other ditches were cleaned out and deepened, the extra water thus brought down would heap itself in Woodward Slough and the dyke ditch. These residents would be the ones to suffer if their opposition to the cleaning out of these watercourses, supported as it was by the opinions of Mr. Cartwright and Mr. Hope, was upheld. On the other hand, the petitioners who favoured the cleaning out would be affected in a much smaller degree. This view was represented to those who opposed the petition, but their opposition was not lessened.

I think a reasonable arbitrator (and in this respect I think the judge occupies the position of an arbitrator) would come to the conclusion that the proposed work on Woodward Slough and the dyke ditch (with the exception of the removal of "the dam") must be postponed to some subsequent petitionary efforts. It is, therefore, ordered accordingly: That the old dam on West Woodward Slough is to be removed and that the rest of the proposed work on Woodward Slough and the dyke ditch is to be abandoned, but that this shall not prejudice a renewal of the efforts to clean out these watercourses, provided the ditches otherwise provided for in Col. Tracey's report are improved according to his report and until a period of two years has elapsed to ascertain the effect of the work otherwise provided for by Col. Tracey. The plan is, therefore, amended to that effect.

Judgment

There is now to be considered the question of how the assessment should be levied, whether it should be a flat rate or whether the land should not be divided into various classes "according to the benefit to be derived from the proposed works," as set out in section 29 of the Drainage, Dyking, and Development Act.

CAYLEY, CO. J.

1920

May 20.

IN RE NEW LULU ISLAND SLOUGH DYKING DISTRICT

The engineer provided for a flat rate, and this, I presume, is due to an opinion expressed by the majority at the meeting of the owners called under section 30 of the Act. I will refer to this opinion later on.

The expression "according to the benefits to be derived from the proposed works" is rather indefinite. The engineer contended that all lands are equally benefited, that the man who lives near the outlet has equal benefit with the man who lives further away, notwithstanding that, while the portion of the ditch near the outlet is necessary to the man living further up, the ditch further up can be of no possible use to the man near the outlet. To interpret the words in any other sense is, according to him, to confound "cost" with "benefit." This view would mean that in no case could the words of the Act mean anything. The Act, however, does contemplate a classification of the lands in some rational manner. The outlet here is on the extreme south-west of the district, and a resident of the extreme north-east needs that outlet, while the residents to the south-west can have no possible benefit from the ditches at the north-east. Nor do I think the residents at the south-west should be taxed for ditches at the north-east. I hold that the man further away from the outlet should be assessed more than the man at, or near, the outlet, and that the Act means they should be classified accordingly. It may be held that the man at the south-west can underdrain deeper than the man at the north-east, but the evidence shewed that the residents to the south-west complained rather that they were too much drained. I think that on flat lands the difference is inappreciable.

Judgment

The majority of the owners, at the meeting before referred to, stated in their minutes that they thought some residents were benefited more than others by the proposed work, but as a flat rate had been imposed in previous years for the dyking and ditching then done, and such flat rate had imposed an inequality on the residents to the north, they thought that a flat rate should now be imposed for the present proposed work, to equalize matters. But that method of reasoning is not countenanced by the Act. I gather from the minutes that the majority of owners did in fact recognize that the proposed

works were chiefly for the benefit of those further away from the outlet, and I cannot but say I agree with them. I might add that in order to bring lands further away under cultivation it would be necessary to deepen and broaden the ditches near the outlet. But this deepening and broadening must be said to be for the benefit of those further away and of little benefit to those nearer the outlet. This seems to me an additional reason for classifying the residents farther away differently from those nearer the outlet. I have classified the land accordingly, and direct assessment to suit.

The lands comprised in the island within the boundary formed by Woodward Slough and the dyke ditch would not benefit at all by the proposed works. A portion of sections 22, 15, 11, 12, 13 and 14 are exempted from taxation as being on this island. Section 21, on the extreme south of the district seems to receive no benefit and is exempt also. The rest of the lands of the district should be classified, first, with reference to the proposed work on the sloughs, and secondly, in regard to the proposed work on the ditches. I would make three classifications: Classification "A," 100 per cent.; Classification "B," 75 per cent.; Classification "C," 50 per cent., both for the sloughs and the ditches.

Judgment

I have drawn up a trial classification for the use of the assessor, which shall be followed by him unless some error has crept in which he is authorized to amend if such error exists, subject to an appeal to this Court. The following is the classification: [after setting out the classification, the learned judge continued.]

In regard to costs, I think the costs of both parties should be borne by the district as a whole.

MURPHY, J.

1920

May 28.

DALTON v. WEST SHORE AND NORTHERN LAND CO.

DALTON *ET AL.* v. THE WEST SHORE AND NORTHERN LAND COMPANY, LIMITED.

Water and watercourses—Farm lands—Irrigation—Water record—Construction of dam and conduit-pipes—Portions of land acquired by conveyance and portions by foreclosure proceedings—Right of transferees to water and works.

The owner of a certain block of land obtained a water record authorizing the use of certain water for domestic and agricultural purposes on said land and he constructed works including dam, pipe-line and other accessories for such purpose. Two of the plaintiffs subsequently became owners of parts of the lands, one by conveyance in pursuance of the Real Property Conveyance Act, and the other by foreclosure of a mortgage in pursuance of the Mortgages Statutory Form Act. In an action for a declaration that the dam, water-pipe and other works were appurtenances of the block of land and belonged to the owners of the various parcels of said block of land:—

Held, that a conveyance in pursuance of the Real Property Conveyance Act or a mortgage in pursuance of the Mortgages Statutory Form Act includes not only the water privileges enjoyed in connection with the land but also a proportionate interest in the works used for diverting and conveying the water.

ACTION for a declaration that a certain dam, water-pipe and accompanying works were appurtenances of district lot 430 in group 1, New Westminster (now Vancouver) District, and belonged to and are the property of the owners of the various parcels of land forming said district lot. In August, 1907, the defendant Company, then owner of said district lot and others in group one, New Westminster District, was granted a record or licence, pursuant to the Water Clauses Consolidation Act, 1897, for a certain quantity of water therein stated to be used for domestic and agricultural purposes on district lot 430, the said water to be stored by means of a dam and diverted by means of a pipe from a stream at a point on district lot 1494 westerly to the south-east corner of said district lot 430. The defendant Company then constructed the dam, laid the pipes and diverted water for said purposes. After completion of the works the plaintiff Dalton acquired title from the defendant by

Statement

foreclosure order to certain portions of district lot 430, and the plaintiff Gorrie acquired title from the defendant by deed to a certain lot in a subdivision of said district lot 430. The plaintiff, the Corporation of the District of West Vancouver, claimed damages for trespass by reason of the water-pipes having been laid on certain streets of the Municipality without leave. Tried by MURPHY, J. at Vancouver on the 19th and 20th of May, 1920.

Craig, K.C., for plaintiffs.
A. M. Whiteside, for defendant.

28th May, 1920.

MURPHY, J.: It is admitted that, under the water legislation of the Province, the water, as distinguished from the means whereby it is conveyed, is appurtenant to lot 430, and in so far as defendants have conveyed away said lot, has passed proportionately to the various transferees. The defendants have, in fact, parted with all but a small portion of lot 430. They contend, however, that no interest in the dam, pipe-line, etc., used to divert and convey the water, passed under such transfers. Their record is an ordinary farm record obtained, as stated on its face, to authorize the use of the water for domestic and agricultural purposes on lot 430. At the time they obtained this record, they could have obtained, under the Water Clauses Consolidation Act, 1897, a record authorizing them to do what they are in reality attempting to do under a farm record, *viz.,* the supplying of water by waterworks systems to, *inter alia,* incorporated localities. By section 4 of the Real Property Conveyance Act, in pursuance of which defendants conveyed away the lots now owned by plaintiff Gorrie, and by section 5 of the Mortgages Statutory Form Act, in pursuance of which defendants mortgaged the portion of lot 430 now owned by plaintiff Dalton (his title having been acquired by assignment to him of said mortgage and foreclosure thereof), it is provided that

Judgment

"Every such deed, unless any exception be specially made therein, shall be held and construed to include all houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments,

MURPHY, J.

1920

May 28.

DALTON v. WEST SHORE AND NORTHERN LAND CO.

and appurtenances whatsoever to the lands therein comprised belonging, or in anywise appertaining, or with the same demised, held, used, occupied, and enjoyed, or taken or known as part or parcel thereof, and if the same purports to convey an estate in fee-simple, also the reversion or reversions, remainder or remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim, and demand whatsoever, both at law and in equity, of the grantor, in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances."

In view of this legislation, I think plaintiffs Gorrie and Dalton are entitled to a declaration that they have an ownership in the dam and pipe-line in question proportionate to their holdings in said lot 430. It is true that the words "dam" and "pipe-line" do not occur in said sections, but the words "ditches" and "watercourses" do so occur. These, coupled with the very general language set out later in said sections, in my opinion, are sufficient to cause a transfer of proportionate ownership in the said dam and pipe-line by virtue of the deed and mortgage above referred to. To hold otherwise would result disastrously to property rights in farm lands in those portions of the Province where irrigation is necessary, and to make provision for the legal carrying on of which was the object, I think, of the legislation under which plaintiffs obtained their record. Many of the irrigation systems in operation are made up partly of ditch, partly of flume and partly of pipe-line. If only such part thereof as consists of ditch passes, by virtue of the sections above cited, the former owner of a farm, title to which is held under deed, or foreclosed mortgage, made in pursuance of the Real Property Conveyance Act or the Mortgages Statutory Form Act, can at the beginning of the irrigation season come in and tear up those portions that consist of flume and pipe-line, and thus utterly destroy for the season the value of the property he had previously conveyed to the present owner. It was, I think, to place beyond doubt that the means already in existence of conveying water to a farm, whether by ditch, flume or pipe-line, passed under a conveyance or mortgage thereof, made in pursuance of said Acts, that these sections were passed.

Judgment

The declaration of ownership herein made only applies to plaintiffs Gorrie and Dalton. The other owners of lots in said

MURPHY, J.

1920

May 28.

DALTON v. WEST SHORE AND NORTHERN LAND CO.

lot 430 are not before the Court, and may hold under a different title.

I am of opinion that the plaintiff, the Corporation of West Vancouver, is not entitled to any relief in this action. The pipe-line was situate as it now is when defendants dedicated the streets. Its existence cannot, therefore, I consider, be held *per se* to be a trespass. The Corporation is entitled to the possession of the streets, but I do not think it was established in evidence that such possession has been inetrfered with. In fact, that is not the claim put forward by the Corporation. The defendants were authorized by their water record to construct the system, and since action brought they have placed themselves in a position enabling them to become once more the owners of district lot 1494, although, in my opinion, even if said lot was still the property of the Corporation, such ownership would not entitle it to the relief prayed for.

Judgment

Judgment for plaintiffs.

HAHN *ET AL.* v. SEIBEL *ET AL.*

SWANSON, CO. J.

1920

May 21.

HAHN v. SEIBEL

County Court—Woodman's lien—Practice—Jurisdiction—Not shewn on plaint—Amendment—R.S.B.C. 1911, Cap. 243.

The Woodman's Lien for Wages Act applies in the case of logs being cut for the purpose of being converted into cord-wood.

If the plaint in an action in the County Court does not disclose the territorial jurisdiction of the Court an amendment may be allowed to do so if the facts in evidence disclose that the Court has actual jurisdiction.

ACTION to enforce a woodman's lien. Objection was taken by the defence of want of jurisdiction, as the plaint did not disclose any local or territorial jurisdiction, no reference having been made to shew the jurisdiction of the County Court of Yale on the face of the proceedings. The plaintiff then made application to amend the plaint to shew jurisdiction, as the facts dis-

Statement

SWANSON, CO. J.

1920

May 21.

HAHN v. SEIBEL

closed that the Court had jurisdiction. Tried by SWANSON, Co. J. at Vernon on the 7th of May, 1920.

Falkner, for plaintiff.

W. H. D. Ladner, for defendant.

21st May, 1920.

SWANSON, Co. J.: This is an action to enforce a woodman's lien. Objection was raised to the form of the affidavit of lien, that it does not describe with sufficient particularity the kind of timber or logs cut, or the place where cut. I am of the opinion that there has been compliance with the Act in this regard. It is also objected that as the logs were cut to be ultimately turned into cord-wood, the Act does not apply. No authority was submitted to shew that the Act (Woodman's Lien for Wages Act, Cap. 243, R.S.B.C. 1911) does not apply to labourers taking out cord-wood. Section 3 says:

"Any person performing any labour, service or services in connection with any logs or timber in the Province, or his assignee, shall have a lien thereon for the amount due for such labour, service or services," etc.

The words "logs or timber" are defined in the Interpretative clause 2:

"'Logs or timber' means and shall include logs, timber, piles, posts, telegraph and telephone poles, ties, mining-props, tan-bark, shingle-bolts, or staves, or any of them, or lumber of any description manufactured from the same or any of them.

"'Labour,' 'service,' or 'services' means and shall include cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting, or booming any logs or timber, and any work done by cooks, blacksmiths, artisans, and others usually employed in connection therewith, and shall also include any work done by engineers and all other persons or workmen employed in any capacity in or about any mill or factory where lumber of any description is manufactured."

Judgment

Seibel (one of the defendants) was cutting some cord-wood. Mr. *Falkner* was disposed not to press the point that the plaintiffs could not have a lien upon the timber which was actually converted into cord-wood, but urged that lien could be enforced against the logs cut and piled up and on those left in the bush. One of the plaintiffs, Halderbein, says that they cut down logs, to be later on cut up into cord-wood, 70 or 80 logs piled up in one pile. The other plaintiff, Hahn, says:

"We felled the trees, cut them up into 16-foot lengths, shortest 12-foot lengths, 75 or 80 logs piled—10 or 15 logs in bush not cut up into cord-wood. It was intended to cut them up into cord-wood."

Mr. *Falkner* contends that the words "logs or timber," used in the interpretation clause (followed by more specific words) must be construed in their "ordinary, popular and natural sense" according to the *dictum* of Lord Selborne in *Robinson* v. *Local Board of Barton-Eccles* (1883), 8 App. Cas. 798 at p. 801, also *Warburton* v. *Loveland* (1832), 2 Dow & Cl. 480 at p. 489; 6 E.R. 806 at p. 809:

"Language clear and explicit must be given effect to as expressing intention of the Legislature."

Abley v. *Dale* (1850), 20 L.J., C.P. 33; Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., p. 299; p. 295 as to word "include" (which enlarges not diminishes the meaning or ambit of the word); p. 335; p. 305, Lord Wensleydale as to the "golden rule" of interpretation "grammatical and ordinary sense." In other words, that the principle of construction *ejusdem generis* or *noscitur a sociis* does not apply here. I find in Webster's International Dictionary, 1913, the following definitions of "logs" and "timber":

"'Log,' a felled tree, log, a bulky piece or stick of wood or timber unhewed, especially a length of timber suitable for sawing into lumber."

"'Timber,' trees cut down squared or capable of being squared into beams, rafters, boards, planks, to be employed in the construction of house, ships, etc., or in carpentry, joinery, etc. The term is often used for all kinds of felled and seasoned wood."

I think the term "logs or timber" wide enough to include the logs in question, some of which could no doubt be cut up into saw-logs or ties. The plaintiffs were actually engaged in "getting the timber out of the forest," using the language of HUNTER, C.J. in *Davidson* v. *Frayne* (1902), 9 B.C. 369. I have no doubt that "logs or timber" is an expression wide enough to include logs, timber, cut for the purpose of being converted into cord-wood. I think it is clear that even if the logs were converted into cord-wood, the "person" "performing any labour or service" upon them (as these men did) in the woods as "woodmen," would have a lien upon the same under this Act. Reading the title and considering the whole purport of the Act makes it abundantly clear to me that such a lien can be successfully maintained.

Judgment

It is objected by Mr. *Ladner* that this Court has no jurisdiction in this cause whatever, as the "plaint" does not disclose

SWANSON, CO. J.

1920

May 21.

HAHN v. SEIBEL

any local or territorial jurisdiction, no reference being made to shew the jurisdiction of the County Court of Yale in the face of the proceedings. The "plaint" consists of a copy of the "affidavit of lien," following the practice outlined in section 7(2) of the Woodman's Lien for Wages Act. The affidavit describes the claimants as "of the City of Vernon, in the Province of British Columbia," and the defendants as of the "City of Vernon," the locality on which logs or timber were cut as being "the ranch known as Campbell's Ranch, in B.X. District, in the neighbourhood of the City of Vernon," no reference being made to the "County of Yale," within the territorial limits of which this Court exercises its statutory jurisdiction.

The Court was asked to take judicial notice that the "City of Vernon" and "Campbell's Ranch in B.X. District in the neighbourhood of said City of Vernon" are in the County of Yale. The evidence submitted at the trial clearly and explicitly proved that these localities or places are within the "County of Yale" and that therefore this Court has actually and in fact full and complete jurisdiction.

It was strenuously urged that because of the mere omission to shew on the face of the pleadings that the cause of action arose in the County of Yale the whole proceedings are a nullity, the Court having therefore *ipso facto* no jurisdiction whatever to adjudicate on the matters herein involved.

Judgment

As to the Court taking judicial notice of "territorial or geographical divisions," many authorities may be quoted against such a practice. See the collection of cases to that effect in Phipson on Evidence, 5th Ed., pp. 13-14. The line of cases relied on by Mr. *Ladner* to shew that the Court has no jurisdiction for the reasons assigned above are: *Beaton* v. *Sjolander* (1903), 9 B.C. 439; *Camosun Commercial Co.* v. *Garetson & Bloster* (1914), 20 B.C. 448, and cases therein referred to. I also quote Robertson's Local Court Act and County Courts Act, 1898, pp. 28, 29, dealing with "jurisdiction," in which the old cases, *Peacock* v. *Bell* (1667), 1 Wms. Saund. 731; *Trevor* v. *Wall* (1786), 1 Term Rep. 151, and *Mayor, &c., of London* v. *Cox* (1866), L.R. 2 H.L. 239 are referred to; also Bicknell & Seager's Division Courts Act, Vol. 1, pp. 54 and 55.

My own view, expressed at the trial, was that the Court has power to amend the plaint, shewing clearly the jurisdiction of the Court.

Mr. *Falkner* made formal application to so amend the plaint, and at the request of Mr. *Ladner* I have reserved judgment to consider the long list of authorities submitted to me by counsel on the argument. Mr. Justice MARTIN, one of the judges who sat in the Full Court in *Beaton* v. *Sjolander, supra,* at p. 443 uses these significant words:

"But I think it would have been open to the judge to have amended the plaint on the material before him once his jurisdiction had been made apparent."

This question of "amendment" was not apparently raised before Mr. Justice MURPHY in the *Camosun Commercial Co.* v. *Garetson & Bloster* case. In *Farquharson* v. *Morgan* (1894), 1 Q.B. 552; 63 L.J., Q.B. 474, on which MURPHY, J. relied, want of jurisdiction was apparent on the face of the proceedings. The defect in jurisdiction there was patent on the face of the proceedings. The cause would then clearly be *coram non judice,* and prohibition was held to lie. Lord Halsbury, in that case, at p. 477 (first column) in the Law Journal report says:

"It seems to me that there has always been recognized a distinction between what I will call a latent want of jurisdiction—*e.g.*, something becoming manifest in the course of the proceedings; and what I will call a patent want of jurisdiction—*e.g.*, a want of jurisdiction apparent on the face of the proceedings."

Judgment

In *Salter* v. *Slade* (1834), 3 L.J., K.B. 204,

"an inferior Court, after verdict and after the allowance of a writ of error, amended the record, and sent up a transcript of the amended record, with the writ of error."

It was *held* by Lord Denman, C.J., Littledale, Taunton and Williams, JJ.,

"that this Court could only look to the transcript as sent up to them; and, whether the Court below were justified or not in making the amendment, this Court would not alter the transcript so sent up, by making it agree with the original record."

Lord Denman said (p. 205):

"Assuming that the record was erroneous by reason of the omission to allege that the money was lent within the jurisdiction of the inferior Court, it appears to me, that we have no right to alter the transcript of the record, as sent to us, upon the writ of error. It appears to me that we must take the record to be as amended."

SWANSON, CO. J.

1920

May 21.

HAHN v. SEIBEL

I have had the privilege of consulting with the Chief Justice of British Columbia (who has been presiding at the Kamloops Spring Assizes) on this matter. The learned Chief Justice (who was one of the judges in the *Beaton* v. *Sjolander* case) expressed himself as being of the opinion that the proper practice to be followed under such circumstances as these is to allow an amendment to the pleadings, when the facts disclose that the Court has actual jurisdiction. The Chief Justice has permitted me to make reference to his own views on this very important point of practice in my reasons for judgment herein.

Mr. *Ladner* also objected to the amendment made at this stage on the ground that the statutory periods of limitation (30 days) set out in sections 6 and 7 of the Act having expired, it is now too late to allow such an amendment. I have adready dealt with a similar point under the Mechanics' Lien Act in the case of *Isitt* v. *Merritt Collieries, Limited* [*ante,* p. 62]; (1920), 1 W.W.R. 879, in which I allowed an amendment to the pleadings. I accordingly allow the amendment to the plaint asked for by Mr. *Falkner,* which will then clearly shew on the face of the proceedings the jurisdiction of the Court.

Judgment

Judgment will therefore be entered in favour of the plaintiffs for the full amount of their claims, with costs. Personal judgment will be entered against defendant J. Seibel, and judgment enforcing plaintiff's right to a lien *in rem* under the Act against the interest of all three defendants. The usual provisions as to right to sell the "logs or timber" in question on default in payment of amount sued for, and costs, will be set forth in the formal decree.

Judgment for plaintiffs.

Since writing the above judgment I have read the judgment of the Court of Appeal in *Rex* v. *Irwin* (1919), 27 B.C. 226. As to whether a magistrate exercising his jurisdiction within the County of Yale could, in the absence of definite proof that the Town of Princeton is in the County of Yale, take judicial notice of such a fact, there is an equal division of opinion in our Court of Appeal.

TERMINAL STEAM NAVIGATION COMPANY, LIMITED v. IMPERIAL OIL LIMITED.

MACDONALD, J.

1920

June 5.

TERMINAL STEAM NAVIGATION CO. v. IMPERIAL OIL LIMITED

Contract—Sale of oil—To be received in monthly instalments during three years—"In fairly equal monthly quantities" as required by purchaser—Monthly deliveries less than amount contracted for—Right of purchaser to balance at end of term.

A company contracted with an oil company for the purchase of 80,000 barrels (35 gallons each) of fuel-oil for its steamers at a fixed price, the oil to be delivered between the 1st of March, 1915, and the 1st of March, 1918, and to be made "in fairly equal monthly quantities as the purchaser's business should require and as it in writing should order." By the end of January, 1918 (one month from the close of the contract period) the purchaser had only requested and received deliveries aggregating slightly less than two-thirds of the quantity contracted for. The market price of oil having increased the purchaser made provision for storage beyond its ordinary requirements and notified the vendor to deliver 30,000 barrels, the balance of the 80,000 barrels contracted for and remaining undelivered.

Held, that the systematic request and receipt each month by the navigation company of a much smaller amount than could have been demanded would not only create an inference that any right to further deliveries beyond the monthly amount so established (or at any rate not in excess of 2,222 barrels which is the monthly delivery required during the contract period to exhaust the 80,000 barrels) was abandoned but would be in accordance with the true intent of the parties under the contract. The purchaser is not entitled to delivery of the balance of the 80,000 barrels nor to continue receiving deliveries at the previous rate per month beyond the contract period in order to receive the full amount contracted for.

Tyers v. *Rosedale and Ferryhill Iron Co.* (1875), L.R. 10 Ex. 195 distinguished.

ACTION for breach of contract by the purchaser of 80,000 barrels of fuel-oil from the defendant Company. The facts are set out fully in the head-note and reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 19th of May, 1920.

Statement

Davis, K.C., and *Angus*, for plaintiff.

J. H. Senkler, K.C., and *Buell*, for defendant.

MACDONALD, J.

1920

June 5.

TERMINAL STEAM NAVIGATION CO. v. IMPERIAL OIL LIMITED

5th June, 1920.

MACDONALD, J.: On the 23rd of January, 1915, plaintiff Company, hereafter called "the Navigation Company," agreed, in writing, with the defendant, hereafter called "the Oil Company," under its previous name of the Imperial Oil Company, Limited, to purchase 80,000 barrels of fuel-oil, of 35 Imperial gallons each, at two and two-seventh cents per gallon. Such oil was stated to be for consumption by the Navigation Company in its steamers, and it was to receive same within a contract period, beginning 1st March, 1915, and ending 1st March, 1918. The purchase price was to be, cash for all deliveries, within 30 days from date of each invoice, or, on demand thereafter, with interest at 8 per cent. It was stipulated, on the part of the Oil Company, that the sale and delivery was to be on certain specified terms and conditions. It was provided that the deliveries should be made "in fairly equal monthly quantities, as the business of the party of the second part (Navigation Co.) shall require and as it, in writing, shall order." In the printed form of agreement used, there was a clause allowing the Oil Company to anticipate orders and make further deliveries beyond such equal monthly quantities, where the purchaser had storage capacity, but the blank space for this purpose was not filled in, it thus being apparent, that it was not intended to be utilized and that there was not storage capacity available by the Navigation Company at the time of entering into the agreement. The situation thus created was, that while the Navigation Company was entitled, during the contract period, to request delivery of the entire quantity of oil mentioned, still, such delivery was subject to the condition providing that such deliveries should be in "fairly equal monthly" quantities. In carrying out the contract, it was mutually varied, as to the place of delivery of the oil, but otherwise there was no change in its terms, and fulfilment of the contract proceeded satisfactorily and without any difficulty arising, until the month of January, 1918. Up to the end of that month the Navigation Company had only requested, and received, delivery of 1,625,505 gallons of oil, which established an average monthly delivery, during the 35 months, from the

Judgment

1st of March, 1915, of only 46,443 gallons. If deliveries had continued at the same rate, until the end of the contract period, the total amount of oil delivered would thus have fallen far short of the amount covered by the contract. Under these circumstances, the price of oil having increased materially in the meantime, the Navigation Company made provision for storage of oil beyond their ordinary requirements and then notified the Oil Company to deliver 30,000 barrels of oil, being practically the balance of the 80,000 barrels contracted for and still remaining undelivered. It was contended, that even if the Oil Company had been willing to comply with this request, that it was not capable of performance nor within the terms of the agreement, as to mode of delivery. I think that the tenor of the correspondence constituted a refusal to make such delivery either as requested or in any modified form. It was clearly indicated, that the Oil Company did not propose to make any such heavy delivery at that period of the contract, when only one month remained before its expiration. Nor was it willing, even to continue deliveries at the previous rate per month, until such amount, in the course of time, would be delivered. It took the ground that the Navigation Company had, at this time, lost its right to call for delivery of the full amount of 80,000 barrels. Further, that as each monthly delivery took place, it formed a complete and absolute sale and that the Navigation Company could not proceed with the contract, taking deliveries monthly and establishing a basis of "the fairly equal monthly quantity," without foregoing its right to the delivery of the balance, except on the same terms. On the contrary, the contention of the Navigation Company is, that such right of delivery was simply postponed and that it was entitled to have its request of January, 1918, complied with, and in the event of failure, to be entitled to damages for breach of the contract. The question then is, whether there was an absolute sale of the 80,000 barrels of oil, or whether "terms and conditions" so control the sale that the Oil Company is thus secure in the position assumed, that each monthly delivery constituted a separate contract, so that the Navigation Company lost its right to compel delivery of the oil contracted for in the manner

Judgment

MACDONALD, J.
1920
June 5.
TERMINAL STEAM NAVIGATION CO. v. IMPERIAL OIL LIMITED

requested. In order to carry out the terms of the contract, and receive 80,000, the Navigation Company would require to order and obtain an average delivery of 2,222 barrels per month during the 36 months that the contract was in force. Such a delivery at 35 Imperial gallons per barrel, would amount to 77,700 gallons. But the oil called for, and delivered each month, as previously mentioned, only averaged 46,443 gallons.

It is common ground that, there was no express request for a postponement of the deliveries, but it is contended, on the part of the plaintiff, that there was an implied request for such postponement. The result that follows from performance, in this manner, of a contract, for the sale of goods by instalments, is referred to in Halsbury's Laws of England, Vol. 25, p. 218, par. 377, as follows:

"The fact that the parties have silently omitted to enforce and to require the delivery of any instalment of the goods, or have by mutual consent foreborne its delivery at the contract time, is relevant, but not conclusive, to shew a mutual agreement to rescind the contract, so far as it applies to the instalment undelivered."

This statement of the law was discussed, and disapproved of in *Doner* v. *Western Canada Flour Mills Co. Limited* (1917), 41 O.L.R. 503, as not being supported by the authorities cited, *viz., Higgin* v. *Pumpherston Oil Co., Limited* (1893), 20 R. 532 at p. 535, and *Tyers* v. *Rosedale and Ferryhill Iron Co.* (1875), L.R. 10 Ex. 195. In referring to these cases, Sir W. R. Meredith, in delivering the judgment of the Court of Appeal, at p. 522 said:

Judgment

"I find nothing in either case which indicates that the view of the Court was, that 'the fact that the parties have silently omitted to enforce and to require the delivery of any instalment' is 'relevant, but not conclusive, to shew a mutual agreement to rescind the contract, so far as it applies to the instalment undelivered.'"

In *Sierichs* v. *Hughes* (1918), 42 O.L.R. 608, the case of *Doner* v. *Western Canada Flour Mills Co. Limited, supra,* was distinguished, but the distinction arose through the facts, and did not destroy its effect, as an authority to be considered in the present case. On the contrary, the circumstances were so similar, as to support the position of the Oil Company, and marked the difference between a contract, where the parties had silently established a basis of monthly, or periodical deliveries below the limit that could have been pursued, and one where

such variation in the contract, in this respect, had been expressly agreed upon.

In the present case, the Navigation Company submits, that the case of *Tyers* v. *Rosedale and Ferryhill Iron Co., supra,* should be followed, and that such decision supports its contention. I think that there is a very clear distinction between the facts in that case and those here presented. There was, in that case, a repeated request on the part of the purchaser to postpone the stipulated deliveries from time to time, and this course was acquiesced in by the vendors. The effect of the evidence was that, by their conduct, the parties indicated an intention not to be free from the contract as each delivery took place, but simply to postpone deliveries to a subsequent time. Here there was no evidence adduced of a like nature. It was only on the eve of the expiry of the contract period, that the Navigation Company requested a delivery, which would have amounted to more than one-third of the whole quantity originally agreed upon to be delivered during the three years. While the contract provided that the Navigation Company might be entitled, upon certain terms and conditions, to receive the quantity mentioned, still, I think that it cannot be properly construed, as being an agreement whereby the purchasers could arrange for, what practically amounted to average deliveries each month, and then call upon the vendors for an immediate delivery of the large balance remaining, or even expect to have such amount delivered subsequent to the contract period, upon the same basis as had been previously adopted. To obtain such a right, the Navigation Company should have had a clause to that effect, the same as the one that was inserted in favour of the Oil Company, whereby it could, at its option, either cancel further deliveries at the end of the contract period or continue to supply oil until the whole amount had been delivered at the stipulated price. The systematic request and receipt each month by the Navigation Company of a much smaller amount, than could have been demanded would not only create an inference that any right to further deliveries beyond the monthly amount so established, or at any rate, not in excess of 2,222 barrels, was abandoned, but, in my opinion, would be in accordance with the

MACDONALD, J.

1920

June 5.

TERMINAL STEAM NAVIGATION CO. v. IMPERIAL OIL LIMITED

true intent of the parties under the contract. I think this is the fair and reasonable construction to place upon the contract, and in arriving at such conclusion, I have borne in mind the oft-quoted canon of Parke, B. in *Ford* v. *Beech* (1848), 11 Q.B. 852 at p. 866 in construing a contract, *viz.*:

> "It ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they have used in the expression of their intent."

I might add, that consideration of the surrounding circumstances tends to strengthen the opinion I have formed, that the Navigation Company had no right to make a demand for the 30,000 barrels of oil during the last month of the contract period, and thus no cause of action existed for non-compliance with its request.

The Navigation Company, at the trial, contended that, in any event, the Oil Company should have complied with its request, as to the 30,000 barrels, by offering to increase the previous monthly deliveries and express its willingness to deliver up to a "fairly equal monthly quantity" of at least 2,222 barrels of oil. I think this position was not seriously considered by the parties prior to the trial. It is not referred to in any way in the pleadings. Even if I considered an amendment unnecessary, I do not think the facts support such a contention. Further, it was never presented for consideration to the Oil Company. It was not called upon directly, or by fair inference, to determine whether it would accede to such a request. It may well be, that it could have done so, without making any special arrangements with its source of supply. At any rate, there was no refusal to deliver any such increased amount, and consequently no breach of the contract, in this respect, occurred. The action is dismissed, with costs.

Judgment

Action dismissed.

PARK v. JUDD.

MACDONALD, C.J.A. (At Chambers)

1920

May 27.

PARK v. JUDD

Practice—Court of Appeal—Application in Chambers—Security for costs —Jurisdiction—Supreme Court of Canada Rules.

On an application to a judge of the Court of Appeal in Chambers to approve of the security on a proposed appeal from a judgment of the Court of Appeal to the Supreme Court of Canada the respondent objected to the approval on the ground that there was no right of appeal.

Held, that assuming a judge of the Court of Appeal in Chambers has power to inquire into the question of the jurisdiction of the Supreme Court to entertain the appeal, it should not be exercised in view of the complete provision made for the protection of both parties by the first four rules of the Supreme Court of Canada.

The powers of a judge of the Court appealed from are limited to consideration of the sufficiency of the proposed security and to the extension of time for giving the security when asked for.

APPLICATION by defendant to a judge of the Court of Appeal to approve of the security to be given on an appeal from the judgment of the Court of Appeal to the Supreme Court of Canada. Objection was taken to the application by counsel for the plaintiff on the ground that there was no right of appeal. Heard by MACDONALD, C.J.A. at Chambers in Vancouver on the 20th of May, 1920. Statement

Alexis Martin, for the application.
Maclean, K.C., contra.

27th May, 1920.

MACDONALD, C.J.A.: On an application by the defendant to me in Chambers to approve of the security on a proposed appeal from the judgment of the Court of Appeal herein to the Supreme Court of Canada, plaintiff's counsel objected on the ground that there was no right of appeal. He referred to the recent amendment of the Supreme Court Act, Can. Stats. 1918, Cap. 7, and to the fact that the matter in controversy does not exceed in value the sum of $1,000. He submitted that the case is not one which falls within any of the other subsections of section 46 of the Supreme Court Act. The application is in Judgment

MACDONALD, C.J.A. (At Chambers)

1920

May 27.

PARK v. JUDD

time, and no objection is taken to the security proposed. The sole question is as to whether I am called upon to inquire into the question of the right of appeal.

It appears to me that the powers of a judge of the Court appealed from are limited to the consideration of the sufficiency of the proposed security and to the extension of time for giving the security where an extension is asked for. I am not, I think, to concern myself with the jurisdiction of the Supreme Court to entertain the proposed appeal.

The first four rules of the Supreme Court make ample provision for determining, at the instance of either party, in a summary manner, the question of jurisdiction, and as pointed out by Mr. Cameron in the second edition of his book on the Practice and Rules of the Supreme Court, at page 482, it would be idle on the part of a judge of the Court appealed from to inquire into the question of the jurisdiction of the Supreme Court to entertain the appeal. Even if I have the power, which I doubt, notwithstanding that such a power has been assumed in some cases (see *Jermyn* v. *Tew* (1898), 28 S.C.R. 497), I think it ought not to be exercised, in view of the complete provision made for the protection of both parties, in a case like this one, by the rules to which I have already referred.

Judgment

Objection overruled.

THE ROYAL BANK OF CANADA v. SKENE & CHRISTIE.

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

Contract—Construction of building—Sub-contract for skylights and roofing —Varying of sub-contract—Louvres—Parties not ad idem.

The defendants, who contracted for the construction of a hotel in Vancouver, sub-contracted to the National Iron Works for the supply and installation of six skylights and roofing on the hotel. Before the work was completed the National Iron Works assigned all moneys due under the sub-contract to the plaintiff Bank. When considering a tender the National Iron Works were supplied with the plan and specifications afterwards made a part of the contract. These specified for louvres in the skylights which should have air space 50 per cent. in excess of the shaft area and this according to the specifications required that louvres be a height of two and a half feet. Before the contract was entered into the Iron Works suggested an "S"-shaped louvre should be installed instead of a straight one, to which the defendants agreed. Subsequently when the work was under way it was found that by using the "S"-shaped louvre (a straight louvre having evidently been contemplated by the specifications) in order to give the air space required by the specifications, the louvres would have to be seven and a half feet high. The architect in charge then agreed not to insist on an excess of air space over the shaft area, which reduced the louvres to a height of five feet. The defendants claimed as an extra, the additional cost occasioned by building the louvres five feet high instead of two and a half feet as shewn in the specifications. A second item in dispute was that the original plan of roof of the tea-room shewed a plain roof but the words "see detail" were written on the side with arrows pointing to the roof. A detailed drawing shewing three tiers of roofing but not louvres appeared to have been subsequently submitted to the sub-contractors but prior to the contract being entered into. The roof was eventually built with three tiers with attendant louvres below each tier. It was held by the trial judge that the plaintiff was entitled to charge as an extra the cost of constructing the louvres on the skylights the additional height, also the cost of the louvres constructed in the roof of the tea-room but not the additional cost of putting in the three tiers of roofing.

Held, on appeal, affirming the decision of MACDONALD, J. (MACDONALD, C.J.A. dissenting), that the louvre construction of the skylights as contemplated by the contract was radically and wholly altered and that the plans of the roof of the tea-room were defective in not indicating the construction of louvres below the tiers and the items claimed as extras were properly allowed.

[Reversed in part by Supreme Court of Canada.]

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

Statement

APPEAL by defendants from the decision of MACDONALD, J., in an action tried by him at Vancouver on the 2nd to the 9th of November, 1917, for work done and material supplied by the National Iron Works for the defendants pursuant to a contract under seal, dated the 13th of August, 1913, between the National Iron Works and the defendants for the supplying and installing of skylights, louvres, roofs and flashings on the Vancouver Hotel and for extras. Messrs. Skene & Christie had obtained the contract from the Canadian Pacific Railway for the construction of the Vancouver Hotel, and later sub-contracted with the National Iron Works for this special work. The work under the sub-contract was to be done in accordance with certain clauses of the sheet metal specifications which was included in the sub-contract, for the sum of $12,223. Before the work was fully completed the National Iron Works assigned all the moneys due under the sub-contract to the plaintiff Bank. A claim was made by the Bank for $5,387.93 for extras, and by arrangement of counsel the trial was limited to the consideration of two items: first, and most important, being as to the installation and supplying of six skylights, and second, in respect to the construction of the roof of the tea-room. As to the first, according to the specifications, the skylights were to be two and a half feet high, with air space between the louvres of 50 per cent. in excess of the shaft area. After specifications and plans had been tendered the National Iron Works for inspection with a view to tendering for the contract, but before the sub-contract had been entered into, the sub-contractors proposed using "S"-shaped louvres instead of the straight ones. This was agreed to and the contract was entered into. While the work was in progress it was found by the plaintiff that in putting in "S"-shaped louvres, if the air space between required to be 50 per cent. in excess of the shaft area it would be necessary to build them seven and a half feet high (the estimate in the specifications of two and a half feet being evidently based on the installation of straight louvres). The architect of the Canadian Pacific Railway (whose assent had to be obtained on all work) then agreed to reducing the air space between the louvres by the 50 per

cent. excess. This still necessitated the building of the louvres five feet high. The plaintiff claimed as an extra the additional cost occasioned by building the louvres five feet high instead of two and a half feet as required by the specifications attached to the contract. As to the second item, with relation to the roof of the tea-room, the original plan only shewed a plain roof, but was marked with the words "see detail," with an arrow pointing to the roof. Subsequently, but before the contract was entered into, a detached plan appeared to have been given the contractors shewing three tiers of sheeting on each side of the roof but did not shew louvres between the tiers. The three tiers of roofing, with accompanying "S"-shaped louvres below each tier, were subsequently, by arrangement, put in. The plaintiff claimed as extras the additional cost of putting in the tiers of roofing and the louvres.

Alfred Bull, for plaintiff.
McMullen, for defendants.

MACDONALD, J.: By a contract dated the 7th of August, 1913, the National Iron Works agreed with Skene & Christie, the defendants herein, to supply and install the skylights, louvres, roofs and flashings in connection with the erection of the Vancouver Hotel in this city. The work was to be done as specified in clauses 6, 7 and 8 of the sheet metal specifications, which formed a portion of the contract. The contract price was $12,223, which was to be paid at the times and in the manner contemplated by a certain contract, entered into between Skene & Christie and the Canadian Pacific Railway Company for the construction of the hotel. For reasons that have not been outlined upon the trial, the contract thus entered into by the National Iron Works was not fully completed; and in the meantime, and before the National Iron Works ceased to do work in pursuance of the contract, it assigned all the moneys that might become due and payable under the contract, and any other contracts that they had with respect to the Vancouver Hotel, to the Royal Bank of Canada, the plaintiff herein. The statement of claim outlines in its particulars not only the contract thus shortly referred to, but a further contract entered into for the performance of work upon the hotel. A claim

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

is made for extras; so that the total amount, after giving credits, alleged to be due by the defendants to the plaintiff, is $5,387.93. It has been arranged between counsel that only certain items in dispute (more particularly those relating to extras) should be dealt with upon this trial, and that should the plaintiff be successful a reference may be had to determine the actual amount owing by the defendants to the plaintiff. The two main items, thus to be considered under this arrangement, consist of a claim, in connection with the installation and supplying of certain skylights, six in number, and also another item with respect to the construction of a skylight in the roof, over the tea-room. Dealing with the first item, which is the more important of the two, it requires a consideration of the contract and the circumstances surrounding the execution of the contract, and also the way in which the contract was treated by the parties, and acted upon during the performance of the work. I think I should look at all the circumstances which will throw light upon the transaction. I should not be guided alone (in view of what I will refer to, later on) by the strict wording of the contract, but should endeavour, if possible, to come to a conclusion as to what the parties really intended, should be a proper performance of the contract. As the trial (which has taken somewhat longer than it otherwise would, as I have not been able to give my entire time to it) commenced, it would appear that the strength of the plaintiff's case was resting upon an effort to shew a mutual mistake in the contract—in the way the contract was entered into. As the trial has developed, however, it seems to me that the plaintiff, properly enough, has taken what I consider the stronger ground, namely, that, by what took place between the parties, they were as to this item never *ad idem*. They were not of the same mind and did not agree upon the same subject-matter. The two parties concerned were thus at variance as to the work to be performed. If there had been a mistake simply on one side, and the other side had contended that the contract should be performed, it is hardly necessary to say that the party, thus not in default through negligence, could insist upon the performance of it. When the National Iron Works made up their minds to tender

MACDONALD, J.

upon this contract they received from the defendants the plans and specifications which would assist them in forming a conclusion as to the proper amount they should offer for the performance of the work; such plans, upon being considered by the National Iron Works, were of a nature that warranted them in employing the services of a quantity surveyor—Mr. McKinley. He appears to have entered upon his work, and was able to make the report referred to as Exhibit 22. He was not available as a witness, but no objection was raised to his report being received in evidence. Considerable controversy has arisen as to the construction to be placed upon this report, to which I shall refer again. Suffice, in the meantime, for me to say that Shaw, one of the firm composing the National Iron Works, and Hazlett, another member of the firm who now appears as a witness on behalf of the defendants, both agreed that this estimate formed a guide to assist them in making the tender. These two witnesses, Shaw for the plaintiff and Hazlett for the defendants, do not agree as to the way in which the tender was made, but both seem to be of the same mind, as to the use made of this estimate of McKinley. I am satisfied that when this estimate was made, that McKinley had not only the plans, but also the specifications before him; and that he utilized both these sources in arriving at his estimate. I accept the explanation given by Thompson, an architect known to me to be of ability, competence and integrity; and that McKinley, apparently on the third page of the estimate, gave the figures not only of the actual square feet of louvres, as taken from the plans in his possession, but also the additional amount which would require to be considered, if 50 per cent. in excess of the shaft area was to be taken into account. On this question, as to what the 50 per cent. of excess means, considerable evidence has been given. Expert opinion has been given upon the desirability from a ventilating standpoint of having the outlet to the shaft less than the intake. I thought, at first, when stress was laid upon this point, that it would require greater consideration than I now intend to give upon it. I think that, as the circumstances existed, at the time that this estimate was made, that compliance with the specifications could

MACDONALD, J.
1917
Nov. 9.
COURT OF APPEAL
1920
May 14.
ROYAL BANK OF CANADA v. SKENE & CHRISTIE

have taken place by the National Iron Works in carrying out their contract. At the time I think the position was that the straight louvre, referred to in the plans, was supposed to be adopted. Had this particular louvre been utilized, and not the one that was afterwards accepted, it appears to me that the plans and specifications would have been consistent and workable. The trouble, however, arose through the National Iron Works, in connection with its bid, suggesting that a particular type of louvre known as the "S"-shaped louvre should be adopted. This is clearly indicated in the correspondence covering the tender. Then the defendants considered the style that was suggested, and being apparently satisfied with it, subsequently the contract was entered into. Counsel for the defendants pressed the witnesses for the plaintiff, as to whether or not they had contracted upon the basis of the "S"-shaped louvre. They admitted that they had done so, so that there seems to be no doubt that at the time the contract was executed, both parties understood that the "S"-shaped louvre should be used upon the work. I am well satisfied that at that time neither the National Iron Works nor the defendants took into account the changed situation that would be created by the adoption of the "S"-shaped louvre. The plan of the ventilating shaft shewed a height of two feet six inches; and it was impossible to utilize the "S"-shaped louvre on a height of that extent and at the same time carry out the letter and perchance the full intention of the specification as to the 50 per cent. of excess area. If I am right in this conclusion, then, instead of these two parties thus contemplating the carrying out of the work, having settled upon the mode of operation, they were in this particular quite wide apart. It does not seem to have dawned upon the parties, however, that this variance existed, until the time came for the completion of that portion of the work. Then a controversy arose, and the result was that it was pointed out that the architect was then calling for the performance of work that was not intended on the part of the National Iron Works should be performed. Objections were raised. It was pointed out that an additional cost would be involved, and it would be unfair to expect the contractors to

MACDONALD, J.

perform such additional work, except as an extra. No agreement, however, was arrived at in the first instance. The work was eventually proceeded with, but subject to an important variation. The architect, who had the usual powers, decided that they would not insist upon the 50 per cent. of excess, but would reduce it, so that the amount of outlet afforded by the louvres should be equal to the area of the shaft. Incidentally one reason that operated on the minds of the architects was that it would be out of keeping in a building of that kind; it would be incongruous, to say the least, to have a shaft, of the height that would have been necessary, for the purpose of installing louvres to the extent required by the strict wording of the specification. It supports me in the belief, that at the time when the contract was entered into, this matter was not present to the mind of either of the said parties and that it would be unfair to expect its performance. Assuming, then, that I am right as to the parties not having agreed upon the proper performance of this portion of the contract, how is the matter to be adjusted so that injustice will not be done to either side? This is a somewhat difficult matter, but the task has been made easier by the figures which have been submitted, as to the cost of the louvres and the cost of glazing. It means, then, that the defendants, working upon a percentage basis in connection with the Vancouver Hotel, if called upon to pay the additional cost for this particular work in the shape of an extra, will have received value for such expenditure if the reference which is to take place is carried out, as I assume it will be, on proper lines. At this late hour I do not think it advisable to dwell further upon this branch of the case. I find that the plaintiff is entitled to succeed, and that a reference should take place for the purpose of determining the additional cost, imposed upon the National Iron Works in the performance of the work on the instructions of the architect, as distinguished from what I have endeavoured to point out was the contract which the National Iron Works really entered into. Generally speaking, where a contract of this nature, as to a piece of work, is rescinded the matter comes back to the basis of *quantum meruit,* and then it involves considerable expense and delay in the reference. As

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA *v.* SKENE & CHRISTIE

MACDONALD, J.

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

I understand it, however, this can be avoided, and the parties intend to avoid such a course, by adopting the figures of the contract and simply dealing with the additional amount upon the basis of measurement. Then as to the other item claimed by way of an extra—that is for the skylights over the tea-room. The original plans of this work, upon which the tender was based do not shew three tiers, nor do they shew any louvres required to be installed in connection with that particular work. Such original plan, however, does give a note of warning to the intending contractors that they are not to be guided solely by such plan, but are to look elsewhere for information. At the point in question upon the plan the following location is plainly seen: "see detail"; and then there is a line with an arrow directed to the roof. This indicates that an intending contractor should not only consider the plan, but should enquire and find out what the details in connection with the work demand. There seems to be no dispute as to such detail drawing being in existence at the time. I think, upon the evidence, I can safely find that it was. The only remaining question is whether it came into the possession of the National Iron Works. Mr. Garrow, the manager for the defendants, produced his book, in which he was in the habit of keeping track of plans; and I am satisfied the entry of June 17th, referring to this detailed plan and numbered 423, was in his possession at that time. His entry would indicate that he gave such a plan out on that date to the National Iron Works. It would have been unlikely that he could recollect as a fact that he did so deliver it, but guided by an entry in a book, one who knows he made such entry honestly is quite entitled, years afterwards, in looking at that entry, to say "I believe such and such an event took place and that the delivery was made as indicated here": see *Maugham* v. *Hubbard* (1828), 8 B. & C. 14. I take it that this is the sum and substance of the evidence in that respect, but whether he gave that plan out or not, it was the duty of these contractors to have satisfied themselves as to the details of that particular work, and if they neglected to do so, then the penalty for the neglect must fall on their shoulders, or in this case, upon the assignee. Now, whether that be

MACDONALD, J.

true with respect to the portion of the work outlined in such detail, I make an exception between the work as shewn upon the detail and the work as it was performed; so that in the reference which I shall direct with respect to this item there is only to be allowed to the plaintiff any additional cost entailed through having constructed louvres on this work. The plaintiff is not to be entitled to any costs incidental to the additional three tiers, as it is claimed that two tiers are shewn on the original plan. I might say in connection with this item of the roof over the tea-room, I am led to this conclusion to some extent by what happened afterwards, at the time when the discussion of the work came up. It emphasizes the great danger, in connection with work of this kind, of not placing something on record. There is not a line of complaint produced in evidence, to shew that the contractors were complaining to the main contractors through being called upon to do this work, or even that they complained to the architect. It is true there was a statement made as to conversations, but I do not see fit to rely upon them in connection with what must be, at this late date, an effort of memory. Then as to the item that is admitted in connection with the intake, amounting to $276.01, there is no dispute. It is a question of measurement, and that can be dealt with in the question of reference again. I thus dispose of the claims that were to be considered by the Court, on the part of the plaintiff.

The defendants claim that they are entitled to a deduction, or set-off, for non-compliance with the additional 50 per cent. of excess already referred to. This claim naturally falls to the ground in view of my conclusion in connection with the claim of the plaintiff. Then a claim is made for what should be properly termed, damages suffered by the defendants through non-completion of the contract. The whole claim amounts to $1,915.99, but only the first four items have been the subject of dispute. The first item of $125 is allowed; also the second item of $66.33; the third item of $950 should be added and dealt with at the same time as the fourth item, namely, $300. The whole amount, namely, $1,250, is covered by a contract entered into with the B.C. Ceiling & Roofing Company, which

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

is filed as an exhibit. It has been strenuously contended that the plaintiff should not be charged with the total amount of this contract, because there is some evidence adduced to shew that the work could have been completed at less cost than the contract price. I do not see that it lies in the mouth of the plaintiff to take such a position. As I mentioned before, I am not familiar with the circumstances under which this contract was abandoned, or at any rate the contractor ceased to work upon it, but it does appear to me where a situation arises that a main contractor is required to complete a contract entered into by a sub-contractor, he is entitled to charge such amount as it was necessary for him to expend, to duly and properly execute his contract. He has responsibility on his part and he must fulfill it. The only way that this position could be successfully assailed would be to shew that a contractor having defaulted, the main contractor used the situation as a means of entering into what might be termed a fraudulent contract, or a contract at an excessive amount, knowing full well that by performing the contract in some other way, less cost would be involved, and a less charge would be made against the contractor thus in default. I do not find any such circumstances have arisen here. I think that the contract was honestly entered into and properly performed. It was arrived at after competition, and a fair amount of profit was simply added by the B.C. Ceiling & Roofing Company to what they considered would be the actual cost of the work, they had to perform. There is, however, a small item upon which I have not been afforded any evidence, to shew that a deduction should be allowed, namely, the division of one skylight as contemplated by the original contract. It appears that this skylight was divided and forms two separate skylights, and this would naturally involve an additional expense. So that the matter can be disposed of, if the parties cannot agree as to the amount that should fairly be deducted from the $1,250, I will allow them to select some independent architect or contractor. And their failing to agree upon it, I will select someone myself to give evidence upon that point; but to that extent only will the trial be adjourned. I am taking this somewhat irregular course, so as

MACDONALD, J.

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

to avoid any additional cost that might be incurred in a reference upon this point. Should the parties, however, find it impossible on the other branches of the case upon which I have given judgment, to agree between themselves and their architects, as to the amount to be allowed plaintiff, and a reference has to take place, then such reference will include what will be a proper amount to deduct from the $1,250. I trust I have made myself clear in that respect, so that the sum of $1,915.99 is allowed to the defendants, subject to any such reduction as may take place with respect to the $1,250.

Then the defendants claim by way of set-off or counterclaim an amount for damages through the defective work upon the roof of the banqueting hall. There is a question of law involved as to whether any such claim would be properly chargeable against the plaintiff herein. I have not been cited authorities in that connection. As I intend to find, on the facts, against the claim, it is not necessary for me to deal with the position from a legal standpoint. I feel no doubt whatever in coming to the conclusion that the work in connection with this roof was performed by the National Iron Works under the supervision of the architect, and even without the evidence of Mr. Hutchinson, I would have considered, from the care that would naturally be bestowed upon that particular portion of the work, that the architect was satisfied with the way the work was done. He, beyond question, would be inspecting from time to time the work upon the roof of an expensive building of that kind. But there is direct evidence given by Mr. Hutchinson that the particular work complained of, to which Mr. Smith referred, was actually done under the specific directions of the architect. If so, no blame can attach to the National Iron Works for carrying out such instructions. I am also satisfied that the work as thus ordered and carried out was not defective. Under these circumstances I do not think there would be any claim for damages as against the National Iron Works if it were suing, and consequently there will be no claim against the plaintiff. The plaintiff is entitled to the general costs of the action.

MACDONALD, J.

MACDONALD, J.
1917
Nov. 9.

From this decision the defendants appealed. The appeal was argued at Victoria on the 28th, 29th and 30th of January and 2nd of February, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

COURT OF APPEAL
1920
May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

Armour, K.C. (*McMullen,* with him), for appellants: As to the louvres in the skylights they say it was a mutual mistake, but there was no mistake. The "S"-shaped louvres were suggested by the sub-contractors, and the architect reduced the air space required to reduce the height to five feet. We never waived our specifications. There was no rescission, and in fact we could have compelled them to build the skylights seven and a half feet high. As to the builders' liability see Hudson's Building Contracts, 4th Ed., Vol. 1, p. 63; *Bottoms* v. *Lord Mayor, &c., of York* (1892), Hudson's Building Contracts, 4th Ed., Vol. 2, p. 208; *Boyd & Forrest* v. *Glasgow and South-Western Railway Co.* (1915), S.C. 20; *Kinlen* v. *Ennis Urban District Council* (1916), 2 I.R. 299; *Tamplin* v. *James* (1880), 15 Ch. D. 215.

Argument

Alfred Bull, for respondent: The parties were not *ad idem.* There was a mutual mistake. As to the difference between the "S"-shaped louvres and a straight louvre see *Wilson* v. *Wilson* (1854), 5 H.L. Cas. 40 at p. 61. The "S"-shaped louvre exhausts the air space quicker than the flat louvre. When you are construing an ambiguous contract all surrounding circumstances must be gone into: see *Walker* v. *Giles* (1848), 6 C.B. 662. An estimate was made of the quantity of copper required. If you can give evidence of price you can give evidence of quantity: see *Allen* v. *Cameron* (1833), 1 C. & M. 832. They held out this plan to us, on which we made our estimate: see *Denney* v. *Hancock* (1870), 6 Chy. App. 1; *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597 at p. 609. There should be rectification of the contract on the ground of mistake, and payment properly adjusted.

Armour, in reply.

Cur. adv. vult.

14th May, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: At the close of the very able and

exhaustive arguments, lasting several days, I was clearly of opinion that the appeal should be allowed, and further consideration of the case has not changed my views.

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

I need only say that in my opinion the specification requiring louvres "spaced to provide 50 per cent. more open area to the air than the entire area of the shaft" is the governing term in respect of these louvres, and the fact that the plan indicates the height of the louvres as two and a half feet cannot, on the evidence, be held to displace this overriding term. The plan appears to have been drawn on the assumption that flat louvres would be built. The adoption of the "S" style of louvre made it necessary to build to an additional height in order to fit the agreed capacity. This style of louvre was adopted on the suggestion of the contractors themselves, and assented to by the owners' architect, but there never was any intention to treat its adoption as an abandonment of said term in the specifications.

A modification was made in favour of the contractors by reducing the said 50 per cent. excess, but the contention that a new contract was virtually entered into in respect of the louvres which would take them out of the main contract is untenable. There is so much in the evidence repugnant to that contention that I have no hesitation, but with great respect to the trial judge, in coming to a conclusion differing from that to which he has come.

MACDONALD, C.J.A.

As to the skylights, I think it has been made clear in the evidence that no changes were made by the owners in these since the delivery to the contractors, before they tendered, of the drawing, Exhibit 34.

The evidence, I think, amply sustains the appellants' contention that at the time the contractors received drawing No. 423, the red pencil lines were upon it.

MARTIN, J.A. would dismiss the appeal.

MARTIN, J.A.

MCPHILLIPS, J.A.: This appeal has relation to the construction of two items in the contract and specifications covering the construction of the Hotel Vancouver, one of the modern hotels of the Canadian Pacific Railway hotel system. The

MCPHILLIPS, J.A.

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

action is between the Bank and the contractors, the Bank (respondent) being the assignee of the claim sued upon, being a claim as against the principal contractors (appellants) arising from work done and materials supplied by the National Iron Works, sub-contractors. The question that required to be determined was whether the claim was within or without the principal contract specifications and plan, being additional work and materials supplied without the purview of the contract entirely or whether in the nature of changed work or extras for which a special allowance must be made. Mr. *Armour,* for the appellants, in a very careful argument, contended that the learned judge had erred in the conclusion at which he had arrived, and that the contract specifications and plans precluded the sub-contractors from recovery.

The two items of the claim allowed by the learned judge being the subject-matter of the appeal are in respect to (1) six skylights on the roof garden level of the hotel, and (2) the roof over the tea-room of the hotel.

Now, as to the first item, it is common ground that the louvre construction of the skylights, as contemplated by the contract, was radically and wholly altered, so much so that it may be well said that it was patently new work. The whole scheme of construction and system of ventilation was altered, and the require-

MCPHILLIPS, J.A.

ment, under the terms of the conrtact, that the area between the louvres should be equal to 50 per cent. in excess of the area of the shaft was unscientific—unnecessary in fact—would bring about defectiveness of operation. I think this was conclusively proved and established, therefore, the requirement to extend the skylights from the height as shewn on the plan to the height constructed was a direction wholly outside the contract of August 7th, 1913, and rightly gives rise to the claim made, and allowed by the learned trial judge, as being a change rightly claimable in excess of the stipulated contract price, and I am not of the opinion that the appellants were entitled to credit for the difference between the cost of making the skylights so as to give an area between the louvres of 50 per cent. in excess of the area of the shaft.

Then as to the second item, I am completely in accord with

the learned trial judge in respect to this item as in the case of the first item. It is plain that the plans were defective, and did not sufficiently indicate that the louvre construction over the tea-room, as carried out, and for which the claim was made and allowed, was to be part of the contract as undertaken by the National Iron Works, and it follows, in my opinion, that this was a proper allowance. Upon the whole of the facts (and the appeal really in the main turns upon the facts), the allowances made by the learned trial judge would appear to be quite permissible upon the basis of a *quantum meruit,* and no such case was made out by the appellants establishing that the learned trial judge was clearly wrong, an onus now so well understood as resting upon appellants, and which must be discharged before a reversal of the judgment can be called for.

The case is not one of the National Iron Works failing to understand that which was demonstrated by the contract specifications and plans, but it is a case of work done and materials supplied *dehors* the contract, and it is impossible, in my opinion, to refer to apt words or draw any reasonable inference that the work done and materials supplied were within the general terms of the contract. Further, I cannot view the question we have to decide as within the hard and fast rule that the contract was a lump sum contract and no extras are allowable. The National Iron Works did not so contract, nor is it possible to successfully contend that that is the legal effect when all the facts and circumstances are carefully weighed and considered. That is, the items of claim allowed were not of the original primary obligations, but constitute extra work *dehors* the contract. The facts impel me to the conclusion that the learned trial judge proceeded rightly when he proceeded upon the basis of a *quantum meruit.* The circumstances were such that upon a review of the whole case a promise to pay for the work done and materials supplied may be rightly implied: *Bush* v. *Trustees of the Town and Harbour of Whitehaven* (1888), 52 J.P. 392. Here we have no contention made that the work done has been improperly done, or the materials supplied are in any way defective, or that all that was done was not of benefit; on the contrary, it is common ground that all that has been done has

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

been satisfactorily done and is of benefit, practical, complete and satisfactory in every respect, and in keeping with the best approved modern and present day building conditions. In passing, I would like to refer to one detail coming under item No. 1. The louvres in the skylights were, as shewn on the plan, to be flat. A radical change was decided upon, an entirely changed form of louvres, *i.e.,* instead of flat, to be "S-shaped." This at once rendered it absolutely unnecessary to then build so as to admit of 50 per cent. in excess of the area of the shaft, in fact, to do this would admittedly destroy the effectiveness of the work. Can it be said, in view of this, that it is fair or reasonable, or conforms with common sense or the law, that nevertheless this absurd and fatal provision should be carried out, or that it is to be a matter of account and the respondent has to be charged with that responsibility? I would not think so, and the law upon the subject is dealt with by Lord St. Leonards in *Wilson* v. *Wilson* (1854), 5 H.L. Cas. 40 at p. 66. With the changed louvres the provision as to the 50 per cent. excess of the area of shaft, as provided in the contract, when straight louvres were in contemplation, became an absurdity, even worse, as it would be destructive of efficiency, therefore, by analogy, the change being decided upon, the contract perforce would in this provision be an obvious mistake, as if it had been written in the contract "S louvres" it would have been a mistake or error on the face of the instrument, so the evidence all reads. The Court can correct an obvious mistake. Can it not likewise refuse to give effect to what becomes an obvious mistake? I would think so. There must be reason in all things, especially where the agency of the Court is invoked. The conduct of the appellants at the time, later happenings and present conditions all render it inequitable to give effect to this absurd provision of 50 per cent. in excess of the area of the shaft, the changed method of construction being decided upon (*Victoria Corporation* v. *Patterson* (1899), A.C. 615, the Lord Chancellor at p. 622; *Adolph Lumber Co.* v. *Meadow Creek Lumber Co.* (1919), [58 S.C.R. 306]; 1 W.W.R. 823).

MCPHILLIPS, J.A.

An important matter not to be lost sight of is this, that the general conditions the appellants so greatly rely upon were

never given to or made known to the National Iron Works, but in any case I cannot see that they really affect the position of matters, or at all operate favourably to the appellants in their application if they could be applied to the matters here in controversy, as, in so far as it might be said the general conditions were applicable there was compliance by the National Iron Works. No questions arise here of the non-compliance with any conditions precedent under the contract; the pleadings do not admit of any exceptions being given effect to upon this ground. It follows that alterations in work being ordered, executed and accepted, import and mean an obligation to pay and are therefore stripped of all the exactitude of requirement of obtaining instructions in writing, etc. We have also the position here of the acceptance of the work of the sub-contractors by the principal contractors. *McNeil* v. *Armstrong* (1897), 81 Fed. 943; Hudson's Building Contracts, 4th Ed., Vol. 1, at p. 195, was a case where

"a contract between a sub-contractor and a builder provided that the work and materials were to be to the entire satisfaction of the owner and architect. In an action by the sub-contractor for the price the builder contended that the satisfaction of the owner and architect was a condition precedent to the sub-contractor's right to recover. The Court of first instance found as a fact that the work 'was constructed both as to work and materials in accordance with the contract plans, drawings and specifications and subsequent agreements' and gave judgment for the contractor. The builder appealed. Held, that the sub-contractor was entitled to recover."

MCPHILLIPS, J.A.

Here, if the principal contract can be said to apply in any way in its terms to the work and materials in question in the present case, the presumption is that it only imports those clauses which relate to the work and materials to be supplied by the sub-contractor (see Collins, M.R. in *Temperley Steam Shipping Company* v. *Smith & Co.* (1905), 2 K.B. 791 at p. 802). I cannot see anything which prevents it being held that the learned trial judge arrived at the right conclusion. In the main, the appeal involves questions of fact. No point of law can be said, in my opinion, to be at all determinative of the appeal, and in view of this phase it is well to remember what Lord Buckmaster said in *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96:

MACDONALD, J.

1917

Nov. 9.

COURT OF APPEAL

1920

May 14.

ROYAL BANK OF CANADA v. SKENE & CHRISTIE

"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."

I would, therefore, for the foregoing reasons, dismiss the appeal.

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

Solicitor for appellants: *J. E. McMullen.*
Solicitor for respondent: *Alfred Bull.*

MURPHY, J.

1920

Feb. 20.

COURT OF APPEAL

Sept. 15.

HAMILTON v. KILLICK

HAMILTON v. KILLICK AND BORTHWICK.

Landlord and tenant — Lease — Covenant not to assign without leave — Breach—Forfeiture—Equitable relief.

The lease of a premises in which the tenants carried on a grocery business contained a covenant not to assign or sub-let without leave with a proviso for re-entry in case of breach. The lessees sold their stock and agreed to give the purchaser an assignment of the lease without having obtained the lessor's leave. The purchaser went into possession, the former lessees remaining on the premises as the purchaser's servants. In an action by the lessor to recover possession of the premises for breach of the covenant the lease was declared forfeited.

Held, on appeal, affirming the decision of MURPHY, J., that there was an express breach of the covenant not to assign or sub-let and that it was not a case in which the Court should grant relief against forfeiture.

McMahon v. *Coyle* (1903), 5 O.L.R. 618 and *Barrow* v. *Isaacs* (1890), 60 L.J., Q.B. 179; (1891), 1 Q.B. 417 followed.

Statement

APPEAL from the decision of MURPHY, J. in an action tried by him at Vancouver on the 20th of February, 1920, for possession of premises known as 6271 Fraser Street, South Vancouver, and damages for breach of covenant not to assign said premises without leave. The defendants, Killick and Borthwick, had carried on a grocery business on the premises

for about six years under lease, the last lease being dated the 25th of August, 1919, in which the lessees covenanted not to assign or sub-let without leave, there being a proviso for re-entry in case of breach. A former owner sold the property to the plaintiff on the 8th of October, 1919. On the 29th of October, 1919, Killick and Borthwick sold all the stock on the premises to one E. G. Ferne, at the same time agreeing to assign to him all their interest in the lease upon the premises. Ferne immediately went into possession and Killick and Borthwick stayed on to assist him for 30 days. On the 20th of November, Hamilton gave Ferne notice to give up possession. On the 19th of January following, finding that leave to assign the lease could not be obtained, the agreement between Killick and Borthwick and Ferne was cancelled and the stock on the premises was re-conveyed to Killick and Borthwick.

Statement

Ginn, and *G. A. King,* for plaintiff.
Gillespie, for defendants.

MURPHY, J.: The facts of this case shew an absolute assignment, undoubtedly, to my mind. It was never intended to execute any further document. The premises were turned over to Ferne, rent adjusted with him, and the other defendants were then as his servants and in no other capacity. Now the only principle at all on which I could relieve against this forfeiture is under the very wide wording of the Laws Declaratory Act in this Province, but that has been commented on by the Full Court, and certainly I, as a *nisi prius* judge, am not going to extend the doctrine of relief in a case of this kind, much as I would like to do so. It is possible there is jurisdiction in the Court. It has never been exercised as far as I know. In my opinion the case of *Barrow* v. *Isaacs* (1890), 60 L.J., Q.B. 179; (1891), 1 Q.B. 417 is conclusive on this matter. I have no doubt there was a perfectly completed assignment, carried out in every particular. That being so, there was a forfeiture of the lease and I can do nothing else than declare there was. Rents and profits on the basis of $50 a month from the month of January; nothing previous to it.

MURPHY, J.

MURPHY, J.

1920

Feb. 20.

COURT OF APPEAL

Sept. 15.

HAMILTON v. KILLICK

From this decision the defendants appealed. The appeal was argued at Vancouver on the 21st and 22nd of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

S. S. Taylor, K.C., for appellants: Ferne entered the store but Killick and Borthwick did not go out. There was no absolute release. Ferne bought the goods but getting warning as to the difficulty of obtaining the landlord's consent Killick and Borthwick stayed on, and finally on the 19th of January, 1920, Ferne sold the business back to them. There was merely an agreement to assign but no assignment or breach of the lease: see *Herschorn* v. *St. Mary's Young Men's Society* (1915), 49 N.S. 260 at p. 274 *et seq.* An equitable assignment followed by possession is not a legal assignment so that the landlord can sue the assignee: see *Horsey Estate, Limited* v. *Steiger* (1899), 2 Q.B. 79 at pp. 92-3; *McCallum, Hill & Co.* v. *Imperial Bank et al.* (1914), 30 W.L.R. 343. We have not done that which the lease says we shall not do: see *Gentle* v. *Faulkner* (1900), 2 Q.B. 267 at p. 276. A legal assignment is necessary to constitute a breach: see Woodfall's Landlord and Tenant, 19th Ed., 397-8, 385, and 775; *Pidgeon* v. *Preston* (1912), 8 D.L.R. 126.

Argument

Ginn, for respondent: There has been a sub-letting: see *Manley* v. *Collom* (1901), 8 B.C. 153. This was a demand for possession, not a notice to quit: see Bell on Landlord and Tenant, p. 526; *Doe* v. *Inglis* (1810), 3 Taunt. 54; 128 E.R. 22. We say, first, there was an assignment and when he resold there was a breach. The assignee went into possession: see Halsbury's Laws of England, Vol. 18, p. 577, par. 1106; *Peebles* v. *Crosthwaite* (1897), 13 T.L.R. 198; Fawcett's Landlord and Tenant, 3rd Ed., 421; *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; *McMahon* v. *Coyle* (1903), 5 O.L.R. 618 at p. 619; *Toronto Hospital Trustees* v. *Denham* (1880), 31 U.C.C.P. 203. The Court's finding of fact is in our favour and important.

Taylor, in reply, referred to *Cox* v. *Bishop* (1857), 8 De G. M. & G. 815 at p. 822.

Cur. adv. vult.

15th September, 1920.

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

MARTIN, J.A.: I concur in the dismissal of this appeal.

GALLIHER, J.A.: I agree in the conclusions of the learned trial judge.

McMahon v. *Coyle* (1903), 5 O.L.R. 618 is practically on all fours with the present case. This is a decision of Chancellor Boyd touching the very point raised here as to the agreement to assign. I am also of opinion that it is not a case where we should relieve against forfeiture.

The appeal should be dismissed.

MCPHILLIPS, J.A.: I am of the opinion that the appeal fails; the learned trial judge arrived at the right conclusion.

There was an express breach of the covenant not to assign without leave, and it would follow that it would be a proper case for ejectment, recovery of possession of the lands and premises and *mesne* profits.

With respect to the claimed relief from forfeiture, I cannot come to a conclusion differing from that of the learned trial judge, who did not think it a proper case for relief. (See *Barrow* v. *Isaacs* (1890), 60 L.J., Q.B. 179; *Eastern Telegraph Company* v. *Dent* (1899), 1 Q.B. 835; *De Soysa* v. *De Pless Pol* (1912), A.C. 194; *Ellis* v. *Allen* (1914), 1 Ch. 904).

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *W. D. Gillespie.*
Solicitor for respondent: *R. W. Ginn.*

MURPHY, J.

1920

Feb. 20.

COURT OF APPEAL

Sept. 15.

HAMILTON v. KILLICK

GALLIHER, J.A.

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

Sept. 15.

NANTEL v. HEMPHILL'S TRADE SCHOOLS

NANTEL v. HEMPHILL'S TRADE SCHOOLS LIMITED. (No. 2.)

Practice—Trial—Order for jury—Trial proceeds without jury—Appeal—New trial—Further application for jury refused—Marginal rule 430.

The plaintiff obtained an order for trial by jury but later by agreement proceeded to trial without a jury. The action was dismissed and on appeal a new trial was ordered. A further application for trial by jury was refused.

Held, on appeal, that the waiver of the plaintiff's right to a jury was only in respect of the first trial, that he was entitled to a jury on the second trial on the first order which was still effective, a further order being unnecessary.

APPEAL by plaintiff from an order of MACDONALD, J. of the 19th of May, 1920, dismissing an application for a jury under marginal rule 430. This action had been previously tried and dismissed and a new trial was ordered by the Court of Appeal. Prior to the first trial the plaintiff applied for and obtained an order for a jury, but finding later that having a jury was more expensive than he expected, he decided to go to trial without a jury. After notice of trial had been given for the second trial the plaintiff again applied for a jury under said rule. The application was refused on the ground that the plaintiff had waived his right to a jury prior to the first trial.

Statement

The appeal was argued at Victoria on the 9th of June, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

S. S. Taylor, K.C., for appellant: The application is under marginal rule 430. The learned judge held that as we did not take advantage of the former order we are not now entitled to an order for a jury. Under the rule there is no discretion; we are entitled to the order. We did not take advantage of the first order on account of the expense. It is admittedly a case where we are entitled to a jury: see *Alaska Packers* v. *Spencer* (1905), 11 B.C. 280 at p. 287. The first order is exhausted. The learned judge said we waived the right to a

Argument

jury, but there is no such law. As to there being no discretion under the rule see *Loo Chu Fan* v. *Loo Chock Fan* (1885), 1 B.C. (Part II.) 172; *Corbin* v. *Lookout Mining Co.* (1897), 5 B.C. 281.

Arthur Leighton, for respondent: The order for a jury being originally made, that order stands. The parties subsequently agreed to go to trial without a jury; he has thereby waived his right to a jury.

Taylor, in reply.

Cur. adv. vult.

15th September, 1920.

MACDONALD, C.J.A.: A party to an action falling within the class mentioned in rule 430 has a right to an order for trial by jury if he apply therefor within the time therein specified after notice of trial. If he fail to do so, he loses his absolute right to such a trial, and if he thereafter wishes to obtain an order for trial by jury, he must seek it under rule 431, which gives the Court or a judge power and discretion to make such an order.

The plaintiff did apply within the time aforesaid after his first notice of trial was given, and got an order for trial of the action by jury, but afterwards the parties agreed to go to trial without the jury. The action was dismissed, but the plaintiff succeeded in obtaining an order for a new trial. After notice of the new trial, and within the time specified in the said rule 430, he applied for another order for trial by jury, which application was dismissed, and hence this appeal.

MACDONALD, C.J.A.

If the order already obtained was by plaintiff's conduct rendered nugatory, then there is no order at present, or what is the same thing, no operative order for trial by jury. If on the other hand, the order is still effective, a new order is not required.

What was the effect of waiving the benefit of the order at the first trial? An order made with jurisdiction and duly entered is effective until set aside. It cannot, I think, be abandoned. The right under it may be waived or abandoned, but that waiver or abandonment in this case, I think, was in respect of the first trial only. Waiver is a question of intention, and I

COURT OF APPEAL

1920

Sept. 15.

NANTEL v. HEMPHILL'S TRADE SCHOOLS

am quite sure that the parties had no intention, by what they did at the first trial, to interfere with the state of the record as it might affect another trial. I think neither party is estopped from taking advantage of the existing order.

The appeal must therefore be dismissed, with costs.

MARTIN, J.A.: Under rule 430 an order was made for a jury on the plaintiff's application but by mutual agreement, as admitted at the bar, the case was tried without one, and later a new trial was ordered by this Court, on April 6th last. If this agreement is to be regarded as a complete abandonment of said order, then other considerations would arise under rule 431, but, in my opinion, all that the agreement amounted to related to the pending trial, then alone in contemplation, and there was no understanding that whatever might happen, a jury could not be had. The new trial ordered is one *de novo,* and the plaintiff is entitled, I think, to fall back upon his original order for a jury, which has not been exhausted but only suspended *ad hoc,* and therefore his application for a jury, after notice of new trial had been given for May 31st last, was unnecessary. This view is supported by the decision of the Full Court in *Alaska Packers* v. *Spencer* (1905), 11 B.C. 280 at pp. 281, 287; 1 W.L.R. 188, 567, wherein a new trial, as here, had been ordered, affirming *Loo Chu Fan* v. *Loo Chock Fan* (1885), 1 B.C. (Pt. II.) 172, and though that was a special jury case, I see no difference in the principle of non-exhaustion involved.

MARTIN, J.A.

The plaintiff's right to a jury is therefore sustained, but because we have decided that the original order for a jury was still subsisting, the application for another order to the same effect should not have been made, and the plaintiff, in strictness, should have proceeded upon the assumption that the order he already had was sufficient for his purpose, as it was. This point, however, was not taken before us nor below, the respondent's counsel simply arguing the question of abandonment and election for trial without a jury, and therefore, though the respondent is entitled to the technical success of a dismissal of the appeal, yet, in accordance with our established practice he

cannot get the costs of it, and so the order should go for a dismissal of the appeal without costs.

GALLIHER, J.A.: At the first trial the plaintiff, having obtained an order for trial by jury, was unable to raise the necessary money to pay jurors' fees, and waived his right to a jury at that trial. The action was dismissed, but on appeal to the Court of Appeal a new trial was ordered. The plaintiff gave new notice of trial and applied for an order for trial by jury, which was refused. It is this order which is appealed against. What is the effect of the plaintiff waiving his right to trial by jury in the first instance? In my view, the first order stands; right to take advantage of it at the first trial only was waived. Since a new trial was ordered, the right to exercise the order for trial by jury is open to the plaintiff, and no new order is necessary or proper. The result is, that while the plaintiff is entitled to trial by jury, the appeal fails, but under the circumstances, without costs.

GALLIHER, J.A.

MCPHILLIPS, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

Appeal dismissed.

Solicitors for appellant: *Taylor, Mayers, Stockton & Smith.*
Solicitors for respondent: *Farris & Emerson.*

MACDONALD, J.

1920

Sept. 3.

AMERICAN MERCHANT MARINE INSURANCE CO. v. BUCKLEY-TREMAINE LUMBER AND TIMBER CO.

AMERICAN MERCHANT MARINE INSURANCE COMPANY v. BUCKLEY-TREMAINE LUMBER AND TIMBER COMPANY.

Practice — Pleading — Contract — Mistake — Rectification—Jurisdiction — Failure to prove on trial—Appearance—Waiver.

The right to object to the jurisdiction is not waived by entry of appearance and delivery of defence.

The plaintiff alleged that the defendant firm carried on business as a partnership in the Province. The alleged partners appeared individually and in their defence denied that allegation which was not proved and there was nothing otherwise to shew jurisdiction.

Held, that the plaintiff having failed to shew jurisdiction the action should be dismissed.

Semble, in seeking rectification of an agreement on the ground of mistake it must be proved that the mistake was mutual or that the defendant had such knowledge as to make his availing himself of the mistake amount to fraud.

ACTION brought by an insurance company against a partnership firm described as Buckley-Tremaine Lumber and Timber Company. The statement of claim contained the following paragraph:

"The defendant is a partnership firm consisting of Frank L. Buckley of the City of Vancouver, British Columbia, H. G. Tremaine, of the city of Seattle in the State of Washington, U.S.A., and Mark G. Buckley, of the said city of Vancouver, with its principal place of business in the city of Seattle in the said State of Washington one of the United States of America and carrying on business in the Province of British Columbia within the jurisdiction of this Court and having an office in the City of Vancouver in the said Province at which place the said F. L. Buckley and Mark G. Buckley, partners in the defendant firm, reside."

Statement

An appearance was entered for each of the alleged partners individually, and a defence was delivered denying, *inter alia,* the above paragraph of the statement of claim. No evidence was given on behalf of the plaintiff to prove the facts alleged in said paragraph. The rules of the Supreme Court of British Columbia provide, by Order XLVIII, r. 1, as follows:

"Any two or more persons claiming or being liable as copartners *and carrying on business within the jurisdiction,* may sue or be sued in the name of the respective firms (if any) of which such persons were copartners at the time of the accruing of the cause of action."

MACDONALD, J.

1920

Sept. 3.

AMERICAN MERCHANT MARINE INSURANCE CO. v. BUCKLEY-TREMAINE LUMBER AND TIMBER CO.

Tried by MACDONALD, J., at Vancouver, on the 3rd of September, 1920. At the close of the plaintiff's case the defendant Company moved for the dismissal of the action on the ground of want of jurisdiction.

Armour, K.C., for plaintiff.

Mayers, and *Matheson,* for defendant: Paragraph 2 of the statement of claim was denied in the defence, and since no evidence was offered by the plaintiff to support this paragraph, the facts must be held to have been found against the plaintiff. Since, therefore, it is found that the defendant was not carrying on business within the jurisdiction at the time of the accruing of the cause of action, the writ was issued without jurisdiction, and nothing which the defendant could do could confer jurisdiction upon the Court. The plaintiff has sued a fictitious entity, without any jurisdiction or authority, in circumstances not permitted by the rules. The only power which the Court has to entertain an action against parties in a partnership connection is derived from Order XLVIIIA., and circumstances must be shewn to bring the case within the rule. The facts of entries of the appearances and delivery of the defence are immaterial, since consent cannot confer jurisdiction, and want of jurisdiction may be raised at any time: *British Wagon Company* v. *Gray* (1896), 1 Q.B. 35; *Armitage* v. *Attorney-General. Gillig* v. *Gillig* (1906), P. 135 at p. 140; *Rithet* v. *Boscowitz* (1894), 3 B.C. 445; *The Ida* (1860), Lush. 6; *The Eleonore* (1863), Br. & Lush. 185; *The Louisa, ib.* 59. Argument

Armour: The entry of appearance and delivery of defence is a complete waiver of any objection to jurisdiction: *Harris* v. *Taylor* (1915), 2 K.B. 580.

Mayers, in reply.

MACDONALD, J.: I would have preferred to have had this trial proceed, and determine whether any evidence could be adduced which would assist or throw any further light on the transaction. It is admitted a difficult position has arisen as far as the defendant is concerned, and I presume also as to the plaintiff, because, if the policy of insurance, so termed, remains in force, as issued, it will I assume be called upon to meet a claim for loss, which occurred through a sailing Judgment

MACDONALD, J.

1920

Sept. 3.

AMERICAN MERCHANT MARINE INSURANCE CO. *v.* BUCKLEY-TREMAINE LUMBER AND TIMBER CO.

in the month of November, and not in the month of October, as referred to in the application for insurance. Defendant, however, presses for a decision, and dismissal of the action upon the case as it stands at the close of evidence for plaintiff.

There are three grounds advanced for a dismissal of the action, the first being that no jurisdiction is shewn in the Court, to try the action; the second being that there is no proof of the mistake which it is necessary for the plaintiff to prove; and the third, that there is no case established as against the defendant Company, even if I were to hold a mistake occurred, in the issuing of the policy. Dealing with the first ground, I find that Odgers on Pleading states that the entering of an appearance is a submission to the Court. This position, however, it is strenuously contended (by counsel for the defence) is an incorrect statement of the law. I find that the same opinion, as that entertained by Mr. Blake Odgers, is held by Mr. Dicey in his work on "Domicile" (1879), p. 233. I was inclined to the opinion that once having entered an appearance to an action, where jurisdiction could be established, that the party thus appearing, waived his right to object to the jurisdiction. Upon considering the authorities, and especially in view of the remarks of Sir Gorell Barnes in *Armitage* v. *Attorney-General. Gillig* v. *Gillig* (1906), P. 136 at p. 140; 75 L.J., P. 42, I am disposed to change my view. He refers to Mr. Dicey's book on "Domicile" as follows:

Judgment

> "There is a passage in Mr. Dicey's book on domicil, where a contrary view is expressed, and where he appears to think that a party, by appearing and pleading, may give the Court jurisdiction. That, I think, is not in accordance with the law of this country. In fact, I myself have so held, and I dismissed a suit some years ago on the petitioner's own evidence."

The plaintiff is seeking reformation of the policy of insurance and alleges facts which, if proved, might give jurisdiction to this Court. Issue is taken by the defence, as to such facts being correct, and the question of jurisdiction pointedly raised. In my opinion, the plaintiff has failed to shew jurisdiction in this Court to try this action. Beyond question, the contract was entered into, in Seattle, Wash., and provided for a risk being taken by the insurance company for a voyage to start in Alaska and terminate in Seattle. There is no provision in the

contract for it being performed in this Province, and the sole ground, I take it, upon which the plaintiff Company sought to have the action tried in this Province, was upon the allegation that the defendant firm, as a partnership, carried on business in this Province, and this has not been proved.

I think it well, however, while this finding as to jurisdiction would dispose of the trial, to deal with the facts so far presented. I think it would be beneficial to the plaintiff that I should, as the trial judge, express myself, and give my view of the facts surrounding the issuance of the policy of insurance, so sought to be reformed. I accept the evidence of Calder, who, on behalf of Seeley & Co., Inc., received this application for insurance, accepted it on behalf of his company, and later on, issued, the policy of insurance. While it is true, that in the issuance of such policy he committed an error, and that the same error crept into three other policies issued at the same time, still I think he was perfectly honest, in his statement, that all four errors were committed by him, and that it was not an intentional change on his part as to the terms of the policy—in other words, a mistake occurred on his part which is now sought to be rectified. I can add nothing further as far as the evidence is concerned. It was given in a perfectly candid and open manner, and nothing whatever was adduced that had any weight in my mind, as tending to detract from his evidence. Under these circumstances it is, however, contended that, even if I accept such evidence in its entirety, the rectification sought should not be granted. It is, on the contrary, contended by plaintiff that a unilateral mistake may be dealt with by the Court and redress granted. I think this is putting the position too broadly. I think that it is necessary for a plaintiff, seeking rectification and not rescission or cancellation, to go further and prove that the mistake was mutual, or at any rate, to shew such a knowledge brought to the defendant in an action, as would amount to fraud on his part, in availing himself of what he must or should have known was a mistake. That is, I do not consider it necessary to prove out of the mouth of the other side the fact that a mistake occurred, but the Court should be satisfied that, taking all the evidence into considera-

Judgment

MACDONALD, J.

1920

Sept. 3.

AMERICAN MERCHANT MARINE INSURANCE CO. *v.* BUCKLEY-TREMAINE LUMBER AND TIMBER CO.

Judgment

tion, no other conclusion can reasonably be reached, than that a mistake occurred and that it was mutual, notwithstanding evidence that might be adduced to the contrary by the defence, but which it was felt should not be accepted. There is no evidence offered as to the view that was taken by Brill, acting for Mather & Co., as to the contents of the policy of the insurance, when it was delivered to him a few days after he applied for the insurance. I am not satisfied that, in any event, even if Brill, representing Mather & Co., were held to be an agent of the defendant, that his knowledge alone, as to a mistake having occurred, would be sufficient to bind the defendant and bring about rectification. There is no evidence, however, to shew that Brill had authority, sufficient at any rate, to affect the defendant's position, which is now assumed. It may have been that the policy in its changed form, being more liberal in its terms, was accepted without question both by Brill and his company and later on by the defendant. However, there is no necessity for me going further into the questions of probability in the matter. I do not think that the evidence of the plaintiff as to mistake goes far enough to entitle a rectification to take place, even accepting it in its entirety. I have thus dealt with all the grounds taken. Action is dismissed, with costs.

Action dismissed.

REX v. MAH HON HING *ET AL.*

COURT OF APPEAL

1920

June 17.

REX v. MAH HON HING

Criminal law—Stated case—Non-disclosure of defence at preliminary hearing — Comment thereon by judge to jury — Only essential part of evidence should be attached to stated case.

The failure of an accused to disclose his defence at the preliminary hearing must not be a matter of comment by the judge in his instructions to the jury on the trial.

On the conviction of three Chinamen on the charge of wounding with intent to do grievous bodily harm, the judge in his charge to the jury commented on the prisoners failing to disclose their defence before the trial.

Held, that the conviction be quashed and that there be a new trial.

Rex v. *Higgins* (1902), 36 N.B. 18 distinguished.

The evidence taken at the trial should not as a rule be included in a stated case for the opinion of the Court of Appeal.

Per MACDONALD, C.J.A.: It sometimes happens, *e.g.*, when the question of law submitted is as to the sufficiency of the evidence to make out a case for conviction, that the evidence must be included in the case but such cases are comparatively rare.

APPEAL by way of case stated from GREGORY, J. and the verdict of a jury in a trial of wounding with intent to do grievous bodily harm, held at the Nanaimo Spring Assize on the 18th of May, 1920. The facts are fully set out in the stated case, which is as follows:

"The above named prisoners were tried before me at the Assizes held in the City of Nanaimo, on the 18th of May, 1920, and all were found guilty for that they did at Chinatown, Cumberland, in the County of Nanaimo, on the 26th of March, 1920, wound one Wong Sing Que with intent to do grievous bodily harm. Statement

"Witnesses claiming to be eye-witnesses were called by both the Crown and the defence. The defence also called witnesses and the prisoners themselves to prove an *alibi* on behalf of the prisoners.

"At the preliminary hearing before the magistrate no evidence was adduced by the defence. On this phase of the case I charged as follows:

" 'Now just a word or two about the evidence. The Crown charges that these men did—and they produce a number of witnesses who swore that they were eye-witnesses of the transaction, and who say they were present, and saw these three men commit this offence. If you believe them it is impossible that you can also believe the witnesses for the defence who set up the *alibi*. The defence says that we did not do it, we were not there; and that the only reason you are bringing this against us is

COURT OF APPEAL

1920

June 17.

REX v. MAH HON HING

because you are members of the Nationalist Society and because you had a row with some of our friends who were running a gambling shop. Now that in a sense suggests a motive, not only for the complainant Wong Sing Que as they suggest, but if you are going to use it, it supplies a motive to these people for committing this attack on him, because he is complaining to the police about their acts, and has already had an altercation in the clubroom with reference to the bet that he made, and which they refused to pay: though he says after a while that they did refund him the money that he had bet.

"'They tell this story of where they were for the first time here in this Court; and I think it my duty to point out to you that when they did that, they lay themselves open to a suggestion that they do it for a purpose. It is quite true, as their counsel says, that they are not bound by law to tell beforehand what took place. It is the duty of the Crown to prove the case to the satisfaction of the jury. The defence does not have to anticipate, or to disprove the case. Now the accused men are not, as suggested I think by counsel for the defence—by a slip—prohibited by law from telling these things. It simply amounts to this that the rules of evidence are such that the law says a policeman may not question a man whom he has under arrest, or take any statement from him, until he has first cautioned him that he is not bound to tell his story; and that rule is for the benefit of the accused man so that he may not be surprised into making a statement without due consideration. He may keep it to himself, but if he does keep it to himself, after due mature consideration, he is open to this suggestion. Now I am reading from Crankshaw, our own authority in these matters. He says [p. 274]: "Where the accused charged with murder goes into the witness box on his own behalf, and then and there for the first time makes known his claim that he was a mere eye-witness of the murder [attempted murder is the same thing] and that the principal witness for the prosecution had committed the deed, the trial judge may properly direct the jury that they may draw inferences from the prisoner's previous silence on the matter of such claim, and consider whether the facts in evidence shewed the motives for such silence to be founded on a consciousness of innocence, for example, that he would thereby the better establish his innocence, or to be a design founded on a knowledge of guilt, to advance a false [pretended] defence at the last moment, and to take the prosecution by surprise. . . . ."

Statement

"'Now it is quite true that counsel—some counsel, and counsel who have good standing, or good counsel at the bar, do invariably advise their clients to say nothing. Personally I never adopted any such practice. If my client was clearly innocent I told him at the very first moment to state his defence, and I think that is the best thing to do.

"'In *Rex* v. *McNair* (1909), [25 T.L.R. 228] the Lord Chief Justice says this: "If a person . . . . reserve his defence, thereby making it impossible for his story to be investigated before trial, it is no ground on which we can interfere with the verdict. . . . . ."

"'And in the case of *Rex* v. *Maxwell* in the same year [2 Cr. App. R. 28 at p. 29] the same judge says: "The jury were entitled to consider adversely to appellant his silence at the police court and the fact that he

reserved his defence." And in the famous Crippen trial the same thing was said practically. Now to reserve until the trial the story of where you were keeps and prevents the Crown from investigating your story. So far as concerns this particular case the only piece of evidence that I can recollect that could be investigated is the story of the man on the right hand there [referring to one of the prisoners in the dock]—I have forgotten which one he is—Gin Yon Gong—he says he told the policeman that he was working. The policeman agreed with that, I think. Now that is the only part that I can recall of this whole defence that could have been investigated, and it is ridiculous to suggest that the foreman of the mine should come here and shew he was the only Chinaman working. Now the foreman of the mine might or might not have been called; but I suppose an investigation might result in discovering that the time check, or the particular check was there, and we have the timekeeper coming here to say that it was. Now that is all his evidence amounts to, that the check was turned in that day, or a check was turned in that day, and that he got credit for work. But no person has been produced here to shew that he worked opposite that man, or saw that man in the mine. I suppose he worked with somebody, but no person has been produced to shew that he was working with him. Now there would have been no difficulty in finding positive evidence of where all these men were on that day. It should have been made clear at the earliest possible moment where they were, because, if you wait until today, some months afterwards, and then you go to someone and say did Ye Dong or J. Smith, or anybody else work with you on the second of March last, or the 26th of March, why he says, my goodness, 26th of March, I cannot remember; I don't know, but everybody there would know the day of the injury to this man, and so they would have been able to fix it, and if they had told immediately where they were somebody then could have checked it up to see whether they were there or not, and evidence could have been brought on that point. That is all I wish to say about that.'

Statement

"After the verdict the prisoners' counsel requested me to reserve a case for appeal and argument before this Honourable Court as to whether I was in error in these instructions to the jury.

"The question which I reserve for the opinion of this Honourable Court is:

"Was I in error in my instructions to the jury as to the prisoners failing to disclose their defence before the trial?

"After the verdict I granted a reserved case and postponed sentence, and admitted the prisoners to bail."

The appeal was argued at Victoria on the 9th of June, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Higgins, K.C., for appellants: My contention is they were convicted by reason of their not having given evidence on the preliminary hearing. There was error in the learned judge referring to their not having done so. He cited *Rex* v. *Higgins*

Argument

COURT OF APPEAL

1920

June 17.

REX v. MAH HON HING

(1902), 36 N.B. 18, but the facts in that case differ, and even under the special circumstances there it applies only to the question of credibility of the accused's evidence. The accused has the right to withhold his evidence and it should not be commented on: see Crankshaw's Criminal Code, 4th Ed., 773. The other cases to which the learned judge referred, *Rex* v. *Maxwell* (1909), 2 Cr. App. R. 28; *Rex* v. *McNair* (1909), 25 T.L.R. 228, and *Rex* v. *Humphries* (1903), 67 J.P. 396, all deal with one witness only.

Argument

Arthur Leighton, for respondent: The learned judge was to an extent answering my learned friend's address to the jury. My submission is the judge's address was fair comment and is justified by *Rex* v. *Higgins* (1902), 36 N.B. 18; 7 Can. Cr. Cas. 68; see also *Rex* v. *Moran* (1909), 3 Cr. App. R. 25. There was the same law in England up to the time of the passing of the Crown Evidence Act, and it was held the judge may comment on the defendant not giving evidence on the preliminary hearing.

Higgins, in reply.

Cur. adv. vult.

17th June, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The accused were tried before Mr. Justice GREGORY at the Nanaimo Assizes, on a charge of wounding with intent to do grievous bodily harm. The judge deferred sentence and stated a case for the opinion of the Court of Appeal. The question submitted is: "Was I in error in my instruction to the jury as to the prisoners failing to disclose their defence before the trial?"

The instructions referred to are somewhat lengthy, and I shall not set them out in full. It appears that the prisoners gave evidence at the trial on their own behalf and swore to an *alibi.* They had given no indication beforehand that that would be their defence. The learned judge, *inter alia,* said in his instructions to the jury, "that they tell this story of where they were for the first time here in this Court and I think it my duty to point out to you that when they did that they laid themselves open to a suggestion that they did it for a purpose."

The learned judge read from Crankshaw, at page 274, these words:

"Where the accused charged with murder, goes into the witness box on his own behalf, and then and there for the first time makes known his claim that he was a mere eye-witness of the murder . . . . the trial judge may properly direct the jury that they may draw inferences from the prisoner's previous silence on the matter of such claim, and consider whether the facts in evidence shewed the motive for such silence to be founded on a consciousness of innocence, or be a design founded on a knowledge of guilt."

This statement from Crankshaw is founded on *Rex* v. *Higgins* [(1902), 36 N.B. 18]; 7 Can. Cr. Cas. 68. The learned judge, continuing his instructions, referred to *Rex* v. *McNair* [(1909) 25 T.L.R. 228] and *Rex* v. *Maxwell* [(1909), 2 Cr. App. R. 28], and quoted from the judgment in the latter case these words:

"The jury were entitled to consider adversely to appellant his silence at the police court and the fact that he reserved his defence."

He then goes on to say that to "reserve until the trial the story of where you were, keeps and prevents the Crown from investigating your story."

The fact is stated to be that the prisoners gave no evidence at the preliminary hearing in the police court. It is also stated as a fact that at the trial "the defence also called witnesses and the prisoners themselves to prove an *alibi* on behalf of the prisoners."

MACDONALD, C.J.A.

It was argued that it was an error in law to instruct the jury that they might draw inferences unfavourable to the prisoners from the fact that they had made no statements with regard to their defence of *alibi* until they entered the witness box. It was also argued that the instructions aforesaid amounted to comment prohibited by section 5 of the Canada Evidence Act, which reads as follows:

"The failure of the person charged or the wife or husband of such person to testify shall not be made the subject of comment by the judge, or by counsel for the prosecution."

Now, there is not in direct terms in the instructions aforesaid, a comment upon the failure of the accused to give evidence at the preliminary hearing in the police court. Apart from the quotation from *Rex* v. *Maxwell, supra,* the instruction might amount to no more than that in *Rex* v. *Higgins, supra,*

COURT OF APPEAL

1920

June 17.

REX v. MAH HON HING

which was held insufficient to justify the setting aside of the conviction, but on this phase of the case I do not propose now to express an opinion, since I have come to a conclusion on the other branch of the argument rendering it unnecessary to do so.

The reference by the learned judge to the withholding of the defence until the accused entered the witness box at the trial, standing alone and without the quotation above referred to from *Rex* v. *Maxwell,* might perhaps be considered as no infringement of the section quoted above, but when coupled with the reference to the police court contained in the quotation, the jury's mind would naturally be directed to the fact that the prisoners had not thought fit to give evidence in the police court and withheld their defence, and they might well conclude that it was because of this that unfavourable inferences against them might be drawn. The section of the Evidence Act aforesaid is wide and general in its terms. Its meaning, I think, is not to be restricted to comment on an accused's failure to give evidence in the particular trial or inquiry in which the comment is made. It seems to me that the judge is prohibited from commenting upon the failure of an accused person to give evidence at the preliminary hearing, as well as his failure to give evidence at the trial, and if I am right in this construction of the section, and if my construction of what the learned judge said to the jury is the true one, then it follows that the question submitted to us must be answered in the affirmative, and the conviction set aside and a new trial ordered.

MACDONALD, C.J.A.

With great respect, I think the learned judge failed to note the distinction between *Rex* v. *Maxwell* and this case. Under the English Evidence Act, there is no prohibition against the judge commenting upon an accused person's failure to give evidence on his own behalf; it is the Crown prosecutor who is so prohibited. But the most vital distinction between the two cases is this, that the Lord Chief Justice was not discussing the correctness of the instructions to the jury, but was referring simply to the silence of the accused in the police court and the reservation of his defence as a circumstance influencing the mind of the Appellate Court against granting him an indulgence which he was asking, namely, the lightening of the sen-

tence because of the suggestion that his crime was induced by a desire to shield his brother. The case therefore has no application to a case like this, and the language quoted to the jury, separated from its context, was calculated to convey a wrong impression.

The evidence taken at the trial is included in the case stated by being attached thereto. We have on several occasions condemned this practice. It sometimes happens, *e.g.*, when the question of law submitted is as to the sufficiency of the evidence to make out a case for conviction, that the evidence must be included in the case, but such cases are comparatively rare. Where, as here, no such question is involved, the inclusion of the evidence in the reference to this Court puts the parties to a needless expense and as well incumbers the record with irrelevant matter. This Court has no duty in respect of the evidence. We must accept the facts as stated by the judge below, and decide the question of law with reference to those facts alone.

MACDONALD, C.J.A.

It is a matter of growing astonishment to me that after so many warnings counsel continue a practice so senseless and costly. For example, in this case, the cost of preparation of the appeal books alone has for no purpose at all been increased by something over $300, a fact which borders on the scandalous.

MARTIN, J.A.: In this case the three accused were, at the last Nanaimo Spring Assizes, found guilty of wounding one Wong Sing Que with intent to do grievous bodily harm. The defence at the trial was an *alibi,* but at the preliminary inquiry before the magistrate that defence was not set up, nor was any evidence called on behalf of the accused.

In this state of affairs, the learned trial judge made the following observations in the course of his charge to the jury: [already set out in statement].

MARTIN, J.A.

At the request of the accused, the learned judge reserved this question for our opinion: "Was I in error in my instructions to the jury as to the prisoners failing to disclose their defence before the trial?"

In my opinion, the question submitted should be answered, on the facts before us, in the affirmative.

COURT OF APPEAL

1920

June 17.

REX v. MAH HON HING

The reference from Crankshaw by the learned judge to the jury is ostensibly founded on the case of *Rex* v. *Higgins* (1902), 36 N.B. 18, which I shall consider later, but at page 773 of the same volume of Crankshaw there are some observations upon the question of the "expediency of calling witnesses for the defence" and the consequences of failing to adduce exculpatory evidence at the preliminary inquiry, which it is unfortunate were not called to the learned judge's attention, based as they are upon the course adopted by Chief Baron Pollock at the Wiltshire Assizes, in *Reg.* v. *Clark* (1851), 5 Cox, C.C. 230, which is a case of special value on the question before us, because it is also one in which an *alibi* was set up for the first time at the trial. It was an indictment for burglary, and the counsel for the defence said that he would call witnesses to prove that the accused was at home on the night in question, many miles from the prosecutor's house; these witnesses were not examined before the magistrate, and perhaps some observations might be made on that account, as was often done in similar cases; but the witnesses went to the magistrates' meeting and were not called, by the advice of the prisoner's attorney. Whereupon the Chief Baron stated that:

"In his opinion no such remark ought to be made as to witnesses not being called for a prisoner when he is being examined before the magistrates, and, if made, it would be very improper. Where a prisoner was clearly spoken to by one or more persons as the person by whom a crime was committed, it would be the duty of the magistrates to commit, and it would be quite useless to call witnesses on the part of a prisoner either to prove an *alibi* or anything else in his favour; it would be an useless expense to call them twice to prove the same thing, and a thing which no discreet attorney ought to advise his client to incur. That had always been his opinion, and therefore he never allowed such observations to be made."

MARTIN, J.A.

I am in entire accord with these expressions, and in the course of judicial experience of nearly 22 years in this Province I have never heard the propriety of them to be questioned, and when I was a member of the lower Court, before the establishment of this Court of Appeal, it became my duty to preside over many Assizes, and it never occurred to me, so well established was the practice, to even refer to, much less animadvert upon, the fact that the accused had reserved his defence at the preliminary inquiry.

The case of *Rex* v. *Higgins, supra,* is an unusual one, and after a careful consideration of the reasons therein and the circumstances in which they are delivered, I am not at variance with it. The learned judges were careful to restrict the generality of their expressions to the particular facts, and the remarkable feature about the case was that the accused, though he claimed he saw the murder committed in his presence, yet nevertheless kept silent regarding so great a crime, though, as Mr. Justice Hanington points out at p. 26, his duty to the public was to tell it so that the murderer might be brought to justice." Mr. Justice Landry [pp. 32-3] says:

"The prisoner had not been silent. On all subjects but the one of his knowledge of the guilty party the prisoner had acted and spoken freely, and often falsely, on all occasions where it was reasonable to expect speech or action from him . . . . . It is admitted that the jury might be told to look into his silence as a matter affecting his credibility. Then, surely, such effect on his credibility must be as it may make for his guilt or for his innocence. Why question his credibility if it is not to affect the matter of his guilt?"

Mr. Justice Barker agreed with Mr. Justice Hanington, and Mr. Justice McLeod said [p. 34]:

"With reference to the misdirection alleged in the charge, I myself was in very considerable doubt about it, and speak now, perhaps not with doubt, but with some hesitation with reference to it. I want to say here that I do not subscribe to the doctrine that the simple silence of a prisoner is evidence or can be taken as evidence in any way of his guilt. When I say that I do not mean that in certain circumstances the silence of the prisoner would not be evidence of guilt; but the circumstances that exists to make it evidence of his guilt must be such a circumstance as in and of itself would tend to shew he is guilty."

MARTIN, J.A.

The learned judge then proceeds to elaborate his view, giving illustrations respecting possession of stolen property and otherwise, and then concludes thus, p. 35:

"I think the attention of the jury may be called to these facts and they may be taken into consideration by the jury in considering the evidence . . . . . and the weight that should be given to it. The question is, has the judge left it so that the jury may fairly understand it in that way; or has he left it in the simple, bald way that the fact that the prisoner said nothing can be inferred as evidence of guilt. Looking over the charge, I take it that the learned judge, in leaving it to the jury, taking all the circumstances together, meant to convey and did convey, to the jury the idea that the fact that Higgins had kept silence all this time, knowing that Goodspeed was the person who had committed the crime, if his story is true, may be taken into consideration by the jury when they come to consider his evidence and all the facts in connection with

COURT OF APPEAL

1920

June 17.

REX v. MAH HON HING

the case, and may in that way be evidence, whether they will believe his story or that of Goodspeed in coming to a determination as to his guilt or otherwise. So I think the charge in that way is proper and correct."

Mr. Justice Gregory dissented on the ground that the charge to the jury was "practically a direction to take into account the silence of the prisoner and infer therefrom his guilt or innocence."

It will be seen from these citations how very different the direction in that case, with its carefully guarded expressions and limitations, is from the one at bar, where, taking the remarks as a whole, there can be no doubt the "suggestion" put forward by the learned judge is that the silence of the accused is not consistent with his innocence, as exemplified by the learned judge's practice at the bar in the case of his innocent clients.

We have been referred to certain other decisions, chiefly of the Court of Appeal in England, but in none of them was the same question raised as is now before us, *viz.*, the propriety of the direction to the jury, and strange to say, in not one of them, though they contain observations bearing indirectly upon the point, do the learned judges refer to the above well-known decision of Chief Baron Pollock in *Reg.* v. *Clark, supra,* so they must be restricted to the facts in question, and I cannot help thinking, with all deference to their Lordships, that had they been familiar with the decision in *Reg.* v. *Clark,* some of their observations would not have been made, or at least greatly modified, moreover, as they were all made after the passing of the Poor Prisoners' Defence Act, 1903 (3 Edw. VII., c. 38, considered in Archbold's Criminal Pleading, 23rd Ed., p. 171), respecting the giving by the Crown of legal aid in the preparation and conduct of the defence of such prisoners, they seem to have been affected by it, and must be read in that light, as was, *e.g.,* the case in *Rex* v. *Humphries* (1903), 67 J.P. 396; and *Rex* v. *Winkworth* (1908), 1 Cr. App. R. 129. In *Rex* v. *Moran* (1909), 3 Cr. App. R. 25, the defence of an *alibi* had been set up before the magistrate, though not with particularity.

MARTIN, J.A.

In considering this question, section 684 of the Code must not be overlooked, which provides that after the depositions of

the prosecutor's witnesses have been signed, and read again if desired by the accused, then "the accused shall be addressed by the justice in these words, or to the like effect":

"'Having heard the evidence, do you wish to say anything in answer to the charge? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial . . . . .'"

And section 686 provides that "after the proceedings required by section 684 are completed, the accused shall be asked if he wishes to call any witnesses," and goes on to direct that the magistrate shall take the depositions of the witnesses in the same manner as those for the prosecution. This section 686 was section 593 in the original Criminal Code of 1892, and introduced the change in the law requiring the magistrate for the first time to hear evidence for the defence (as noted in the first edition of Crankshaw, 1894, p. 560), and it would seem to be an anomalous thing to hold that though an accused was "not bound to say anything" at the preliminary inquiry, yet if he did not at least "say" something, *i.e.,* outline his defence, *e.g.,* an *alibi,* that his decision not to do what he was not "bound" to do at the inquiry should subject him to adverse "suggestion," *i.e.,* criticism and prejudice at his trial. This is, in my opinion, inconsistent with the fundamental principle of our law that the accused is presumed to be innocent till proved guilty, and for that reason I am entirely in accord with the observation of Chief Baron Pollock, made, be it remembered, not on appeal, but in the presence of the jury at the Assizes, as hereinbefore set out. The conclusion I have come to is that we should affirm the long-established practice in this Province that an accused may properly reserve his defence till his trial and it is not a matter for adverse comment if he does so, and though there may in special cases be an exception to this rule, as in *Rex* v. *Higgins, supra,* yet the fact of his silence then becomes a question of his credibility if he goes into the witness box, or the credibility of the defence he sets up if he does not give evidence himself. Apart from special circumstances in certain classes of crimes, as set out by Mr. Justice McLeod, *supra,* silence *solus* does not furnish an inference of guilt or innocence, but, as Mr. Justice McLeod puts it, *supra,* is something that "may

MARTIN, J.A.

COURT OF APPEAL

1920

June 17.

REX v. MAH HON HING

be taken into consideration by the jury in considering the evidence given by [the accused] . . . . and the weight that they should give to it."

The recent English decisions on the point are not, if I may say so with every respect, for the reasons above stated, of a satisfactory nature, nor are they adequately reported, but if they are at variance with our established practice, based upon the older and better English practice of more than half a century, then they should not be followed because they are not binding on us, though entitled to most careful consideration: *Pacific Lumber Agency* v. *Imperial Timber & Trading Co.* (1916), 23 B.C. 378.

It follows that the question reserved should be answered in the affirmative and there should be a new trial.

MARTIN, J.A.

I have only to add that I entirely agree with what has been said by the Chief Justice respecting the heavy and wholly unnecessary expense that has been imposed upon the appellant by sending up to us a transcript of the entire record of the evidence and proceedings below, attached to the case stated, in contravention of the practice we recently reaffirmed in *Rex* v. *Fong Soon* (1919), [26 B.C. 450]; 1 W.W.R. 486. This transcript of 140 pages was not, and could not properly have been referred to on the argument, and is an illustration of the pecuniary oppression that in fact results from forcing an appellant at grievous expense to supply us with something that is of no use and against our practice, which is designed to prevent a state of affairs which, obviously, if permitted, would result not seldom in an actual denial of justice, for many accused persons cannot raise the large sum, often hundreds of dollars, necessary to pay for such useless transcripts and so would be forced unjustly to languish in gaol, which is something so shocking that it disturbs all just minds even to contemplate it. It is due to the appellant's counsel to say that he is in no way responsible for the addition of said transcript to the case.

GALLIHER, J.A.

GALLIHER, J.A. agreed in quashing the conviction.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is a stated case from Mr. Justice GREGORY. The question submitted is: "Was I in error in my

instructions to the jury as to the prisoners failing to disclose their defence before the trial?"

With great respect to the learned judge, this, in my opinion, was error in law. It is fundamental that in all proceedings under the Canadian Criminal Code no comment upon the fact that the person charged failed to give evidence at any time when evidence could have been given is permissible. The Canada Evidence Act (Cap. 145, R.S.C. 1906), Sec. 4, Subsec. 5, reads:

"The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution."

The learned trial judge would appear to have thought that he had support for the right to comment, in view of decisions in England upon the point (see *Rex* v. *McNair* (1909), 25 T.L.R. 228; *Rex* v. *Maxwell* (1909), 2 Cr. App. R. 28), but the statute law is different in England. There the provision is:

"The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence, shall not be made the subject of any comment by the prosecution"

(see Archbold's Criminal Pleading, 25th Ed., 445). And we find it stated at the same page:

"Though counsel may not comment on failure by the defendant to give evidence, the judge may comment if in his discretion he thinks it proper to do so. *R.* v. *Rhodes* (1899), 1 Q.B. 77, 83; [(1898)], 68 L.J., Q.B. 83; and *cf. Kops* v. *R.* (1894), A.C. 650; 64 L.J., P.C. 34. . . . . The fact that the defendant did not give evidence before the justices may be matter for unfavourable comment. *R.* v. *Humphries, ante,* p. 444 [67 J.P. 396]. And the jury are entitled to draw inferences unfavourable to the defendant where he is not called to establish an innocent explanation of facts proved by the prosecution, which without such explanation tell for his guilt. *R.* v. *Corrie* (1904), 68 J.P. 294 (C.C.R.); *R.* v. *Bernard* [(1908)], 1 Cr. App. R. 218."

MCPHILLIPS, J.A.

It is only necessary to refer to the procedure at the preliminary inquiry, section 684, subsection 2, of the Criminal Code, to see that the accused is in effect invited to say nothing, yet if the comment which has occurred in the present case is permissible, it means that the accused is led into a trap. See Tremeear's Annotated Criminal Code at p. 311 and Appendix p. 1500. See *Rex* v. *Romano* (1915), 24 Can. Cr. Cas. 30 at p. 36).

In my opinion, with great respect to the learned trial judge,

COURT OF APPEAL

1920

June 17.

REX v. MAH HON HING

substantial wrong and miscarriage was occasioned at the trial (section 1019) by the comment made on the accused failing to disclose their defence before the trial. It was error in law and tended to prejudice the jury (*Allen* v. *Regem* (1911), 44 S.C.R. 331). It may be reasonably said that the observations of the learned trial judge might have had the effect of producing in the minds of the jury the conclusion that the prisoners were guilty because of the delay in disclosure of their defence, *i.e.*, if innocent, the defence would have been immediately made known. This would be substantial wrong, and the comment cannot be approved. It is fundamental, as I have already said, that there should be no comment of this nature. The spirit and intention of the Parliament of Canada is clear, and whatever may be the decisions of other Courts based upon different statute law, the criminal jurisprudence of Canada does not admit of such comment.

MCPHILLIPS, J.A.

In my opinion there has been a mistrial, and I would direct a new trial, the conviction to be quashed.

Conviction quashed.

Solicitor for appellants: *Frank Higgins.*
Solicitor for respondent: *Arthur Leighton.*

HENDRY v. LAIRD.

Interpleader—Evidence—Receipt for purchase-money—Whether a "bill of sale"—R.S.B.C. 1911, Cap. 20, Sec. 7.

An automobile was seized under execution and one Hendry claiming that it had been sold to him, an interpleader was directed in which he was made plaintiff. It was held by the trial judge that although the sale appeared to be a *bona fide* one a certain receipt given for the purchase-money by the execution debtor amounted to an "assurance" and was a bill of sale within the meaning of the Bills of Sale Act and not having been registered the purchaser's claim was bad as against the execution creditor.

Held, on appeal, reversing the decision of MACDONALD, J. (MACDONALD, C.J.A. dissenting on the ground that the sale was not a *bona fide* one), that the receipt in question was not intended to be part of the bargain to pass the property in the goods and therefore was not a bill of sale within the meaning of the Act.

Ramsay v. *Margrett* (1894), 2 Q.B. 18, and *Charlesworth* v. *Mills* (1892), A.C. 231 followed.

APPEAL by plaintiff on an interpleader issue from the decision of MACDONALD, J. of the 6th of May, 1919. The defendant, who was successful in a divorce action, obtained judgment for costs against the co-respondent George Maltby, and on the 15th of March, 1919, the sheriff seized under execution an automobile at the Ferguson Higman Garage, Vancouver, that Laird claimed belonged to Maltby. On the 17th of March, one Alexander Hendry claimed that the automobile was sold to him and an interpleader was directed, Hendry being made plaintiff. Hendry was a sailor and a power of attorney was put in evidence purported to have been executed by him in favour of Thomas Maltby (a brother of the co-respondent) on the 13th of December, 1918, and Hendry at the same time left $700 in Thomas Maltby's hands to use in case an opportunity arose to make an advantageous buy of an automobile. Thomas Maltby swore he purchased the auto in question for Hendry on the 14th of January, 1919, for $600. A notice of the sale was signed by George Maltby and Alexander Hendry (Hendry's signature being written by Thomas Maltby under the power of

Statement

COURT OF APPEAL

1920

Sept. 15.

HENDRY v. LAIRD

Statement

attorney) and filed in the department of Provincial police in Vancouver, but there was nothing on the document to shew when it was filed, the only stamp on it being by the department of police in Victoria when received there on the 31st of March, 1919, and after the seizure in question had been made by the sheriff. A receipt for the $600, signed by George Maltby and dated the 13th of January, 1919, was put in as an exhibit, also a Provincial motor-car revenue receipt for a licence fee received from Alexander Hendry and dated the 3rd of February, 1919. The learned trial judge concluded that the sale to Hendry was a genuine one, but found that the plaintiff on the issue had not complied with the provisions of the Bills of Sale Act and dismissed the action.

The appeal was argued at Vancouver on the 28th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Martin, K.C., for appellant: On the question of the *bona fides* of the sale to Hendry the Court found in our favour. Then as to the Bills of Sale Act the property must be in the hands of the debtor under section 7 of the Act and the evidence in this case shews it was not in his possession. The next question is whether this is a bill of sale, and my contention is that it is not. This was merely a receipt signed by George Maltby that he had received $600 in payment for a car. The English cases apply as our Act is the same: see *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *North Central Wagon Company* (1888), 13 App. Cas. 554 at p. 569; *Shepherd* v. *Pulbrook* (1888), 59 L.T. 288; *Charlesworth* v. *Mills* (1892), 61 L.J., Q.B. 830; *Ramsay* v. *Margrett* (1894), 63 L.J., Q.B. 513. A receipt is mere evidence of payment, it does not transfer or pass the property. The evidence is that Thomas Maltby rented the machine to George Maltby. There are no grounds for the judge to find it was seized in the possession of George Maltby.

Rubinowitz, for respondent: In order to be a valid seizure, first, the machine must be in the possession of the grantor and, second, the receipt or document must be a record or document shewing title under the Act. There is no question that the

car was in the actual and physical possession of Maltby the co-respondent, and under section 3 of the Act the "receipt is deemed to be a bill of sale": see *Ramsay* v. *Margrett* (1894), 2 Q.B. 18 at p. 23. If the document is intended to be part of the bargain it must be deemed to be a bill of sale, and the notice of transfer is set up as a document of title. The evidence is sufficient to shew the receipt was part of the bargain and a record of the sale. It must be registered as a bill of sale: see *Marsden* v. *Meadows* (1881), 7 Q.B.D. 80 at pp. 84-5; *Ex parte Odell. In re Walden* (1878), 10 Ch. D. 76 at pp. 84-5; *Evans* v. *Prothero* (1852), 1 De G. M. & G. 572; *French* v. *Bombernard; Tower Furnishing & Finance Co., Claimants* (1889), 60 L.T. 48 at pp. 49 and 51. As to a new trial for the rejection of evidence see *Ford* v. *Elliott* (1849), 4 Ex. 78.

Argument

Martin, in reply: Respondent relies on the judgment of Lord Esher in *Ramsay* v. *Margrett* (1894), 63 L.J., Q.B. 513 at p. 515, but the important point is whether the receipt is part of the bargain, in which case it would be a bill of sale, but in this case it is not part of the bargain and not an assurance. The evidence is not sufficient here to overrule the findings of the judge below: see *Barron* v. *Kelly* (1918), 56 S.C.R. 455; *Dominion Trust Company* v. *New York Life Insurance Co.* (1919), A.C. 254; *Ryan* v. *Ryan* (1881), 5 S.C.R. 387.

Cur. adv. vult.

15th September, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The learned trial judge thought that the alleged purchase of the automobile by the appellant was *bona fide.* With respect, I have come to the opposite conclusion.

The deportment of a witness in the box is no doubt indicative to some extent of his credibility, and therefore, in many cases, especially where it is difficult to draw the true inferences from the evidence and to form an opinion of the credibility of the several witnesses, the trial judge who observes the demeanour of the witnesses is in a better position to come to a right conclusion than is an Appellate Court. But in my opinion, too much importance is not to be attributed to demeanour. In the last analysis the value of testimony must be gauged in the main

COURT OF APPEAL

1920

Sept. 15.

HENDRY v. LAIRD

by what the witness has said, the consistency of what he has said and its consistency with other facts and circumstances in evidence.

After reading the appellant's own testimony, I have no hesitation in discarding it. His demeanour in the box could not, in my opinion, either prejudice or lend credit to that which to me appears to be wholly bad.

As to Maltby, his testimony is equally unreliable.

MACDONALD, C.J.A.

In this view of the case it is unnecessary to decide the question turning on the receipt, upon which the judgment below in the plaintiff's favour is founded.

I would dismiss the appeal.

MARTIN, J.A.: In this case the learned judge below upheld the validity of the sale of the motor-car in question, but gave judgment in favour of the defendant (Laird) in the issue of *Hendry* v. *Laird,* upon the ground that the receipt in question was a bill of sale under the definition given in section 3 of the Bills of Sale Act, R.S.B.C. 1911, Cap. 20, and therefore should have been registered under section 7 thereof [(1919), 2 W.W.R. 341].

This question has been so fully considered by the House of Lords in *Charlesworth* v. *Mills* (1892), A.C. 231; 61 L.J., Q.B. 830, and the Court of Appeal in *Ramsay* v. *Margrett* (1894), 2 Q.B. 18; 63 L.J., Q.B. 513, that there is now very

MARTIN, J.A.

little to be said upon the subject, and it would be mere repetition to enlarge upon it.

After applying here the test deduced by Lord Esher, M.R. in *Ramsay* v. *Margrett* from *Charlesworth* v. *Mills,* I am of the opinion that the document in question was "not intended to be part of the bargain to pass the property in the goods," and therefore it must not be deemed to be a bill of sale.

I note that the receipt given in that case, though held to be an ordinary one, yet contained unusual words of acknowledgment of title which are absent here. On this branch of the case, therefore, with all respect, I think the judgment below must be reversed.

On the other branch, as to the *bona fide* sale, I have, after some hesitation and difficulty, reached the conclusion that the

view taken by the learned judge should not be disturbed. The circumstances of the case, though strange and unusual, are not incredible, having regard to the character, occupation and conduct of Hendry. I may say that my difficulty has been increased by the fact that the learned judge states that the conclusion he has reached "with some hesitation, is not based upon the demeanour of the witnesses, but on conclusions or inferences drawn from proven facts. Another Court might take a different view of the matter." With every possible respect, I do not think this is a proper way to, in effect, submit a case to a Court of Appeal. It was pointed out by Lord Esher in the similar case of *Ramsay* v. *Margrett, supra,* at p. 22, that the learned trial judge

"had to try an interpleader issue without a jury, and, therefore, as regards the decision of matters of fact, he stood in the same position as if he were a jury."

Now, demeanour is one of the best tests of credibility, not only by a jury but by a trial judge (I speak from long experience as a trial judge when a member of the Court below) and where we have, as here, a nicely balanced question of fact the element of demeanour may become the turning weight in the scale and the exclusion of it from consideration by the trial judge deprives this Court of a most valuable guide, because it is only possible for us to look at the record before us; whereas the jury or the judge, as the case may be, may also look at the witnesses in the box. Such a situation may easily work an injustice upon a litigant, and I think it is due to a litigant that where a question of fact may depend upon demeanour below or above, that element should be passed upon by the trial judge and not eliminated, just as it would be passed upon by the jury, for which the judge is the substitute. Therefore, the statement of the exclusion of an element which may become the turning weight in the scale of credibility might well make it necessary for this Court to order a new trial, wherein the trial judge should pass upon that missing element which a Court of Appeal has no way of supplying, though it would decide the case one way or another.

MARTIN, J.A.

I am led to make these observations because I have noticed of late that there is a growing disposition upon the part of

COURT OF APPEAL

1920

Sept. 15.

HENDRY v. LAIRD

certain learned trial judges to make similar observations, with the excellent intention, doubtless, of being of assistance to this Court, whereas I have found them to be an embarrassment and a hindrance in the discharge of my appellate duty and to tend to bring about a miscarriage of justice, consequently I think this innovation, for such it is, in our judicial procedure should not be countenanced.

MARTIN, J.A. The result is that the appeal should be allowed.

GALLIHER, J.A.: I have read the evidence in this case through carefully, and while the transaction on behalf of Hendry seems an unbusinesslike one, yet there are people who are trusting and unbusinesslike in their affairs, and sailors are among the number. I feel, therefore, that while the circumstances are somewhat suspicious, I would not be warranted upon the evidence in finding that the money was not *bona fide* advanced by Hendry.

GALLIHER, J.A. As to the conclusions on the other point reached by the learned trial judge, with some hesitation as he expressed it, I am, with great respect, forced to a different conclusion. The rule referred to by the Master of the Rolls (Lord Esher) in *Ramsay* v. *Margrett* (1894), 63 L.J., Q.B. 513 at p. 515, as being laid down by Lords Halsbury and Herschell in *Charlesworth* v. *Mills* (1892), 61 L.J., Q.B. 830, wherein it is said,

> "But if the document [in this case the receipt] is no part of the bargain, and if the bargain is complete without the document, so that the property passes wholly independently of the document, it is not to be deemed a bill of sale,"

is, in my opinion, fitted to the circumstances of this case.

I would allow the appeal.

MCPHILLIPS, J.A. MCPHILLIPS, J.A. would allow the appeal.

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

Solicitor for appellant: *J. A. Russell.*
Solicitor for respondent: *I. I. Rubinowitz.*

DOMINION TRUST COMPANY v. BRYDGES.

MORRISON, J. (At Chambers)

1920

June 8.

DOMINION TRUST CO. v. BRYDGES

Practice — Company — Winding-up — Counterclaim—By way of defence— Dominion Winding-up Act—Leave to counterclaim not necessary— R.S.C. 1906, Cap. 144, Sec. 22.

If the subject-matter of a counterclaim is not outside, and independent of the subject-matter of the claim it is in the nature of a defence, in which state it is not a proceeding as to which leave to commence or proceed against a company in liquidation is necessary under section 22 of the Winding-up Act.

APPLICATION by the plaintiff to strike out defendant's counterclaim, on the ground that no leave to proceed had been obtained under section 22 of the Winding-up Act. Heard by MORRISON, J. at Chambers in Vancouver on the 8th of June, 1920. Statement

J. G. A. Hutcheson, for the application.
Bucke, contra.

MORRISON, J.: The action is for foreclosure of a mortgage given by defendant and for personal judgment against him. A defence and counterclaim is filed. The counterclaim sets up an indebtedness from plaintiff to defendant arising out of the subject-matter of this action and claims that that sets off the amount due under the mortgage, and a reconveyance is claimed. This is an application to strike out the counterclaim, on the ground that no leave has been given to plead it as provided by section 22 of the Winding-up Act, Cap. 144, R.S.C. 1906, which enacts that Judgment

"after the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes."

The question arising on this application is, whether a counterclaim of the character herein filed is a proceeding as to which leave to commence or proceed is first to be obtained. In my opinion it is not: Halsbury's Laws of England, Vol. 5, p. 538, par. 915; *Mersey Steel and Iron Company* v. *Naylor*

MORRISON, J. (At Chambers)

1920

June 8.

DOMINION TRUST CO. v. BRYDGES

(1882), 9 Q.B.D. 648, in the course of the argument in which Jessel, M.R. interpolates that a counterclaim is in the nature of a defence, and that a defendant sued by a company must be entitled to raise any defence without leave. Since, during the argument at bar, the terms "counterclaim" and "set-off" were used by counsel interchangeably, it may be well to point out briefly the difference between them. A counterclaim has its origin in section 24 of the Judicature Act, 1873, and is in the nature of a cross-action: *Stooke* v. *Taylor* (1880), 5 Q.B.D. 569. It may raise any cross-claim that can conveniently be tried at the same time as the plaintiff's claim; and so long as it discloses a valid cause of action it may have arisen either before or since the commencement of the plaintiff's action. It need not be connected with the original matter of the plaintiff's action except where a third person is made defendant to the counterclaim along with the plaintiff, in which case it must be so connected. If the subject-matter of the counterclaim is not outside of and independent of the subject-matter of the claim, it is then, as here, in the nature of the defence. A set-off remains, as it was under the statute 2 Geo. II., c. 22, and is a defence proper to the plaintiff's claim arising out of the subject-matter, and must be for a liquidated claim only. The plaintiff's claim and the defendant's set-off must be mutual debts, both due from and to the same parties in the same right. A set-off can be pleaded as a counterclaim, but a counterclaim cannot be pleaded as a set-off. There is no advantage, however, in pleading only a set-off as a counterclaim. From the facts of this case the counterclaim is used "as a shield, not as a sword," or in other words, it is used as a defence, and it therefore is not necessary first to obtain leave.

Judgment

Application dismissed.

COURT OF APPEAL

1920

Sept. 15.

LOCHEAD v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

LOCHEAD v. B.C. ELECTRIC RY. CO.

Negligence—Street-car—Passenger boarding moving car—Conductor opening gates without stopping car—Injury to passenger.

A car of the defendant Company stopped to allow on passengers as it was about to round a curve into another street. A woman immediately in front of the plaintiff got on and the conductor not seeing the plaintiff started to close the gates and gave the starting signal. When the gates were half closed and the car commenced moving, seeing the plaintiff he reopened the gates but did not give the signal to stop. The plaintiff grasped both handle-bars and put her right foot on the lower step but as the car gained momentum she was thrown violently against the gate and injured her left leg. The jury brought in a verdict for the plaintiff for $321 but the learned judge on motion for nonsuit held that the plaintiff having attempted to enter the car while in motion the accident was due to her own voluntary act and dismissed the action.

Held, on appeal, reversing the decision of CAYLEY, Co. J., that the plaintiff in attempting to board the car was entitled to assume that it would stop and the conduct of the conductor justified a jury's verdict for damages against the Railway Company.

APPEAL by plaintiff from the decision of CAYLEY, Co. J. of the 15th of January, 1920, in an action for damages for injuries sustained by plaintiff through the negligence of the servants of the defendant Company. A car of the defendant Company going south on Templeton Drive in Vancouver on the 2nd of July, 1919, had stopped immediately before it was about to turn west on Dundas Street. A woman just in front of the plaintiff got on the car and the conductor not seeing the plaintiff proceeded to shut the gates and give the signal to start, then seeing that the plaintiff wanted to get on when the gates were half shut and the car had started to move he reopened them but did not give the signal to stop. The plaintiff following took hold of both handle-bars (one on each side of the entrance) and got her right foot on the lower step. As the car proceeded to gain speed going around the curve she was thrown violently against the gate and her left leg from ankle to knee was badly bruised. She worked as a cook and was unfit

Statement

COURT OF APPEAL

1920

Sept. 15.

LOCHEAD v. B.C. ELECTRIC RY. CO.

for work for two months. At the conclusion of the plaintiff's case the defendant moved for nonsuit, but the learned judge allowed the case to go to the jury and reserved the question of nonsuit. The jury brought in a verdict in favour of the plaintiff for $321. On renewal of the motion for nonsuit the learned judge decided that it was imprudent for the plaintiff to attempt to enter the car before it was brought to a standstill and having elected to do so the accident was due to her own voluntary act and the action should be dismissed.

Statement

The appeal was argued at Vancouver on the 8th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Gillespie, for appellant: When the gates opened again the plaintiff had a right to assume it was an invitation to her to get on and that the car would stop. It must be admitted it was negligence on the part of the conductor to open the gate and not stop the car. The learned judge found contributory negligence in spite of the jury: see *Daynes* v. *British Columbia Electric Rway. Co.* (1914), 49 S.C.R. 518; see also *Grand Trunk Rway. Co.* v. *Mayne* (1917), 56 S.C.R. 95; *Williams* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 295.

McPhillips, K.C., for respondent: The cases referred to are all with reference to getting off a car and do not apply. There was no negligence on the part of the Company: see *Siner* v. *Great Western Railway Co.* (1869), L.R. 4 Ex. 117 at pp. 122-3; *Harrold* v. *The Great Western Railway Company* (1866), 14 L.T. 440; *Cockle* v. *London and South Eastern Railway Co.* (1872), L.R. 7 C.P. 321. She incurred liability when she got on a moving car: see also *Herbich* v. *North Jersey St. Ry. Co.* (1900), 47 Atl. 427.

Gillespie, in reply.

Cur. adv. vult.

15th September, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal, and direct judgment to be entered for the plaintiff (appellant) in accordance with the verdict of the jury, as there is, in my opinion, evidence to sustain the verdict.

Assuming that the plaintiff was negligent in boarding a moving tram-car, yet the conductor could easily have prevented the consequences of her negligence by doing the obvious thing and that which it was his duty to do, namely, pull the bell-cord.

I think the jury by their verdict shewed their common sense and common knowledge of the operation of street railways. When the conductor opened the gates of the car, the car was moving slightly. It was his duty to have at once given the signal to the motorman to stop; he did not do it. The plaintiff seized the side-bars and got her foot upon the lower step, the car kept increasing in speed, the conductor standing there and seeing her danger failed to do what was then, as well as at the time of opening the gates, his obvious duty to do, namely, to stop the car, and as a result of that negligence the plaintiff sustained the injuries of which she complains.

MACDONALD, C.J.A.

I see a very clear distinction between the facts of this case and those of *Siner* v. *Great Western Railway Company* (1869), L.R. 4 Ex. 117. There was no factor of ultimate negligence in that case. The defendants there could not have done anything to avert the plaintiff's injury when her negligence manifested itself.

MARTIN, J.A.: There was evidence, in my opinion, which justifies the verdict of the jury in the plaintiff's favour. Though the charge of the learned judge is somewhat tenuous yet the real point was left to them, *viz.*: Did she elect to take an obvious risk? It is for the jury to say what the obvious risk was, and she certainly did not accept the risk which injured her if she were justified in the circumstances in thinking that the conductor would stop the moving car before increasing the risk of injury to her, being a passenger still on the step, by attempting to round the curve at an increased speed, as the evidence would warrant the jury in believing he did. As I view the matter the jury found that she did not elect to take that risk, which was not obvious at all from her point of view, but the reverse, and so judgment should have been entered in her favour, and therefore the appeal must be allowed.

MARTIN, J.A.

GALLIHER, J.A.: I was inclined at the hearing to dismiss

GALLIHER, J.A.

COURT OF APPEAL

1920

Sept. 15.

this appeal, but on further consideration, and as my learned brothers are all of the opinion that it should be allowed, I will not dissent.

LOCHEAD v. B.C. ELECTRIC RY. CO.

MCPHILLIPS, J.A.: This appeal, in a negligence action for personal injury upon an electric street-car, raises a point of some considerable nicety. It would appear that the conductor of the car had stopped the car to take on a passenger and was in the act of closing the gates when the appellant appeared also wishing to board the car. The conductor then proceeded to reopen the gates (the car still proceeding slowly), the appellant accepting, as I think not unreasonably, this apparent invitation to board the car, did so, but when upon the steps of the car, was, by reason of it not being brought to a stop, thrown down upon the car and suffered injuries to leg and shoulder. The cause that gave rise to the fall of the appellant was in the main, the fact that at this point there is a considerable curve and besides the negligence in inviting the appellant to board the car there was negligence in not stopping the car when she had stepped upon the steps, especially when about to go around a sharp curve. All this conduct amounted, in my opinion, to gross negligence upon the part of the conductor.

MCPHILLIPS, J.A.

It is to be remembered that a street-car service is not to be viewed the same as a railway, with trains running at high rates of speed between stations; the truth is that to carry out the service there must be a good deal of mutuality of action and expedition in getting on and off the cars or the service could not be economically or expeditiously carried on. Now the opening of the gates (although the car had not actually stopped) was plainly an intimation to the appellant to step upon the steps of the car and in ordinary course, had no curve in the line existed at that point, no accident would have taken place, but owing to the curve that ensued, which the conductor must have or should have known would ensue, namely, the passenger so invited to board the car was placed in peril and thrown down by reason of the car being negligently allowed to take the curve, the passenger not having arrived at a place of safety upon the car, not yet even upon the floor of the car. The liability of a

carrier of passengers for injuries suffered has been tritely stated to be as follows:

"To carry safely and securely as far as reasonable care and forethought on his part can go, and if an accident which he could not possibly have prevented takes place, he is under no liability": Indermaur's Common Law, 12th Ed., 142.

Here there was every opportunity for the prevention of accident. The gates should not have been opened under the circumstances or, if opened at all, only when the car was brought to a standstill. In inviting the passenger to board the car and thereby accepting her as a passenger, the duty then was to carry her safely, which was not done. To proceed around the curve with the passenger in the act of then ascending the steps was, as I have already said, gross negligence. The car was under the absolute control of the conductor, the conductor being at his post of duty but failing to perform his obvious duty, *i.e.*, all took place in his immediate presence and following his opening of the gates of the car. I cannot persuade myself that the accident that occurred was not due to the carrier's negligence. It may well be said that the thing speaks for itself, and in this case there was no attempt upon the part of the defendant Company to shew the want of negligence on its part, relying solely upon what has been claimed to be the contributory negligence of the plaintiff, but contributory negligence is negatived by the general verdict in favour of the plaintiff.

It is, of course, contended that the case should never have gone to the jury (and the learned trial judge has in effect so held), yet he did allow it to go to the jury. He could very properly do this if he was of the opinion that there was some evidence, or that negligence might reasonably be inferred, and with great respect to the learned judge's very careful judgment, I am of the opinion that it was a proper case to leave to the jury upon the question of fact. (See *Flannery* v. *Waterford and Limerick Ry. Co.* (1877), 11 Ir. R. C.L. 30; *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1166, as to what will be evidence of negligence.) Also see the case, which is much in point, of *Delaney* v. *Metropolitan Railway Company* (1920), 36 T.L.R. 596. In the present

COURT OF APPEAL

1920

Sept. 15.

LOCHEAD v. B.C. ELECTRIC RY. CO.

case, as in that case, there was evidence which entitled the jury to infer negligence.

Upon careful consideration of all the facts of this case, I am clearly of the opinion that the negligence which was the cause of the accident and the personal injuries to the plaintiff was negligence imputable to the Company, and for which there is legal liability. The Company must, in the circumstances, be held to have undertaken and to have been charged with the duty to carry the plaintiff safely in so far as reasonable care could provide, but there was an absence of reasonable care, and the accident took place which could have been prevented, but was not prevented owing to the gross negligence of its servant, for which it must be held responsible (see *Delaney* v. *Metropolitan Railway Company, supra,* Lord Justice Bankes at p. 597).

Further, in the present case we have the finding of the jury in favour of the plaintiff, upon facts which, in my opinion, admit of their reasonably so finding for the plaintiff, and what Lord Loreburn said in *Kleinwort, Sons and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697, is peculiarly applicable to this case:

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. . . . . That is, in my opinion, what the finding means, and there is sufficient evidence to support it."

In my opinion, the appeal should be allowed and judgment entered for the plaintiff in accordance with the verdict of the jury.

Appeal allowed.

Solicitor for appellant: *W. D. Gillespie.*
Solicitors for respondent: *McPhillips & Smith.*

REX *EX REL.* ROBINSON v. HONG LEE *ALIAS* WAH CHEW.

CAYLEY, CO. J.

1920

Sept. 17.

REX v. HONG LEE

Criminal law — Charge by city police-clerk — Dismissal by magistrate — Right of appeal—Person "aggrieved"—Criminal Code, Sec. 749.

Upon the acquittal of an accused on a charge under section 749 of the Criminal Code, the right of appeal extends to those who prosecute in an official capacity and allege themselves to be "aggrieved" (although there is no pecuniary loss) by the decision.

The Crown is always "aggrieved" when there has been a failure of justice and when the law officers of the Crown advise that a magistrate should have convicted, the police officers and police-court clerks "who are complainants for the public" may allege that they are "aggrieved" within the meaning of the Act.

APPEAL from the decision of the police magistrate at Vancouver, dismissing a charge brought against one Hong Lee for having in his possession morphine, cocaine and opium, for other than scientific or medicinal purposes. Argued before CAYLEY, Co. J. at Vancouver on the 12th of September, 1920. Statement

Reid, K.C., for the prosecution.

J. A. Russell, for the accused.

17th September, 1920.

CAYLEY, Co. J.: This is an appeal from a decision of the police magistrate, dismissing a charge brought against Hong Lee for having in his possession morphine, cocaine and opium for other than scientific or medicinal purposes.

The information was laid by Earl E. Robinson, who describes himself in the information as simply "Earl E. Robinson." The notice of appeal reads as follows:

"Take notice that The King, on the information of Earl E. Robinson and the said Earl E. Robinson being persons who think themselves aggrieved, intend to prosecute an appeal," etc. Judgment

Mr. *Russell,* for the respondent, now objects that the King and Earl E. Robinson are not parties "aggrieved" and that, therefore, the appeal should be dismissed. He relied upon *Rex* v. *Suckling,* decided December 5th, 1919 [(1920), 3 W.W.R. 91], where I sustained the objection then taken on

CAYLEY, CO. J.

1920

Sept. 17.

REX v. HONG LEE

the ground that the appellant was not a party aggrieved. He also cited *Rex* v. *Lee Tan and Lee Him,* a decision dated March 18th, 1920 [28 B.C. 49; (1920), 3 W.W.R. 792], in which I sustained a similar objection, but those cases are, in my opinion, quite different from the present one. In *Rex* v. *Suckling* the King did not appeal. Complainant went into the box, and being asked whether he felt himself aggrieved or not, stated that the appeal had been taken without his knowledge and without his being consulted, and that he did not consider himself to have been "aggrieved." The complainant was, at that time, police clerk of the City of Vancouver, just as Earl E. Robinson was, in the present proceedings, police clerk of the same city. In *Rex* v. *Lee Tan and Lee Him* the appellant was president of a Chinese Club. He laid his information, however, as a private person and in his notice of appeal, he appeared as a private person, whereas the property, whose destruction he complained of, was admitted to be the property of the club. I decided, in that case, that the appeal was not rightly taken in the form in which it was taken; that it was the club which was "aggrieved," but as the club did not lay the information and as the complainant did not lay the information in the name of the club, he had no *locus standi* to appeal.

Judgment

In the present instance, the complainant, Earl E. Robinson, goes into the box and states that he is the police clerk of the City of Vancouver and that it was on behalf of the public that he laid the information against Hong Lee. Upon the charge being dismissed by the police magistrate, he authorized an appeal to be taken and instructed counsel for the Crown, although, as a matter of course, we know that the real authority to appeal came from the law office of the Crown and that Mr. Robinson's "authority" and "instructions" to appeal were formally given by him to counsel for the Crown at the direct request of counsel for the Dominion Government. It is well to have all the facts as they actually are. Now, as police clerk representing the public, it may be said that Mr. Robinson was not an agent of the Crown, and this feature is the only thing that makes me hesitate in the conclusion which I have

come to, dismissing the objection of Mr. *Russell,* but I consider that the Crown has adopted Mr. Robinson as its agent and that the Crown is always behind every public official, who lays an information in the course of his duties as an official. The Crown is present in every Court of Justice and is properly said to be represented by public officers while performing their public duties and within the scope of their duties. The Crown is, therefore, properly joined as appellant in this case, so that the question comes down to this: Can the Crown be said to be "aggrieved" in the sense in which the word "aggrieved" has been used in the past, especially in such cases as *Rex* v. *The Justices of Essex* (1826), 5 B. & C. 431; *Harrup* v. *Bayley* (1856), 6 El. & Bl. 218; 119 E.R. 845, and *The Queen* v. *Justices of London* (1890), 59 L.J., M.C. 146?

The position of the Crown in regard to offences is set out in Blackstone's Commentaries, Lewis's Ed., Book I., Cap. 7, p. 268, quoted in Stephen's Commentaries on the Laws of England, 15th Ed., Vol. 2, pp. 579-80, as follows:

"All offences are either against the King's peace or his crown and dignity; and are so laid in every indictment. For though, in their consequences they generally seem (except in the case of treason, and a very few others) to be rather offences against the kingdom than the King, yet as the public, which is an invisible body, has delegated all its powers and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to those powers and breaches of those rights are immediately offences against him to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law."

Judgment

There is, of course, a slight difference between the injury the Crown is supposed to suffer and a grievance which an unsuccessful complainant must shew, but to interpret section 49 of the Code as meaning that no one can be "aggrieved" unless he has suffered pecuniary damages would not be interpreting the section in a reasonable sense. I think the section must be interpreted as extending more widely the liberty of an appeal; that is, extending it from those who had been convicted and were appealing, to those who prosecuted in an official capacity and alleged themselves to be aggrieved although not pecuniarily hurt by the decision. The public are the real parties behind a public official who acts as prosecutor, and the public is, in this appeal, represented by the King. To construe the word

CAYLEY, CO. J.

1920

Sept. 17.

REX v. HONG LEE

"aggrieved" in the same sense as it is construed in *Harrup* v. *Bayley, supra,* would be to deprive the Crown in every action of a right of appeal from an erroneous decision of a magistrate. I do not agree with that. The Crown is always "aggrieved" when there has been a failure of justice. When there is a conviction, the accused is assumed to be "aggrieved"; when there is an acquittal and the law officers of the Crown advise that the magistrate should have convicted, the Crown may properly allege in the notice that it is aggrieved, and police officers and police-court clerks, "who are complainants for the public," have a right to allege that they are "aggrieved." In Blackstone's words, the King is "the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law," and this, of course, includes appeals from acquittals by magistrates.

Judgment

Appeal allowed.

MACDONALD, J. (At Chambers)

1920

Sept. 21.

BELL v. GREEN

BELL v. GREEN. *IN RE* MARTIN.

Solicitors—Dismissal of action—Costs—Conduct of plaintiff's solicitor—Liability for costs of action.

The conduct of the plaintiff's solicitor in continuing an action after an opportunity of accepting a fair offer of settlement even where the case appears to be a weak one is not sufficient ground to render him personally liable for the costs of the action. There must be clear evidence of misconduct or default on the part of the solicitor going further than error of judgment or miscalculation as to the chances of success.

Statement

APPLICATION for an order that the solicitor for the plaintiff pay the defendant's costs (as between solicitor and client). The facts are set out fully in the reasons for judgment. Heard by MACDONALD, J. at Chambers in Victoria on the 15th of June, 1920.

1920

Sept. 21.

BELL v. GREEN

Aikman, for the application.
Maclean, K.C., contra.

21st September, 1920.

MACDONALD, J.: Defendant, upon dismissal of this action, applies for an order, directing the solicitor for the plaintiff to pay his costs, as between solicitor and client. He bases his application upon various grounds, but the nature and course of the action, coupled with its outcome, will require first to be considered before the question of liability is determined.

It appears that in December, 1918, plaintiff consulted C. W. Bradshaw, a barrister and solicitor, with regard to his dealings with the defendant, but that Bradshaw, on account of his health, and with the approval of the plaintiff, arranged that Alexis Martin, another solicitor practising in Victoria, should act for the plaintiff in the matter. There was no special reason given why he should have been chosen. Counsel for Martin, in opening his argument, stated that there had been friction between defendant and Martin for some time, so that his selection, involving consideration of the acts of the defendant, was, to say the least, unfortunate. It was decided that an action should be brought, and Bradshaw assisted to the extent of drafting the indorsement on the writ of summons and, later on, the statement of claim. Defendant, before and after action was commenced, stoutly repelled the attack upon him, and promptly moved to dismiss the action for non-delivery of a statement of claim, and upon other grounds. The indorsement contained various charges of fraud and misconduct on the part of the defendant, especially with reference to certain mortgages, assignments and promissory notes, and also claimed $2,000 damages for conversion by the defendant of a motor-car. Before such application to dismiss was launched, the plaintiff made an affidavit, on the 23rd of April, 1919, to which reference will hereafter be made. Upon the hearing of the application and after various adjournments, plaintiff was given liberty to either file another statement of claim or allow a statement of claim delivered in the meantime to stand, and certain terms were imposed. Subsequently a further statement of claim was delivered and upon application, an order was made in September, 1919, striking it out, with costs, but again giving leave

Judgment

MACDONALD, J. (At Chambers)

1920

Sept. 21.

BELL v. GREEN

to file another statement of claim. Advantage was taken of this privilege. A third statement of claim was delivered in October, 1919. Application then was made to strike out such statement of claim and dismiss the action. The matter was heard by the Chief Justice, who considered the merits and found that he could not find in the lengthy examination for discovery of the plaintiff, any foundation for the charges against the defendant of fraud or any other cause of action. He then struck out the statement of claim, with costs to defendant in any event. He referred to the cause of action as follows:

"There may possibly be a good cause of action for debt or for an account and it may possibly be that in respect of certain transactions, want of consideration or the absence of independent advice could be successfully set up, but I am not to be understood as suggesting that there is any ground for doing so, as it is impossible to make out from the discovery whether the plaintiff has any good cause of action at all."

The order, while disposing of the last statement of claim, gave the plaintiff liberty within eight days to file such new statement of claim as he might be advised, and in default of such delivery the action should, without further order, stand dismissed. The question of appealing from such order was discussed and also the acceptance of a certain settlement that had been previously mooted. No further statement of claim was delivered and no appeal was taken within the proper time, nor was a settlement effected directly between the solicitors of the parties, so the action became dismissed with costs. The plaintiff and defendant, however, apparently came together, for in December, 1919, plaintiff supported this application of the defendant for payment of his costs by said Martin. He also repudiated the actions of Martin as being unauthorized.

Judgment

In the first place, it is not disputed, that Martin commenced the action without being consulted by the plaintiff, or having any direct authority from him to act on his behalf, so it is not a question, as to whether he was retained in the first instance or not. The same point does not arise as in *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241, where there was no written retainer and a conflict arose, as to the solicitors being authorized to act. There, it was held that weight should be given to the denial of the retainer, rather than to the statements of the solicitor. Here, Martin proceeded at his peril and can

only shew his authority to act, through instructions from Bradshaw, coupled with knowledge and ratification on the part of the plaintiff. I do not think that the consultation of plaintiff with Bradshaw in November, 1918, would, of itself, have been sufficient to justify Bradshaw in instructing Martin to take proceedings, along the lines indicated in the indorsement upon the writ of summons. There is no implied authority for one solicitor to instruct another to commence an action. It has even been held that instructions, given to a country solicitor, are not sufficient to authorize his city agents to act. See *Wray* v. *Kemp* (1884), 26 Ch. D. 169. So this phase of the situation depends, only partially, upon the interviews between the plaintiff and Bradshaw, and is really controlled by the subsequent acts of the plaintiff. See, as to ratification being sufficient *Norton* v. *Cooper* (1856), 3 Sm. & G. 375.

I feel satisfied that plaintiff thoroughly understood that, through the illness of Bradshaw, Martin was to act for him in obtaining redress, if possible, for his grievances against the defendant, which had actuated him in consulting Bradshaw. Then, subsequently he directly consulted and paid Martin. At this point, I might say, that wherever the statements of Bell come in conflict with those of Bradshaw or Martin, I accept those of the latter. My reasons for arriving at this conclusion are, that he not only flatly contradicts the statement of Bradshaw that the first statement of claim was read over and approved by him, but in his affidavit replying to that of Bradshaw, he goes further and says:

Judgment

"I never at any time felt or considered, that the defendant had defrauded me nor taken advantage of or misled me in any way nor been guilty of dereliction of duty towards me and never so instructed the said Martin."

This serious allegation would leave this matter in a state of contradiction between the parties, but the plaintiff by other statements discredits himself, or to put it mildly, shews such inconsistency, that my conclusion, as to his being unreliable is amply supported. On the 6th of December, 1918, in a notice signed by himself and addressed to one James Daniels, he objects to any payment being made to defendant, under a certain mortgage, and adds that he is taking proceedings to have the assign-

MACDONALD, J. (At Chambers)

1920

Sept. 21.

BELL v. GREEN

ment of such mortgage "from myself to the said J. R. Green set aside on the ground of its invalidity." It is also true that the statement contained in this notice was not under oath, but on the 23rd of April, 1919, plaintiff in his affidavit refers to the writ of summons with its indorsement, having been shewn to him, that he stated that he believed he had a good cause of action, in respect to the matters set forth in such indorsement. He also stated that

> "the defendant by various representations and devices and whilst acting as my solicitor and without my having any independent advice induced me to execute the various mortgages, assignments and promissory notes set forth in the said indorsement."

The difference between these statements and those contained in the affidavits after the action was dismissed, are so apparent as to need no comment, and should bring only one result, in testing the credibility of the plaintiff. I might add, that in the affidavit of April, 1919, he stated that the defendant had received approximately $1,200 from the sale of a motor-car, which was completely at variance with the facts. Then the cross-examination of the plaintiff strengthens my conclusion, that no dependence can be placed upon his statements, when they differ with those of Martin or Bradshaw. He was at that time quite satisfied to leave the conduct of the proceedings to them. He now takes a different attitude and disavows the charges in the pleadings, of fraud or professional misconduct, and swears that they were made by the said Martin "for his own personal reasons and not for my purposes at all." This expression of opinion, however, coming from such a source, has no weight. I must consider the facts upon which I can depend and the surrounding circumstances, in order to determine the next and important question, as to whether Martin was justified in bringing the action in the form indicated, or whether, assuming he was so justified, in the first place, he was entitled to proceed therewith or should not have retired, at some future stage of the proceedings. This is a task which is rendered somewhat more difficult, by the fact that I am called upon to determine as to whether liability exists between two solicitors, who are thus officers of the Court. Then, again, greater care, in arriving at a conclusion, arises, because while not altogether losing sight

Judgment

of the strained relationship between such parties, I must not allow it to carry me too far.

Now, while Martin was not directly instructed by the plaintiff, still as I have intimated, he was entitled to act as his solicitor. He had, however, to depend upon instructions given to Bradshaw and facts disclosed which would reasonably support the allegations in the indorsement on the writ of summons. He was required to assume the responsibility of Bradshaw, having taken the necessary steps to justify the commencement of the action, particularly an action involving the conduct of another solicitor.

Amongst the duties of a solicitor defined in Bowstead on Agency, 6th Ed., 160, he is

"to check useless litigation, and before instituting proceedings, especially on behalf of a wife against her husband, to carefully ascertain the facts of the case, and whether there is a reasonable prospect of success."

I think in this application Martin, in supporting the proper discharge of such duty, is bound to assume the same position, as if he had been directly instructed by the plaintiff. He wrote defendant Green in a general way, stating that the plaintiff had consulted him as to his transactions with Green for several years, and asking if he, Green, had any proposal of settlement. There was no definite claim made in such letter, but on the 20th of March, a further letter was written, requesting a release of certain mortgages, delivery of all promissory notes and the payment of $1,000. A copy of the proposed indorsement on the writ of summons was also enclosed, which alleged that conveyances, mortgages and securities had been obtained by Green through fraud, and increased the demand for a money payment to $2,000. On the 4th of March, 1919, Green replied, returning the proposed indorsement to the writ of summons and disputing any liability, but stated that all transactions between Bell and himself, were covered by numerous documents, and enclosed a few of same, with an intimation that he would be willing to produce them all, if Martin so desired. He also suggested that any matters of account between Bell and himself should be left to an accountant or arbitrator, as being a more suitable and less expensive proceeding. He added that he would use his letter in any Court proceedings. This letter

Judgment

MACDONALD, J. (At Chambers)

1920

Sept. 21.

BELL v. GREEN

was referred by Martin to Bradshaw, with a request to advise him, whether it made any difference. Bradshaw replied on the 25th of March, stating that he had seen Bell regarding the matter, and that he, Bell, "professes utter ignorance of having signed the documents, copies of which Mr. Green professes to enclose to you." He then refers to the possibility of such documents having been signed by Bell without any independent advice, and in that event, the onus would be thrown upon Green, to justify their execution.

As to the course then to be pursued, he said it was a question, as to whether Martin should have Green disclose copies of all documents before commencing action "or whether it would not be as well to go ahead with the action and obtain discovery after the action is commenced." He adds that he would "be inclined to adopt the latter course," but before doing so, it might be as well to notify Green to that effect, if thought proper to do so. No further letter was written, however, and the writ of summons was issued on the 27th of March, with the indorsement to which I have already referred. If such a letter had been written prior to commencement of the action, it would not likely have served any purpose, as a firm stand had already been taken by the defendant.

Judgment

Should Martin under the circumstances have "checked" such proposed litigation as useless, or did he fail to carefully or reasonably ascertain the facts of the case and as to the possibility of success. In Cordery on Solicitors, 3rd Ed., 156, it is stated that one of the class of cases "where the solicitor is ordered to pay costs to the other side is where the action . . . . . is improperly undertaken by him without any *bona fide* chance of success." Knight Bruce, L.J., in *In re Clarke* (1851), 21 L.J., Ch. 20, refers to the duty of a solicitor, to give proper advice on a subject submitted for consideration, and not allow a client to blindly give instructions, which do not support any cause of action. He also refers to the liability of a client for costs, and the right of a solicitor to recover from his client, in connection with the litigation, where such client

"insufficiently or falsely inform his attorney on a matter of fact, or if being informed by his attorney of the utter madness and hopelessness of bringing such an action, he [the client] should require the attorney to proceed with the action whether he considered it wise or unwise."

In this action I consider that Bell "insufficiently and falsely" informed Bradshaw and subsequently Martin, as to the true facts of the case. He repudiated genuine documents, which he should have recollected that he had executed, or suggested, that his signature to them had been improperly obtained. I conclude that Bell was well aware that an action was being launched, alleging misconduct on the part of Green as his solicitor, claiming delivery up or cancellation of the securities received by Green and seeking to recover $2,000. I have no reason to doubt, that Bradshaw at the time believed in the statements of Bell, and such belief would doubtless be strengthened by the affidavit of Bell in April, 1919. In default of any proposition of settlement, Martin was, in my opinion, justified in commencing the action.

Did, then, a stage of the action arise, at which he should, in view of its nature and all the circumstances, have advised his client to stop the proceedings or accept a settlement offered by Green?

Bell was examined for discovery in June, 1919, and before such examination was completely finished, he, on advice of Martin, refused to answer certain questions and retired from the examination. Sufficient evidence was disclosed upon the examination to shew a weak case, warranting further serious consideration.

Judgment

Martin must then at least have been concerned, as to the chances of success. Aside from the question as to how Green had acted towards Bell, as his solicitor, it was quite apparent that he, Bell, in respect to a certain mechanic's lien action had made inconsistent statements under oath. Further, that as to the transaction of the motor-car, his story was unreliable and shewed no cause for complaint. The Chief Justice, in his reasons for judgment, dealing with an application to dismiss the action found, as I have indicated, no ground of misconduct. It may be contended that solicitors are assumed to have confidence in their client, and while a judge might find that certain facts do not shew fraud nor misconduct, still that the solicitor is not assumed to sit in judgment upon his client's case, and if there is a reasonable prospect of success, he should

MACDONALD, J. (At Chambers)

1920

Sept. 21.

BELL v. GREEN

pursue it to trial: see *In re Jones* (1870), 6 Chy. App. 497 at p. 500. When the nature of this action is considered, and the client has proved so unsatisfactory in his evidence on many points, it might call for closer consideration on the part of the solicitor for plaintiff, as to his duty. The next move, however, came from Green, while the cross-examination thus remained in an unfinished state. He apparently consulted with his then solicitor, and the result was an offer of settlement on July 8th, 1919, on the terms that the defendant should release and deliver up all securities held by him, and that each side should pay his own costs. Martin consulted with his client Bell as to this offer and the advisability of its acceptance. Bell then consulted Bradshaw and he advised that a settlement should only be made upon payment of $300. This advice was approved by Martin, or at any rate, he became responsible for it, so that upon Green refusing to pay the amount, settlement was not effected. The action then proceeded, and the further statement of claim delivered, did not differ materially from the indorsement upon the writ of summons. There was still a claim made for a money payment of $2,000. It is apparent that the stumbling block in the way of settlement was the demand for $300. No particulars were given of how this amount was arrived at, nor was there any information afforded during the argument upon this application, as to the basis for such claim. I cannot see that there was any evidence afforded in its support, so it would appear simply to be a demand for the payment of the amount in order to dispose of the litigation. I do not think such claim was warranted, and although it emanated from Bradshaw, still Martin became responsible for such claim, though it might tend to destroy the contention of any bad faith on his part in this respect. Green had already applied to dismiss the action for want of prosecution and as being frivolous and vexatious. While such application was pending, the statement of claim was served and the cross-examination of the plaintiff took place, then such application was finally heard before me in September, 1919. Green and Martin differed as to what occurred upon such hearing, and as to my remarks in connection with the action, I recollect referring to the claim

Judgment

regarding the motor-car as being fruitless, and may have intimated that the action seemed to be one that might be properly brought to trial. I have not a clear recollection on this point, but I would naturally be disinclined to dismiss the action at that stage, if the plaintiff, through his solicitor, was desirous and felt justified in pursuing it further.

In view of the nature of the action, the opportunity it would afford for discovery, as suggested by Bradshaw before the action commenced, the result of the cross-examination of Bell, the length of time that elapsed during which the plaintiff made payments after his alleged cause of complaint arose, and all the circumstances of the case, in my opinion, the settlement offered by defendant should have been accepted.

Is the opinion I have thus formed sufficient to visit Martin with any of the costs of the action? The facts here disclosed do not agree with those outlined in any of the cases cited in Halsbury's Laws of England, Vol. 26, p. 833, as instances in which a solicitor may be ordered to pay the costs of the opposite side. There is no suggestion that this action was of a speculative nature. I think that before a defendant can complain of the actions of the solicitor acting for the plaintiff, there should be clear evidence of misconduct or default on the part of such solicitor. It must go further than error of judgment or miscalculation as to the chances of success. I do not consider that the findings of the Chief Justice, coupled with the facts and all the surrounding circumstances of the case, are sufficient to impose upon Martin the costs of the defendant. When I speak of all "the surrounding circumstances," I bear in mind what occurred, after the order was made, dismissing the action in default of a further statement of claim being delivered, and while the time for appeal from such order had not expired, Green was not then satisfied to await the result of the order he had obtained, but approached Bell and effected what really amounted to a settlement of the action. Bell was not closely examined as to what took place, nor was Green cross-examined on his affidavit. He did not offer any explanation as to why he thus interviewed his opponent, but I will accept Bell's statement that the question of costs was not discussed between them.

Judgment

MACDONALD, J. (At Chambers)

1920

Sept. 21.

BELL v. GREEN

Judgment

Bell at the time kept faith with Martin, as his solicitor, and still recognized him as acting, by reporting the offer made by Green, as to which Martin advised acceptance. There was apparently no arrangement between them as to the disposition of the costs. This phase of the situation, involving a settlement, was not presented by counsel for Martin during the argument, but has had considerable weight with me in coming to a decision. While thus determining that Martin was not liable to Green for his costs in the action, even after the examination for discovery, I do so with some hesitation. I do not think that this application was altogether unwarranted, and Martin, while succeeding, should not recover his costs. I thus follow the same course as was adopted by Darling J. in *Warren* v. *London Road Car Co.* (1907), 52 Sol. Jo. 13. The pleadings and other material containing allegations of fraud or misconduct may be removed from the files of the Court, and there will be an order accordingly. The application is otherwise dismissed, without costs.

Application dismissed.

LUMSDEN v. PACIFIC STEAMSHIP COMPANY.

COURT OF APPEAL

1920

Sept. 15.

LUMSDEN v. PACIFIC STEAMSHIP CO.

Carriers—Trunk checked by passenger—No directions—Lost in transit—Transhipment in course of passage—"Deviation."

The plaintiff purchased a ticket from the defendant at Los Angeles, California, to travel by their steamship "President" from San Francisco to Victoria and signed the conditions indorsed on the ticket which limited the Company's liability in case of loss to $100. She then proceeded to Santa Barbara and there purchased a ticket to San Francisco on a railroad not connected with the defendant. Then with the railway ticket and the steamship ticket she checked her trunk to Victoria, the check on the trunk containing the words "To Victoria, B.C. route *via* So. Pac. Co. to San Fran. Pac. S.S. Co." The trunk arrived in San Francisco two days before the "President" sailed and was shipped on another boat of the same Company sailing at once that did not stop at Victoria but went to Seattle. The trunk was there handed over to another company for transhipment to Victoria and was lost while in the latter's possession. In an action for damages for loss of the trunk it was held by the trial judge that there was "deviation" and the Company was liable in damages for the value of the goods.

Held, on appeal, reversing the decision of RUGGLES, Co. J., that there was no obligation on the defendant to send the trunk by the "President" or other ship calling at Victoria. It was open to them to send it by any of their vessels by which it would reach its destination in due course. There was no "deviation" such as to entitle the plaintiff to recover more than the amount limited under the contract.

APPEAL by defendant Company from the decision of RUGGLES, Co. J., of the 22nd of March, 1920, in an action for damages for loss of a trunk. The plaintiff, who was in Los Angeles, California, bought a ticket from the defendant Company on the 7th of June, 1919, to sail on the steamship "President" from San Francisco on the 24th of June, for Victoria. After purchasing the ticket she went by rail to Santa Barbara, where she remained a few days. On the 11th of June she purchased a ticket by rail to San Francisco, and with this ticket and the ticket she held for sailing on the "President" she checked her trunk through to Victoria. On the check was written: "To Victoria, B.C., route *via* So. Pac. Co. to San Fran. Pac. S.S. Co." The trunk arrived in San Francisco on the

Statement

COURT OF APPEAL

1920

Sept. 15.

LUMSDEN v. PACIFIC STEAMSHIP CO.

12th of June and was immediately transferred to the ship "Admiral Dewey," which was leaving San Francisco for Seattle on that day. On the arrival of the "Admiral Dewey" in Seattle (not having stopped at Victoria on the way) the trunk was delivered to the C.P.R. for shipment to Victoria. No trace of the trunk could be found after delivery to the C.P.R. in Seattle on the 15th of June. The plaintiff claimed $1,000, the actual value of the contents of the trunk being $1,329. The ticket purchased by the plaintiff was indorsed with certain conditions to which she affixed her signature but did not read. One of these conditions was, that in case of loss, the limit of the Company's liability would be $100, and this amount was paid into Court by the Company. The learned judge held that there was a deviation from the contract that deprived the defendant of the benefit of the conditions, and gave judgment for the plaintiff for $1,000.

Statement

The appeal was argued at Victoria on the 1st and 2nd of June, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Armour, K.C., for appellant: The defence is the plaintiff carried a ticket which included a contract; by this the liability is limited to $100. The contract was made in California, and by the law of California the liability is $100. It is an implied condition that there shall be no deviation, and I contend there was no deviation. If there was any deviation, it was on her part.

Argument

R. M. Macdonald, for respondent: The whole basis of the transaction was a specific designated voyage. The trunk was to go by rail to San Francisco and from there by boat to Victoria. It was deliberately sent to Seattle. There was a breach of the elementary features of the contract: see *Meux* v. *Great Eastern Railway Co.* (1895), 2 Q.B. 387 at pp. 390-1. We are entitled to sue apart from the contract. The special conditions are only applicable when performing the contract. In this case they carried outside the contract. My contention is there was deviation; they put themselves outside the contract and they were guilty of misfeasance: see *Austin* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (1850),

10 C.B. 454 at p. 475. There was no contract for turning the trunk over to the C.P.R. On the doctrine of deviation see *Morrison & Co., Limited* v. *Shaw, Savill and Albion Company, Limited* (1916), 1 K.B. 747 at p. 756; *Davis* v. *Garrett* (1830), 6 Bing. 716; *Balian and Sons* v. *Joly, Victoria, and Company (Limited)* (1890), 6 T.L.R. 345; *Joseph Thorley, Lim.* v. *Orchis Steamship Co.* (1907), 76 L.J., K.B. 595 at p. 597; *Internationale Guanoen Superphosphaatwerken* v. *Macandrew & Co.* (1909), 78 L.J., K.B. 691; *The Dunbeth* (1897), 66 L.J., P. 66. You cannot make Seattle an intermediate port between San Francisco and Victoria. As to the passenger being bound by the California law see *Dobell & Co.* v. *Steamship Rossmore Company* (1895), 2 Q.B. 408; see also *Boston and Maine Railroad* v. *Hooker* (1914), 233 U.S. 97.

Armour, in reply: Unless under the contract there is a certain ship on which the goods are to go, there can be no deviation. The cases are collected in MacMurchy & Denison's Railway Law of Canada, 2nd Ed., 435; see also *The Great Western Railway Company* v. *Pocock* (1879), 41 L.T. 415; *London and North Western Railway* v. *Hinchcliffe* (1903), 2 K.B. 32. As to reading conditions on ticket see *The Provident Savings Life Assurance Society of New York* v. *Mowat* (1902), 32 S.C.R. 147; *New York Life Ins. Co.* v. *McMaster* (1898), 87 Fed. 63; (1899), 99 Fed. 856.

Argument

Cur. adv. vult.

15th September, 1920.

MACDONALD, C.J.A.: The appeal must be allowed.

To entitle the plaintiff to succeed it was, I think, incumbent upon her to prove that the Southern Pacific Railway Company was the agent of the defendant, which proof is entirely lacking. The defendant had no knowledge that she intended to sail on the "President," and in view of this there was, I think, no obligation on its part to forward the trunk to Victoria on that ship. In the proper sense of the term there was no deviation, no breach of contract, or want of ordinary care on the defendant's part. What the plaintiff did was what many travellers

MACDONALD, C.J.A.

COURT OF APPEAL

1920

Sept. 15.

LUMSDEN v. PACIFIC STEAMSHIP CO.

would, no doubt, have done, but the fault was not the fault of the defendant.

MARTIN, J.A.: In the judgment appealed from, the learned judge below bases it upon a "deviation" from the contract, but with all respect, if there has been one, it was upon the part of the plaintiff, not the defendant. The plaintiff complains that her trunk did not accompany her on the S.S. "President," one of the defendant's ships, which was to, and did, sail from San Francisco direct to Victoria on June 14th, 1919 (for which voyage she had purchased a ticket as a passenger, with her personal baggage, limited to $100 value), but was sent two days before on another of the defendant's passenger ships, the "Admiral Dewey," which ran as far as Seattle, and there it was to be transhipped to one of the Canadian Pacific Railway Company's ships to Victoria, in the ordinary way of the defendant's connections, and it was delivered to the C.P.R. in Seattle for that purpose on June 15th, but went astray and was lost.

Now it seems to me that if the plaintiff wished to avoid the obvious chance of her trunk preceding her from San Francisco, and wanted to be sure that it would go on the same ship with her therefrom, the proper and reasonable course for her to adopt was not to attempt to check it through to Victoria from Santa Barbara (over 200 miles south of San Francisco), but to check it to the defendant Company at San Francisco and then see to it herself, or, by her agent there, that it was placed on board the ship either in the cabin, if she wanted it on the voyage, or in the hold if not, as any reasonably careful traveller and passenger would have done. Instead of that, however, she, in effect, left it to the defendant Company to forward the trunk by its first steamer in the ordinary course of its transportation connections, which would ordinarily have been delivered in Victoria ahead of the arrival of the "President." I cannot regard such shipment by an alternative and ordinary route as a "deviation" from the contract in its true sense; the situation is not altered in principle by the fact that the check did not state that the last part of the trunk's journey to Victoria would be by the

MARTIN, J.A.

agent (*i.e.*, the Canadian Pacific Railway) of the defendant. If it were necessary, I am prepared to hold that by her conduct the plaintiff elected that it was not necessary to send the trunk on the same steamer as herself, and that she left it to defendant to send it to Victoria by its first available ship and its usual and customary connections. Nor can I accept the submission that the Southern Pacific Railway, in checking the trunk at Santa Barbara, was the defendant's agent, because there is no evidence to that effect (even if it were material in my view). On the contrary, it appears to have been purely a voluntary act, and in answer to her question, the man at Santa Barbara who checked the trunk, refused to say that it would go by the "President," as she wished; nor did she label or mark her trunk in the ordinary way shewing that it would be required for use in the cabin. I regard the contract as presupposing and meaning that the passenger would present herself and her baggage at the steamship before sailing in the ordinary course of travel, but she did not do so, and consequently it was only reasonable and practical for the defendant to forward the baggage by its first and earlier boat in the usual course of its business, as was done.

In deciding such cases, "judges cannot denude themselves of that knowledge of the incidents of railway travelling which is common to all," as Mr. Justice Montague Smith said in *Siner* v. *Great Western Railway Co.* (1869), L.R. 4 Ex. 117 at p. 123, 38 L.J., Ex. 67, and see also at p. 122 the reference by Mr. Justice Mellor to the notorious exigencies of traffic, and by Mr. Justice Hannen, at p. 125.

MARTIN, J.A.

Many authorities were cited to us on this question of deviation, but in all of them the facts and circumstances are different, and little, if any, assistance is to be derived from them. In the latest of them, *Morrison & Co., Limited* v. *Shaw, Savill and Albion Company, Limited* (1916), 1 K.B. 747, 85 L.J., K.B. 724, Mr. Justice Bailhache said the question of deviation from a direct course to an intermediate port was a question of degree in which geographical position was only an element. Would it be contended that there was a real deviation here if the "President" had touched first at Port Angeles, U.S.A., 17

COURT OF APPEAL

1920

Sept. 15.

LUMSDEN v. PACIFIC STEAMSHIP CO.

miles across the Straits of Juan de Fuca from this port, or even gone on to Seattle, about 70 miles S.E., before coming here, having regard to coasting voyages here? And if she had stopped at Port Angeles or Seattle and transferred her passengers to another ship of her own line for Victoria, what then? And what is the essential difference between a ship of her own line and a ship of another company specially chartered for that purpose or available by a general traffic arrangement? These questions will require further consideration when necessary, but at present, in the view I take of the matter, I need not go into them. In my opinion the contract is still in force, and under it the defendant's liability is limited to the $100 paid into Court.

MARTIN, J.A.

The appeal must therefore be allowed, and the judgment reduced to that amount.

GALLIHER, J.A.: Mr. *Macdonald* argues that by reason of deviation the defendant has lost the benefit of the stipulations limiting its liability under its contract, and cited a number of cases bearing on that point. In most of the cases the deviation is from the usual or regular course of the voyage of a ship on which the goods have been placed for transport from one port to another. There can also be deviation where the goods are carried upon a ship different from that contemplated. as expressed by Lord Justice Fry in *Balian and Sons* v. *Joly, Victoria, and Company (Limited)* (1890), 6 T.L.R. 345. It is upon this latter ground that Mr. *Macdonald* relies. The facts are shortly these:

GALLIHER, J.A.

The plaintiff, having been to California, where she remained some months, desiring to return to Victoria, B.C., purchased at Los Angeles, from the defendant, a ticket from San Francisco to Victoria by the steamship "President," one of the defendant's vessels. The plaintiff travelled by rail from Los Angeles to Santa Barbara, about 100 miles from San Francisco, having with her the trunk containing the goods claimed for in this action, and after arriving in Santa Barbara, where she stayed a few days, she purchased a ticket from the Southern Pacific Railway from Santa Barbara to San Francisco, where she

would take the steamer for Victoria. At Santa Barbara she procured the agent of the Railway Company to check her trunk to Victoria, B.C., upon the railway ticket she had just purchased and the steamship ticket from San Francisco. There was nothing on the check to indicate which particular steamer the trunk should go by. The trunk arrived at San Francisco two days before the "President" sailed, and upon the day the "Admiral Dewey," another of the defendant's vessels, was sailing for Seattle, and was placed upon the "Admiral Dewey," and on arrival at Seattle was handed over to the Canadian Pacific line for carriage to Victoria. Whilst in the possession of the latter company, the trunk, with its contents, was lost.

Now, while the check on the trunk did not designate the particular vessel on which it was to go, I think it must be taken to have been known to the servants of the Steamship Company that the "Admiral Dewey" did not call at the port of Victoria. In fact, it is admitted in the answer to the interrogatories delivered by the plaintiff that the "Admiral Dewey" went direct from San Francisco to Seattle without calling at any intermediate port.

In sending it by the "Admiral Dewey," the defendant knew it would have to be handed over to another transportation company to be forwarded to its destination.

GALLIHER, J.A.

In purchasing her ticket by the steamship "President," it would certainly be in contemplation of the plaintiff that her baggage would accompany her on that ship and not on some other ship, and in the natural and usual course, unless for unavoidable reason (which is not shewn), or to put it in the language of section 17, subsection (d) of the tariff regulations, as proved, the Company would have in contemplation the sending of the trunk by the "President." This subsection reads as follows:

"Every effort will be made to forward baggage on same steamship with the passenger, but such forwarding is not guaranteed and the right is reserved to forward baggage on a preceding or following steamship to that on which the passenger travels."

Had the plaintiff taken her trunk to the Company's wharf at San Francisco to be checked to Victoria and presented her ticket for passage on the "President," and the Company had sent it by the "Admiral Dewey" without making any effort to

COURT OF APPEAL

1920

Sept. 15.

LUMSDEN v. PACIFIC STEAMSHIP CO.

send it by the "President," there would be such deviation as would, in my opinion, entitle her to recover. Can what transpired here be put upon as high a plane?

The trunk was not checked in San Francisco but in Santa Barbara, and by the Southern Pacific Railway Company, which it is not shewn had any connection with the Steamship Company or was in any way its agent. When the trunk arrived at the wharf in San Francisco, two days before the "President" was to sail, there was nothing to indicate that it should be retained and forwarded on the "President" except that it was checked to Victoria, where the "President" called. Is this one fact sufficient to impress upon the defendant the obligation of sending the trunk by the "President" or some preceding or following ship calling at Victoria? I am afraid I am unable to conclude that it is. The plaintiff, by her own act in having her trunk forwarded by the Railway Company in Santa Barbara, without specifying any particular ship, has, I think, left it open to the defendant to forward it by any of their vessels by which it would reach its destination in due course, even if it had to be carried for a portion of the way by another line.

GALLIHER, J.A.

The appeal should be allowed and the judgment reduced to the amount paid into Court.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *Bird, Macdonald & Co.*

IN RE JONES AND THE SUCCESSION DUTY ACT.

COURT OF APPEAL

1920

Sept. 15.

IN RE JONES AND THE SUCCESSION DUTY ACT

Succession duty—Bulk of estate left to blood relations—Two small legacies to strangers in blood—"Net value"—Application of term—R.S.B.C. 1911, Cap. 217, Sec. 9—B.C. Stats. 1917, Cap. 60, Sec. 4.

A testator, whose estate was valued at over $60,000, bequeathed it all to his wife and children with the exception of two small legacies aggregating less than $5,000 left to two strangers in blood. On an application by the executors to determine the succession duty payable upon the estate it was held that there was no duty payable on the two legacies.

Held, on appeal, reversing the decision of MACDONALD, J., that the words "net value" in section 9 of the Succession Duty Act as re-enacted by section 4 of the Succession Duty Act Amendment Act, 1917, applies to the whole estate and is not limited to the amount passing under the section. The amount passing under the two legacies is therefore subject to the tax imposed by said section.

APPEAL by the Minister of Finance from the decision of MACDONALD, J. of the 19th of April, 1920, on a question as to the interpretation of section 9 of the Succession Duty Act as amended in 1917. One Thomas D. Jones died in Nanaimo on the 3rd of June, 1919, leaving an estate of $60,287.12, all left to his wife and children except two legacies, one of $936.05 to the wife of a deceased nephew, and the other of $1,896.03 to his brother-in-law, both being strangers in blood to the deceased. The question is whether the words "net value" in the section in the Act above mentioned applies to the whole estate or to the amount bequeathed under the section. It was held by the learned judge below that the words applied to the amount bequeathed under the section, and, it being less than $5,000, was exempt from taxation under the Act. Statement

The appeal was argued at Victoria on the 18th of June, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Carter, for appellant: The net value of the estate is $60,287.12. Under the will $2,832.08 of this amount passes to strangers in blood of the deceased. The question is the inter- Argument

COURT OF APPEAL

1920

Sept. 15.

IN RE JONES AND THE SUCCESSION DUTY ACT

pretation of section 9 of the Succession Duty Act as amended by section 4 of the Act of 1917, Cap. 60. Do the words "net value" in the section apply to the whole estate or to the amount involved under the section? My contention is it applies to the whole estate.

Cunliffe, for respondents: Section 7 of the Act as amended in 1915 (Cap. 58) is dealt with by the Chief Justice in *In re Estate of Sir William Van Horne, Deceased* (1919), 27 B.C. 269 at p. 273. This case under section 9 is the same as the *Van Horne* case under section 7. The interpretation clause does not apply when the meaning is found in the Act itself: see

Argument

The Queen v. *The Justices of Cambridgeshire* (1838), 7 A. & E. 480 at p. 491; *Meux* v. *Jacobs* (1875), L.R. 7 H.L. 481 at p. 493. What is in the Interpretation Act is not in accord with the wording of this Act: see Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., 299; *In re Todd* (1900), 7 B.C. 115 at p. 119.

Carter, in reply.

Cur. adv. vult.

15th September, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal. The rate is governed by the net value of the whole estate. This conclusion is in conformity with the construction I put upon the Act in *In re Estate of Sir William Van Horne, Deceased* (1919), [27 B.C. 269]; 3 W.W.R. 76. The decision of this Court was reversed by the Supreme Court of Canada, but not in respect of the point involved in the present appeal.

MARTIN, J.A.

MARTIN, J.A.: It is submitted that under section 9 of the Succession Duty Act, R.S.B.C. 1911, Cap. 217 [as re-enacted by the Succession Duty Act Amendment Act, 1917], when the property of the deceased passing under that section is $5,000 or less, no duty is payable. Here the estate was worth about $60,000, and there were two legacies to strangers in blood amounting to $2,832.08, and so, if duty is paid as claimed, it will be at the rate of 15 per cent. under subsection (*c*). The Act begins by imposing under sections 4 and 5, a duty on all estates over $5,000, saving certain exceptions, and then sections 7, 8

and 9 impose varying rates of duty, depending on remoteness of blood, all based upon "the net value of the property of the deceased," the "net value" being determined as provided by section 3. We are asked to so construe the section in question, 9, as to limit its effect to the net value of property passing under it alone, and not the net value of the estate as a whole.

With every respect for the opinion of the learned trial judge below, I find myself unable to impose such a limitation. In my opinion, the section contemplates first the determination of the net value of the whole estate passing under the will, and then the imposition of a duty according to the sliding scale upon "so much thereof as so passes" under this particular section, and I can find no indication of an intention to create by it another exemption up to $5,000.

MARTIN, J.A.

It is easy, of course, in legislation of this character, to suggest and to illustrate anomalies that may arise from this, or any other construction, but that does not affect the general reasonable operation of the statute. There is nothing in the recent decision in *In re Estate of Sir William Van Horne, Deceased* (1919) [27 B.C. 269], 3 W.W.R. 76, to conflict with this view.

It follows that, in my opinion, the appeal should be allowed.

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

GALLIHER, J.A.

MCPHILLIPS, J.A. would allow the appeal.

MCPHILLIPS, J.A.

Appeal allowed.

Solicitor for appellant: *Wm. D. Carter.*
Solicitor for respondent: *F. S. Cunliffe.*

MACDONALD, J.

1919

Dec. 23.

COURT OF APPEAL

1920

Sept. 15.

BROWN v. GREAT NORTHERN RAILWAY CO.

BROWN v. THE GREAT NORTHERN RAILWAY COMPANY *ET AL.*

Costs—Witness fees—Timber cruisers—Examination of locus in quo prior to giving evidence—Expenses.

The plaintiff who was successful in an action for damages for the destruction of a timbered area by fire employed three cruisers to examine the burnt portions and surrounding timber lands in order to prepare themselves for giving evidence on the trial. An application to disallow the expenses so incurred, which were allowed by the taxing officer, was dismissed.

Held, on appeal, MACDONALD, C.J.A. dissenting, that the charges were properly allowed.

APPEAL by defendants from an order of MACDONALD, J., of the 18th of December, 1919, dismissing an application to strike out certain items allowed by the taxing officer on the taxation of the plaintiff's bill of costs. The action was for damages for destruction by fire of standing timber, buildings, fences and pasture belonging to the plaintiff. The defendants admitted liability and paid into Court $1,500 to cover the loss sustained. On the trial the plaintiff recovered $2,200 and costs. The plaintiff included in his bill of costs the charges of three cruisers "for making cruise and qualifying to give evidence on trial as to damage; including railway fare and witness expenses," the charges being respectively $125.20, $141.50 and $264.50. The men took from five to six days in examining the burnt portion and surrounding timber. It was proved that they were qualified and they were paid the above sums.

Argument

A. H. MacNeill, K.C., for the application.
McTaggart, contra.

23rd December, 1919.

MACDONALD, J.: In this appeal, from the taxation by the registrar at Fernie, of the plaintiff's bill of costs, it is contended that moneys paid to "cruisers," in inspecting the burned area, and thus preparing themselves to give evidence at the trial, should, if allowed at all, be only on the basis of ordinary

MACDONALD, J.

witnesses. In this connection, and in considering such allowance, I adopt a portion of the judgment of MURPHY, J. in *Bogardus* v. *Hill* (1913), 18 B.C. 358, as follows:

"I think the principle to be acted upon in dealing with allowances to witnesses for equipping themselves is that all work should be allowed for which a reasonable man, preparing for trial, would feel bound to undertake in order to prove his case."

I think plaintiff was well advised, to employ competent men of good standing to inspect the property, prior to trial, and cruise it in detail, so as to be prepared to intelligently give their evidence.

The first question to be considered is, whether there is any item in the tariff, under which a charge of this nature, requiring, on the part of the witnesses, skill and experience, should be allowed. I have no doubt that these witnesses, Horie, Farquharson and Hart, could not have been secured, to thus prepare themselves to give evidence, without a payment per day beyond that allowed ordinary witnesses. The provision invoked, to support this charge, appears as an addition to item 17 of Appendix M of the tariff of costs as follows:

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

I do not think that this direction is applicable, as these parties could not be properly termed "professional" or "scientific" witnesses.

Can the plaintiff, then, go outside of the tariff for assistance in support of a charge for moneys thus expended? Can subrule (29) of rule 27 of Order LXV. be applied? The change in the rules in this respect is worthy of consideration.

Under the Supreme Court Rules of 1890, marginal rule 800, the position was quite clear. 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 N 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 now as follows: Order LXV., r. 8:

"8. In all causes and matters the fees allowed shall be those set forth

MACDONALD, J.

1919

Dec. 23.

COURT OF APPEAL

1920

Sept. 15.

BROWN v. GREAT NORTHERN RAILWAY CO.

MACDONALD, J.

MACDONALD, J.

1919

Dec. 23.

COURT OF APPEAL

1920

Sept. 15.

BROWN v. GREAT NORTHERN RAILWAY CO.

in Appendix M, and no higher fees shall be allowed in any case, except such as are by these Rules provided for."

Said sub-rule (29) was then introduced by such rules, and provided that:

"29. 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."

I do not think that the latter portion of this sub-rule prevents its application, finding, as I do, such charges and expenses were "necessary or proper for the attainment of justice." They were not "unusual" in the sense of being contrary to the usual course adopted in preparing to prove damages resulting from fire destroying an extensively wooded area.

I consider that the registrar was entitled, in the exercise of his discretion, to allow the charges, in this respect, as taxed.

I am not considering the *quantum* of the allowance, and am assuming that the increased amount was for expenses incurred in employing these witnesses to inspect and cruise the burned area and thus prepare themselves to give evidence at the trial. It is not an allowance for attending trial, as witnesses, in excess of the amount stipulated in the tariff. In this connection, as I am satisfied that the registrar properly considered the matter, I do not think I have any jurisdiction to consider the several amounts allowed. See Kekewich, J. in *Oliver* v. *Robins* (1894), 43 W.R. 137-8 as follows:

MACDONALD, J.

"I do not think I have any jurisdiction in the matter, for by the rule [sub-rule (29)] it is left to the discretion of the taxing master. I think the rule means that the taxing master is to do his best, and in that case his discretion is conclusive. Matters of detail must be left to his discretion. . . . . Even if I have jurisdiction I do not think that it is the province of the judge to go into matters of detail of this kind which had been settled by the taxing master in the exercise of his discretion."

In coming to a conclusion that sub-rule (29) can be properly applied to support the charges thus allowed on taxation, I refer to the notes thereon in the 1919 Annual Practice, particularly to the unreported decision at p. 1235 of Younger J, in *Re*

MACDONALD, J.

1919

Dec. 23.

COURT OF APPEAL

1920

Sept. 15.

BROWN v. GREAT NORTHERN RAILWAY CO.

Norddeutsche, &c., fabrik, 20th June, 1917, that the taxing master can, under such sub-rule (29), allow proper fees even where there is no provision in the tariff.

From this decision the defendants appealed. The appeal was argued at Vancouver on the 15th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. H. MacNeill, K.C., for appellants: The items in question are costs of three cruisers in examining the *locus in quo,* totalling $531.25. *Bogardus* v. *Hill* (1913), 18 B.C. 358, was referred to by the leraned judge, but it does not apply here. The rule is discussed in the cases of *Peel* v. *London and North Western Railway Company (No. 2)* (1907), 1 Ch. 607 at p. 611; *Giles* v. *Randall* (1915), 1 K.B. 290. A timber cruiser has no profession and he cannot be called a scientist. He does not come within the category of professional witnesses.

A. I. Fisher, for respondent: We have to fight the defendants with equally good witnesses on a scientific question, and it is not unreasonable that we should have three expert cruisers for that purpose. Taxation of the items is supported by marginal rule 1002(9), and see *Attorney-General* v. *Birmingham, &c., Drainage Board* (1908), 52 Sol. Jo. 855. By rule 10 of the Rules of the Supreme Court (English), January, 1902, Order LXV., r. 27(29) was annulled and substituted, but under the new rule the items should be allowed: see *McIver & Co., Limited* v. *Tate Steamers, Limited* (1902), 2 K.B. 184 at p. 185 (foot-note); *In re Ermen. Tatham* v. *Ermen* (1903), 2 Ch. 156; Annual Practice, 1920, p. 1278; *Re Burroughs, Wellcome & Co.'s Trade Mark* (1904), 22 R.P.C. 164. Expenses qualifying themselves for examination should be allowed: see *Mackley* v. *Chillingworth* (1877), 2 C.P.D. 273 at p. 279; see also *Kerr* v. *Canadian Pacific Ry. Co.* (1913), 18 B.C. 389; 49 S.C.R. 33.

Argument

MacNeill, in reply.

Cur. adv. vult.

15th September, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The Tariff of Costs, Appendix M. to the rules, under the heading "Witnesses, allowance to," being

MACDONALD, J.
1919
Dec. 23.
COURT OF APPEAL
1920
Sept. 15.
BROWN v. GREAT NORTHERN RAILWAY CO.

part of Schedule No. 4, sets forth in detail the fees and expenses which a taxing officer may tax to the successful party in respect of witnesses. Two principal classes of witnesses are recognized, the ordinary witness and the professional or scientific witness. The witnesses whose fees are in question here were timber cruisers, and the learned judge has rightly, I think, put them in the category of ordinary witnesses. But notwithstanding this, he held that the taxing officer was not in error in taxing to the plaintiff the expenses incurred by these witnesses in preparing themselves to give evidence.

Now in the case of professional or scientific witnesses, such expenses are specifically made taxable. In the case of other witnesses they are not, and if the matter rested there it could not be doubted that the expenses of an ordinary witness in preparing himself to give evidence could not be allowed on taxation. But the learned judge was of opinion that the taxing officer could do this under the powers conferred upon him by rule 1002, sub-rule (29), which reads as follows:

"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."

MACDONALD, C.J.A.

My interpretation of that rule is that where the tariff has not dealt with matters of the character referred to in the sub-rule, the taxing officer may make allowances, but where the tariff specifically provides for a matter of costs or expenses, this rule has no application. It is applicable only to matters outside the tariff. Now the tariff does provide in express terms what fees or expenses shall be taxable in respect of witnesses. The successful party is entitled, in respect of professional witnesses, to three classes of disbursements, the witness's *per diem* fees, his travelling expenses, and the expense incurred by him in preparing himself to give evidence. The rule makers have therefore considered and specifically dealt with the expenses of the preparation of a witness for giving his evidence. It has also expressly dealt with the fees and expenses to which the

successful party shall be entitled in respect of an ordinary witness, *viz.*, his *per diem* fee and his travelling expenses.

Applying the maxim, *expressio unius est exclusio alterius,* the rule makers intended that expenses incurred by ordinary witnesses in preparing themselves to give testimony were not taxable, and in my opinion, said sub-rule has no application at all to the taxation of such expenses, and I think this would be so even in the absence of the latter part of the rule excluding allowances "for special fees or expenses to witnesses," but with these words in it any doubt is set at rest.

MACDONALD, J.

1919

Dec. 23.

COURT OF APPEAL

1920

Sept. 15.

BROWN *v.* GREAT NORTHERN RAILWAY CO.

MARTIN, J.A.: I agree with the judgment of my brother GALLIHER dismissing the appeal and the cross-appeal.

GALLIHER, J.A.: I would dismiss the appeal and cross-appeal.

In my opinion, the learned trial judge came to the right conclusion. While timber cruisers can not, strictly speaking, be included under the head of professional or scientific witnesses, as that term has been dealt with in the decisions, when we consider the physical features of this mountainous, heavily-wooded country, scientific skill in one sense is really necessary to determine the feasibility of logging timber areas at a profit and estimating timber that is available. I think, however, the learned judge below was justified in his conclusions on the other ground.

GALLIHER, J.A.

In taxing bills of cost including such items, I think that the registrar should have in mind always that no party should be put to unnecessary expense by duplicating cruises. In my view, a proper cruise by a competent man, checked by another cruise of a competent man, should be sufficient.

In this case plaintiff is charging for three cruises, but the registrar, in his discretion, has allowed for three and the learned judge below has not interfered, and under the circumstances I hesitate to do so.

MCPHILLIPS, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

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

Solicitor for appellants: *Alex. Macneil.*

Solicitors for respondent: *Lawe & Fisher.*

COURT OF APPEAL

1920

Sept. 15.

CUNLIFFE v. PLANTA

CUNLIFFE v. PLANTA.

Agency—Solicitor acting on instructions of agent—Agent's authority—Repudiated by principal—Solicitor responsible for costs incurred—Solicitor's right to recover from agent.

Appeal books—Exhibits—Copies of letters—Must contain signature of writer.

The plaintiff, a solicitor, was instructed by the defendant, as agent of absentee landlords, to distrain for rent goods that were removed from the premises. A chattel mortgagee claimed the goods and the plaintiff under instructions from the agent unsuccessfully contested the claim in interpleader proceedings. The authority of the agent was then repudiated by the landlords and the plaintiff was ordered to pay all costs incurred subsequent to seizure of the goods. An action against the agent to recover the amount so paid was dismissed.

Held, on appeal, reversing the decision of BARKER, Co. J. (GALLIHER, J.A. dissenting), that the solicitor was justified in accepting the agent's assumption of authority as genuine and in carrying out his instructions without questioning the extent of his authority. The agent made himself liable as upon a warranty of authority and the solicitor was entitled to recover.

Per MACDONALD, C.J.A.: Copies of letters put in as exhibits on the trial should always contain the signature of the writer, and on appeal should be so copied into the appeal books.

APPEAL by plaintiff from the decision of BARKER, Co. J., of the 25th of November, 1919, dismissing an action to recover $100, general damages, and $372.95, special damages. The plaintiff, a solicitor of the Supreme Court, was instructed by the defendant Planta to seize certain goods in the possession of the Esquimalt and Nanaimo Railway Company at Victoria. The goods belonged to one Tamblyn, the tenant of the Patricia Hotel in Nanaimo, and had been removed by him from the hotel and sent to Victoria. Planta, who was a broker in Nanaimo, represented that he was the authorized agent of Messrs. Whitelaw and Slater, owners of the hotel; that the tenant, Tamblyn, owed $675 rent, and had on the previous day fraudulently and clandestinely removed the furniture and goods and sent them to Victoria. The plaintiff thereupon instructed his Victoria agent, J. S. Brandon, to seize the goods on their

Statement

arrival in Victoria and distrain for the rent. The goods were seized and distress levied in the name of Messrs. Whitelaw and Slater, whereupon the Silver Spring Brewery, Limited, claimed the goods under a chattel mortgage and an issue was directed. The Silver Spring Brewery were successful in the issue, and Messrs. Whitelaw and Slater were ordered to pay $175 costs. Messrs. Whitelaw and Slater then obtained an order staying proceedings, on the ground that they had never authorized the proceedings to distrain, and that the plaintiff had no authority to bring the proceedings, and the plaintiff was ordered to pay the $175, costs on the issue, and the further costs incurred in the subsequent proceedings, the total being $372.95. The trial judge dismissed the action. Statement

The appeal was argued at Vancouver on the 6th of May, 1920, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: Planta was acting as agent for the Dominion Trust Company. He denied agency for Whitelaw and Slater, but later obtained an amendment of his pleadings.

[MACDONALD, C.J.A.: All copies of letters put in as exhibits should be true copies and contain the signature of the writer. When letters are put in the appeal books without the signature they are not true copies, and it is difficult at times for the Court to tell who wrote them. Putting letters in the appeal books in this way is a very loose practice, and it is the duty of the Court in such cases to send the books back for correction.]

It is only in the case of gross negligence that a solicitor is responsible in damages to a client: see *Purves* v. *Landell* (1845), 12 Cl. & F. 91 at pp. 98 to 101; *Faithfull* v. *Kesteven* (1910), 103 L.T. 56. Argument

Martin, K.C., for respondent: It cannot be disputed that Planta was agent for the Dominion Trust and Whitelaw and Slater. An agent has authority to look after property and go to the extent of ordering distress not only on the property but on goods removed, but that is the end of his authority. He has no power to bring his principal into Court. A general authority is confined to taking proceedings out of Court. Without express authority, no one can issue a writ or defend in his name. The

COURT OF APPEAL

1920

Sept. 15.

CUNLIFFE v. PLANTA

lawyer should know this, and it is his duty to guide his client.

Mayers, in reply: The litigation was not voluntary; it was forced on them. Planta said he was agent: see *Starkey* v. *Bank of England* (1903), A.C. 114.

Cur. adv. vult.

15th September, 1920.

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

It is not disputed that respondent represented himself to the plaintiff as being the agent of the Patricia Hotel owners, that is to say, the agent of the landlords. Nowhere does it appear that he put any qualification upon the extent of his agency. In his evidence he says:

"I rang up Mr. Cunliffe, I explained to him that I was agent for the owners of the Patricia Hotel premises, and that I had received information that the furniture was being removed from the building . . . . . I told him there was a large amount owing for rent and asked him what could be done."

And again, respondent said, in speaking of a conversation he had with one of his principals:

"I explained to Slater that the goods had been removed from the premises and I had instructed the solicitor to take proceedings to protect their (the landlords) interests."

The respondent's own view of his authority is made clear from a perusal of the evidence. He thought he had the right to instruct the solicitor to take such proceedings as would ade-

MACDONALD, C.J.A.

quately protect the interest of his principals, the landlords, who were absentees. It is suggested that the solicitor should have questioned the respondent as to the extent or limitations of his authority, and not having done so, he was guilty of some breach of duty as a solicitor. I cannot take that view. He was not retained to advise the respondent as to the extent of his authority, but to carry out the respondent's instructions on the assumption that the respondent was what he represented himself to be.

Now the proceedings taken by the solicitor were quite proper on the instructions given that the tenant had fraudulently removed his goods to avoid distress. In fact, the propriety of the proceedings up to the time of the interpleader is not, as I understand it, in dispute, but it was contended by respondent's counsel that when a claim was made to the goods by the chattel

mortgagee and when the solicitor was faced with an interpleader issue, he should have advised his client to go no further; but the respondent is again met with the consequences of his own declaration and instructions, because when the solicitor discussed this phase of the matter with him, the appellant in his evidence says, and this is not contradicted:

"Mr. Planta told me that he did not think the chattel mortgage was genuine."

As a result of this the claim of the chattel mortgagee was resisted, and it is the costs of these proceedings which the solicitor has been ordered to pay because the landlords have repudiated the authority of the respondent to instruct the taking of any such proceedings.

MACDONALD, C.J.A.

Now, while the landlords were held not to be bound, the respondent, in my opinion, made himself liable as upon a warranty of authority. In my opinion the only want of care shewn by the appellant in connection with his retainer was in not protecting his own interests as against the landlords. The respondent certainly cannot complain if the solicitor took him at his own estimate of himself and accepted his assumption of authority as genuine.

GALLIHER, J.A.: While it would be within the scope of Planta's authority to distrain on the goods upon the premises for the protection of his landlord's rights and even to follow them, under the statute, when clandestinely removed, it certainly would not be within the scope of his authority to authorize the proceedings taken in this case. It then becomes a question as to whether he expressly or impliedly warranted to the plaintiff that he had such authority.

GALLIHER, J.A.

There is no question that he did not expressly do so, nor can I hold, upon the evidence, that he did so impliedly.

When it was ascertained that there was a chattel mortgage upon the goods, it must have then been apparent, if the chattel mortgage was *bona fide* and valid, that the seizure would have to be abandoned. This fact the plaintiff chose to contest, and he did so without obtaining direct instructions from the landlord and upon instructions from the agent, the defendant herein, which were not ordinarily within the scope of the agent's

COURT OF APPEAL
1920
Sept. 15.
CUNLIFFE v. PLANTA

authority, and which the plaintiff should have known. The plaintiff should have inquired directly of Planta if he had such authority, and had Planta so asserted the case would be in a very different position.

I regret that I cannot see my way to assist the plaintiff, as I believe he acted in good faith throughout, but I am afraid his own failure to put himself in a position of safety is responsible for the situation in which he finds himself.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would allow the appeal.

Appeal allowed, Galliher, J.A. dissenting.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitors for respondent: *Yarwood & Harrison.*

COURT OF APPEAL
1920
Sept. 15.
IN RE GILLESPIE

IN RE GILLESPIE, COMMISSIONER OF THE MUNICIPALITY OF SOUTH VANCOUVER.

Municipal corporation—Commissioner in control—Statutory appointment—Inspection of documents—Mandamus—B.C. Stats. 1914, Cap. 52, Secs. 35-46 and 177-182; 1918, Cap. 82, Secs. 2 and 10.

When the management of a municipal corporation is in the hands of a commissioner appointed by the Lieutenant-Governor in Council under a statute which also provides for inspection and audit of his books and accounts, a ratepayer has no right to demand from the commissioner their production for inspection where there is no statutory provision requiring him to produce them.

Where it appears that a commissioner appointed by the Lieutenant-Governor in Council under statutory authority to have the management and control of a municipal corporation had filed in the office of the County Court the by-laws passed by him during his tenure of office, *mandamus* to compel production of such by-laws for inspection by ratepayers will be refused (MARTIN, J.A. dissenting).

Statement

APPEAL from an order of MACDONALD, J. of the 23rd of April, 1920, that a writ of *mandamus* do issue directing the

Commissioner of the Municipality of South Vancouver to produce for inspection all books, accounts and documents of said Municipality. Mr. Gillespie was appointed Commissioner of the Municipality on the 7th of May, 1918, under chapter 82 of the British Columbia Statutes of 1918. On the 7th of February, 1920, pursuant to a resolution passed by the executive of the Ratepayers Protective Association of the Municipality (composed of about 500 ratepayers), M. B. Cotsworth and William Ross were appointed to inspect certain documents, accounts and books of the Municipality. Cotsworth and Ross then applied to Gillespie for leave to inspect the books and documents of the Municipality, but he refused to allow them to do so. On an application for a writ of *mandamus* being granted, Gillespie appealed.

Statement

The appeal was argued at Victoria on the 10th of June, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

F. A. McDiarmid (*Wismer,* with him), for appellant: The short point is whether *mandamus* will lie at the instance of one or more ratepayers to compel the commissioner of a municipality to produce the books of the municipality. Two, at the instance of an association of 500 ratepayers, brought these proceedings. The commissioner was appointed under B.C. Stats. 1918, Cap. 82. Section 10 provides for the inspection and audit of his books. The cases are collected in Short & Mellor, 2nd Ed., 204. *Mandamus* will not issue to an inferior officer, nor to an officer whose duties are prescribed by statute for an act not clearly prescribed by the statute: see *Regina* v. *Stennett and Hodgkinson, Overseers of St. George's, Hanover Square* (1840), 10 L.J., M.C. 40; see also *Reg.* v. *Lewisham Union* (1897), 1 Q.B. 498. As to the common law right to inspect documents see *Tenby Corporation* v. *Mason* (1908), 77 L.J., Ch. 230; *Bank of Bombay* v. *Suleman Somji* (1908), 99 L.T. 62. There is another appropriate remedy; this is by inspection under the Municipal Act: see *Reg.* v. *Lewisham Union, supra,* at p. 501. If *mandamus* should issue and everything was found wrong, they would have no legal remedy. The

Argument

COURT OF APPEAL

1920

Sept. 15.

IN RE GILLESPIE

Court will not grant something that would be of no avail: see *In re Charleson Assessment* (1915), 21 B.C. 281.

Wismer, on the same side: They have not shewn there is any dispute between the parties: see *Rex* v. *Merchant Taylors' Company* (1831), 2 B. & Ad. 115. The material before the Court is not sufficient: see *In re J. L. Young Manufacturing Company, Limited* (1900), 2 Ch. 753; *Tate* v. *Hennessey* (1901), 8 B.C. 220 at p. 222. Outside of saying they are ratepayers they say nothing more.

A. H. McNeill, K.C., for respondents: There was a refusal to open for inspection all papers: see section 2 of chapter 82 of the statutes of 1918, also sections 35, 46 and 177 to 182 of the Municipal Act, B.C. Stats. 1914. The statute gives us the right of inspection. The Commissioner must live up to the provisions of the Municipal Act as far as possible. As to the common law right of inspection see *Herbert* v. *Ashburner* (1750), 1 Wils. K.B. 297; 95 E.R. 628; *Rex* v. *Southwold Corporation; Ex parte Wrightson* (1907), 97 L.T. 431; *Rex* v. *Fraternity of Hostmen in Newcastle-upon-Tyne* (1745), 2 Str. 1223; 93 E.R. 1144; *The King* v. *The Justices of Staffordshire* (1837), 6 A. & E. 84; *The King* v. *Babb* (1790), 3 Term Rep. 579; 100 E.R. 743; *The Mayor and Assessors of Rochester, in re the Parish of St. Nicholas* v. *The Queen* (1858), 27 L.J., Q.B. 434 at p. 437; Encyclopædia of the Laws of England, Vol. 8, p. 97.

Argument

McDiarmid, in reply: He must shew a specific ground of application, and he has not done so.

Cur. adv. vult.

15th September, 1920.

MACDONALD, C.J.A.: The appeal should be allowed and the order for a writ of *mandamus* set aside.

MACDONALD, C.J.A.

No doubt the Court has power to direct the issue of such a writ against an officer of the character of the Commissioner here: *Rex* v. *Southwold Corporation; Ex parte Wrightson* (1907), 97 L.T. 431.

The Corporation of the District of South Vancouver is the creature of the statute, its powers and duties and those of its officers are those given or imposed by statute or which may

reasonably be inferred therefrom: *Tenby Corporation* v. *Mason* (1908), 77 L.J., Ch. 230. In the present case, the Commissioner's powers and duties are defined by chapter 82 of the Statutes of British Columbia, 1918. Even if it were granted that the Commissioner's duties are co-extensive with those of the Corporation, I have asked counsel for the respondents in vain for reference to any statute giving his clients the rights they demand. The sections in the Municipal Act touching upon the Corporation's duty in respect of the production of its books and documents are inferentially not in favour of respondents' demand, but against it: section 379 *et seq.* and section 475.

When the said chapter 82 is appealed to, and this, in my opinion, is the governing Act to be applied in this case, it will be found that express provision is, by section 10, made for inspection and audit of the Commissioner's books and accounts, and by section 9, "the Commissioner shall make a report to the Minister of Finance concerning all matters connected with his administration whenever required by the Lieutenant-Governor in Council" to do so.

The Legislature, while safeguarding the interests of ratepayers and municipalities by providing for a duly authorized inspection, audits, and even compulsory audits, and by public enquiries into the conduct of municipal business, and in the case of its Commissioner, by ample control of the Lieutenant-Governor in Council over him, defined his duties in the matter of production for inspection of his books, documents and contracts, and neither directly nor by implication has the duty been imposed upon him to open his books and exhibit his papers or documents to any ratepayer who may desire to gratify his curiosity. The question to be decided in this appeal is not one of common law. It is the statutory right, if any, of a ratepayer to demand from the Commissioner the production of his books and documents when the ratepayer has no direct interest therein.

MACDONALD, C.J.A.

It was argued that the by-laws at least ought to have been produced. It appears these were duly filed in the office of the County Court, as required by law, and were open to inspection

COURT OF APPEAL

1920

Sept. 15.

IN RE GILLESPIE

by the respondents. *Mandamus* is an extraordinary remedy, and ought not to be applied unless there is real necessity therefor. Moreover, I do not decide, it being unnecessary to do so, that the Commissioner is bound in the matter of production by the provisions of the Municipal Act.

MARTIN, J.A.: There are two distinct branches to this case, as the learned judge has rightly considered in his formal order, which under the first branch grants inspection of "all by-laws passed by the said F. J. Gillespie during the tenure of his office pursuant to the said order in council"; and under the second branch, grants inspection of "books, papers and documents" of various classes, seven in number, relating to the affairs of the Municipality of South Vancouver.

With respect to this second branch, it is sufficient to say that I agree that the authorities do not support the order of the learned judge, the more because section 10 of Cap. 82 of 1918 (Corporation of the District of South Vancouver Administration Act) provides for rules and regulations to be made by the Lieutenant-Governor in Council for "inspection and audit of the Commissioner's books and accounts," but with regard to the first and more important branch, I am of opinion that he took the correct view of the matter when he said that one of the rights of the ratepayers would be:

MARTIN, J.A.

"To peruse any by-law in which they are interested. I think this right still exists if reasonably exercised. It would seem unfair and unjust that persons compelled by their taxes to contribute towards the carrying on of municipal affairs and the payment of the commissioner, should be deprived of such a right."

And he goes on to say, in answer to the suggestion that the by-laws would, or ought to be found registered in the County Court registry at the City of Vancouver, and that inquirers should journey there to inspect them instead of conveniently going to the office of the Commissioner in their own municipality of South Vancouver:

"I think that is a position that should not have been taken. The by-laws should be open for inspection at all reasonable times, in my opinion, to those who were intended to be governed by those laws so that they might inquire and find out their rights and what had been done with respect to matters in which they were interested. To expect them to journey into the City of Vancouver upon every occasion when they are

anxious to find out the contents of a by-law, instead of going to the central point of the municipality, seems unreasonable."

It is well to clearly understand the situation respecting the the claim made to inspect these by-laws and other documents. From the sworn testimony before us it appears that Wm. Ross and M. B. Cotsworth, being two of the ratepayers of said municipality, on their own behalf and also on behalf of a large number of ratepayers, went together on February 9th last to the office of the Commissioner and requested him to allow them to inspect the documents set out in a certain resolution (a copy of which they handed to him) of the executive of the Ratepayers' Association of South Vancouver, which resolution contained a long list of the number of documents, the eighth item of which was as follows:

"All by-laws passed during the management of the Commissioner and particularly all by-laws for the purpose of borrowing or expending moneys."

According to the affidavit of said Ross, the Commissioner replied:

"'I am not interested in what you fellows want to do. You fellows want a smash on the side of the ear.' To Mr. D. A. Tibbett, vice-president of the said association, the said commissioner said, placing his fist on Mr. Tibbett's chin, 'You want a smash and I have a good mind to give it to you.'"

In the affidavit filed by the said Cotsworth, the above allegation of said Ross is verified in exact terms.

I much regret to say there is no denial of this serious charge, and therefore it must be taken, for the purpose of this appeal, to be true. Such a course of conduct is so obviously improper that it requires no comment, and as to the by-laws, it was illegal as well.

MARTIN, J.A.

The right to inspect the by-laws of our municipal corporations is, I think, beyond doubt. At common law any subject has the right to inspect the Parliament roll in case of doubt about the correctness of published copies of the statutes, as was done in *Rex* v. *Jefferies* (1721), 1 Str. 446, which are now published by the King's Printer, or even before their publication in the necessary delay which takes place in the printing and distribution of them after the end of the session. (I have, *e.g.*, not even yet been supplied with a copy of the statutes passed at the last session of the Federal Parliament at Ottawa,

COURT OF APPEAL

1920

Sept. 15.

IN RE GILLESPIE

nor is a copy to be found in the Law Society's library, though its prorogation took place two and a half months ago.) This must, *ex necessitate rei* be so, because every citizen has the right to know exactly what the law of the public weal is, so that he may not jeopardize his person or his property by unwittingly infringing it. And whatever may be said about the by-laws of certain of the old English town corporations of various and peculiar origins, based largely upon custom (in regard to which some decisions are to be found in the English reports which are, to say the least of them, strange to our modern ears and entirely out of keeping with the habits and customs of the people of this Province), their position is very different from that of our municipal corporations, which are the creatures of the Legislature and exercise a delegated power to pass by-laws upon a great variety of subjects (218 in number, under section 54 of the Municipal Act, B.C. Stats. 1914, Cap 52), which make it the duty of the residents or others within the municipality to obey under pain of loss of property, by fine, or of liberty by imprisonment. To say that the general public may be fined and imprisoned under laws which they are not permitted to see beforehand, so as to conform to them, is to state an outrage upon the people. Even so far back as 1750 it was decided by the King's Bench, in *Herbert* v. *Ashburner,* 1 Wils. K.B. 297, that books of sessions were "public books which everybody has a right to see," and that decision has never been overruled despite the individual statement of Abbott, C.J. in *Rex* v. *Sheriff of Chester* (1819), 1 Chit. 476 at p. 479, that the proposition was "too general," whose attention moreover does not seem to have been called to the decision of the same Court in *Rex* v. *King* (1788), 2 Term Rep. 234, wherein it was held that "the assessments of the land-tax are public proceedings; every person is entitled to take copies"; and in the argument in *Rex* v. *Purnell* (1748), 1 Wils. K.B. 239; (1749), 1 W. Bl. 37 at p. 39, Wilbraham, standing counsel for the University of Oxford, in shewing cause against a rule *nisi* to inspect the books of the university, admitted in his argument, p. 39, that "many [rules] indeed have been granted to inspect poor rates; but those are public evidences which everybody has a right to . . . ." and an

MARTIN, J.A.

"indictment [at a Borough Sessions] is a public record; he might have had it without a rule."

By-laws of municipalities are treated in the Evidence Act, Cap. 78, R.S.B.C. 1911, Sec. 32, as public documents, and moreover, in the case at bar, they have the additional direct governmental element of approval by the Lieutenant-Governor in Council under section 4 of the special Act in question, of which public order of approval by the executive council proof may be given under section 29 (*c*) of the said Evidence Act.

Being of this opinion, it is unnecessary further to consider this subject of inspection of "public writings," because if such a right here exists, the *mandamus* should issue, which right, I observe, is exhaustively treated in Taylor on Evidence, 11th Ed., Vol. 2, chapter IV., p. 1015; and also earlier in that admirable work, Tidd's Practice (1828), 9th Ed., Vol. 1, chapter XXIII., p. 586 *et seq.* I only note that if the sufficiency of the interest of the applicant for *mandamus* is questioned, a very slight interest is sufficient; all, for example, that the applicant had in *Reg.* v. *Cotham* (1898), 1 Q.B. 802, 67 L.J., Q.B. 632, was that he was an "inhabitant of the parish," which nevertheless was held, p. 805, to be "clearly sufficient," despite *Reg.* v. *Lewisham Union* (1897), 1 Q.B. 498, 66 L.J., Q.B. 403, cited *contra.* The case of *In re Burton and the Saddlers Company* (1861), 31 L.J., Q.B. 62, is instructive as shewing that the Court will issue a *mandamus,* though not a rule, to enable information to be obtained "for the purpose of initiating proceedings" so that the applicant may "start his claim," in which case also it was conceded that the by-laws of the corporation could be inspected by a corporator. This decision confirms the view I advanced during the argument of the use that section 177 could be put to at the instance of a mere resident in obtaining a copy of any "by-law, order, or resolution of the council."

MARTIN, J.A.

Before us, indeed, it was hardly seriously contended that the by-laws should be kept under lock and key, but it was suggested that because section 174 of the Municipal Act provides that copies of by-laws passed by the municipal council shall be registered in the office of the County Court for the district in which the municipality is situate, and that such by-laws shall not come

COURT OF APPEAL

1920

Sept. 15.

IN RE GILLESPIE

into force until and from the date of such registration, therefore that provision is, in some way, an answer to the present application. But it is not, for two reasons: (1) Because it was properly objected that there is no evidence at all before us to shew that all the by-laws passed by the Commissioner have been registered, or even one of them; and (2) There is no obligation, statutory or otherwise, to register such by-laws in the case of the Commissioner under the special Act, because section 4 thereof provides that he "shall have power to pass all such by-laws as might be passed by the said Reeve and Councillors" and shall submit them for approval to the Lieutenant-Governor in Council, and upon such approval they "shall become valid and binding in all respects." This is an entirely distinct provision from that above quoted relating to the coming into force of the by-laws passed by the council, the validity of which depends upon registration, whereas the validity of the Commissioner's by-laws depends upon his Honour's approval, and there is no obligation upon the Commissioner whatever to register his by-laws. The truth is, of course, for the purposes of the special Act he is, in effect, a dictator, subject to the executive. The preamble sets out what was contemplated by the statute, in reciting that it was enacted in order "that the management and control of the affairs of the said Corporation should be wholly vested in a Commissioner to be appointed by the Lieutenant-Governor in Council," and under section 2 the Commissioner "shall have all the powers, authorities, and functions heretofore vested in or exercisable by the Reeve and Councillors, Boards of Police Commissioners and School Trustees, and all other officers of the said Corporation."

MARTIN, J.A.

An argument was advanced that because section 46 of the Municipal Act authorizes "the inspection by any person" of the minutes of proceedings of all meetings of the council, therefore the inference should be that its other proceedings should remain secret, but this, in the first place, would not apply to by-laws, for the reasons hereinbefore given, and in the second place it does not relate to the Commissioner, because when he "passes" by-laws, under section 4, there are, properly speaking, no minutes of his "meetings," because he cannot "meet" with himself.

It is not for me to criticize the bestowal of the almost despotic powers here enjoyed by the Commissioner, of which much was said in argument, because it must be assumed that the Legislature acted in the public interest in bestowing them, but a Court of Justice, in applications such as this to its discretion, cannot be unmindful of the way in which they are exercised, and as they are great, so they ought to be exercised in a corresponding spirit of discretion and due moderation, entirely freed from any element of the "mailed fist" or the "jack-boot," the enormity of which methods we have heard so much about as formerly administered by the Germans in Alsace-Lorraine, and have experienced too much of lately in certain quarters in our native land of Canada. This case brings to my mind the apposite statement of Lord Justice Farwell (which my own long judicial experience fully confirms) in *Dyson* v. *Attorney-General* (1911), 1 K.B. 410 at p. 424, 80 L.J., K.B. 531, that "the Courts are the only defence of the liberty of the subject against departmental aggression." To the autocratic mind the assertion of the rights of the public is always offensive, however beneficial to the best interests of the people, of which no better example can be found than the case of *Rex* v. *Hampden* (1637), 3 How. St. Tri. 826, the judgment pronounced in which against Hampden was based, as Clarendon said, "upon such grounds and reasons as every stander-by was able to swear was not law": Hist. 1, 150; VII. 82.

MARTIN, J.A.

It follows, therefore, that the appeal should be allowed in part, so far as it relates to the books and documents, but the order of the learned judge should stand so far as it relates to the more important matter of the inspection of the by-laws.

GALLIHER, J.A.: I agree in the reasons for judgment of the Chief Justice.

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would allow the appeal.

Appeal allowed, Martin, J.A. dissenting in part.

Solicitor for appellant: *G. S. Wismer.*
Solicitor for respondents: *W. A. Woodward.*

GREGORY, J.

1920

Jan. 15.

COURT OF APPEAL

Sept. 15.

WESTMINSTER TRUST CO. v. BRYMNER

WESTMINSTER TRUST COMPANY v. BRYMNER AND RAND.

Bond—Guarantee—Vendor's interest in sale agreement—Assignment of—Bond by vendor to secure payment of instalments—Whether independent contract of indemnity or guarantee—Extension of time for payment of instalment—Effect of.

A vendor assigned his interest in an agreement of sale of land and at the same time gave a bond to his assignee with respect to the payments to be made under the agreement of sale. An action for payment of the amount due under the bond was dismissed.

Held, on appeal, affirming the decision of GREGORY, J., that the bond was a guarantee of payment and not an independent contract of indemnity as it was so treated by the parties and its wording and the nature of the transaction so indicated, and an extension of time given by the obligee to the purchaser without consulting the obligor, operated as a discharge of the liability under the bond.

APPEAL from the decision of GREGORY, J. in an action tried by him at Vancouver on the 17th and 18th of June, 1919, and the 12th of January, 1920, to recover $22,400 due on a bond. The circumstances under which the action arose are that one Meade, the owner of a property in the New Westminster District, entered into an agreement on the 4th of October, 1909, to sell to A. E. Rand for $16,000, a cash payment of $5,000 being made. On the 27th of April, 1911, Meade assigned his interest in the agreement and gave a conveyance of the land to the plaintiff Company. On the 25th of November, 1911, Rand, under agreement for sale, sold his interest under the agreement for sale from Meade to one Dice for $42,000, on which (previous to this action) $19,600 was paid. On the 7th of November, 1912, Rand assigned to the plaintiff Company the balance due from Dice on the agreement for sale of the 25th of November, 1911. In paying Rand the Company deducted $1,041.19 commission, relieved him of the payment of $11,463.08, the balance due Meade on the original sale, $90 for conveyancing, and gave him a cheque for the balance of the $22,400, with $158.92 interest, *i.e.*, $9,964.70. The defendants at the same time gave a bond to the plaintiff for the due payment of

Statement

$22,400, in accordance with the terms of the agreement with Dice of the 25th of November, 1911, namely, $11,200 on the 25th November, 1913, and $11,200 on the 25th of November, 1914. Subsequently the plaintiff Company, without consulting the defendants, extended the time for payment of the first instalment for one year, fixing the date for payments of both instalments on the 25th of November, 1914.

W. J. Taylor, K.C., and *Dixie,* for plaintiff.
Lennie, and *D. J. O'Neil,* for defendant Rand.
Mayers, and *J. R. Grant,* for defendant Brymner.

15th January, 1920.

GREGORY, J.: This is an action on a bond, given by the defendants to the plaintiff. The plaintiff claims it is a bond of indemnity, while defendants claim it is a bond guaranteeing the payment of certain money by one Dice, that the plaintiff gave Dice an extension of time for his payments without conculting them, and that they are therefore released from their obligation. The non-payment by Dice has been proved, and I think it has also been established that Dice was given an extension of time as claimed by defendants. It has not been questioned that if the bond sued on is a guarantee and the extension given, that such extension operates as a discharge of defendants' obligation, and the real question in dispute is purely one of law, *viz.,* is the bond a guarantee or an independent contract? The material facts may be shortly stated as follows:

Defendant Rand, being the owner of certain lands, entered into an agreement dated 25th November, 1911, with Dice, to sell the same to him. On the 7th of November, 1912, Rand sold his interest in the land in question to the plaintiff and executed a transfer and assignment of the same to the plaintiff, who paid him the amount still remaining due thereon by Dice, less a certain percentage. The defendants at the same time executed the bond sued on.

The plaintiff still holds the lands, and there is no evidence to shew that it has ever attempted to realize upon the same in order to ascertain if it has really suffered any pecuniary loss. There were some deals between Rand's vendor, one Meade, and

GREGORY, J.

1920

Jan. 15.

COURT OF APPEAL

Sept. 15.

WEST-MINSTER TRUST CO. v. BRYMNER

the plaintiff Company, by which the plaintiff took a conveyance from Meade of the lands, less a small percentage, which it might readily be assumed was omitted by error, but I think nothing turns on this, in my view of the case, so I make no further reference to it.

The question is, is the instrument sued on a guarantee for the payment of the debt of another? I think it is. The parties themselves have so treated it. The moneys were long overdue by Dice before plaintiff asked defendants to pay the same, and the plaintiff in the interim, on two occasions forced or persuaded Dice to enter into an agreement to pay an increased rate of interest for the extensions granted him. The case is not as strong as *Forbes* v. *Watt* (1872), L.R. 2 H.L. (Sc.) 214, but in that case the House of Lords held that when a document is obscure and the parties have long acted on the footing of a given practical construction, the Court, in the absence of better evidence, will accept that construction as correct.

The document itself is indorsed "Guarantee of Payments under Agreement of Sale," and it is headed or entitled "Vendor's Bond to Secure Performance of an Agreement of Sale."

I do not think the language used, whatever form the instrument may take, can make it other than a guarantee if in substance and in fact it is a guarantee. The formal part binds the defendants "in the penal sum of $22,400 to be paid to the [plaintiff] . . . . as per terms entered into under a certain agreement of sale dated the 25th of November, 1911," already referred to, and the defendants "agree that in case the payments under said agreement are not fully and promptly met on the dates they become due, that they will from date of said default pay the [plaintiff] interest on said arrears at the rate of 10 per cent." and further "will pay all payments due under above agreement of sale in case William C. Dice is in default," etc.

GREGORY, J.

The condition which renders the obligation void is that the defendants "shall from time to time, and at all times hereafter, well and truly pay, defend and keep harmless and fully indemnify the [plaintiff] . . . . from and against all loss, costs, charges and expenses," etc., which the plaintiff "may at any time or times hereafter, bear, sustain, suffer, be at, or put to,

for or by reason or on account of the aforementioned agreement of sale or anything in any matter relating thereto, when said agreement of sale is fully satisfied and paid up," etc.

The bond itself is, I think, the strongest evidence that it was merely intended as a guarantee that Dice should make the payments called for by the agreement. The payments referred to throughout are the payments under the said agreement, and by that agreement Dice was the only person to make them. There is no suggestion that the defendants were to make them in the first instance. Rand had assigned his right to collect them to the plaintiff, and the plaintiff was the only person who could give Dice an effectual receipt therefor. It would be preposterous to suggest that defendants were to collect them from Dice and then hand them over to the plaintiff without some express provision of that kind in the document of assignment. In order to ascertain the true nature of the transaction, all the documents must be looked at together.

Mr. *Mayers* argues that the whole question of whether the document is a guarantee or not is, "Is there or is there not a principal debtor who remains liable?" and that seems to me to pretty well state the rule, but Vaughan Williams, L.J., in *Davys* v. *Buswell* (1913), 2 K.B. 47 at p. 53, quoting from note to *Forth* v. *Stanton* (1668), 1 Wms. Saund. 211e in Williams' Notes to Saunders Reports, 1871, Vol. 1, p. 233, expresses it as follows:

"'The fair result seems to be, that the question, whether each particular case comes within this clause of the statute [of Frauds] or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.'"

In the present case there can be no question that Dice remains liable and that liability is under the assignment to the plaintiff and to the plaintiff alone, and it is equally clear that there was and is no liability on the part of the defendants to make those payments except the promise contained in the bond sued on. There is not, even in the contemporaneous assignment from Rand to the plaintiff an undertaking of promise of any kind to make the payments. The case therefore seems to me to clearly fall within the rule accepted by Vaughan Williams, L.J. It

GREGORY, J.

1920

Jan. 15.

COURT OF APPEAL

Sept. 15.

WEST-MINSTER TRUST CO. v. BRYMNER

is true that in that case he was dealing with the Statute of Frauds, but that seems to me to be immaterial, the question being practically the same, a guarantee being nothing more than an undertaking to answer for the debt, default or miscarriage of another.

It is unnecessary to refer to any of the other cases cited by Mr. *Mayers* in his very clear and concise argument, for the only question seriously argued by plaintiff's counsel was whether the bond was a guarantee or not.

Mr. *Taylor,* for the plaintiff, urges "that the question whether the undertaking is one of indemnity or guarantee depends upon whether the promisor has or has not an interest in the undertaking independent of the guarantee," and he cites a number of cases which he argues support that proposition. If any of the cases express the test in that way, none of them are so recent as *Davys* v. *Buswell,* to which I have already referred. I do not propose to discuss all the cases cited, but shall refer briefly to one or two of those upon which he seemed to particularly rely.

Reader v. *Kingham* (1862), 13 C.B. (N.S.) 344: I cannot see the analogy between the cases. Erle, C.J., at p. 354 says, "the payment of the £17 would not necessarily have been a discharge of the Malins debt," and Byles, J. says at p. 357, "The contract is between Reader and Kingham: 'If you Reader will

GREGORY, J.

abstain from arresting Hitchcock I will pay you £17.'" It is a promise made to a stranger. At p. 353 Erle, C.J. says:

> "It has been distinctly settled, that, to bring the promise within the statute, the promisee must be the original creditor."

It seems to me that in the present case the plaintiff is the original creditor; not perhaps the original creditor in order of time, but in the sense that Dice's liability is first to the plaintiff and then to the defendants, if they have to pay the instalments. Lord Justice Vaughan Williams, in *Harburg India Rubber Comb Company* v. *Martin* (1902), 1 K.B. 778 at 784 expresses the question somewhat differently and says, after referring to several cases:

> "'These cases establish that the statute applies only to promises made to the person to whom another is already or is to become liable.'"

In the present case, on the completion of the transaction Dice became liable to plaintiff for the instalments as they fell due.

Thomas v. *Cook* (1828), 8 B. & C. 728, appears to me to support the defendant. The defendant in that case, having to find sureties, applied to the plaintiff to join him in a bond and undertook to save him harmless, and on his executors being sued on that promise they set up the Statute of Frauds. Bayley, J. at p. 732 says:

"The bond was given to Morris as the creditor; but the promise in question was not made to him."

It is true that the same learned judge says on the same page that a promise to indemnify and save harmless does not fall within the statute, and the conditions of the bond sued on is to save harmless. But in that case the plaintiff was an entire stranger to the whole transaction, and except that he joined in the bond, had nothing to do with it. His sole consideration for joining in the bond and assuming a liability was the defendant's promise to save him harmless for all loss occasioned by his so doing. Such a contract of indemnity was surely an independent one, and so, not within the statute. But in the case at bar the transaction is simply this, the defendant, having a claim against Dice, says to the plaintiff, "I will for so much money sell and transfer to you my claim and guarantee that Dice will perform his obligation." If the promise of the defendant was in reality one to save plaintiff harmless, etc., we would have to enquire, harmless from what, and the answer could only be for loss sustained by not receiving back the moneys plaintiff had paid defendant and the profit he was to make, but no loss has been proved; had Dice paid the money, plaintiff would have had to transfer to him the land. This he has not done, but still retains it, and it is quit conceivable that it is today worth much more than the amount due by Dice, and if so, where is the loss or damage? The question is not by any means free from doubt, and I can easily understand that another judge might come to a different conclusion. Each case must be judged on its own particular facts, and the facts in each case vary so much that it is rather difficult to get much assistance from them, but applying the rule in *Davys* v. *Buswell, supra,* as I understand it, it seems to me that the defendants must succeed, and there will be judgment accordingly. The costs will follow the event.

GREGORY, J.

1920

Jan. 15.

COURT OF APPEAL

Sept. 15.

WEST-MINSTER TRUST CO. v. BRYMNER

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 5th and 6th of May, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

W. J. Taylor, K.C. (*Dixie,* with him), for appellant: My contention is the bond is not a mere guarantee, but a primary liability: see *Harrison* v. *Seymour* (1866), L.R. 1 C.P. 518; *Croydon Gas Co.* v. *Dickinson* (1876), 1 C.P.D. 707; 2 C.P.D. 46. As to whether this was an indemnity or a mere guarantee see *Williams* v. *Leper* (1766), 3 Burr. 1886; *Castling* v. *Aubert* (1802), 2 East 325; *Barrell* v. *Trussell* (1811), 4 Taunt. 117; *Edwards* v. *Kelly* (1817), 6 M. & S. 204. It is not only the language, but you must look at the surrounding circumstances, and the true position shews an indemnity: see *Fitzgerald* v. *Dressler* (1859), 7 C.B. (N.S.) 374; *Reader* v. *Kingham* (1862), 13 C.B. (N.S.) 344; *Wildes* v. *Dudlow* (1874), L.R. 19 Eq. 198; *Beattie* v. *Dinnick* (1896), 27 Ont. 285; *Davys* v. *Buswell* (1913), 2 K.B. 47; *Harburg India Rubber Comb Company* v. *Martin* (1902), 1 K.B. 778; *Sutton & Co.* v. *Grey* (1894), 1 Q.B. 285; *Batson* v. *King* (1859), 4 H. & N. 738; *Hargreaves* v. *Parsons* (1844), 13 M. & W. 561. If he has a legal interest the whole matter should be gone into, and when you do, it shews the transaction amounted to an indemnity. It is in its nature an original obligation: see *Simpson* v. *Dolan* (1908), 16 O.L.R. 459; *Conrad* v. *Kaplan* (1914), 18 D.L.R. 37; *Walker* v. *Bowen* (1916), 10 W.W.R. 1071.

Mayers, for respondent Brymner: The question is one of construction of the bond. There was a legal assignment under the statute; Rand had disposed of all interest: see *Adolph Lumber Co.* v. *Meadow Creek Lumber Co.* (1919), 1 W.W.R. 823; 58 S.C.R. 306. All the cases he cited are unintelligible unless the facts are gone into. The latest case is *Davys* v. *Buswell* (1913), 2 K.B. 47. See also *Brown* v. *Coleman Development Co.* (1915), 34 O.L.R. 210; *General Financial Corporation of Canada* v. *LeJeune* (1917), 3 W.W.R. 196; (1918), 1 W.W.R. 372. There was in fact not only an extension of time of both payments, but the extension was given in consideration of a

higher rate of interest: see *Bristol, etc., Land Co.* v. *Taylor* (1893), 24 Ont. 286; *Merchants Bank of Canada* v. *Bush* (1918), 56 S.C.R. 512. As to discharge from guarantee see *Polak* v. *Everett* (1876), 1 Q.B.D. 669; 45 L.J., Q.B. 369; *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495. There are three features to be considered: (1) As to a primary liability; (2) As to an entire divesting of all interest in the person sought to be charged; (3) As to an entire absence of all liability in the person sought to be charged other than that arising out of the instrument sued on.

Taylor, in reply.

Cur. adv. vult.

15th September, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal for the reasons given by the learned trial judge.

MARTIN, J.A.

MARTIN, J.A.: I concur in dismissing the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: There is one short, neat point only for consideration in this case, *viz.*: Is the instrument sued on a guarantee for the payment of the debt of another? If it is, then I think it has been established that the plaintiff has, without the knowledge of the defendants, given extension of time to the principal debtor, and the defendants are released. As to whether it is a guarantee or not, I think Mr. *Mayers* has submitted the true test, and which is the test I deduce from the authorities cited on both sides. First, is there a primary debtor? Dice is the primary debtor. Second, is there an entire divesting of all interest of the person sought to be charged? Rand, for a certain sum, assigned and transferred all his interest under his agreement to Dice to the plaintiff, and as the learned trial judge puts it, is in no way liable to make the payments for which Dice remains primarily liable, except under the bond sued on. His interest in the subject-matter disappears under the assignment except in so far as he may have obligated himself in the bond, and this answers the third proposition that there is an absence of liability of the person sought to be charged other than that arising out of the bond. I think all these elements are present here.

GREGORY, J.

1920

Jan. 15.

COURT OF APPEAL

Sept. 15.

WESTMINSTER TRUST CO. *v.* BRYMNER

The learned trial judge has gone very fully into the matter, and I do not propose to do more than state my agreement in the conclusions he has arrived at.

I would dismiss the appeal.

MCPHILLIPS, J.A.: This appeal raises a point which, after all, is of small compass—a pure question of law—whether the contract is one of indemnity or guarantee?

We have had most excellent and elaborate arguments addressed to us, and in the very able argument of Mr. *Taylor,* counsel for the appellant, he frankly concedes that if the contract be one of guarantee simply, then the appeal must fail.

The case presents at first sight difficulties and complications, but these are dissolved when the whole transaction is viewed in its true perspective. Before the execution of the instrument under seal upon which the respondents are sought to be made liable to the appellant (called "Vendor's Bond to Secure Performance of an Agreement of Sale," and styled on the back thereof, "Guarantee"), all the interest in the land as described in the agreement of sale had been transferred to and was in the appellant, and Dice was the debtor of the appellant. Then it was that the situation was created of the respondents becoming surties, as I view it, for the payment of the debt of Dice, *i.e.,* it was in its nature a guarantee. To make this clear it is only necessary to make some excerpts from the bond. The obligors (the respondents)

MCPHILLIPS, J.A.

"are held and firmly bound unto the Westminster Trust, Limited [the appellant], ... in the penal sum of $22,400. . . . . We, the obligors, agree that in case the payments under said agreement are not fully and properly met on the dates they become due, that we will from date of said default pay the obligee interest on said arrears at the rate of 10 per cent. per annum.

"We, the said obligors, further agree that we will pay all payments due under above agreement of sale in case William C. Dice is in default and bind ourselves equally with William C. Dice as per terms and covenants entered into under said agreement for said payments. . . . . ."

It is apparent here that Dice is the principal debtor and it is clear that it is not a case of indemnity. *Harburg India Rubber Comb Company* v. *Martin* (1902), [1 K.B. 778]; 71 L.J., K.B. 529, is a case very much in point and supports the judgment of the learned trial judge, and is referred to in his judg-

ment. There the Court of Appeal for England had to determine on the facts of that case whether the contract was one of guarantee or indemnity, *i.e.*, whether the contract was or was not under section 4 of the Statute of Frauds. In that case, Vaughan Williams, L.J., gave very careful consideration to the cases which are, in the main, the authorities relied upon by the appellant in the present case, the Lord Justice in particular quoting, at p. 532, some of the language of Lord Davey as used by that Lord Justice in *Guild & Co.* v. *Conrad* (1894), 63 L.J., Q.B. 721, which appears to me to be exceedingly apposite to the present case:

"'In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not.'"

Here it is Dice, the purchaser under the agreement of sale, who is the principal debtor and liable to the appellant; it is only in case of default of payment on his part that any liability can arise upon the part of the respondents. Then the admitted fact is that time was given to the principal debtor without the assent of the sureties (the respondents), and if it be a guarantee, it follows of course that the respondents are absolved from all liability. I would apply the language of Vaughan Williams, L.J. in the *Harburg* case, as it appears at p. 532, to the present case, reading "Dice" in place of the words "the syndicate":

MCPHILLIPS, J.A.

"In my judgment the circumstances of the present case shew plainly that there was a guarantee for the payment of a debt for which [Dice] was primarily liable, and not an original promise by the defendant to keep the plaintiffs indemnified. I have tried to keep this question distinct, and in my judgment there is nothing to justify us holding that in the present case the contract is a contract of indemnity. . . . . I think it is a contract of guarantee—a promise to answer for the debt of another."

Mr. *Taylor* relied greatly upon the reasons for judgment of Stirling, L.J. in the *Harburg* case as supporting his position, but, with deference, I am not able to agree that support can be found for the case of the appellant in the reasons of the Lord Justice. It has to be admitted that the question is one of great nicety, and as Stirling, L.J. at p. 534 said, "undoubtedly the

GREGORY, J.

1920

Jan. 15.

COURT OF APPEAL

Sept. 15.

WEST-MINSTER TRUST CO. v. BRYMNER

decisions ran fine in these cases." Further on in his judgment Stirling, L.J. said:

"From the judgment of Lord Justice Bowen in *Sutton & Co.* v. *Grey* (1893), 63 L.J., Q.B. 633; [(1894)], 1 Q.B. 285; it is clear that he regarded *Couturier* v. *Hastie* [(1852)], 22 L.J., Ex. 97; 8 Ex. 40 (reversed on another point (1853), 22 L.J., Ex. 299; 9 Ex. 102. (1856), 25 L.J., Ex. 253; 5 H.L. Cas. 673), as going to the very verge of the law."

The ratio of all that the Lord Justice (Stirling) says, if as affecting the present case and the application of the law, is that there must be some "interest" to take the case out of the category of guarantee and suretyship and place it in the category of indemnity. At p. 535 Stirling, L.J. said:

"As it seems to me, in the judgment of Chief Justice Cockburn in *Fitzgerald* v. *Dressler* [(1859)], 29 L.J., C.P. 113; 7 C.B. (N.S.) 374 and in the judgment of Lord Esher, 'interest' means some species of interest which the law recognizes."

I cannot see that the respondents in the present case have any "interest" such as "the law recognizes." In truth and in fact, all the "interest" has passed to the appellant; there exists only the bare suretyship or guarantee to the appellant. The appellant is still possessed of the lands described in the agreement of sale, and it is only when Dice completes his payments that he can call for a conveyance thereof. There is no resultant or other interest outstanding and in the respondents (see also *Davys* v. *Buswell* (1913), 2 K.B. 47; *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 50 L.J., Ch. 355 at p. 358; *General Financial Corporation of Canada* v. *LeJeune* (1917), 3 W.W.R. 196; (1918), 1 W.W.R. 372). It is also a matter to bear in mind, as the evidence shews (see judgment of GREGORY, J., *ante*, pp. 505-9), that the parties to the transaction always treated the obligation as one of guarantee, and the instrument should be so construed. In *Adolph Lumber Co.* v. *Meadow Creek Lumber Co.* (1919), [58 S.C.R. 306 at p. 307]; 1 W.W.R. 823 at p. 824, Sir Louis Davies, C.J. said:

MCPHILLIPS, J.A.

"In these circumstances we have the right and the duty, as by their subsequent conduct, the parties have themselves put a construction upon the contract, to adopt and apply that as the proper construction."

It may be said that the whole case as presented by the appellant resolves itself into the contention that the situation is not one of suretyship, but one of indemnity, in effect, one of independent contract whereby the respondents undertook and bound

themselves to pay the debt of Dice, quite apart from the responsibility of Dice as principal debtor, and that in any case the dealings with Dice, the changes in the incidence of liability and extensions of time were all matters of benefit and not of prejudice to the respondents.

I am satisfied that the present case is not one of indemnity but one of suretyship, and that, upon the facts, the respondents stand discharged from all liability to the appellant; that the dealings, alterations of contract and extensions of time were matters of benefit, not of prejudice cannot be listened to (*Polak* v. *Everett* (1876), 45 L.J., Q.B. 369 at p. 373; *Holme* v. *Brunskill* (1878), 47 L.J., Q.B. 610).

I therefore am of the opinion that the judgment of the learned trial judge should be affirmed and the appeal dismissed.

Appeal dismissed.

Solicitor for appellant: *J. W. Dixie.*
Solicitors for respondent Brymner: *Corbould & Grant.*
Solicitors for respondent Rand: *Lennie, Clark & Hooper.*

COURT OF APPEAL

1920

Sept. 15.

MITUSI v. BROWN

MITSUI & COMPANY LIMITED v. BROWN *ET AL.*

Contract—Purchase of goods—Consigned to Japan from Vancouver—Agreement to repurchase if shipping space not obtained in one month—Rising market until armistice four months later—No request to repurchase until after armistice.

The plaintiffs purchased an engine from the defendants, the defendants agreeing to buy it back if they did not get shipping space to Japan within one month from its arrival in Vancouver. The goods arrived in Vancouver towards the end of July, 1918, and after the expiration of one month the plaintiffs' agent continued to urge the defendants to secure shipping space, at the same time using his best efforts to secure space. There was no evidence of extending the obligation to repurchase and no request was made by the plaintiffs to repurchase until towards the end of November and after the armistice. In an action to enforce the agreement to repurchase it was held by the trial judge that it was for the plaintiffs to shew, despite the rising market, that they had made a demand for repurchase and that any extension of the time within which space was to be secured was accompanied by a clear stipulation, express or by necessary implication that the time within which a request to repurchase should be communicated, should likewise be extended and the plaintiffs having refrained, when the market was rising, from making any request for repurchase, and having endeavoured to throw the loss on the defendants after the armistice, the appeal should be dismissed.

Held, on appeal, reversing the decision of CLEMENT, J. (MARTIN and EBERTS, JJ.A. dissenting), that after the expiration of the month both parties continued on a mutual understanding to endeavour to obtain space which was an essential feature of the contract and there was an implied extension of the time in which repurchase could be demanded and there was no unreasonable delay in exercising it.

Statement

APPEAL by plaintiffs from the decision of CLEMENT, J., of the 28th of November, 1919, reported 27 B.C. 502, in an action for $5,000 damages for breach of contract. The plaintiffs purchased a boiler and engine from the defendants for the sum of $5,000, it being made a term of the contract that the defendants should procure shipping space for the shipment of the boiler and engine to Japan within one month from the date of the arrival of the boiler and engine in Vancouver, and that in the event of the defendants failing to procure shipping space within said period they would repurchase the boiler and engine

for $5,000. The boiler and engine arrived in Vancouver towards the end of July, 1918. On the expiration of the month from the arrival of the goods, shipping space had not been obtained, but the plaintiffs' agent in Vancouver (one Suga) continued to urge the defendants to secure shipping space, and he himself continued in his endeavours to obtain shipping space, but no request was made by the plaintiffs to the defendants to buy back the boiler and engine, nor was anything said as to the defendants' undertaking until November 27th following. The learned trial judge dismissed the action.

Statement

The appeal was argued at Vancouver on the 27th and 28th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Griffin, for appellants: The learned judge found that because we had not asked them to repurchase we cannot succeed, but it is a question of law as to our moving within reasonable time. We would not lose our right to demand repurchase unless we had decided to keep the boiler: *The Rochdale Canal Company* v. *King* (1851), 2 Sim. (N.S.) 78; *Davis* v. *Bomford* (1860), 6 H. & N. 245; *Morgan* v. *Bain* (1874), L.R. 10 C.P. 15; *In re Baker. Collins* v. *Rhodes* (1881), 20 Ch. D. 230 We made every reasonable effort to sell at the contract price, and eventually sold at the best possible price.

L. J. Ladner, for respondents: The case rests largely on equitable principles. In July, 1918, prices were going up, but after the armistice there was a slump. The relationship changed at the end of the month when they did not ask the defendants to repurchase: see *Jones* v. *Daniel* (1894), 2 Ch. 332; *Inglis* v. *Buttery* (1878), 3 App. Cas. 552. In any case they are guilty of laches and are estopped from claiming under the contract: see *Ewing* v. *Dominion Bank* (1904), 35 S.C.R. 133 at p. 153. They say the time was extended by implication: see *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218 at pp. 1230-1; *Lindsay Petroleum Company* v. *Hurd* (1874), L.R. 5 P.C. 221.

Argument

Cur. adv. vult.

COURT OF APPEAL

1920

Sept. 15.

15th September, 1920.

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

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

MITUSI v. BROWN

GALLIHER, J.A.: The learned trial judge has found the facts in favour of the appellant, accepting the evidence of the witnesses Suga and Orr, nevertheless he gave judgment in favour of respondents. The learned judge took the view that when space could not be procured at the end of 30 days, and as no demand was made by plaintiffs at that time upon the defendants to repurchase, and no express extension of the obligation to repurchase and no implied extension could be inferred from the evidence, the plaintiffs could not succeed.

To satisfy myself on this latter phase of the question I have read the evidence carefully, and I am in agreement with the learned judge that the facts are as stated by Suga and Orr. Accepting those facts and considering the conduct of the parties and the nature of the transaction (one of purchase for shipment to Japan), the obtaining of space for shipment was an essential feature of the contract, as was also the agreement to repurchase. When the 30 days had expired and space had not been procured, the plaintiffs obtained information from the defendants to enable them to aid in applying for space, and from that time on we find both parties endeavouring to obtain space. When the 30 days expired the plaintiffs could have demanded that the defendants repurchase, but they did not do so. Does this fact deprive them of the right to recover? That is something that must be decided upon a review of the whole evidence. My view of that evidence, read as a whole, is that there was an implied extension of the time in which repurchase could be demanded, and that under the circumstances there was no unreasonable delay in exercising that. I do not fall in with the suggestion that the plaintiffs were playing fast and loose and delaying exercising their right because of a rising market. Their *bona fides* were shewn in the first place by the payment of the purchase price, $5,000, even before the plant arrived, also by their anxiety to obtain space throughout, the constant enquiries as to this of the defendants, and their employing a

GALLIHER, J.A.

broker on their own account to assist the defendants. To my mind, it bears the entirely opposite aspect.

I view the conduct of the plaintiffs as consistent with this that when it was found that space could not be procured within the allotted time there was an implied understanding that the plaintiffs would not exercise their right, but would extend the time and assist in every way, and with that extension of time, I think the evidence warrants me in concluding there would be an implied extension during which a demand for repurchase could be enforced. It would be of little use to refer particularly to the evidence. It is spread upon the appeal book, and in my view supports the conclusion I have come to.

GALLIHER, J.A.

As to the amount that should be recovered, I think it should be the amount paid less the price for which the plant was sold. The plaintiffs have sworn that it was sold for the best price they could get, and they were not cross-examined upon that. The defendants had been trying for months to sell it but could get no offer. They were notified that it would be sold, but they disclaimed any interest in it.

The appeal should be allowed.

McPHILLIPS, J.A.: The learned trial judge dismissed the action, being of the opinion that the contract of sale, which had a term therein in the following words,—

"In case we cannot get shipping space to Japan within one month from the time the engine and boiler arrive here we will buy back from you at the price paid, namely, $5,000,"

was optional in its nature, and that the plaintiff did not at once, or within a reasonable time, demand compliance upon the part of the defendants with the provision for repurchase, the "shipping space to Japan" not being procurable. Looking at all the evidence and the surrounding circumstances, I cannot, with respect, arrive at the same conclusion as that arrived at by the learned trial judge. Without entering into detail, the evidence, in my opinion, fully establishes the insistence upon the part of the plaintiffs that the defendants perform their contract, and there was unquestionably a breach of contract which entitles damages being assessed against the defendants. It is true a considerable time elapsed, but it is evident that at no

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

Sept. 15.

MITUSI v. BROWN

time could the defendants say that the plaintiffs excused them from their performance of the obligation to repurchase, and it is to be observed that the learned trial judge was not impressed with the evidence for the defence, and although dismissing the action, refused the defendants their costs. It is clear that the delay in pressing the defendants to comply with their contractual obligation of repurchase was all in the way of indulgence to the defendants and to admit of, if possible, the defendants effecting a sale which would discharge the liability existent from them to the plaintiffs, a liability which was in no way released by anything that took place. The correspondence which is in evidence well exemplifies the situation, and efforts were continually being made by the defendants to get the shipping space. Finally it was possible to get shipping space, but after the armistice, and when it was too late for the purposes of the plaintiffs.

Upon a careful analysis of the evidence it would seem to me that the only conclusion that can be come to is that the delay in the earlier insistence upon the requirement to repurchase arose from the fact that the defendants were asking for further time, firstly, to get the shipping space, secondly, when space was capable of being got, but too late, time to effect a sale in Japan or elsewhere, which would relieve the defendants from their liability to the plaintiffs to repurchase the machinery, the defendants throughout this time admitting and agreeing that there was still existent, as there always was, the liability to repurchase. There is no evidence upon which it can be said that there was a waiver of the contractual obligation to repurchase, nor any evidence upon which any release from the obligation could be founded.

MCPHILLIPS, J.A.

On November 27th, 1918, the plaintiffs wrote urging a settlement. This was followed up by a letter of December 13th, 1918, and it was only on December 14th, 1918, that a note was sounded of denial of liability, then based upon the contention that the plaintiffs had taken the matter of getting space out of their hands, the letter, in part, reading as follows:

"Regarding the last paragraph of your letter, would say that you took the matter of getting space for you out of our hands, and gave it to

Mr. James to attend to, consequently we feel that we are released of any obligation regarding space."

On February 10th, 1919, the following letter was written by the plaintiffs to the defendants:

"We are in receipt of your letter dated the 8th, accompanied by copy of contract note with the C.P. Rly. Co. in connection with space for boiler.

"As you know, space for this boiler should have been submitted to us within one month after the boiler arrived here, and since then we have called your attention to the matter asking you to fulfill your obligation, but you did not do so. It is now too late to send the boiler to Japan and it is no use to take this space. We think there is no way to do but return the boiler to you.

"Herewith enclosed we return your letter dated Feb. 8th, also the copy of contract between yourselves and the C.P. Rly. Co.,"

and in connection with this letter, K. Suga, the manager of the plaintiffs, had this to say, in giving his evidence at the trial:

"Now after that letter was written did you have a conversation with Captain Brown? On the same date?

"The same date or the next, that was the 10th of February? The 11th of February, the next day Captain Brown came to my office and he asked me to wait some time as he said 'I have some good prospects of selling in Japan and I want to send particulars.'

"THE COURT: What is that? Captain Brown said 'I have a good prospect to sell in Japan.' Captain Brown told me that he had good prospects to sell in Japan, so he wanted to send particulars of the boiler to Japan, so he asked us to wait some time, to wait settlement some time, so I told him, I agreed to do so, but do you buy back boiler at contract price as per agreement regardless you can sell it at Japan or not, so he hesitated and did not reply the first time and so we repeated the same question again and finally he said yes. So we wrote a letter confirming that conversation."

MCPHILLIPS, J.A.

The letter of confirmation is in the following terms:

"We beg to confirm our conversation had with your Captain Brown this morning.

"We understand that owing to the fact that Capt. Brown has good prospect to sell in Japan the boiler and engine which we bought from you, he intends to send particulars of the same to Japan; so we will wait for some time without settling this matter, as per his request, until you have exchanged communications with Japan. It is understood that you will take back the boiler and engine in question, at the contract price if you cannot dispose of the same in Japan."

The evidence is conclusive throughout that the time given was all at the request and for the benefit of the defendants. It all culminated in the defendants finally repudiating the requirement to repurchase, and after notice to the defendants, the plaintiffs sold the machinery for $950. The course of the trial would seem to have been that if the plaintiffs were to be

COURT OF APPEAL

1920

Sept. 15.

MITUSI v. BROWN

held to be entitled to recover, that then the damages to be assessed would be the difference between the price obtained upon the sale of the machinery and the original purchase price thereof, that is, the purchase price of $5,000 would stand reduced by the amount achieved from the sale; the difference would be $4,050.

I must say that I am not at all satisfied that the question of damages was fully covered at the trial, yet the defendants did not adduce any evidence to shew that the sale made at $950 was not at the time a fair price. The machinery was second-hand machinery, and there was evidence that it shewed some hard usage, and all things considered, it may be that $950 was the best possible price that could have been obtained. The defendant Mahoney undertook to say that the machinery was only worth $2,000 owing to it being left unprotected for such a long time, but did not venture to say that it could be sold for $2,000.

The assessment of damages is always a matter of difficulty, but there is some evidence upon which the assessment may be made in the present case, also bearing in mind the Sales of Goods Act (R.S.B.C. 1911, Cap. 203, Sec. 64), *i.e.*, the measure of the damages is the loss resulting from the breach of contract, and here that loss would seem to be the difference between $5,000, the purchase price paid, and the $950 received from the sale of the machinery (*Dunkirk Colliery Company* v. *Lever* (1878), 9 Ch. D. 20 at p. 24), a very great disparity it is true, but the market conditions were at the time far from normal, in fact, still very unsettled. I cannot refrain from saying that it is with some hesitation that I decide to pass upon the *quantum* of damages or venture to actually assess same, yet, if this be not done, all that can be done is to direct a new trial for their assessment. After some anxious consideration of the matter, I have concluded that the best course will be to assess them as I think, upon the evidence, the learned trial judge could have done in case he had come to the conclusion that the plaintiffs were entitled to recover as and for a breach of the contract to repurchase the machinery, the view at which I have arrived. The damages therefore would be the difference between the price realized for the machinery, *viz.*, $950, and

MCPHILLIPS, J.A.

the original contract price paid by the plaintiffs to the defendants, and that is $4,050.

In arriving at the conclusion that the appeal should be allowed, it is in no way in disagreement with the learned trial judge's findings upon the disputed questions of fact, as the evidence upon which I proceed is the evidence referred to by the learned judge in the following terms:

"On the facts, I accept the evidence of Mitsui [meaning Suga the manager for the plaintiffs] and Miss Orr. I think the facts are as stated by Suga and Miss Orr."

I have set forth some of the evidence of Suga, and I particularly rely upon, and would call attention in particular to, the following statement sworn to by Miss Orr in cross-examination:

MCPHILLIPS, J.A.

"Now if Captain Brown denies that there were any such conversations as those what would you say? I would say that I heard him say it.

"Why do you say so, you were busy attending to your own business and not in a position to state accurately what conversations took place between these two men? I distinctly heard Captain Brown say—I heard Mr. Suga ask him if regardless of selling it in Japan if he could not, would he buy the boiler back and I heard Captain Brown say distinctly he would. I cannot be mistaken in that because I clearly and distinctly remember it."

Upon the whole case, I am of the opinion that the appeal should be allowed and damages assessed and allowed to the plaintiffs in the amount hereinbefore set forth.

EBERTS, J.A.: Plaintiffs are a Japanese company carrying on business in Japan and licensed to carry on business as a foreign company in British Columbia. Their representative in Vancouver bought a Scotch boiler from the defendants, and a memorandum in writing evidencing the sale and purchase was signed by both as follows:

July 11th, 1918.

"Messrs. Brown & Mahoney,
"736 Granville Street,
"Vancouver, B.C.

"Gentlemen:—

EBERTS, J.A.

"We beg to confirm our purchase from you of one Scottish Marine Boiler, on the following terms and conditions:

"Specification: Scottish Marine Boiler seventy-eight inches (78″) in diameter and eight feet (8′) long with steam pressure of one hundred and sixty-five pounds (165 lbs.) together with fore and aft compound engine eight inches by sixteen inches by ten inches (8″ x 16″ x 10″) with independent air and circulating pump and surface condenser, shaft, wheel and bearings completed with all fittings including steam pump, whistle, stack, grate and hand capstan.

COURT OF APPEAL

1920

Sept. 15.

MITUSI v. BROWN

"Certificate: Lloyd's Certificate of Inspection, certifying that the boiler is in first class condition, to be furnished.

"Price: At five thousand dollars ($5,000) F.O.B. Vancouver, B.C., for boiler and engine complete.

"This contract is made out in duplicate so if the same is found by you correct and satisfactory you will kindly return to us at your earliest convenience either copy duly signed and approved by your good selves.

"Mitsui & Company, Ltd.,
"by K. Suga,
"Representative.

"Approved and accepted,
"Brown & Mahoney,
"*per* J. Hilton Brown."

It appeared from the evidence that it was common ground that it was of the essence of the transaction that such arrangements for shipping space would be secured so that the boiler might be shipped from Vancouver to Japan within a specified time, namely, "within one month from the arrival of the boiler in Vancouver." Instead of making such a stipulation a condition of the sale and purchase of the boiler, it was collaterally agreed that if such shipping space could not be obtained within such month, the defendants would re-purchase the boiler from the plaintiffs for the same price as that at which the defendants sold it to the plaintiffs. A memorandum of that agreement appears in a letter dated 10th July, 1918, from Messrs. Brown & Mahoney to Messrs. Mitsui & Co., and is in the words and figures following:

EBERTS, J.A.

"We beg to thank you for your order of the 10th inst. for Scottish Marine Boiler and Engine as per our letter of the 9th. We will have Lloyd's certificate supplied with same.

"In case we cannot get shipping space to Japan within one month from the time the engine and boiler arrive here we will buy back from you at price paid, namely, $5,000.

"Please be good enough to let us have your cheque for this amount and oblige.

"Again thanking you, we remain."

The boiler arrived in Vancouver in July, 1918, was inspected by plaintiff Company through its duly-authorized agent, Mr. Suga, and accepted as up to specifications. The month from that period elapsed without success in procuring shipping space. Not only did defendants busy themselves in endeavouring to get space, but plaintiff Company instructed a shipping agent, one Mr. James, to procure space if possible, but without avail. By

the end of August, 1918, it became necessary for the plaintiff Company to decide whether it would exercise its option to call on defendants to purchase the boiler for $5,000 and take delivery. The sole question in this action(in my view) is how long did this option last? I am of opinion, for a reasonable time (taking into consideration the market conditions). The difficulty in obtaining transportation across the Pacific, the unsettled times and markets, the situation of both parties at the time the conditional contract to repurchase was entered into, are all circumstances which must be duly considered in construing the agreement. The times were extraordinary. A terrific war had been going on for four years, prices and freight were exceedingly high and transportation was difficult to obtain, and (that) by reason of such disorder business conditions were highly panicky, so that if either party was, by reason of its circumstances, entitled to call on the other for strict compliance with the conditions above specified, the plaintiff was entitled to call on the defendants to furnish shipping space within the month strictly, and the defendants to have plaintiffs (as soon as the option to force the boiler back on the defendants came into effect) exercise (if plaintiffs intended to do so at all) the option to demand repurchase promptly and decisively, so that defendants would understand that the boiler was theirs to deal with as they thought fit.

It follows that if nothing more had been done, if the plaintiffs had simply stood by and said nothing about the boiler for several months from the termination of the option, the plaintiffs' chances to succeed would have been very slight; but there is much more. The plaintiffs tried themselves to sell the boiler. They wrote a letter to the defendants, dated 27th November, 1918, in which they used the words: EBERTS, J.A.

"Will you please advise us what you have done with the marine boiler which we have purchased from you some time ago. Kindly let us know what prospect you have of disposing of same for us."

It may be here noted that the armistice was signed on the 11th of November, 1918, and from that time the markets began to break. By prompt action of the plaintiffs on the termination of the option in August, 1918, in notifying defendants that they required defendants to repurchase the boiler for $5,000,

COURT OF APPEAL

1920

Sept. 15.

MITUSI v. BROWN

EBERTS, J.A.

the defendants most probably would have been in a position to resell the boiler before the armistice was signed, and so save themselves from serious loss, as the evidence shews the market price was a rising one up to that important moment. Finally finding the boiler unsaleable, they called on the defendants, in the spring of 1919, to take delivery as on a repurchase at $5,000, or pay damages for breach of contract to do so. On the defendants' refusal to recognize that position, the plaintiffs sold the boiler for $950, which they allege was the best price obtainable, and brought this action. This price in itself shews the fluctuating and uncertain conditions of the market.

I see nothing in my perusal of the record that plaintiffs tendered the boiler to the defendants and formally demanded the $5,000. I am of the opinion the judgment of the Court below should be affirmed and the appeal dismissed.

Appeal allowed,
Martin and Eberts, JJ.A. dissenting.

Solicitors for appellants: *Griffin, Montgomery & Smith.*
Solicitors for respondents: *Ladner & Cantelon.*

KEAYS v. SHELL GARAGE LIMITED.

COURT OF APPEAL

1920

Sept. 15.

KEAYS v. SHELL GARAGE LIMITED

Sale of goods—Automobile—Delivery to be "as soon as possible"—Failure to deliver—Repudiation.

The plaintiff who was a chauffeur, purchased an automobile from the defendants which he used as a taxi. Trouble almost immediately arose and the car was repaired by the defendant on a number of occasions. The plaintiff then contracted with the defendant to purchase a new car and delivered his old car to the defendant as part of the purchase-price, the new car to be ordered from the factory and delivered "as soon as possible," three weeks being mentioned as about the time required for delivery. In the meantime the plaintiff was without a car although the defendant had offered him the use of another car which he refused. More than six weeks elapsed before the new car was on hand for delivery, and the plaintiff then refused to accept it, the old car in the meantime having been sold by the defendant. An action to recover the value of the old car was dismissed.

Held, on appeal, reversing the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that considering the urgency and the inadequate efforts of the defendant to deliver the car sooner, the delay justified the plaintiff in repudiating the contract upon the expiration of the three weeks, but he was not entitled to damages for loss of profits in the meantime.

APPEAL by plaintiff from the decision of GREGORY, J. of the 20th of February, 1920, in an action to recover the purchase price of an automobile. The plaintiff had purchased a Nash car from the defendant, who was agent for the Nash Motor Company, having its head office in Kenosha, Wisconsin. The plaintiff had trouble with the car from the beginning, the defendant having repaired it on two or three occasions, and finally, on the 3rd of November, 1919, the parties entered into an agreement whereby the defendant was to take over the car at $2,450 and order a new Nash car that the plaintiff was to take at $2,850, the balance of $400 to be paid upon its delivery, the car to be delivered as soon as possible or in three weeks. On the 13th of December the plaintiff issued the writ in this action. On the 17th following, the car having arrived from the Nash Motor Company, the defendant immediately offered delivery, but the plaintiff, having commenced negotiations for another

Statement

COURT OF APPEAL

1920

Sept. 15.

KEAYS v. SHELL GARAGE LIMITED

car, refused to take it. Five days later the defendant sold the car to another buyer.

The appeal was argued in Vancouver on the 29th and 30th of April, 1920, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: The arrangement on the 3rd of November, 1919, was that the new car was to be delivered as soon as possible or in about three weeks, but the defendant was not in a position to deliver until the 17th of December, when the car was offered but not accepted, as the plaintiff in the meantime entered into negotiations with others for the purchase of a car. As the plaintiff is a chauffeur, time is an essential condition of the contract: see *Reuter* v. *Sala* (1879), 4 C.P.D. 239 at p. 249; *Hydraulic Engineering Company* v. *McHaffie* (1878), 4 Q.B.D. 670; *Atwood* v. *Emery* (1856), 1 C.B. (N.S.) 110; *Giles* v. *Edwards* (1797), 7 Term Rep. 181; *Hudson* v. *Robinson* (1816), 4 M. & S. 475. We are also entitled to damages for loss of profits between the 24th of November and the 13th of December.

Harold B. Robertson, for respondent: The learned judge accepted the story of defendant's agent, and no definite time was fixed for completion of the contract. We ordered the new car two or three days before the contract was made, but it did not arrive until six weeks had elapsed. It was immediately offered on its arrival. I contend the offer of delivery was made in a reasonable time: see *Hick* v. *Raymond & Reid* (1893), A.C. 22; *Hydraulic Engineering Company* v. *McHaffie* (1878), 4 Q.B.D. 670. The time of payment only is of the essence. On the 1st of December the plaintiff made other offers that amounted to waiver of the condition as to time of delivery: see *Alexander* v. *Gardner* (1835), 1 Bing. (N.C.) 671. As to a sale and delay in completion see *Webb* v. *Hughes* (1870), L.R. 10 Eq. 281; *Nelson* v. *Dahl* (1879), 12 Ch. D. 568 at pp. 599-600. Five days after the plaintiff refused to accept we sold the new car. As to the property passing see *Atkinson* v. *Bell* (1828), 8 B. & C. 277; Chalmers's Sale of Goods, 8th Ed., 64. As to the assent of the buyer being neces-

Argument

sary see *Campbell* v. *Mersey Docks* (1863), 14 C.B. (N.S.) 412; and as to there being a sufficient delivery to pass the property see *Gowans et al.* v. *Consolidated Bank* (1878), 43 U.C.Q.B. 318. He was offered other cars for use in the meantime, but refused to take any of them.

Mayers, in reply.

Cur. adv. vult.

15th September, 1920.

MARTIN, J.A.: In the view I take of this case in its main feature, *viz.*, the time for delivery of the new car, no conflict of evidence is involved, and I deal with the matter on the assumption that the learned trial judge was right in "accepting Eve's story in its entirety," Eve being the defendant's manager. It is quite clear to me at least, from Eve's evidence, that he gave the plaintiff to understand that the car would be in Victoria in about three weeks' time, and in another place he puts the time as being "as soon as possible," and again he says that "three weeks would be a reasonable time." It was held by the Court of Appeal in *Hydraulic Engineering Company* v. *McHaffie* (1878), 4 Q.B.D. 670, 27 W.R. 221, that to agree "to do a thing 'as soon as possible' means to do it within a reasonable time, with an undertaking to do it in the shortest practicable time."

Here we have the defendant's admission that "three weeks" would be "reasonable time," and yet we are, in my opinion, left without any good reason why that "reasonable time" of three weeks was sought to be extended to over six weeks. The defendant knew that the plaintiff was a chauffeur, plying his car for hire as his means of livelihood, and that it was of first importance to him that the new car should be delivered to him "as soon as possible," and yet no special efforts were made to meet such a situation, and we are left to speculation as to the cause of an apparently unreasonable delay save by some general remarks about coal shortage in the east and the fact that during that winter it took seven weeks to get cars to come through instead of from three to four weeks during the summer.

MARTIN, J.A.

I am quite unable to accept these vague generalities as an excuse sufficient to discharge the defendant from using due, not

COURT OF APPEAL

1920

Sept. 15.

KEAYS v. SHELL GARAGE LIMITED

to say special, diligence in the circumstances to redeem their promise to have the car "as soon as possible."

The plaintiff was, I think, justified in repudiating the transaction at the end of the three weeks, but he is not entitled to damages for the loss of profit, because, according to the evidence of Eve (whose account of the settlement and bargain the learned judge accepted, and I see no reason to differ from him), he was to have the free use of an old "Cadillac" car or Dodge car until the new one arrived, but he unjustifiably refused to take either of them; and after the said three weeks he was not entitled to anything, because he had repudiated the contract and consequently should therefore have made his own arrangements for the hiring or purchase of another car. He is, of course, entitled to be paid the sum of $2,450, which became due to him when, under said settlement, he returned the Nash car to defendant on November 3rd.

MARTIN, J.A.

I have not overlooked the fact that it was submitted that the plaintiff had waived his rights, as shewn by certain correspondence, but in my opinion nothing is therein contained supporting such a submission.

The appeal, therefore, should be allowed, and judgment entered to the above effect in favour of the plaintiff.

GALLIHER, J.A.: I conclude, upon the evidence, that on the 3rd of November the plaintiff and defendant came to an arrangement by which the defendant was to take back the Nash car it had sold the plaintiff, and which had not given satisfaction, at a valuation of $2,450, and furnish a new Nash car at $2,850, the plaintiff, on delivery of same, paying the difference in cash, $400.

GALLIHER, J.A.

It is not quite clear from the evidence whether this was conditional on the defendant being able to sell the old car for that amount, but in any event it did sell it, and that condition, if any such existed, was fulfilled.

Plaintiff has contended that defendant had no right to sell the old car, but I think this cannot be maintained in the face of the evidence.

The learned trial judge has found that pending the arrival

of the new car there was an arrangement by which the plaintiff was to have the use, without charge, of a Cadillac car. The defendant offered the plaintiff the use of a Cadillac car and also a Dodge car, but plaintiff would not accept either of these. I am not prepared to disagree with the finding of the learned trial judge as to this arrangement.

We next come to the time within which the new car was to be delivered. There is no doubt three weeks was mentioned, but I think it was a statement of the time in which Eve expected a car could be got here from the factory in Wisconsin rather than an agreement to have it here in that time. It then becomes a question whether from the 3rd of November till the 17th of December (the date when the car was in Victoria ready for delivery) can be said to be a reasonable time under all the circumstances. The learned trial judge has so held. Two things have to be considered in this connection: (a), the urgency for having the car as soon as possible, and (b), the efforts made by the defendant to meet this situation.

As to (a), certainly after the 7th of November, when the defendant knew that the Cadillac and Dodge cars were not satisfactory to the plaintiff, it must have been apparent to it that every effort should be made to speed delivery, the plaintiff in the meantime having no means of properly carrying on his vocation. Let us examine what was done by defendant.

Eve, the sales manager in Victoria, tried to get a car from the Vancouver agency, but they had none in stock. He then requested them to give him one out of their first shipment from the factory in Wisconsin, and the evidence is that the car which was ready for the plaintiff in Victoria on December 17th was out of that shipment. The following extract is from the evidence of Eve:

"Do you know whether they had cars on order from the factory when you sent your order in to them? Oh, yes; we all have cars on order, our contract calls for order of cars from time to time.

"Did you know that Vancouver garage had cars on order and were expecting them as soon as they could come, when you wrote to them? Yes.

"And by writing to them you were getting it quicker than by writing directly to the factory? Yes.

"Why? Because they have orders on the way; their orders were placed and their order had to come.

COURT OF APPEAL

1920

Sept. 15.

KEAYS v. SHELL GARAGE LIMITED

GALLIHER, J.A.

"Their order would be filled before yours? Yes; their order would leave the factory probably before ours got there. They were out of cars, and I knew by that that they must have cars on the way, because they are very seldom out of cars."

Mr. *Robertson* relies upon this evidence as shewing that the defendant took the speediest and best way of procuring this new car, and urges that it proves there were cars on the way for the Vancouver agency at the time he ordered from them, and therefore bound to reach here before any order that might be sent direct to the factory. If I so read that evidence, it would make a strong impression on me, but I do not. Upon a casual reading of it, it might appear so, but when carefully read as a whole, his reasons for knowing are based on the last three lines. So far as that evidence goes it is not shewn, as I view it, that the Vancouver agency had any orders placed for delivery in the month of November at all, or that any cars were on the way. The only thing we do know is that cars arrived some time on in December, this car among them. It seems to me that Eve should have ascertained this fact definitely and not have left it to supposition; or have wired the factory for a rush order. He tries to explain that such wiring would be of no avail, but I am not satisfied with that explanation. He seems to have taken it for granted that there were cars on the way for the Vancouver agency, and troubled no more about it except that he says he wrote to the factory about cars, but the letter is not produced, and he can give no date when it was sent.

What is a reasonable time depends upon the circumstances of each case. Under the circumstances of this case, with deference, I find the car was not made available within a reasonable time, and the proper efforts to bring that about were not made.

I am of opinion that the plaintiff was justified in repudiating the contract when he did, and that the appeal should be allowed. There should be judgment for the plaintiff for $2,450.

As I have found that there was an arrangement to use other cars pending a reasonable time for delivery of a new car, and a refusal to use the cars agreed on, and apparently no great effort made by the plaintiff to continue his business, I do not feel that I should award damages.

As to the tools sued for, the plaintiff has made out no case.

In fact, I have a note that Mr. *Mayers* is not pressing this feature.

MCPHILLIPS, J.A. would dismiss the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *J. R. Green.*

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

THE BISHOP OF VANCOUVER ISLAND v. THE CORPORATION OF THE CITY OF VICTORIA.

Municipal law — Taxation — Exemptions — Church — Land upon which it stands—Invalid assessments—Limitation of actions—B.C. Stats. 1914, Cap. 52, Secs. 197 (1), 484 and 485; 1919, Cap. 63.

Section 197 (1) of the Municipal Act (B.C. Stats. 1914, Cap. 52) exempts from taxation "every building set apart and in use for the public worship of God." An action by the Bishop of Vancouver Island for a declaration that no rates or taxes were lawfully imposed on the lands on which St. Andrew's Cathedral, Victoria, stands, and for an injunction restraining the City from offering said lands for sale, was dismissed.

Held, on appeal, reversing the decision of MACDONALD, J. (MACDONALD, C.J.A. dissenting), that the exemption aforesaid includes the building and the land upon which it stands.

The limitation of actions provided for by sections 484 and 485 of the Municipal Act does not apply to prevent an action to restrain tax-sale proceedings under invalid assessments, as the assessments, not interfering with the use and occupation of the premises, could in the meantime be ignored as nullities.

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

APPEAL by plaintiff from the decision of MACDONALD, J., of the 28th of November, 1919, reported 27 B.C. 516, in an action for a declaration that no rates or taxes were lawfully imposed upon lots 9, 10 and 11 of block 12, City of Victoria, upon which

Statement

COURT OF APPEAL

1920

Sept. 15.

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

St. Andrew's Cathedral is situate, and for an injunction to restrain the City from selling said lands for taxes. The City counterclaimed for the general taxes and local improvement taxes for the years 1914 to 1918, inclusive, in the sum of $15,934.44. The Cathedral covers substantially the whole of the three lots mentioned, and the main question to determine is whether the land upon which the cathedral stands is exempt from taxation under the first subsection of section 197 of the Municipal Act, B.C. Stats. 1914, which is as follows:

"Every building set apart and in use for the public worship of God."

The learned trial judge dismissed the action.

Statement

The appeal was argued at Vancouver on the 7th, 10th and 11th of May, 1920, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

F. A. McDiarmid (*N. H. McDiarmid,* with him), for appellant: The City counterclaim for the taxes due. There is no dispute as to the facts. The City has levied and assessed on the land and improvements on the value of the land alone. There is no assessment on the Cathedral. The question here is whether the words "every building" in section 228 of the Municipal Act as amended by section 16 of the 1913 amendment, includes the land on which the building stands. In the present case the Cathedral covers substantially the whole of the three lots. There is no ground left. When the building covers the whole of the lots there is no such thing as land left; it is all building. A building (which is exempt) is always on land within the meaning of the Act. It cannot be suspended. Under the definition of "building," land and building go as one. They cannot take away something that is an absolute necessity to the house: see *Cole* v. *The West London and Crystal Palace Railway Company* (1859), 27 Beav. 242; 28 L.J., Ch. 767; *Lord Grosvenor* v. *Hampstead Junction Railway Co.* (1857), 1 De G. & J. 446. They can only put a value on the land in relation to the buildings on it. The worship of God is the dominant factor in creating the exemption, and the land is as necessary as the building for the purpose. The land is absolutely necessary: see *Low* v. *Staines Reservoirs Joint Committee* (1900), 64 J.P. 212; *Crayford Overseers* v. *Rutter* (1897), 66 L.J.,

Argument

Q.B. 506. The words "the site thereof," that were struck out by the 1913 amendment, has application to the surrounding lands, but not the land under the building. The definition of "site" will be found in *Board of Works for Plumstead District* v. *Ecclesiastical Commissioners for England* (1891), 2 Q.B. 361. Under the Local Improvement Act the assessment is on the real property. The building cannot be sold under any taxation, and the City cannot do indirectly what it cannot do directly. I say, therefore, the City cannot sell the land under the church. The owner of land underneath has no rights or powers over the surface rights: see *Thomson* v. *St. Catharine's College (Cambridge)* (1919), 88 L.J., Ch. 163; *Hobbs* v. *The Esquimalt and Nanaimo Railway Company* (1899), 29 S.C.R. 450. As to the works being justified by the by-laws see *Arbuthnot* v. *Victoria* (1910), 15 B.C. 209. The cases are collected in the argument of Mr. *Bodwell*. A statute giving a new remedy does not of itself destroy previously existing rights and remedies: see Halsbury's Laws of England, Vol. 27, p. 169, par. 323, where the cases are collected; see also *In re Levy* (1911), 16 B.C. 354; *O'Flaherty* v. *M'Dowell* (1857), 6 H.L. Cas. 142 at p. 157. A private Act prevails whether prior or subsequent.

Harold B. Robertson, for respondent: Up to 1891 the church "and the site thereof" were exempt from taxation. From 1891 until the Revised Statutes of 1911 the "site" was subject to taxation, then the "site" was again made exempt until the Act of 1913, when the words "and the site thereof" were struck out of the section and has been subject to taxation continuously ever since. Taxation is the rule, and exemptions are the exception. The words "and the site thereof" includes both the lands adjoining a church and the land on which it rests. When these words are taken away it takes away the land under the building.

Argument

[MARTIN, J.A. referred to *Sherman* v. *Williams* (1873), 113 Mass. 481].

The radical change was in 1891, when they intended to grant exemption to the building alone, and when they added in the words "and the site thereof" in the Revised Statutes of 1911,

COURT OF APPEAL

1920

Sept. 15.

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

Argument

it was intended to be confined to the ground on which the building rested. It is a term of limitation, not expansion. As to the interpretation sections see *Weidman* v. *Shragge* (1912), 46 S.C.R. 1 at pp. 38-9; Whitehead's Church Law, 1892, p. 270; Cooley on Taxation, 3rd Ed., 356. Section 197 gives the right to tax every one, and the exceptions must be shewn and unquestionable. The exception here is not in clear and unequivocal language. We have the right to sell the land, and at common law the land carries the building: see *Wilson* v. *Delta Corporation* (1913), A.C. 181 at p. 189; *Attorney-General of British Columbia* v. *Bailey* (1919), 27 B.C. 305. Under the authority of these two cases the Act makes the by-law valid. On the question of remedy as to the judgment against the Bishop, section 241 of Cap. 63 of the statutes of 1919 is directory and not imperative: see Craies's Statute Law, 2nd Ed., 236; *Clive School District* v. *Northern Crown Bank* (1917), 2 W.W.R. 549 at p. 552; *Howard* v. *Bodington* (1877), 2 P.D. 203 at p. 212. Any person on the roll is liable under the Act: see *Coquitlam* v. *Hoy* (1899), 6 B.C. 458 and 546.

Cur. adv. vult.

15th September, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I am so fully in accord with the learned trial judge that I shall confine what further I have to say to narrow limits.

It is of importance to note that the Legislature has, for assessment purposes, severed the land from the improvements thereon, which include the buildings. It was urged with plausability by appellant's counsel that as the building could have no useful existence without the land, "building" must be read to mean building and site; in other words, that by judicial construction the Court ought, in effect, to replace in the section that part of it which the Legislature had deliberately stricken out. To assist this submission, it was argued that because of sections 21, 22 and 23 of the Interpretation Act, set out in full in the reasons below, no notice must be taken of the state of the law previous to the amendment of 1913. Section 21 has no application at all to this case, and the others, I think, mean only

that the repeal or amendment of a statute is not in itself to imply a legislative interpretation of the law, but this is not to say that the Court is precluded from construing a statute in the light of its history. But apart from its history, it will be seen that the Legislature has granted, in apt and precise words, exemption of the building, and a survey of the whole Act not only fails to shew that a wider meaning was intended, but on the contrary, rebuts any such notion.

Mr. *McDiarmid's* argument would be well nigh irresistible if the case were not governed by statute and the question were the meaning of "building" at common law.

As pointed out by the learned judge, the municipality has authority to exempt all other buildings in the municipality from taxation, but not their sites. Upon the exercise of such authority, all other buildings in the municipality would be placed in precisely the same situation in respect to taxation as that occupied by the church, and all the sites thereof would be in like situation with the church site, and the consequences claimed to follow thereupon would exist as to all alike, and every taxpayer could, if appellant's contention be sound, properly be heard to say, "You cannot assess my land, since at common law it is part and parcel of my building, which is exempt, and you cannot sell my land for default in payment of taxes assessed against it, because my building, which is exempt from assessment, is situate upon it."

MACDONALD, C.J.A.

I do not think it would be useful here to refer to the many sections of the statute to which attention has been directed by appellant's counsel, in an exhaustive endeavour to find inconsistencies which would appear if his submission were not accepted. There are not a few such, but they cut both ways. They are not vital, but such as are found in abundance in many voluminous statutes. The Act as a whole must be looked at, and effect given to what is its true intent and meaning. Notwithstanding minor defects, the scheme of the Act is amply manifested by its provisions, and creates no doubt in my mind as to the soundness of respondent's contentions, and while it may not be necessary to decide whether the Municipality can sell more than the land severed by law from the building, which, as I understand

COURT OF APPEAL

1920

Sept. 15.

it, was all it intended to do, yet, in view of the general importance of the dispute, I desire to say that in my opinion the Municipality may sell both site and building for arrears of taxes levied upon the land alone.

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

MARTIN, J.A.: This appeal, respecting St. Andrew's Cathedral in Victoria, raises a question of great public importance not only to the religious denomination primarily concerned, but to many others, at the least, because the exemption from taxation of "every building set apart and in use for the public worship of God" extends to the buildings of all religious denominations who worship "God," and whatever definition may be placed upon that wide word elsewhere, it certainly, in this Province of complete religious liberty, freed from an established church, is not restricted to the God of the followers of Christ, but also, for example, obviously includes the Supreme Being who is worshipped by our Jewish or Mahommedan fellow subjects, the latter of whom, in India alone, are greater in number than all the white people of European extraction in the whole British Empire. As to the religious worship of the Sikhs and the Buddhists, and other sects in our midst, I say nothing now, merely noting them as illustrating the gravity of the question at issue, though the last named, after an existence of 2,400 years, is still, in regard to the number of its adherents, the prevailing religion of the world.

MARTIN, J.A.

Turning then to the consideration of the statutes upon which the question must be determined, I have reached the conclusion that when they are properly understood *ab initio,* as is essential, the case presents no real difficulty.

It is conceded that the first enactment necessary to consider is Cap. 16, of 1881, Sec. 120, and as it is the starting point for a solution of the question, I quote it *in extenso,* as follows:

"*Taxes on Real Estate.*

"Rates and taxes may be settled, imposed, and levied upon real estate and improvements thereon within a municipality by the Council thereof, not exceeding in any one year one per cent. and one-third of one per cent. on the assessed value thereof, subject to the following exemptions, that is to say:

"*Exemptions.*

"(1.) Real estate vested in or held in trust for Her Majesty or for the public uses of the Province:

"(2.) Real estate vested in or held in trust for the municipality:

"(3.) Real estate vested in or held in trust for any tribe or body of Indians:

"(4.) Every place of public worship, churchyard, burying ground, public school-house, public roadway, square, township, or city hall, gaol, hospital, with the land requisite for the due enjoyment thereof:

"(5.) Real estate and improvements, the property of any fire department or company, or of any mechanics' institute or public library."

Now the expression "place" of public worship in (4) is as wide as it is indefinite, and would, without more, include a building with the adjoining land necessary for due enjoyment, and it might mean either a building or a piece of land, open or inclosed, without any building or even an altar where people congregated according to their religious inclinations for public worship, with seats or benches, or without, just as they did, for example, in the early days in Victoria, under a fine oak tree called the "Gospel Oak," which until a few months ago was still standing on Fort Street, between Douglas and Blanshard Streets, within a few yards of the cathedral now in question. The addition to the expression "place" of the words, "with the land requisite for the due enjoyment thereof," would, in such case, be as inappropriate as superfluous, as it is in the case of certain of the other places specified in the same subsection, *viz.*, a churchyard, burying ground, public roadway, square or township, all of which are land without buildings in the ordinary sense.

It is apparent from a careful perusal of said list of exemptions that with one exception, the last, no attempt is made, in dealing with them, to distinguish between real estate and improvements, even in the case of "(2) Real estate vested or held in trust for the municipality" itself; the fact, indeed, that such a distinction is drawn in the last one is an indication of an intention not to do so in those preceding it. In the case of a gaol or hospital, *e.g.*, the addition of the words "with the land requisite for the due enjoyment thereof" evidences to my mind, as would be expected, an intention to exempt a considerable area, if need be, in excess of the land upon which the building actually stands, as would also apply in the case of a "place" of public worship if it were a building, as is usual.

It is clear to me, therefore, that at that time (1881) all

COURT OF APPEAL

1920

Sept. 15.

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

"places of public worship" and, in addition, "the land requisite for the due enjoyment thereof" were exempt from municipal taxation. This state of affairs continued until 1889, when the Legislature expanded the exemption by striking out the word "public" before worship, thereby including places of private worship. So the matter stood until 1891, when by section 159 of Cap. 29 the indefinite and unsatisfactory word "place" disappears, and the exemptions were curtailed to three, as follows:

"(1.) Every building set apart and in use for the public worship of God:

"(2.) Every burying ground in actual use as such, and every cemetery:

"(3.) Every building set apart and in use as a public hospital, in which the sick, injured, infirm or aged are received and treated, and the land adjoining thereto, not, however, exceeding twenty acres."

Here for the first time occurs the word "building," and public worship is now declared to be "of God." It is essential, therefore, to determine what meaning the Legislature intended to convey by the word "building." Assistance is afforded by reference to the third exemption, which relates to "every building set apart and in use as a public hospital . . . . and the land adjoining thereto, not however exceeding twenty acres." It will be observed at once that unless the expression "building" includes the land thereunder, *i.e.*, the sub-soil, the preposterous position is created of a public hospital which has the land "adjoining thereto" exempted up to twenty acres, but the land, its foundation, which it does not "adjoin" but stands upon, is liable to taxation. This is a very significant and important feature, because this same third exemption in subsection (3) is, with the first, carried through all the later statutes and still stands exactly the same as subsection (3) (saving an extension to private hospitals) in the statute of 1914, Cap. 52, Sec. 197, which finally controls this case, so the same reasoning applies now as in 1891.

MARTIN, J.A.

It is apparent, therefore, that the expression "building" is used in the ordinary and legal, as well as popular sense hereinafter to be determined.

Now, in determining the meaning, I agree with the learned judge below ([(1919), 27 B.C. 516], (1920), 1 W.W.R. 120) that, as Lord Herschell said, when he was construing an exemption in the Customs and Inland Revenue Act, *Commis-*

sioners of Inland Revenue v. *Scott* (1892), 2 Q.B. 152 at p. 160, 61 L.J. Q.B. 432:

"The only safe course to take is to follow the ordinary and natural meaning of the words that are used. If we depart from them we may run the risk of not carrying out that which was intended by the Legislature, and it seems to me that it would be a departure from the ordinary and natural sense of the language used if we held that this was not property which, or the income or profits of which, were legally appropriated [*i.e.*, exempted] in a manner expressly prescribed by Act of Parliament."

And in *Braybrooke* (*Lord*) v. *Attorney-General* (1860), 9 H.L. Cas. 150, a succession duty case, Lord Chancellor Campbell said, p. 165:

"This statute . . . . . is to be construed, not according to the technicalities of the law of real property in England or in Scotland, but according to the popular use of the language employed."

What, then is the meaning of "building" in the present circumstances? Clearly that "ordinary and natural" and "popular" one which would be employed by the Legislature, though here fortunately the Legislature, in employing it, has embodied not only the said meaning, but also the legal one used by lawyers in dealing with land, which is, that the word "building" includes the land, the sub-soil, upon which it stands. There is for our guidance, happily, in determining this basic question the unanimous decision of the Supreme Court of Massachusetts (consisting of five judges) *en banc,* in *Sherman* v. *Williams* (1873), 113 Mass. 481, where it was held that "a lease of a 'building' conveys the land under the eaves, if that land be owned by the lessor," the Court saying, *per* Endicott, J. at p. 484:

MARTIN, J.A.

"The first question to be determined on this report is, Did the lease include the strip of land ten inches wide under the eaves in the rear of the brick building? Did it pass under the description, 'a certain brick building situated in said Boston, on Milk Street, so called, and numbered five, seven and nine, on said street?' The strip ten inches wide was substantially covered by the eaves of the building, and was owned by the defendants. The well settled rule that the grant of a house carries with it the title to all the land under the house which the grantor owns, extends to all the land covered or occupied by the house itself. As the eaves are a part of the building, the land under them is included in the description, when owned by the grantor. Where land is conveyed, bounded on a house as a monument, the land to the edge of the eaves only passes, that being the extreme part of the building; so where the house itself is granted or demised, the extreme parts of the house are the bounds and limits of the

COURT OF APPEAL

1920

Sept. 15.

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

conveyance, and such title as the grantor has to the land thus occupied by the whole house passes by the grant or demise. *Millett* v. *Fowle* [(1851)], 8 Cush. 150. *Carbrey* v. *Willis* [(1863)], 7 Allen, 364. By the conveyance of a mill, the land under the mill and its overhanging projections passes; *Blake* v. *Clark*, 6 Greenl. 436. We are of opinion, therefore, that all the land under the eaves was included in the lease, and passed as parcel under the description of the 'brick building.'"

I adopt wholly the above expressions as accurately setting out the "well-settled rule" of law upon which the Court founded its judgment.

Two years later a similar question in a still more instructive form arose in the same Court before five of its judges *en banc*, on an appeal from the Superior Court, in *Trinity Church* v. *Boston* (1875), 118 Mass. 164, respecting the exemption from taxation of the plaintiff's church, which was in course of rebuilding after being burnt down, on the point that the unfinished building was nevertheless a "house of religious worship," and the Court, *per* Colt, J., at p. 165 held at follows:

"The statutes, by which 'houses of religious worship' 'when owned by a religious society, or held in trust for the use of religious organizations' are exempted from taxation, have been uniformly assumed or construed to exempt the land upon which such houses are erected. Gen. Sts. c. 11, s. 5. St. 1865, c. 206; *Lowell Meeting-house* v. *Lowell* [(1840)], 1 Met. 538. The purpose of the statute is to relieve such organizations from the burden of taxation upon property devoted to public uses. And as the land upon which the building stands is essential to the existence of the structure, it is fairly to be presumed that it was the intention of the Legislature to include it in the provisions of the statute by the phrase 'houses of religious worship.'"

MARTIN, J.A.

And Mr. Justice Wells, who dissented on the ground that the exemption only applied to a finished building, says, p. 167:

"The exemption then must rest upon the ground that when the house of religious worship shall have been built upon the land, the land as well as the house will be exempt under the designation contained in the statute. It may be conceded that this would be so, just as, in case of deeds, the grant of a mill or a house, by that designation only, would carry by implication the land under and around it which is necessary for its enjoyment."

So the Court was unanimous upon the point that the exemption of a "building" or "house" includes the land "upon which it is erected."

I am glad to be able to say that this view of the meaning of "house" is in accord with that earlier one expressed by the Court of Appeal in *Steele* v. *Midland Railway Co.* (1866), 1

Chy. App. 275, 12 Jur. (N.S.) 218, in which Lord Justice Turner considered the question "as to whether a strip of land in the middle of a six-acre field ought to be considered as part of the plaintiff's house," and said:

"Now, I take the law on that point to be that by the descripion of a 'house' what is necessary for the convenient occupation of the house will pass."

Is there anything so necessary for a house as its foundation?

I have not overlooked the fact that the learned judge below dissents from the latter of the two Massachusetts judgments (the former was not cited to him nor to us), but I am, with every respect, unable to take his view, which is based also upon a case he mentions, *Lefevre* v. *Mayor, &c., of Detroit* (1853), 2 Mich. 586, a careful consideration of which, however, discloses that it turned upon the particular language of the statute, set out at pp. 589-90, differing essentially from that before us, two instances of which are sufficient to mention, *viz.*, that all property, real and personal, was declared to be subject to taxation unless "specially exempted," and that real estate should for the purpose of taxation be construed to include all lands and all buildings and fixtures thereon except in cases otherwise "expressly provided by law," and the Court held that these "special" and "express" provisions "expressly excluded" it from resorting to implication to supply the absence of the requisite "express terms" to include any land under the general term of "house."

MARTIN, J.A.

It has not escaped me, that in said section 159 of 1891, there appears for the first time the disjunctive provision that taxes may be "levied upon land or upon real property or upon improvements" instead of "real estate and improvements thereon" as theretofore, and that a definition is also for the first time given in section 2 of "land," "real property," and "improvements," but not of "building." After careful consideration of the new word, "real property," and the said definitions I am unable to say that they elucidate the question, because "real property" is defined to include "not only the land itself" and everything included in the prior definition of "land," but "also all buildings, structures . . . [and] improvements made to the land," etc., and the definition of "improve-

COURT OF APPEAL

1920

Sept. 15.

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

ments" is simply a repetition of the latter half of the definition of "real property," which includes both land and improvements. There is no essential difference for the purposes of present construction between this new triple expression and the former dual one of "real estate and improvements thereon," and so the question is still begged as to the use and meaning of the new word "building," which properly includes both elements of land and improvements, and it really all comes back to that, therefore it is unprofitable to continue to consider this point the more, because in 1896 the words "real property" disappeared and did not reappear till 1914, Cap. 52, Sec. 197, with a definition in section 2, that they

"mean the ground or soil . . . . . and shall include everything annexed to the soil, such as buildings, structures, fences, and all machinery and fixtures."

The truth is that is is difficult to extract any fixed plan or intention from all this legislative experimentation from year to year, with the important exception that the meaning to be attached to "building" in the first and second exemptions, as already pointed out, has never altered, save temporarily as to "site," since it was introduced in 1891, and still stands undisturbed, as I have already defined it, *viz.*, as including the land upon which it stood to the extent defined in *Sherman* v. *Williams, supra.*

MARTIN, J.A.

No change in this situation was made by the statutes of 1892 and 1893, and the only change made by that of 1896, Cap. 37, Sec. 166, was to leave out the words "or upon real property," which, having regard to what I have already said, had no effect, and thereafter, up till 1911, there was no change, when, by Cap. 170, Sec. 228, the words "and the site thereof" were inserted after the words "every building." Now, if I am right in my view of the meaning of "building," the addition of these words is an augmentation and not a limitation of their former meaning, because "site" is a word of wide significance, importing situation and surroundings, the ordinary and natural meaning of which expands the appurtenance to include an area far larger than the land, sub-soil, covered by a building merely, and may in the variation of circumstances be very spacious in extent and include other complementary buildings, of which

one notorious example of many that might be cited is the Anglican Christ Church Cathedral, occupying a commanding and historic "site" in the city, covering an entire block within four streets. I have been unable to find any judicial definition of its ordinary meaning, but where the Legislature has intended to use it in a narrow sense it has been careful to so define it, as in section 14 of the Metropolis Management and Building Acts Amendment Act, 1878, considered in *Blashill* v. *Chambers* (1884), 14 Q.B.D. 479, 53 L.T. 38, wherein Mr. Justice Grove, after drawing attention to the difference between the narrow statutory definition before him and the usual "more extended" meaning of "general locale," said (p. 485):

"The section is conclusive as shewing that the word 'site' does not mean merely the general locale on which the house is to be built, but something which can be made, formed, and excavated,"

and consequently he restricted the Act to apply to "the space which will necessarily be taken up when the house and walls come to be built." My view of the meaning is, moreover, supported by the remarks in *Steele* v. *Midland Railway Co., supra.* Such being the case, in the absence of any restricted definition, the effect of said section 228 was to confer an increased exemption in favour of "the public worship of God."

The use of such an indefinite and elastic term as "site," varying indefinitely with the circumstances of each religious edifice, gave rise to much difficulty, so in 1913, by section 16 of Cap. 47, the said added words, "and the site thereof," were struck out of the section, and it again stood precisely as it was in 1911, embracing nothing more, but nothing less.

MARTIN, J.A.

The three erroneous views, if I may be permitted to say so, with all due deference and respect for contrary opinions, which the learned judge below, in my opinion, entertained, arose from the omission to begin to consider the matter from the original statute of 1891 and follow it downwards from the foundation instead of backwards from the end of the legislative history; in not distinguishing between the definite sub-soil upon which a building stands and its indefinite "site"; and in overlooking the fact that the addition of the words "and the site thereof" expanded the exemption beyond that of the pre-existing sub-soil.

COURT OF APPEAL

1920

Sept. 15.

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

In arriving at the conclusion which flows from all the foregoing, *viz.*, that the building in question and its sub-soil are exempt from taxation, I have experienced no difficulty or doubt, the matter being clear and simple to me at least, in the light of the legislation, and so I could accept the learned judges principle of the strict construction of statutes against an exemption, and still retain my opinion undisturbed. But I think it desirable to point out that there has been a modification in later years of that principle upon which so much reliance was placed below, and I should prefer to take the view of a more recent and high authority, Lord Russell, C.J., in a case by the Crown to recover penalties under the Stamp Act of 1891, *Attorney-General* v. *Carlton Bank* (1899), 2 Q.B. 158, 68 L.J., Q.B. 788, wherein he said, p. 164:

> "In the course of argument reference was made on both sides to supposed special canons of construction applicable to Revenue Acts. For my part I do not accept that suggestion. I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying, that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely, to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed."

MARTIN, J.A.

And even under the earlier decisions there is the highest authority for holding that a claim for exemption should not be viewed with more strictness than those provisions of the same Act which imposed the general duty; on the contrary, in the House of Lords in *Stockton Railway Company* v. *Barrett* (1844), 11 Cl. & F. 590, Lord Brougham said, pp. 607-8:

> "It must be observed that, *in dubio*, you are always to lean against the construction which imposes a burden on the subject. The meaning of the Legislature to tax him must be clear. . . . . Here, the question is of an exemption or restriction of the duty imposed. The article in question restricts the duty on exported coal to a halfpenny, being 3½*d.* less than the second article allows, making it one-eighth part only of the tax. Therefore we are, according to the books cited, to lean in favour of the construction, where it is doubtful, which, by extending the limits of the port, enlarges the bounds of the exemption from the special taxation."

And see the remarks of Lord Penzance in *Pryce* v. *Monmouthshire Canal and Railway Companies* (1879), 4 App. Cas. 197 at p. 205, 49 L.J., Ex. 130, citing Lord Brougham,

supra. Now, ought not Courts to "lean in favour" of an exemption respecting religion as well as coal?

There remains the objection raised by the defendant that the action is barred by sections 484-5 of the Municipal Act, B.C. Stats. 1914, Cap. 52, in that the cause of action arose more than six months under section 484, or one year under section 485, before the issue of this writ on May 8th, 1919.

In my opinion, these sections have no application to the present circumstances. It may be true that a series of wrongs was committed against the plaintiff, beginning several years ago, when the exempted building was first wrongfully assessed, and that he might then or later have invoked the assistance of the Court below on one or more causes of action which then arose. But on the other hand, it was open to him to take the position that if his property were exempt from taxation, all the defendant's acts from first to last, in the chain of attempted unlawful taxation, were absolute nullities which he could afford to ignore as such because they did not interfere with his use and occupation, the fact being that his Cathedral, though situate within the boundaries of the Corporation of Victoria was in law just as far removed from its fiscal jurisdiction as is the Temple of Heaven in Pekin. This is the effect in principle of the decision of the Privy Council in *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809, 73 L.J., P.C. 120; and of the Supreme Court in *Anderson* v. *South Vancouver* (1911), 16 B.C. 401, 18 W.L.R. 373; 45 S.C.R. 425, 20 W.L.R. 434, leave to appeal being refused by the Privy Council on July 25th, 1912. But when at last the defendant's aggressive acts reached such a critical stage that it was about to put his property up for tax sale on May 28th, 1919, he could in safety no longer ignore such a violation of his rights, which would, by operation of the Land Registry Act, R.S.B.C. 1911, Cap. 127, culminate in the title to his property being indefeasibly vested in the tax-sale purchaser, and therefore he was entitled to at once invoke, as he did, the protection of the Court to preserve those rights by injunction, which is in reality the "cause of action" he now finally and warrantably asserts.

MARTIN, J.A.

COURT OF APPEAL

1920

Sept. 15.

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

In conclusion, and speaking generally, upon the question of exemption, I cite the rule laid down by Lord Chancellor Lyndhurst in the House of Lords in *Stockton Railway Company* v. *Barrett,* above cited. He said at p. 601 (11 Cl. & F.):

> "The terms are large enough to comprehend both [constructions]; and if it was a case of doubt, the rule is, in Acts of this nature, to adopt the construction most beneficial to the public."

Now, can it be said that the legislators of this Province could have any better intentions for the public benefit than to encourage, as their statute has it, "the public worship of God"?

MARTIN, J.A.

Therefore, the result is that the appeal is allowed and judgment entered for the plaintiff, the counterclaim for taxes being dismissed.

McPHILLIPS, J.A.: This appeal brings under review the provisions of the Municipal Act relative to the exemption of "Every building set apart and in use for the public worship of God" (R.S.B.C. 1911, Cap. 170, Sec. 228, B.C. Stats. 1912, Cap. 25, Sec. 34, 1914, Cap. 52, Sec. 197 (1)).

The apparent policy which the language at once indicates, is exemption in favour of all buildings used for the public worship of God, and, of course, churches used for the public worship of God come within this terminology, and the particular church in question in the present action is the St. Andrew's Cathedral, situate on Blanshard Street, in the City of Victoria. The action was commenced to prevent the Corporation of the City of Victoria selling the Cathedral at a municipal tax sale for claimed arrears of taxes imposed against the land upon which the cathedral is situate. The cathedral is a substantial building of stone and brick, with deep footings, and foundations well sunk into the soil, admittedly a building of permanent character, in use for many years, and is still being used for "the public worship of God," but notwithstanding this declared statutory exemption, assessments have been imposed, and because of default in payment of these assessments tax-sale proceedings are being pressed, now restrained by injunction, pending the final determination of this action.

MCPHILLIPS, J.A.

I do not find it necessary to in detail refer to the various provisions of the statute law that have been enacted from time to

time, especially as the judgment of my brother MARTIN makes full reference thereto, a judgment with which I entirely agree, but content myself by saying that throughout there has been a plain statutory policy of exemption of all buildings in which the public worship of God takes place. The fact that in the Revised Statutes of British Columbia, 1911, Cap. 170, Sec. 228 (1) (Municipal Act), the added words "and the site thereof" were inserted, and later struck out (Cap. 47, Sec. 17, 1913), in my opinion in no way supports the contention that "building" cannot be held to carry along with it as exempt the actual land upon which the edifice is situate. In this connection, it is well to remember sections 22 and 23 of the Interpretation Act, R.S.B.C. 1911, Cap. 1, these sections reading as follow:

"22. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was or was considered by the Legislature to have been different from the law as it has become under such Act as so amended.

"23. The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law."

The words "and the site thereof" are very comprehensive in their nature, and the intention of the Legislature might well be to obviate difficulties that would unquestionably arise if the words taken in their fair meaning were held to be somewhat expansive in effect, and cover, as referred to by my brother MARTIN, the historic site surrounding Christ Church Cathedral and analogous cases throughout the Province. (See New English Dictionary, Vol. IX., Part II., Murray, Oxford, at the Clarendon Press, 1919, at p. 113.)

MCPHILLIPS, J.A.

In the present case if the assessment was illegal, it was a void assessment *ab initio,* a wholly invalid assessment, and my view is that it was illegal, and nothing that has occurred can validate that which was a void assessment, and the appellant is unaffected by any provision by way of a statute of limitations as contained in the Municipal Act. (See *The City of London* v. *Watt & Sons* (1893), 22 S.C.R. 300; *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809; 73 L.J., P.C. 120), and the appellant rightly invokes the action of the Court by way of perpetual injunction to restrain the tax sale when the attempt is made to sell property which by the language of the Legisla-

COURT OF APPEAL

1920

Sept. 15.

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

ture, in its plain meaning, is clearly exempt from any assessment or sale under the provisions of the Municipal Act. It was admitted upon the argument at this bar, by counsel for the Corporation of the City of Victoria, the respondent in the appeal, that the land occupied by St. Andrew's Cathedral, except what is relatively an infinitesimal part, is wholly built upon, and it was not contended for that there was any portion assessed that would not be deemed as wholly built upon land and covered by the building, so the whole question narrows itself to whether the assessment is valid or invalid within the meaning of the language "Every building set apart and in use for the public worship of God."

Now, what was the basic purpose and intention of the Legislature in granting this exemption? It could only be immunity from taxation, *i.e.*, the building for "the public worship of God" was not to be subject to the peril of tax-sale proceedings, it was to be wholly exempt and not to be an illusory exemption, it must follow that the actual site is intended to be exempt. An effective meaning must be given to the language of the Legislature, that in other analogous legislation there is found at times specific mention of the lands occupied by the building proves nothing, as the Legislature must be assumed to know the law, and in using the word "building" intended, as the fair reading of the enactment imports, to give an effective exemption. (See as to the meaning of the word "house," *Cole* v. *The West London & Crystal Palace Railway Company* (1859), 27 Beav. 242, the Master of the Rolls at p. 245 : "If Mr. Cole had granted a house called Belmont Lodge . . . . it is clear that the whole of this garden would have passed by such a grant"; also see *Lord Grosvenor* v. *Hampstead Junction Railway Co.* (1857), 1 De G. & J. 446). It is instructive upon this point of what is meant by "building" to note the judgments of Lindley, M.R., Rigby, L.J., and Vaughan Williams, L.J., in *Low* v. *Staines Reservoirs Joint Committee* (1900), 64 J.P. 212-13. There section 92 of the Land Clauses Consolidation Act was under consideration but the decision is based upon the law as to the meaning of "house" in the case of a grant, and the Legislature must be held to have used the word "building," in my opinion, with like meaning.

MCPHILLIPS, J.A.

The plain intention of the Legislature is that "Every building set apart and in use for the public worship of God" shall be withdrawn from the operation of the Municipal Act, and coming specifically to the consideration of the exemption section and subsections (R.S.B.C. 1911, Cap. 170, Sec. 228; B.C. Stats. 1912, Cap. 25, Sec. 34; 1914, Cap. 52, Sec. 197 (1), (3)), it will be seen how anomalous the situation becomes if the words "building" and "hospital" do not include the land upon which the structures are built.

My brother MARTIN has called attention to subsection (3) of section 197, and we find that after referring to "hospital," not itemizing the actual land built upon, there is contained the amplification of the exemption, *viz.*, "and the land adjoining thereto [adjoining the hospital is clearly meant] and actually used therewith, not exceeding twenty acres in case of a public hospital and three acres in case of a private hospital."

We have here a dictionary as indicating the meaning and intention of the Legislature, and it accords with common sense, that "building" is to be held to be comprehensive of the land actually occupied and upholding the building. To admit of tax proceedings that will evade this plain meaning of the Legislature would be a denial of justice, and would be a violation of the plain reading and plain intent of the Legislature, and render nugatory that which is the declared policy of the Legislature. Even were it possible to read the enactment as contended for by the respondent, I might, in passing, say that it would be a barren victory, as with the building exempt attached to the soil, as it is, the injunction would be rightly maintainable, inhibiting any tax-sale proceedings which would affect or imperil the utilization of St. Andrew's Cathedral "for the public worship of God." Any sale thereof would be abortive and of no avail, even if unrestrained by injunction, and the purchaser would find himself absolutely unable to take possession of the cathedral, and in the result it would be nothing but an illusory sale and purchase. The building, being exempt, cannot be sold for taxes, the acquirement by sale for taxes (if that is permissible) of the title to the land occupied by the building cannot, in the face of the statutory enactment conferring

MCPHILLIPS, J.A.

COURT OF APPEAL

1920

Sept. 15.

BISHOP OF VANCOUVER ISLAND v. CITY OF VICTORIA

exemption, give title to the building. What must be done is to give effect to the intention of the Legislature (*Attorney-General* v. *Carlton Bank* (1899), 2 Q.B. 158, 174), and here it is plain that the policy is to exempt from taxation the "building" in use for the public worship of God. The building, of necessity, must rest upon land. Wherein is there evidence of any intention to give other than a complete exemption? It follows that it is reasonable to give "building" the meaning that the law gives it in a grant, *i.e.*, it comprises the land at least upon which it is situate.

In view of the express exemption by statute, it becomes necessary for the respondent to establish that there is express and unambiguous language that will admit, notwithstanding the exemption of the "building," the taxation of the land upon which the "building" rests. This onus has not been discharged (see *Brightman and Company (Limited)* v. *Tate* (1919), 35 T.L.R. 209 at p. 211; Maxwell on Statutes, 5th Ed., 461). There is nothing to indicate the intention to impose a charge upon the land; the implication is all to the contrary (*Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842, 856). Here it is clear that the preservation of the church was in the mind of the Legislature, and what indication is there that the intention of the Legislature is confined to the edifice alone? Rather should it be viewed as comprehensive of the land and in accordance with the accepted and well-known meaning attached to the description if contained in a grant.

MCPHILLIPS, J.A.

The final determination of the present case turns upon what is meant by the language used, *i.e.*, what is its fair meaning? Lord Davey, in *London Corporation* v. *Netherlands Steamboat Company* (1906), A.C. 272 at pp. 268-9, said:

> "A great many authorities have been referred to . . . . so far as they lay down general principles applicable to the construction of statutory enactments exempting particular persons from the payment of rates, they may be usefully consulted. . . . . Ultimately the opinion of your Lordships must be formed on the language and effect of the particular enactments now in question."

(Also see *London (City) Corporation* v. *Associated Newspapers, Limited* (1916), 113 L.T. 1, Lord Parmoor at p. 10, as to cases decided on other Acts.)

In *Associated Newspapers, Limited* v. *City of London Corporation* (1916), 2 A.C. 429, Viscount Haldane at p. 439 said:

"The question must, in each case, depend on the meaning of the particular words used,"

and at p. 444 we find this further language:

"The words are not sufficiently clear to operate by way of repeal of exemptions given in express terms,"

and the present case is one of exemption in express terms and should be given the widest meaning. Undoubtedly, the policy of the Legislature is to encourage the building of churches for the public worship of God and that they should be preserved to the people, admitting at all times of the worship of God therein, without the peril of being affected by taxation.

For the reasons above expressed, I am of the opinion that the appeal should be allowed and that there be a declaration that the building, St. Andrew's Cathedral, was and is exempt from taxation, the building including in its meaning the land upon which the structure rests, and that there be an injunction restraining any tax-sale proceedings. The allowance of the appeal will, of course, also dispose of the counterclaim of the respondent, being a claim for the taxes as a debt due to the Corporation of the City of Victoria. Such a claim is not maintainable. The assessment was illegal and void (see *North Cowichan* v. *Hawthornthwaite* (1917), 24 B.C. 571; *Toronto Railway* v. *Toronto Corporation* (1904), 73 L.J., P.C. 120).

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

Solicitor for appellant: *F. A. McDiarmid.*
Solicitor for respondent: *H. S. Pringle.*

MURPHY, J.

1920

Sept. 14.

ROYAL BANK OF CANADA v. CANADA NATIONAL FIRE INSURANCE COMPANY.

ROYAL BANK OF CANADA v. CANADA NATIONAL FIRE INSURANCE CO.

Company—Execution—Seizure of shares—Service on company—Statute to be strictly complied with—R.S.B.C. 1911, Cap. 79, Secs. 20 and 23; Cap. 113, Secs. 10 and 47—Marginal rules 55(a) and 1016.

The provisions of the Execution Act with relation to the method of carrying out execution against the shares in a company standing in the name of a judgment debtor must be strictly complied with.

Where the Dominion charter of a fire insurance company provides a method of service of process upon it and the company has also appointed an attorney on whom service can be effected in compliance with the provisions of the British Columbia Fire Insurance Act, an execution against shares held by a judgment debtor in the company cannot be carried out without service required by the Execution Act being made on the Company in either of the said methods. The proviso in section 47 of the British Columbia Fire Insurance Act that "nothing herein contained shall render invalid service in any other mode [than on the attorney aforesaid] in which the company may be lawfully served" does not apply as marginal rule 55(a) expressly indicates that its provisions apply only in the absence of any statutory provision regulating service of process.

The admission by letter by the company of receipt of the documents does not prevent its subsequently objecting to the validity of the service, having regard to the necessity of protection of the shareholder.

Statement

ACTION to enforce registration of transfer of fifteen shares in the defendant Company. In 1917, the plaintiff Bank secured judgment against one George Stewart for $5,000, and on issuing a writ of *fi. fa.* on the 25th of October, 1917, the sheriff at Vancouver was instructed to seize, *inter alia,* fifteen fully-paid shares in the Canada National Fire Insurance Company standing in the share register of the Company in the name of George Stewart, said Company having a Dominion charter, with head office at Winnipeg, and an office in Vancouver to carry on the business of fire insurance, in the hands of an agent. The sheriff wrote the Insurance Company in Vancouver notifying it of the seizure of the shares and on the same day delivered a letter and copy of writ to one A. W. Woodard, agent of the Insurance Company at Vancouver for soliciting fire insurance

and writing policies. Correspondence then ensued between the sheriff and the plaintiff's solicitors on the one hand, and the Canada National Fire Insurance Company, Winnipeg and Vancouver, on the other. On the 9th of August, 1918, one J. A. Findlay notified the defendant Company that fourteen of these shares had been transferred to him on the 5th of November, 1915, but the Company refused to transfer the shares on account of the sheriff's notice. On the 18th of December, 1918, the sheriff returned the writ to the registry with the return that the shares had been offered for sale but were not sold owing to lack of bidders. On the 2nd of January, 1919, plaintiff obtained a writ of *venditioni exponas,* and on the 14th of January following sold the shares to Major Tupper for the Royal Bank for $600, and on the 5th of March, 1919, the Insurance Company was notified by the sheriff of the sale. On the 23rd of September, 1919, the sheriff delivered to one F. B. MacArthur, accountant for the Insurance Company at Vancouver, a further notice of the sale, with a copy of the writ of *venditioni exponas,* with certificate of sale indorsed thereon. The plaintiff's solicitors then requested the Insurance Company to transfer the shares, which they refused to do. Tried by MURPHY, J. at Vancouver on the 10th of September, 1920.

Statement

14th September, 1920.

MURPHY, J.: Many points were raised by way of defence, but in my view I need deal with but two, the method of service adopted by the sheriff, and his failure to comply with the provisions of section 23 of the Execution Act. This Act provides a method of execution against shares held by a judgment debtor by constructive as distinguished from actual seizure. In consequence it may well happen that such an execution may be carried out without the judgment debtor even hearing of it before his property has been sold under execution. This being so, I am of opinion that the provisions of the Act relating thereto must be strictly observed. Defendant Company has a Dominion charter, which defines a method whereby legal service can be effected upon it.

Judgment

The British Columbia Fire-insurance Act, Cap. 113, R.S.B.C. 1911, Sec. 10, provides as a condition of obtaining a

MURPHY, J.

1920

Sept. 14.

ROYAL BANK OF CANADA v. CANADA NATIONAL FIRE INSURANCE CO.

licence to do business in British Columbia by a company other than a Provincial company, that such company must appoint an attorney-in-fact, on whom service of legal process against the company may be effected. Defendant Company has complied with this provision, but the sheriff did not serve this attorney, but served an agent whose only authority was to write policies. It is argued that because section 47 of the British Columbia Fire Insurance Act contains a proviso that nothing contained in said Act should render invalid service in any other mode in which the Company may be lawfully served, therefore the service so effected by the sheriff herein is good by virtue of marginal rules 1016 and 55, subsection (*a*).

Said subsection is the rule on which this argument rests. The rule expressly states that its provisions apply only in the absence of any statutory provision regulating service of process. There is, as stated, a statutory provision both by the Dominion and by the Province for service on this Company. True, the Provincial provision preserves other methods of service that are lawful, but there remains the Dominion statutory provision which, if valid, would, in my opinion, bring this case within the qualifying words with which marginal rule 55 opens. There can be no question of the validity of the Dominion provision: *Jordan* v. *McMillan* (1901), 8 B.C. 27. In fact, that case seems to go much further than merely to determine the validity of such a provision. It is argued that the defendant cannot be heard to raise this point, since by letter it admitted receipt of the documents so served. But it is to be remembered, the Court is being requested to *mandamus* the defendant to remove Stewart's name as a shareholder and to substitute some other person as owner on its register of shares. Although Stewart is not before the Court, the order asked for would, if made, affect him, and the Court, I think, must have regard to this situation to the extent of seeing that what the Execution Act requires to be done has been legally done. The action is dismissed.

Judgment

Action dismissed.

EDWARDS v. FAIRVIEW LODGE.

MURPHY, J.

1920

Sept. 24.

EDWARDS v. FAIRVIEW LODGE

Landlord and tenant — Lease — Proviso for re-entry — Leaseholds Act — Words included not in form—Effect of—Covenant—"A private invitation dance" — Interpretation — Extrinsic evidence — Admissibility — R.S.B.C. 1911, Cap. 135, Sec. 8.

A lease contained the following proviso for re-entry "Proviso for re-entry by the said lessor on non-payment of rent, whether lawfully demanded or not, or on non-performance of covenants or seizure or forfeiture of the said term for any of the causes aforesaid" which included words not in the short form given by the Leaseholds Act.

Held, that the additional words did not exclude the application of the Act.

A lessee covenanted not to use, or assign, or sub-let the premises as a "dance hall" or suffer, or permit them to be used for any such purpose or otherwise than for lodge purposes, without consent in writing of the lessor, provided that the lessee or its regular tenants might use them "for a private invitation dance held under their auspices."

Held, that extrinsic evidence was admissible to explain what was understood by a "private invitation dance," and even without the evidence the term could not be held to include a dance where an admission fee was charged, and any of the public vouched for by a member of the lodge could attend apparently whether invited beforehand or not.

Held, further, the proviso for re-entry applied for breach of such covenant under section 8 of the Leaseholds Act and it not being a case of "fraud," "accident," "surprise" or "mistake" the Court would not relieve against the forfeiture.

ACTION by the landlord to recover possession of certain premises leased to the defendant and for a declaration that the lease was determined. A proviso for re-entry in the lease was as follows:

"Proviso for re-entry by the said lessor on non-payment of rent, whether lawfully demanded or not, or on non-performance of covenants, or seizure, or forfeiture of the said term for any of the causes aforesaid." Statement

The lease included the following covenant:

"And the lessee covenants with the said lessor that the said lessee will not use the said premises or any part thereof or sub-let the same as a 'dance hall' or suffer or permit the same to be used for any such purpose or otherwise than for lodge purposes without the consent in writing of the said lessor; provided that nothing in this lease shall debar the lessee or its regular tenants from using the said premises for a private invitation dance held under their auspices."

MURPHY, J.

1920

Sept. 24.

EDWARDS v. FAIRVIEW LODGE

Statement

The plaintiff pleaded that the provision allowing a private invitation dance was only permitted by him to be included in the lease on the distinct understanding that the words "private invitation dance" meant only an occasional dance without entrance fee and not to extend beyond 12 o'clock at night, and to be confined to the lodge membership and sub-tenants; and it was upon the representation of the defendant that this construction should be put upon the words "private invitation dance." The plaintiff used the ground floor as an undertaking establishment. The plaintiff entered into possession on two grounds: (1) non-payment of rent; (2) failure to comply with the covenant as to dancing. The defendant pleaded general denial, counterclaimed, and in the alternative prayed for relief against forfeiture. Tried by MURPHY, J. at Vancouver on the 15th, 16th and 17th of September, 1920.

S. S. Taylor, K.C., and *G. L. Fraser,* for plaintiff.
Burnett and *Hossie,* for defendant.

24th September, 1920.

Judgment

MURPHY, J.: The first point to be determined is whether the proviso for re-entry, worded as it is, falls within the Leaseholds Act or not. The exact wording here used has been decided as bringing the proviso within said statute and, further, as applying to all the covenants whether they occur before or after the proviso: *Crozier* v. *Tabb et al.* (1876), 38 U.C.Q.B. 54. There was, I find, a breach of the covenant to pay rent and consequently under the lease so construed a right to re-enter in the manner employed. There is nothing in the evidence, as I view it, justifying the contention that plaintiff waived his right to payment on the dates called for by the lease. The non-insistence on prompt payment during the months of January and February would not, I think, have this effect if it were a fact, but I accept plaintiff's evidence that he did at least once demand payment when default had been made. Under the law, if this were the only breach, the defendant would, I think, under the circumstances, be entitled to relief against forfeiture: *Huntting* v. *MacAdam* (1908), 13 B.C. 426. But a further breach is alleged of the covenant as to dancing. *In limine* it

must be decided whether extrinsic evidence can be adduced to aid in interpreting this covenant. In my opinion such evidence is admissible. It cannot be said, I think, that the words "a private invitation dance" have a fixed meaning not susceptible of interpretation: *Evans* v. *Pratt* (1842), 3 M. & G. 759; *Mumford* v. *Gething* (1859), 29 L.J., C.P. 105; *Macdonald* v. *Longbottom* (1859), 28 L.J., Q.B. 293; *Bank of New Zealand* v. *Simpson* (1900), 69 L.J., P.C. 22. I accept the plaintiff's evidence as to what was said in reference to the meaning of this clause previous to the execution of the lease, agreeing as it does in the main with the admitted fact that he had Exhibit 1 prepared. If I am right, the evidence shews a breach of the covenant as to dancing. If, however, I am wrong in holding extrinsic evidence to be admissible and the Court is confined in interpreting this covenant exclusively to the language thereof, I still hold there has been a breach. Six or seven dances were held during the period (approximately three months) of defendant's tenancy. On a strictly grammatical construction much can be urged in favour of the interpretation that only one dance (to be given either by the defendant or its tenants either separately or jointly) is to be permitted. If this seems too narrow a view, then I hold "a private invitation dance" cannot be held to include such a dance as was given by the Native Daughters, where an admission fee (whether so called or not) was charged at the door and which any one of the public, vouched for by a member of the lodge, could attend, apparently whether invited beforehand or not. It is said this is a breach of a negative covenant and therefore not within the ambit of the proviso for re-entry, but if I am right in holding this proviso to be operative under the Leaseholds Act, that point is covered by section 8 of said Act. There remains the question whether defendant should be relieved against the forfeiture entailed by this breach. The principles upon which the Court will act are stated in *Barrow* v. *Isaacs* (1890), 60 L.J., Q.B. 179. It is objected that this case, being decided after the passage of the Conveyancing Act, 1881, is not applicable in British Columbia. It, however, discusses the principles of equity apart from that Act, and further, as I

Judgment

MURPHY, J.

1920

Sept. 24.

EDWARDS v. FAIRVIEW LODGE

read said Act, its provisions increase rather than circumscribe the jurisdiction of the Court. The principles so laid down are that equity may intervene in cases of breach occasioned by fraud, accident, surprise or mistake, and then only where complete compensation can be made. It is obvious here, as it was in *Barrow* v. *Isaacs,* that this is not a case of "fraud," "accident" or "surprise." Is it a case of "mistake?" If I am right in admitting extrinsic evidence and in believing the plaintiff, it clearly cannot be for defendant, it must be held to have knowingly allowed the breach for it is responsible under the covenant for the acts of its tenants. If this evidence should be excluded, is the case one of "mistake" in the sense that word is used in equity? I think clearly not. If it is a mistake at all it is one of law in interpreting the legal effect of the covenant. To hold that this is a "mistake" against which equity will relieve would be virtually to destroy the law of contract as applied to leases, even if the qualification that such "mistake" must *bona fide* be made a condition precedent to the exercise of such jurisdiction. I hold, therefore, that the lease has been forfeited and that relief against same cannot be granted. The injunction granted herein is dissolved and plaintiff is entitled to recovery of the premises. The counterclaim is dismissed.

Judgment

Judgment for plaintiff.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

BISHOP OF VANCOUVER ISLAND, THE v. THE CORPORATION OF THE CITY OF VICTORIA (p. 533).—Affirmed by the Judicial Committee of the Privy Council, 1st August, 1921. See (1921), 3 W.W.R. 214.

CAINE v. CORPORATION OF SURREY (p. 321).—Affirmed by Supreme Court of Canada, 2nd November, 1920. See 60 S.C.R. 654; (1921), 2 W.W.R. 273.

DONALD v. JUKES (p. 215).—Affirmed by Supreme Court of Canada, 2nd November, 1920. See 60 S.C.R. 652; (1921), 2 W.W.R. 208; 56 D.L.R. 692.

GREER v. GODSON (p. 175).—Affirmed by Supreme Court of Canada, 8th March, 1920. See 60 S.C.R. 653; (1921), 2 W.W.R. 209; 56 D.L.R. 696.

KIDSTON v. STIRLING & PITCAIRN, LIMITED. STIRLING & PITCAIRN, LIMITED v. KIDSTON (p. 306).—Reversed by Supreme Court of Canada, 23rd November, 1920. See 61 S.C.R. 193; (1921), 1 W.W.R. 162; 55 D.L.R. 366.

STANDARD BANK OF CANADA, THE v. MCCROSSAN (p. 291).—Affirmed by Supreme Court of Canada, 2nd November, 1920. See 60 S.C.R. 655; (1920), 3 W.W.R. 846; 55 D.L.R. 238.

WILLIAM LYALL SHIPBUILDING COMPANY, LIMITED, THE v. VAN HEMELRYCK (p. 196).—Affirmed by the Judicial Committee of the Privy Council, 21st January, 1921. See (1921), 1 A.C. 698; 90 L.J., P.C. 96; 125 L.T. 133; (1921), 1 W.W.R. 926.

WILLIAMS v. RODGERS (p. 161).—Affirmed by Supreme Court of Canada, 23rd November, 1920. See 60 S.C.R. 664; (1921), 2 W.W.R. 185; 56 S.C.R. 691.

Case reported in 27 B.C., and since the issue of that volume appealed to the Supreme Court of Canada:

WELLINGTON COLLIERY COMPANY, LIMITED AND CANADIAN COLLIERIES (DUNSMUIR), LIMITED v. PACIFIC COAST COAL MINES, LIMITED (p. 404). —Affirmed by Supreme Court of Canada, 8th March, 1920. See 60 S.C.R. 651; (1921), 2 W.W.R. 363; 56 D.L.R. 697.

INDEX.

CONTRACT—*Continued.*

the market was rising, from making any request for repurchase, and having endeavoured to throw the loss on the defendants after the armistice, the appeal should be dismissed. *Held*, on appeal, reversing the decision of CLEMENT, J. (MARTIN and EBERTS, JJ.A. dissenting), that after the expiration of the month both parties continued on a mutual understanding to endeavour to obtain space which was an essential feature of the contract and there was an implied extension of the time in which repurchase could be demanded and there was no unreasonable delay in exercising it. MITSUI & COMPANY LIMITED v. BROWN *et al.* - - - - - - - - **516**

8.——*Sale of Manchurian white beans—Sale by description — Sample subsequently asked for by purchaser — Bank guarantee for purchase price — Breach — Measure of damages.*] The defendants entered into contracts with the plaintiffs to supply "Manchurian white beans hand picked." The defendants in Vancouver were to have the beans brought from Japan and forward them to the plaintiffs in Montreal. Subsequently the plaintiffs asked for a large sample for sale purposes, and the defendants asked for a bank guarantee in Vancouver for the full payment of beans upon shipment from Vancouver, to which plaintiffs replied that the sample must first be obtained. Upon the arrival of a shipment from Japan the defendants would not forward until a bank guarantee for the shipment was obtained, but the plaintiffs demanded that proof of the beans being of Manchurian origin should first be provided their agents in Vancouver; this was never done. The defendants then sold the beans to other parties. The plaintiffs succeeded in an action for damages for breach of contract. *Held*, on appeal, affirming the decision of MURPHY, J. (MARTIN, J.A. dissenting), that the sale was by description, the sample subsequently furnished being for sale purposes and not operating in the way of forming a new contract. The contract provided that the beans were to be "Manchurian white beans hand picked." The burden was on the defendants to establish this fact, and having failed in this, they were liable in damages for the difference between the market price of such beans and the contract price at the time of the breach. RADOVSKY *et al.* v. CREEDEN & AVERY, LIMITED. - - - - - - - - - - **331**

9.——*Sale of oil — To be received in monthly instalments during three years—*

CONTRACT—*Continued.*

"In fairly equal monthly quantities" as required by purchaser—Monthly deliveries less than amount contracted for—Right of purchaser to balance at end of term.] A company contracted with an oil company for the purchase of 80,000 barrels (35 gallons each) of fuel-oil for its steamers at a fixed price, the oil to be delivered between the 1st of March, 1915, and the 1st of March, 1918, and to be made "in fairly equal monthly quantities as the purchaser's business should require and as it in writing should order." By the end of January, 1918 (one month from the close of the contract period) the purchaser had only requested and received deliveries aggregating slightly less than two-thirds of the quantity contracted for. The market price of oil having increased the purchaser made provision for storage beyond its ordinary requirements and notified the vendor to deliver 30,000 barrels, the balance of the 80,000 barrels contracted for and remaining undelivered. *Held*, that the systematic request and receipt each month by the navigation company of a much smaller amount than could have been demanded would not only create an inference that any right to further deliveries beyond the monthly amount so established (or at any rate not in excess of 2,222 barrels which is the monthly delivery required during the contract period to exhaust the 80,000 barrels) was abandoned but would be in accordance with the true intent of the parties under the contract. The purchaser is not entitled to delivery of the balance of the 80,000 barrels nor to continue receiving deliveries at the previous rate per month beyond the contract period in order to receive the full amount contracted for. *Tyers* v. *Rosedale and Ferryhill Iron Co.* (1875), L.R. 10 Ex. 195 distinguished. TERMINAL STEAM NAVIGATION COMPANY, LIMITED v. IMPERIAL OIL LIMITED. - - - - - - - - - **393**

10.——*Shares in company—Property of two persons — Sale by agent — Judgment obtained after action against one owner—Right of action against other owner with whom contract was made.*] R., living in British Columbia, and H., living in New York, owned all the shares in a mining company that they contemplated selling. R. wrote the plaintiff "referring to our conversation about your having a purchaser for the Hidden Creek Copper property. I will give you a commission providing your purchaser takes up the property, of not to exceed $10,000," etc., and later H. wrote R., "referring to our conversation about the

defendants under the Settlers' Rights Act is null and void in so far as it purports to grant the minerals, for an injunction to restrain the defendants from mining the property, for wrongful trespass, an inquiry as to the coal extracted and its value, and damages. The defendant, the Granby Consolidated, by *mesne* conveyances, obtained title under said Crown grant. Pursuant to an order of the Court the plaintiff delivered interrogatories to the defendant Company: (1), as to whether the officer of the defendant company had made necessary inquiries so as to be in a position to answer; (2), as to the agreement between the Company and an intermediate purchaser under the Crown grant; (3), as to the *status* of a certain counsel appearing on behalf of a person not a party to the action at the inquiry before the Governor in Council as to the issue of the Crown grant in question and as to an alleged agreement between said third party and the defendant Company as to said lands; and (4), full particulars of the coal mined from said lands by the defendant Company. *Held*, on appeal (reversing the decision of GREGORY, J.), that the interrogatories were irrelevant to the issue in the action and oppressive and that they ought not to be allowed. *Per* MCPHILLIPS, J.A.: When the parties elect to go to trial pending a judgment in an interlocutory appeal, the appeal should be struck out, as a decision would be abortive. ESQUIMALT & NANAIMO RAILWAY COMPANY v. WILSON AND MCKENZIE, THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA AND THE GRANBY CONSOLIDATED MINING, SMELTING & POWER COMPANY LIMITED. - - - - - - - - - **271**

14.——*Judgment in default of defence —Application to enter conditional appearance.*] After judgment had been entered in default of defence and a previous application to set aside the writ and other proceedings had been dismissed on the ground that the defendant not having entered an appearance, had no *status* to attack the writ, a further application to enter a conditional appearance was granted. VICTORIA (B.C.) LAND INVESTMENT TRUST, LIMITED v. WHITE. (No. 2). - - - - - - - **21**

15.——*Jurisdiction — Not shewn on plaint.* - - - - - - - - - - **387**

See COUNTY COURT. 2.

16.——*Libel — Indorsement on writ — Statement of claim served at same time— Interlocutory judgment — Motion to set aside — Irregularity — Marginal rules 18a, 105 and 225.*] In an action for libel where the indorsement on the writ does not comply with marginal rule 18a, the service of a statement of claim at the same time as the writ does not cure the defect and enable the plaintiff to sign interlocutory judgment after eight days in default of appearance under rule 105. Where interlocutory judgment is so signed the defendant is entitled to have it set aside *ex debito justitiæ* without an affidavit of merits. CAMPBELL v. SHAW. - - - - - - - - - - **77**

17.——*Order for examination de bene esse—Clause included providing for application to rescind—Right of appeal—Evidence — De bene esse — Discretion of judge — Appeal—Marginal rule 487.*] The defendant obtained an order to examine a witness *de bene esse* which included a clause "that the plaintiff may at any time not less than two weeks before the date of trial apply to discharge this order." *Held*, that there was the right of appeal from the order without first resorting to the Court below under said clause. In an action by the liquidator attacking the right of the Bank to hold certain securities deposited with or pledged to the Bank by the Company prior to its winding-up, an order was made allowing the Bank to examine *de bene esse* its superintendent of branches while temporarily in British Columbia, but having his residence in Montreal, he having been the local manager at the time the facts at issue arose. *Held*, on appeal (affirming the order of MURPHY, J.), that the judge had power to make the order under marginal rule 487 and there was no ground upon which the Court could interfere with his discretion as exercised. DOMINION TRUST COMPANY AND GWYNN v. ROYAL BANK OF CANADA. - **260**

18.——*Order for service ex juris—Judgment—Application to set aside order and all subsequent proceedings — Assignee of judgment—Added as party.*] On an application to set aside an order for service *ex juris* and the writ of summons and all subsequent proceedings, it appeared the order was for service upon the defendant in England but subsequently service was effected in California. Judgment was entered in default of appearance and was subsequently assigned to a third party. *Held*, that the Court should endeavour to have the rights of the parties considered and determined and not have them thwarted or affected by acts or slips of counsel or solicitors and an order should be made that

SALE OF GOODS — *Automobile—Delivery to be "as soon as possible" — Failure to deliver — Repudiation.*] The plaintiff who was a chauffeur, purchased an automobile from the defendants which he used as a taxi. Trouble almost immediately arose and the car was repaired by the defendant on a number of occasions. The plaintiff then contracted with the defendant to purchase a new car and delivered his old car to the defendant as part of the purchase-price, the new car to be ordered from the factory and delivered "as soon as possible," three weeks being mentioned as about the time required for delivery. In the meantime the plaintiff was without a car although the defendant had offered him the use of another car which he refused. More than six weeks elapsed before the new car was on hand for delivery, and the plaintiff then refused to accept it, the old car in the meantime having been sold by the defendant. An action to recover the value of the old car was dismissed. *Held*, on appeal, reversing the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that considering the urgency and the inadequate efforts of the defendant to deliver the car sooner, the delay justified the plaintiff in repudiating the contract upon the expiration of the three weeks, but he was not entitled to damages for loss of profits in the meantime. KEAYS v. SHELL GARAGE LIMITED. - - - - - - - - - - - - - **527**

2.——*Bulk Sales Act — Creditors—Sale to—Set-off—Transaction within section 3—Waiver—B.C. Stats. 1913, Cap. 65, Secs. 3 and 4.*] A creditor purchased the stock of goods of a debtor on the terms of paying certain claims against the debtor and setting off its own claim against the purchase price. After taking stock it was found the creditor's claim with the amount paid on claims exceeded the purchase price. In an action by a creditor who had not been paid to set aside the sale:—*Held*, that the transaction was within section 3 of the Bulk Sales Act and the sale was void as against unsatisfied creditors. Waiver from creditors under section 4 in order to be effective must be obtained after receipt of the statutory declaration provided for in the Act and before the sale is carried out. PAISLEY v. LEESON *et al.* - - - - - - - - - **18**

3.——*Execution—Laws Declaratory Act —Purchaser—Rights of—Burden of proof*

SALE OF GOODS—*Continued.*

—R.S.B.C. 1911, Cap. 133, Sec. 2(24.)] The defendant purchased goods subsequent to the issue of execution by a judgment creditor of the vendor and moved them to his warehouse where they were later seized under the execution. The purchase price was $400 and there was evidence of their being worth nearly $2,000 on a forced sale. The sheriff had previously to the sale seized other goods of the vendor and advertised them for sale in two newspapers. It was held by the trial judge that the burden was on the defendant to shew he was a *bona fide* purchaser of the goods without notice, that on the evidence he had not satisfied that onus and the plaintiff should succeed. *Held*, on appeal, MCPHILLIPS, J.A. dissenting, that before the purchaser can invoke the protection of section 2(24) of the Laws Declaratory Act he must prove that the sale was *bona fide* and for valuable consideration, and that on the evidence the finding of the trial judge should be upheld. ISLAND AMUSEMENT COMPANY, LIMITED v. PARKER & KIPPEN AND PRICE. - - - - - **43**

SALE OF LAND—*Misrepresentation—Rescission — Improvements made by purchaser after entry — Acts of ownership.*] The plaintiff purchased a house, made a substantial payment on account of the purchase price, entered into possession and made improvements, adding on a kitchen. She then brought action for rescission, on the grounds of misrepresentation as to the construction of the house, as to the dampness of the locality, and other matters. It was held by the trial judge that there was no fraud and the action should be dismissed, as the representations made were not material and the plaintiff exercised acts of ownership while in possession. *Held*, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that the purchaser is not entitled to rescission, as she changed the character of the property by erecting an addition and could not restore the subject-matter of the contract. *Per* MARTIN, J.A.: That a case for rescission was established. The question of *restitutio in integrum* is one of degree, varying with the circumstances. The vendor was not prejudiced by the addition, as the value of the premises was increased and restoration could be substantially carried out. *Per* MCPHILLIPS, J.A.: That it was not a case for rescission, owing to the acts of the purchaser, but fraud was established and a new trial should be had to assess damages. The Court being equally divided, the appeal was dismissed. CUSICK v. TAYLOR AND TAYLOR. - - - **241**

SOLICITORS—*Dismissal of action—Costs—Conduct of plaintiff's solicitor—Liability for costs of action.*] The conduct of the plaintiff's solicitor in continuing an action after an opportunity of accepting a fair offer of settlement even where the case appears to be a weak one is not sufficient ground to render him personally liable for the costs of the action. There must be clear evidence of misconduct or default on the part of the solicitor going further than error of judgment or miscalculation as to the chances of success. BELL v. GREEN. *In re* MARTIN. - - - - - - - - **462**

STATUTE—*Penal—Construction—Intention of the Legislature to be affectuated.*] The chief object in construing penal as well as other statutes is to ascertain the intention of the Legislature. A subsection relating only to penalties after conviction under a previous section of the Act, after referring to convictions under said previous section in the case of a person, proceeded with the words "and if the offender convicted under this subsection be a corporation, it shall be liable," etc. *Held*, that the words "under this subsection" could be read "under this section" meaning the previous section dealt with, or could be treated as obvious surplusage. *McGregor* v. *Canadian Consolidated Mines* (1907), 12 B.C. 373 applied. WHIMSTER AND OWEN v. DRAGONI. WHIMSTER AND OWEN v. MILLS. WHIMSTER AND OWEN v. NORTHERN CLUB & CAFE COMPANY, LIMITED. - - - - - - - - - **132**

2.——*Municipal Act — Crown grant — Right to "resume" reserved for road purposes—Exceptions—Land for more convenient occupation of buildings — B.C. Stats. 1914, Cap. 52, Sec. 325; 1915, Cap. 46, Sec. 11; 1916, Cap. 44, Sec. 16.*] Upon the defendant Corporation being about to resume portions of the plaintiff's lands under section 325 of the Municipal Act, which contains a proviso "that no such resumption shall be made of any lands on which any buildings may be erected or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings," the plaintiff brought action and obtained a perpetual injunction restraining the defendant from entering upon the lands containing an outbuilding with adjoining garden and orchard. *Held*, on appeal, affirming the decision of CLEMENT, J. (MCPHILLIPS, J.A. dissenting), that in determining whether land is in use "for the more convenient occupation" of a building, regard must be had to the uses to which a building is put. A driveway is for the more convenient occupation of a house, and so is a barnyard for a stable or barn. The question is one of fact whether it was so used in each case, and an element to be considered is whether the land is withdrawn from the larger purposes of the farm, such as growing of grain and depasturing of cattle, etc., and kept for use in connection with house and farm buildings. [Affirmed by Supreme Court of Canada.] CAINE v. THE CORPORATION OF THE DISTRICT OF SURREY, STEVENSON AND COTTON. - **321**