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 CITED
A TABLE OF THE CASES ARGUED

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 XXIX.

VICTORIA, B. C.
PRINTED BY THE COLONIST PRINTING AND PUBLISHING COMPANY, Limited
1922.

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.

MEMORANDA

On the 17th of October, 1921, John Charles McIntosh, Barrister-at-Law, was appointed Junior Judge of the County Court of Nanaimo, and a Local Judge of the Supreme Court of British Columbia.

On the 3rd of May, 1922, the Honourable William Henry Pope Clement, a Judge of the Supreme Court of British Columbia, died at the City of Vancouver.

On the 8th of May, 1922, David Alexander McDonald, one of His Majesty's Counsel learned in the law, was appointed a Judge of the Supreme Court of British Columbia in the room and stead of the Honourable William Henry Pope Clement, deceased.

TABLE OF CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

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BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

EASTERN TOWNSHIPS INVESTMENT COMPANY LIMITED v. McLENNAN.

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Promissory note—Action to enforce payment—Denial of signature—Weight of evidence—Surrounding circumstances—Evidence of admission.

In an action on a promissory note the defendant denied having signed it. On the evidence the defendant, who was poor and in bad health three years previously to the date of the note, borrowed small sums from the plaintiff Company for which he gave notes, these notes being renewed from time to time and were gradually paid off. At this time the defendant had personal friends who were interested in a liquor company, one of them being manager. The company was badly managed and was threatened with liquidation. The defendant suggested to the manager of the plaintiff Company that it would be a good buy to purchase the liquor company and shortly afterwards he did so. Some two years later, owing to the prohibition laws, the liquor company went out of business and shortly after the manager of the plaintiff Company having trouble with his company absconded with his secretary. Two of the directors of the plaintiff Company then took charge and the defendant was asked to appear at its solicitors' offices with reference to certain promissory notes. On going to the solicitors' offices (there being four present besides the defendant, *i.e.*, the two directors and two solicitors) the small notes were mentioned and admitted by the defendant. Then he was told the books of the Company shewed he had given the Company a note for $10,000 that had been renewed a number of times, the last renewal

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being for $8,569, the money advanced having been used in payment for the liquor company. The defendant swore he promptly denied ever having signed such a note. The other four present swore they were under the impression that the defendant said it was an accommodation note and one of the solicitors present made a memorandum at the time of the notes and opposite where he wrote "note for $10,000" was written the word "accommodation." None of the four, however, would swear positively the defendant said it was an "accommodation note," their evidence on the whole being somewhat uncertain as to their recollection of the conversation, the note itself not being produced as it was not found up to that time. The final note for $8,569 was produced at the trial with a cheque made by the Company in favour of Dr. McLennan for $10,000 and indorsed by him, but the original note for $10,000 and the intervening renewals were never found. One expert on handwriting was called who was of opinion the defendant's signatures were genuine. The manager of the plaintiff Company and his secretary were not called or examined on commission. The learned trial judge had the several signatures enlarged and concluded the signature on the note and cheque in question was a forgery.

Held, on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that in face of the fact that the evidence of the former manager of the plaintiff Company and his secretary was not obtained and of the other surrounding circumstances the evidence of the two directors and the two solicitors of the defendant's admissions was too vague and uncertain to override the direct and positive denial of the defendant and the appeal should be dismissed.

APPEAL by plaintiff from the decision of MORRISON, J. of the 5th of November, 1919, dismissing an action against the defendant as maker of a promissory note dated the 2nd of January, 1915, for $8,569 principal, and $5,419.20 interest, the note bearing interest at 20 per cent. per annum. The defendant denied having signed the note. The facts were that in 1912, Dr. McLennan, requiring money, borrowed small sums from the plaintiff Company for which promissory notes were given. These notes were renewed from time to time and were gradually paid off, the largest amount owing at any time being $750. One Dresser was manager of the plaintiff Company and through these transactions became friendly to Dr. McLennan. At this time one Swanstead who lived in England and a friend of Dr. McLennan asked the doctor to keep a friendly eye on his daughter, who was the wife of one King, manager and part owner of the Vancouver Wine & Spirit Company. King was addicted to liquor and the Wine Com-

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pany was in a bad way, as the Vancouver Brewery and the Hudson's Bay Company were threatening its foreclosure. On one occasion when Dr. McLennan was interviewing Dresser as to life insurance, the doctor suggested to him that he should buy out the Vancouver Wine & Spirit Company. After consideration Dresser decided to do so, and he bought out the company for $33,000 in March, 1914. The business was carried on by Dresser until the prohibition laws came into force, when it was wound up, and shortly afterwards Dresser had trouble with the plaintiff Company and absconded in February, 1916. It appeared from the books of the Company that a promissory note dated the 17th of March, 1914, payable in one month for $10,000, signed by Dr. McLennan, had been received and had been renewed from month to month with the interest (20 per cent. per annum) added. In June, 1914, $2,000 was paid off and the final note, dated the 2nd of January, 1915, for $8,569 was the only one produced in evidence, the original and other renewals having disappeared. A cheque for $10,000 signed by Dresser as managing director of the plaintiff Company and by Miss E. J. Scott as secretary, payable to P. A. McLennan in trust, dated the 17th of March, 1914, drawn on the Bank of Nova Scotia and indorsed by P. A. McLennan in trust was filed in evidence. Upon Dresser absconding the affairs of the company were taken over by the directors. The promissory note of the 2nd of January, 1915, and the cheque on which Dr. McLennan's name was indorsed were found, and Dr. McLennan was called to the plaintiff's solicitors' offices where he was questioned as to the notes on which his name appeared. Besides Dr. McLennan, two of the directors of the plaintiff Company were present and Messrs. Bourne and DesBrisay, solicitors. Dr. McLennan admitted his liability to the smaller notes produced. Then it was brought to his attention that the books shewed the Company held a note of his for over $8,000, there having been an original liability for $10,000, $2,000 of which was paid off, the promissory note and the cheque not being on hand at this time, they having been found later. He states in evidence that he denied ever having signed any such notes, that he was a poor man at the time and it would have been ridiculous to accept his name for such an

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amount. The recollection of the four others present was that it had been mentioned the large note was "accommodation" and although none of them could state positively that Dr. McLennan had said it was an "accommodation note" they were under the impression he had done so and Mr. DesBrisay during the meeting took down a memorandum of the notes referred to, which included the words and figures "$8,569 in connection with the Vancouver Wine & Spirit Company—never received anything—accommodation." Dresser and Miss Scott had both left the Province and were not called as witnesses or examined on commission. The original note for $10,000 and the intervening renewals were never found. There was evidence of one witness as an expert on handwriting called by the plaintiff who was of opinion that Dr. McLennan's signature on the note and on the cheque was genuine.

Craig, K.C., and *W. B. Cochrane,* for plaintiff.
J. H. Senkler, K.C., for defendant.

5th November, 1919.

MORRISON, J.: This is an action to recover the sum of $13,988.20 alleged to be due with interest at 20 per cent. on a note for $8,569, dated January 2nd, 1915, which sum, it is alleged, was the balance of one for $10,000 at the same rate of interest previously made by the defendant in favour of the plaintiff. The defendant denies having made the note and claims that the signature alleged to be his is a forgery.

MORRISON, J.

At the trial the defendant was contradicted by four other witnesses as to what occurred at a conference between him and those witnesses as to the above note. In view of the opinion I hold, as to the genuineness of the signature in question, it is not necessary for me to pronounce upon the credibility of that part of the evidence. Where one is confronted with the question of forgery or no forgery, it does not help to know whether the man whose name is alleged to have been forged is telling the truth or not about the transaction out of which the controversy arose. His version may be an entire figment of his imagination and yet the signature may not be his. At the trial, the plaintiff called a witness as to handwriting, who swore

that the signature was the genuine signature of the defendant. I was not further aided by an enlargement of the writings but left to use my own powers of observation. However, with the consent of counsel, I have had the signatures, admitted to be the defendant's, enlarged together with the disputed one, and I now have no hesitation in finding that the indorsement in question is not in the handwriting of the defendant.

As no trial, designed as this one was, to try out a question of fact, would be turned into a problem play, I shall not attempt to fathom the mysteries of the defendant's business relations with the plaintiff Company and its absconding manager.

The action is therefore dismissed.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 12th and 13th of April, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Craig, K.C., for appellant: The whole question in the case is whether Dr. McLennan signed the note, and my submission is that the evidence of the four men present in the solicitors' office when Dr. McLennan was asked as to the promissory note in question is sufficient to find that he admitted having signed the note. The signature should be examined and the evidence of the expert who considers the signature genuine should be accepted. The learned judge was in error in having the signatures enlarged and relying on his own view of them.

Argument

S. S. Taylor, K.C. (*J. H. Senkler, K.C.*, with him), for respondent: The learned judge below has decided in our favour and it is a question of fact to be decided on the evidence. The burden is on them to shew Dr. McLennan was interested and in this they have failed. Counsel for the plaintiff only has a theory as to how the transaction took place, and he sets this up against the doctor's oath. If it had been a genuine signature the manager would have submitted it to his directors. The director who took charge after Dresser absconded admitted to Dr. McLennan beforehand that he knew nothing about the transaction and looked upon it as one of Dresser's tricks.

Craig, in reply.

Cur. adv. vult.

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

The learned trial judge decided the case on a comparison of the disputed signatures with the genuine signature of the defendant, and expressed no opinion with respect to the demeanour and conduct of the defendant in the witness box. I am, therefore, without the assistance of any statement from the learned judge with respect to the impression made upon his mind by the witnesses in the case.

The defendant has emphatically denied that the signatures to the notes sued on are his. As against his positive testimony there is certain circumstantial evidence entitled to careful consideration; there is the expert evidence with regard to the disputed signatures; there is also the evidence of Mr. DesBrisay, founded on a memorandum which he made at an interview between the defendant and the officers of the plaintiff Company, which would indicate that defendant did not then take the stand he took at the trial. As against this evidence and apart from the defendant's denial of the signatures, there are matters in his favour which are entitled to weight in arriving at a conclusion in the case.

It is common ground that one Dresser, for whose accommodation the notes in question were made, if they were made at all, was a dishonest man. At the time of the transactions in question he was an officer of the plaintiff Company. His evidence and the evidence of a Miss Scott, who was his stenographer or clerk at the time, would no doubt have been of assistance. I think it was incumbent upon the plaintiff to have procured the evidence of these two persons, or at least that of Miss Scott, or to have shewn that their testimony could not have been procured. They have not done this satisfactorily. With respect to Mr. DesBrisay's evidence, it is to be observed that the notes were not produced at the interview in question, and it is also to be observed that the other parties present were not able to substantially corroborate the evidence of Mr. DesBrisay. In saying this I do not mean to reflect for a moment on Mr. DesBrisay's veracity, but his memorandum is quite consistent with mistake or the drawing of a wrong inference. The question then arises, having regard to all the circumstances above

referred to, can it be fairly said that they over-bear the direct and positive evidence of the defendant? I am unable to say that the result in the Court below was wrong, and therefore would dismiss the appeal.

MARTIN, J.A. would dismiss the appeal.

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

The recollection of Bourne, Akhurst and Gordon as to what transpired at the meeting in Bourne's office with the defendant is by no means clear, and they candidly admit it in their evidence. It is at most an impression as to what was said from a none too clear recollection. DesBrisay's evidence is somewhat stronger, aided as it is by reference to notes taken by him at the time. While in no way reflecting upon the honesty of purpose with which those notes were indited, they are cryptic and do not purport to set out the conversation in general and there is always the possibility of a misconception of what is said or a word used that may not have been the word uttered. I might cite my own case where, in delivering oral judgments, stenographers have inadvertently put in my mouth words I feel certain I have not used. In addition to the above testimony we have that of Sprott, who has on several occasions given testimony as an expert on handwriting, and in his opinion, no doubt honestly given, the signature to the note sued on in this action is the signature of the defendant. Expert testimony of this character has its value but it has also its danger—a forgery cleverly executed may lead to the conclusion being reached by an expert that the signature is genuine and an innocent person may suffer, so that one should look carefully into all the surrounding circumstances before giving too much weight to such testimony.

Now, what do we find in answer to all this evidence? We have first the absolute and positive denial of the defendant that he ever signed the $10,000 note or the $8,000 odd note sued upon, which purports to be a renewal thereof. We have also his positive denial that he ever stated that the note was an accommodation or that he ever in any way obligated himself in con-

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nection with the deal for which the note is said to have been given.

The defendant is a well-known practising physician in Vancouver, whose reputation for honesty and integrity would not, I venture to say, be questioned. This fact must not, of course, determine me in coming to the conclusions I do. But let us examine other facts which present themselves. We find the $10,000 note of which the note sued upon is said to be a renewal, has never to the present been produced or accounted for, nor any of the intermediate renewal notes between. This might be answered by the statement that the original note and each renewal preceding the last were given back to the defendant on the different occasions when new renewals were taken, but there is no evidence of this and it is contrary to the practice adopted by the plaintiff in dealing with loans made the defendant by the plaintiff, in which the original notes and renewals thereof were retained by the plaintiff until the indebtedness was wiped out. Further, it is not shewn that any of the proceeds of the cheque for which the $10,000 note was given reached the defendant, in fact the evidence is that it did not.

Again, we find that for about two years after the meeting in Bourne's office, no demand for payment of any part of this large sum has been made on the defendant, and the only suggestion plaintiff offers is that the defendant was during that time paying off the small notes about which there was no dispute. It may be from its point of view that it was an accommodation note that it was being lenient with the defendant, but again, even in cases where it was admittedly an accommodation, one would expect to find in that period of time some further conversation between the parties or some suggestion as to arrangements for payment.

The lack of evidence I have just pointed to would lead to the suggestion, and in fact such suggestion is made by counsel for plaintiff, that the defendant was a party to a scheme by which Dresser, the plaintiff's manager, was enabled by the use of defendant's name, to obtain a loan from his company which he could not otherwise obtain; in effect, was a party to a dishonest scheme. In order to find for the plaintiff, I would

have to conclude that the defendant has perjured himself, something which I am certainly not prepared to do, and in reference to the scheme suggested, that the transaction was a dishonest one, I would have to consider the reasonableness of Dr. McLennan binding himself to such a transaction without any interest to himself and in the interest of a mere acquaintance, a conclusion which I also feel I cannot accept.

Another fact which it is proper to consider is, that Dresser was dismissed from his position with the Company by reason of the fact that he had diverted large sums of the Company's moneys to his own use entirely outside the present alleged transaction, and that he left the country shortly after his dismissal and is still absent therefrom, nor does the plaintiff appear to have made any great effort to procure him for the trial.

MCPHILLIPS, J.A.: I cannot say that the evidence adduced at the trial is as satisfactory and complete as it might have been, and the learned judge was left to decide the case upon material far short of that which one would ordinarily expect to be forthcoming. No doubt the circumstances surrounding the transaction and the conduct of the managing director of the appellant complicated matters greatly, yet there was a purchase of the business of the Vancouver Wine & Spirit Company by the then managing director of the appellant (Dresser), which involved the payment of over $30,000, and it is apparent that the respondent was the one who suggested that Dresser should become the purchaser, the respondent being interested in a friendly way, to preserve something out of the business for his patient, the wife of King, one of the proprietors of the company, and also desiring to protect Swanstead (the father of Mrs. King) in the matter. The respondent is a physician, not a business man; it is evident he reposed trust in Dresser and, further, it is to be remembered that the respondent held a power of attorney from King (King being ill and incapacitated from doing business) and was in a position to dispose of King's interest in the business and, in fact, did carry out the sale. Now it followed that there would have to be a good deal of financing on the part of Dresser to carry the transaction through, and everything points to that being done which was

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done. Amongst other ways to obtain the necessary money, $10,000 was borrowed from the appellant and the way that was done was by an advance upon the promissory note of the respondent. I can quite believe that the respondent did not appreciate really the possible result of all that was done, or remember or particularly observe the different documents and papers Dresser put before him to sign, he fully relied no doubt upon Dresser that all was formality and that he was not undertaking any personal liability, nevertheless the balance of probability is that he really did sign the promissory note sued upon, as he signed other papers and documents in the carrying out of the transaction, not appreciating in a business way what he did sign.

It is not improbable, as I view it, upon the facts of this case that the cheque for $10,000 was indorsed by the respondent, "P. A. McLennan, in trust," and that the promissory note for $8,569 was also signed by the respondent.

The cheque would appear to have been cashed in due course, following the indorsement thereof, it being payable to "P. A. McLennan, in trust" by the bank upon which it was drawn, namely, the Bank of Nova Scotia, being paid in upon the further indorsement of Messrs. McKay & O'Brien, solicitors, acting in connection with the transfer of the business purchased, and it is to be observed that the promissory note also passed to the Bank of Nova Scotia, as the impressed stamp of the bank thereon shews. Now all this would seem to be regular and in ordinary course and *prima facie* rebuts all irregularity, *i.e.*, that the cheque and promissory note issued in due course and were dealt with in due course. It is clear that the funds of the appellant were advanced upon the faith of a promissory note of the respondent for $10,000, now represented by the renewal note sued upon covering the balance due.

MCPHILLIPS, J.A.

As the appeal was presented and as I understood counsel at the bar on both sides, the sole question for decision is, did the respondent sign the note sued upon? If he did, it is conceded that the judgment should be for the appellant. To determine this question in accordance with our jurisprudence there are in all four methods of proof, any one of which may be conclusive, *i.e.*:

"1. By admission. 2. By calling the attesting witness, if there is one. 3. By calling any person who actually saw the writing or signing, or the party who wrote it, or signed it himself. 4. By calling a witness who has acquired a knowledge of the writing in question, by having seen the person write at some other time, even though only once, or by having had correspondence with such person which has been acted upon, or who is otherwise acquainted with the handwriting. 5. By comparison of the writing in question with any writing proved to the satisfaction of the judge to be genuine":

Indermaur's Common Law, 12th Ed., 498; Phipson's Evidence, 5th Ed., 488.

In the present case the promissory note, a negotiable security being sued upon, received and held in due course by the appellant, it remained for the respondent to prove that it was not his promissory note. To establish this defence the respondent has undertaken to say that the signature to the promissory note is not his signature, and has also sworn that the indorsement on the cheque, "P. A. McLennan, in trust," is not his indorsement. The following evidence was put in at the trial by the appellant, being discovery evidence of the respondent, which goes to shew the surrounding facts and attendant circumstances in connection with the sale and purchase of the business: [The learned judge here set out the evidence at length and continued].

Four witnesses for the appellant agreed as to certain statements made by the respondent relative to the sale transaction and papers signed which the respondent denied having made, all pointing in the direction that everything was left to Dresser and that anything he signed was accommodation to Dresser. These statements are said to have been made at an interview had with the respondent. As Mr. DesBrisay, one of the four witnesses present at the interview, took down some notes relative to what was said at the interview, I think it well to here set out the evidence given by Mr. DesBrisay: [After setting out the evidence at length the learned judge continued].

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The learned trial judge in his reasons for judgment refers to the evidence and to the interview had with the respondent in these terms:

"At the trial the defendant was contradicted by four other witnesses as to what occurred at a conference between him and these witnesses as to the above note. In view of the opinion I hold, as to the genuineness of the signature in question, it is not necessary for me to pronounce upon the credibility of that part of the evidence."

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Therefore there is no finding upon this point of evidence and the learned judge refrains from dealing with the question of credibility.

In arriving at the decision the learned judge did arrive at, he proceeded in the way of an enquiry into the question as to whether it was the signature of the respondent by comparison of enlarged admitted signatures with the disputed signatures upon the cheque and promissory note, also enlarged, and the learned judge had this to say relative thereto:

"At the trial, the plaintiff called a witness as to handwriting, who swore that the signature was the genuine signature of the defendant. I was not further aided by an enlargement of the writings but left to use my own powers of observation. However, with the consent of counsel, I have had the signatures admitted to be the defendant's enlarged together with the disputed one and I now have no hesitation in finding that the indorsement in question is not in the handwriting of the defendant."

With great respect to the learned judge, I venture to think that the question of fact in the present case ought not to be disposed of solely in this way, as signatures vary in many respects, although authentic. The case is not one of a person who had a definite set signature, or a signature carrying a private mark of any kind, nothing, in fact, to help the alleged signatory to determine whether it was in his own proper handwriting. The respondent evidently was quite unwilling to pledge his oath as to whether certain signatures presented to him were or were not in his own proper handwriting when he had only the signatures to look at, so that the respondent evidently was unwilling to proceed upon an examination of the signature alone to test authenticity. In this connection, note the following evidence of the respondent, he then being under cross-examination at the trial:

"I am going to ask you to give me a little assistance with some of these papers, Doctor. I am going to ask you to look at something here without anything to indicate what I am shewing you except just the signature. Can you tell me if that is your signature? My signature and writing is in such a poor hand I would vary so much, whether I am tired or in a proper position to write it. I don't think I can swear to my signature exhibited that way.

"I am shewing you a document which purports to have your signature and I have concealed everything in the document, one piece of paper I have torn all through, so that it exhibits your signature, what appears to be your signature, and you say you cannot tell whether it is your signature or not? I could not say whether it is or not.

"I shew you another specimen that same way. Can you tell from that one whether that is your signature or not? I cannot swear to my signature under those circumstances. I don't believe there is any man living who can swear to his signature that way.

"The one I have just shewn you and the one I shewed you last are both documents which you have admitted to be your signature. They are marked as exhibits and you have admitted them as your signature. I want to try one or two more.

"Mr. *Senkler*: He has already stated that he will not swear to his signature put that way at all.

"Mr. *Craig*: Will you look at that? No, I don't think there is a man living who can identify his signature that way without making a mistake.

"There is another, can you tell that one? I don't care to pass any opinion about these."

It is evident that the respondent was unwilling to say, when the signatures were placed before him, whether they were or were not his signatures, and a great deal can be said for the reasonableness of this view. A forgery, to be of any real value, must be effective, and a physician would not ordinarily be one who would give any particular attention to the manner or form of his signature, and it is not here contended that the respondent had any positive and definite form or style of signature, therefore, how can it be said that the comparison as made by the learned judge is a sound method of arriving at the truth of the matter? That the respondent did not appreciate the obligation he undertook, in fact, did not apply his mind to it in detail at all, has been mistaken and forgotten what he did sign, merely signing what Dresser put before him, does not relieve him from his liability, if really the promissory note does bear his signature, and that is the question requiring decision.

This Court is a Court of rehearing, and we cannot shrink from deciding upon the facts of the case: (*Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402). It is not the case of deciding as against the opinion of the learned trial judge upon rival or conflicting evidence (*Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95; *Nocton* v. *Ashburton* (*Lord*) (1914), A.C. 932 at p. 945), as the learned judge has refrained from so deciding, but proceeds wholly upon the comparison of the signatures as enlarged. As against that there is the evidence as to what took place at the interview, where we have four witnesses disagreeing with the respondent, and we have

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the very clear and valuable evidence of the expert (Sprott) upon handwriting. This, coupled with all the surrounding circumstances and attendant facts, impels me to the belief that the signature to the promissory note is the proper handwriting of the respondent (see *Schwersenski* v. *Vineberg* (1891), 19 S.C.R. 243; *Pratte* v. *Voisard* (1918), 57 S.C.R. 184). As to good and special reason for doubting soundness of decision under appeal, see *Morrow Cereal Co.* v. *Ogilvie Flour Mills Co.*, *ib.* 403.

The respondent may very well be honestly mistaken in the matter, relying, as he did, so implicitly upon Dresser, and treating the execution of the writings and documents as mere formalities, the nature of the papers signed making no impression upon his mind, and not appreciating that he was undertaking a personal responsibility, and it is to be remembered that the respondent, in his evidence, was giving testimony as to what took place nearly five years before the trial of the action. But be that as it may, the clear weight of evidence is with the appellant, and entitles judgment going for the amount sued for, that is, the appeal, in my opinion, should be allowed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Maitland & Maitland.*

Solicitors for respondent: *Senkler, Buell & Van Horne.*

REX v. PLAXTON AND McINNIS.

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1920

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Criminal law—British Columbia Prohibition Act—Intoxicating liquor—Proof of analyst's authority—B.C. Stats. 1918, Cap. 68, Sec. 19; 1920, Cap. 72, Sec. 16.

On appeal from the dismissal of an information that the accused unlawfully kept liquor for sale it was agreed that the evidence given before the magistrate should be used as evidence on the appeal. The only evidence of the liquor in question being intoxicating was a certificate of analysis in the ordinary form, headed "Canada Department of Health," etc., then proceeding, "I, J. A. Dawson, an analyst acting under authority of the Food and Drug Act," etc., and signed "J. A. Dawson, Public Analyst." Section 36A of the British Columbia Prohibition Act, as enacted by section 19, B.C. Stats. 1918, Cap. 68, and amended by section 16 of the Act of 1920, provides that "a certificate of any Dominion, Provincial or City analyst, as to the contents of any liquid . . . . . shall be *prima facie* evidence of such contents."

Held, that there is nothing in the certificate shewing that the person signing the certificate belongs to any one of the three classes of analysts specified by the Act and the appeal should be dismissed.

APPEAL from the dismissal of an information by the police magistrate at New Westminster on the 29th of July, 1920. B. Plaxton and M. J. McInnis were charged that on the 3rd of July, 1920, at Huntingdon, in the County of Westminster, they unlawfully kept liquor for sale contrary to the British Columbia Prohibition Act. It was agreed that the evidence taken in the police court should be used on this appeal, and the only evidence of the liquor in question being intoxicating liquor was a certificate of analysis on the ordinary form, headed Canada Department of Public Health, and then proceeds: "I, J. A. Dawson, an analyst acting under the authority of the Food and Drug Act," etc., and signed "J. A. Dawson, Public Analyst." Argued before HOWAY, Co. J. at Chilliwack on the 15th of September, 1920. Statement

Wood, for appellant.

R. L. Maitland, for respondents.

27th September, 1920.

HOWAY, Co. J.: Upon the trial of this appeal before me in Judgment

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Chilliwack on the 15th of September it was agreed by counsel that the evidence given before the magistrate should be taken as the evidence upon this appeal.

Mr. *Maitland* for the respondents relied upon a number of objections. I do not find it necessary to discuss these various objections as there is one which, in my opinion, is conclusive of the matter and renders it unnecessary to consider the others. That objection is that there is nothing to shew that Mr. Dawson (whose certificate is the only evidence of the illegal strength of the beer in question) is an analyst of one of the classes mentioned in section 36A, B.C. Stats. 1916, Cap. 49, as enacted by section 19 of Cap. 68 of 1918, and amended by section 16, Cap. 72 of 1920. Those sections make the "certificate of any Dominion, Provincial or City analyst" *prima facie* evidence of the contents of any liquor. There was no evidence given at the trial that Mr. Dawson was a Dominion, Provincial or City analyst. The only testimony upon the point is that of the witness John McDonald, who having stated that he kept the sample bottle in his possession "and took it to Mr. Dawson at Vancouver," was then asked:

"He is an Analyst? Yes.

"And he gave you this certificate? Yes."

This falls far short of proof that Mr. Dawson belongs to one of the three classes of analysts whose certificates are *prima facie* evidence. It is suggested that the certificate itself is not only evidence of the contents of the bottle, but also evidence of the official capacity of the signatory. I am not able to agree with this contention. There is nothing in the certificate shewing that he belongs to any one of the three specified classes. It merely describes him as a "public analyst attached to the staff of the department of health." I do not know therefrom to which, if any, of these classes Mr. Dawson belongs.

Judgment

To be admissible under section 36A the certificate offered in evidence, where it does not carry exact compliance therewith on its face, must be shewn to the Court by evidence *aliunde* to be within its purview. The accused having been by this section practically deprived of cross-examination upon the crux of the case is, I think, entitled to have it clearly shewn that the certificate is that of one of the named analysts.

I have considered the Documentary Evidence Act, 1845, and assuming it to be in force here (see hereon English Law Act, R.S.B.C. 1911, Cap. 75, and the Statutes Revision Act, 1897, in R.S.B.C. 1897, Vol. 1, pp. cxii. and cxiii.) I do not see how it can remedy the defect. The certificate even thereunder must, I take it, purport on its face to be given by one holding the office specified by the Legislature.

There being no other evidence of the strength of the liquor in question, the certificate not on its face purporting to be and not being otherwise shewn to be a certificate of the class mentioned in 36A, I have no alternative but to dismiss this appeal.

Under the Crown Costs Act the appeal is dismissed without costs.

Appeal dismissed.

NORTHWEST TRADING COMPANY LIMITED v. NORTH WEST TRADING COMPANY LIMITED *ET AL.*

Company law—Registration—Previous registration in same name—Rival traders—Imitation—Calculated to deceive—Foreign company—R.S.B.C. 1911, Cap. 39, Secs. 18, 27 and 168.

In 1917 the plaintiff Company incorporated in the State of Washington, being the outcome of a partnership, engaged for several years in the business of exporters and importers of general merchandise. The business extended and it engaged in business, directly to some extent, but chiefly through agents in British Columbia, prior to application to the registrar of joint-stock companies for registration as an extra-provincial company. The application was refused owing to the defendant Company having been incorporated in March, 1918, under identically the same name. In an action for a declaration that the plaintiff Company is entitled to the exclusive use of its corporate name, that the defendant Company be compelled to change its name and that in default it be wound up, it was held on the trial that although a foreign Company is not debarred by the Companies Act from obtaining redress in a proper case, the action should be dismissed on the grounds that the name was "geographical" and not

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"fanciful" and at the time of the incorporation of the defendant Company the plaintiff Company had not established such a business in the Province that the public were deceived by the adoption of the name by the defendant Company.

Held, on appeal, *per* MACDONALD, C.J.A., that the plaintiff had not made out a case of equitable relief and the appeal should be dismissed.

Per MARTIN, J.A.: That the appeal should be dismissed on the ground that the name of the plaintiff Company does not warrant protection.

Per GALLIHER and MCPHILLIPS, JJ.A.: That the appeal should be allowed as owing to the recognized position of the plaintiff Company in the business world the use of the same name by the defendant was wrongful and should be restrained; the fact that the plaintiff had been doing business in the Province without incorporation did not disentitle it to relief, especially in view of its attempt to become registered, which was prevented owing to the previous incorporation of defendant under the same name, and evidence of actual instances of confusion was improperly rejected at the trial, although not essential to the plaintiff's case.

Per GALLIHER, J.A.: The Court should not confine its consideration of the plaintiff's business to that carried on in British Columbia and should also consider the probable development of business under the respective companies.

The Court being equally divided the appeal was dismissed.

APPEAL from the decision of MACDONALD, J., of the 13th of January, 1920, reported 27 B.C. 546, in an action for a declaration that the plaintiff is entitled to the exclusive use of its corporate name as against the defendants and to compel the defendants to change the name of the defendant Company to one different from that of the plaintiff, and in default of such change being effected within a reasonable time so as to enable the plaintiff to be registered as an extra-provincial company, that the defendant Company be wound up. The plaintiff Company has a capital of $300,000 fully paid and is an outcome by incorporation, of a partnership known as the North West Trading Company. The partnership was engaged in the business of exporters and importers of general merchandise with its head office at Seattle, Washington, U.S.A., and in January, 1917, incorporated in that State with such name, adding to it the word "limited." The business prospered and agents were established in other places in the States, also in Europe and the Orient. It engaged in business in British Columbia to some extent, the larger portion being done through agents and it then sought to be registered in this Province as an

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extra-provincial company and applied to the registrar of joint-stock companies for that purpose. The application was refused on the ground that the defendant Company had in March, 1918, incorporated under identically the same name. The learned trial judge dismissed the action. The plaintiff appealed.

The appeal was argued at Vancouver on the 12th, 13th and 14th of May, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. Alexander, for appellant: The plaintiff had acquired a property right to its trade name which was infringed upon by the defendants, the present name of the plaintiff Company being established in January, 1917, whereas the defendants were incorporated in March, 1918. The learned judge gives practically a "Scotch verdict," but in a case where they use our name under suspicious circumstances calculated to deceive, the burden is on them to disprove this *prima facie* evidence: see *Orr Ewing & Co.* v. *Johnston & Co.* (1880), 13 Ch. D. 434 at pp. 463-4; *Ewing* v. *Buttercup Margarine Company, Limited* (1917), 2 Ch. 1; *Hendriks* v. *Montagu* (1881), 50 L.J., Ch. 456 at pp. 457-8. These cases establish the view as to onus taken by the Courts. The evidence shews there was an intention to appropriate the plaintiff's business. He shelters himself behind the answer, "I do not remember": see *Guardian Fire and Life Ass. Co.* v. *Guardian and General Ins. Co.* (1880), 50 L.J., Ch. 253 at p. 256. Although there is no evidence of fraud the Court will assume fraud on account of similarity of names: see *Lloyd's and Dawson Brothers* v. *Lloyds, Southampton (Limited)* (1912), 28 T.L.R. 338. The prior adoption in time was about four years. The similarity in the names is calculated to deceive the public: see *Ouvah Ceylon Estates Lim.* v. *Uva Ceylon Rubber Estates Lim.* (1910), 103 L.T. 416; *Atlas Assur. Co.* v. *Atlas Ins. Co.* (1907), 112 N.W. 232; Kerly on Trade Marks, 4th Ed., 543. On the right of a foreign company as to its name when doing business in British Columbia see *Panhard et Levassor* v. *Panhard Levassor Motor Co., Lim.* (1901), 2 Ch. 513; 70 L.J., Ch. 738; *The Russia Cement Co.* v. *The Le Page Liquid*

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Glue, Oil and Fertilizer Co. (1909), 14 B.C. 317. We had no actual office here but a man represented us and executed commissions for us. The evidence of confusion arising was rejected at the trial. As to confusion arising and the admissibility of evidence of confusion arising see *Royal Warrant Holders' Association* v. *Edward Deane & Beal, Limited* (1912), 1 Ch. 10 at p. 13; *North Cheshire and Manchester Brewery Company* v. *Manchester Brewery Company* (1899), A.C. 83 at p. 85. As to the locality covered by the business of the respective parties see *Paine & Co.* v. *Daniells and Sons' Breweries* (1893), 2 Ch. 567 at pp. 575 and 585; *Machado* v. *Fontes* (1897), 2 Q.B. 231 at p. 235; *Pisani* v. *Lawson* (1839), 6 Bing. (N.C.) 90. On the question of right of action when the plaintiff's business is carried on in another place see *National Folding Box & Paper Co.* v. *National Folding Box Co., Ltd.* (1894), 13 R. 60; *"Singer" Machine Manufacturers* v. *Wilson* (1877), 3 App. Cas. 376; *The Collins Co.* v. *Brown* (1857), 3 K. & J. 423; *The Collins Company* v. *Reeves* (1859), 28 L.J., Ch. 56.

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Mayers, for respondent: On the question of fraud there are three points, (1) according to the law of the Province we are senior in rank; (2) whether the Court will consider the name and circumstances such as to entitle them to relief; and (3) whether a party who has violated the laws of the Province can obtain equitable relief. Fraud is a question of fact and has to be proved by evidence. The learned judge found on the facts in our favour: see *Hayes* v. *Day* (1908), 41 S.C.R. 134; *Horne* v. *Gordon* (1909), 42 S.C.R. 240. On the question of "legal fraud" see *Derry* v. *Peek* (1889), 14 App. Cas. 337 at pp. 346 and 348. Setting aside the trial judge is considered in *Barron* v. *Kelly* (1918), 56 S.C.R. 455. The points must be considered, (a) they were carrying on businesses dissimilar in their nature; (b) they were conducted in different markets; (c) nothing to shew the name had any particular significance or related to the business they did; (d) the name itself is not one with which the Court will deal. The defendant Company was chiefly engaged in lumber business and the plaintiff in iron, steel and machinery, the defendant not dealing at all in

steel or iron. It must be shewn defendants are selling their own goods as those of the plaintiff's: see *Turton* v. *Turton* (1889), 42 Ch. D. 128 at p. 136; *Singer Manufacturing Company* v. *Loog* (1880), 18 Ch. D. 395 at p. 412; *British Vacuum Cleaner Company, Limited* v. *New Vacuum Cleaner Company, Limited* (1907), 2 Ch. 312 at pp. 320 and 322. On the geographical question see *Colonial Assurance Company* v. *Home, &c. Assurance Company* (1864), 33 Beav. 548; *Grand Hotel Company of Caledonia Springs* v. *Wilson* (1904), A.C. 103 at p. 110. We were the first to register here and they having carried on business here illegally are not entitled to equitable relief. Our whole market is in British Columbia, except some lumber business in the Southern States, and does not interfere with them. As to their illegal business here see *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297. Where there is prohibition the act is illegal and where there is prohibition with a penalty it passes beyond doubt: see *Komnick Brick Co.* v. *B.C. Pressed Brick Co.* (1912), 17 B.C. 454; *Standard Ideal Company* v. *Standard Sanitary Manufacturing Company* (1911), A.C. 78 at p. 83. The facts upon which they rely should be clearly stated in the pleadings: see *Philipps* v. *Philipps* (1878), 4 Q.B.D. 127 at pp. 133 and 139; Bullen & Leake's Precedents of Pleadings, 7th Ed., 388. A question as to whether defendants' name is calculated to deceive is inadmissible as that is the issue to be tried: see *Royal Warrant Holders' Association* v. *Edward Deane & Beal, Limited* (1912), 1 Ch. 10 at p. 14; see also Halsbury's Laws of England, Vol. 27, p. 744, par. 1326; *Goodfellow* v. *Prince* (1887), 35 Ch. D. 9 at pp. 20-1. There must be great similarity in the businesses of the two concerns: see *Turton* v. *Turton* (1889), 42 Ch. D. 128 at p. 143; *Dunlop Pneumatic Tyre Company, Limited* v. *Dunlop Motor Company* (1907), A.C. 430 at p. 438.

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Alexander, in reply: In any case they call themselves "exporters and importers." On the question of our illegally doing business in British Columbia see *Mickelson* v. *Mickelson* (1916), 10 W.W.R. 261.

Cur. adv. vult.

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MACDONALD, C.J.A.: I would dismiss the appeal on the ground that appellant has not made out a case for equitable relief. I agree in the main with the reasons of the learned trial judge, but I refrain from concurring in the view expressed by him as to the effect of the amendments to the Companies Act as bearing upon the decision in *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297. On this point I express no opinion, it being unnecessary in the result to do so.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed, primarily upon the broad, and, to me, satisfactory ground that the name of the plaintiff Company does not warrant protection. There is no case which supports the submission that an exclusive use can be acquired in a name which is essentially geographical and in no sense fanciful, either as attached to its manufactured products or its business associations. It almost startles one at all familiar with the historic development of Western Canada, to think that the use of so common a name in trade and commerce as a "North West Company" of whatever complexion, can be so restricted, bearing in mind that ever since 1784, when it was adopted by the great "North West Company" of fur traders of Montreal (who were the first to extend overland their business operations through the north-west regions of British North America, and across the Rocky Mountains to what are now the States of Oregon and Washington even to the acquisition of Astoria and this Province of British Columbia) that name has been a household word throughout all Canada.

MARTIN, J.A.

Such cases as *Panhard et Levassor* v. *Panhard Levassor Motor Co., Lim.* (1901), 2 Ch. 513; 70 L.J., Ch. 738; 18 R.P.C. 405, which was relied upon in support of the right claimed, has no real analogy or application, and is also based upon fraud, but there is clearly none here: the case at bar is much stronger than that of *Grand Hotel Company of Caledonia Springs* v. *Wilson* (1904), A.C. 103; 73 L.J., P.C. 1, wherein it was held that there was no right to the exclusive use of the word "Caledonia" in connection with certain mineral waters.

I note it was admitted by a witness of the plaintiff that in Seattle alone, in the telephone book, there were 43 companies which had the words "North West" as part of their name, and it was also admitted that the voluntary addition in January, 1917, of the word "limited" to the plaintiff's name was not sanctioned by the laws of the State of Washington and had no legal effect whatever, but was done solely with the object of aiding the company in its business competition with English "limited" companies in certain places; in other words, by means of a false complexion to give it an advantage in trade, which is a deception upon the public. I do not think such a subterfuge should receive any encouragement from the Courts of Canada.

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Holding the above view, it is unnecessary to deal with the other points raised.

GALLIHER, J.A.: The salient facts in this case are fully set out in the judgment of the learned trial judge (27 B.C. 546 at pp. 547-58). He has also discussed very fully the law and the cases bearing upon the subject.

I agree with the interpretation placed by him upon section 18 (Companies Act, R.S.B.C. 1911, Cap. 39), and also as to the effect of section 27 (1) of the Act. I also agree with the reasoning of the learned trial judge in holding that the plaintiff is not invoking the aid of a Court of Equity to sanction and perpetuate business of an illegal nature. I have some doubt as to whether the defendants, in adopting the name of the plaintiff Company, had entirely forgotten the existence of that Company. I will assume that it was not at the moment present to their minds, yet in the following month after incorporation, the plaintiff's agent in Vancouver (Thompson) came to the defendants and pointed out the fact, and made what I consider a fair offer at a time when defendants had not really started to do business under their corporate name. This offer was not accepted, and the defendants developed their business under their new name with considerable profit to themselves. Later the defendants offered to meet the wishes of the plaintiff for the sum of $10,000, which offer was refused, but I will deal with that under another head.

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The learned trial judge has found that there was no fraud on the part of the defendants, either in the inception or in the refusing to change their name and continuing business thereunder after request by the plaintiff.

On the first branch, assuming that the defendants, when they incorporated, had not present to their mind the existence of the plaintiff Company, it could not be said they had any fraudulent intent in taking the name, but it seems to me on the second branch that the words of James, L.J. in *Orr, Ewing & Co.* v. *Johnston & Co.* (1880), 13 Ch. D. 434 at pp. 453-4 are applicable here:

> "Supposing that by some accident a man had inadvertently used a ticket which was so calculated to deceive the ultimate purchaser, and therefore so calculated to injure the plaintiffs in their legitimate right of property in a trade-mark, the moment the attention of the defendants or any persons in their position, was called to the fact of the similarity of the two marks and to the complaint of the persons who owned the first mark that it was likely to injure them, it was his duty to immediately discontinue the use of the trade-mark complained of; and, however honest or inadvertent the original mistake may have been, the continuation of the use of it after that was pointed out is itself sufficient evidence of a fraudulent intention. The fraud would then consist in continuing to do it even if there had been an original inadvertence in the use of it."

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It was suggested that the rule as to how the Courts will deal with trade names or trade-marks when used in connection with the manufacture of goods is not applicable when the name is used only as a trade name and not to identify particular goods. It may be that in all respects it cannot be applied, but in my opinion where persons or corporations have been for some time dealing in commodities in different parts of the world under a trade name and have been transacting a large volume of business and have established a credit and reputation under that name, if the adoption of that name is calculated to mislead the public or to cause confusion, Courts of Equity will grant relief. I refer to the words of Sherwin, J., in *Atlas Assur. Co.* v. *Atlas Ins. Co.* (1907), 112 N.W. 232 at p. 233, where he lays down this proposition:

> "To hold that a trade name or a trade-mark shall receive the protection of the Court only when used in connection with the manufacture of some article of commerce, would be adopting an extremely narrow view of the matter, and leave large financial interests engaged in other lines of business wholly without protection of the Court, so far as a trade-mark or trade name is concerned, and open to general piracy."

The learned trial judge seems to have confined his attention to the nature and extent of the business carried on by the plaintiff in British Columbia. I think we are not confined to that. The defendants are carrying on business as importers and exporters, with power to engage in any lines of business now being carried on by the plaintiff in Canada or elsewhere, and are actually in competition with the plaintiff in some of these lines both here and abroad. Moreover, we are not confined to the business now actually being done, but may look at the powers they have under their incorporation and the probable development of the business.

In several of the cases injunctions have been granted to prevent persons engaging in business under a specific name, where the powers were similar to those enjoyed and being exercised by another under the same name. Now in what position does the plaintiff find itself?

It is desirous of registering under its corporate name as a foreign company in British Columbia, but finds itself unable to do so by reason of the fact that the defendants are registered here under an exactly similar name, except that the word is "Northwest" in one and "North West" in the other, a distinction to which I attach no importance. The fact that the defendants are registered in British Columbia and the plaintiff is not, does not render the Court helpless to grant redress if a proper case has been made out. As to this, I do not propose to deal with the evidence in detail. Suffice it to say that, in my opinion a proper case is made out for relief if plaintiff is not barred by delay in bringing action.

It is true that plaintiff did not come to the Court with promptitude, and had not negotiations been going on between the parties in the interim it might be a matter for serious consideration. But we find that as soon as the plaintiff learned of the defendants' incorporation, or within a month afterwards, it approached the defendants and requested them to change their name, making at the same time an offer to reimburse the defendants for the expense they had been put to, which, considering the state of affairs at that time, I would, as I have before stated, consider fair and reasonable. The defendants

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refused this, and matters proceeded for some considerable time without any further efforts at settlement, when finally defendants submitted a proposition to comply with plaintiff's request upon payment of $10,000. This the plaintiff considered unreasonable and at once took action in the Courts.

If I am right in my conclusions, and the defendants were doing what they should have known was wrong and persisting in it after notice, then I hold that there was not unreasonable delay. What is unreasonable delay depends largely on the circumstances of each case.

GALLIHER, J.A.

I am of opinion that the appeal should be allowed and the plaintiff granted the relief asked for in its prayer. I might add that I have examined the cases cited by defendants' counsel, among them being *British Vacuum Cleaner Company, Limited* v. *New Vacuum Cleaner Company, Limited* (1907), 2 Ch. 312, and *Grand Hotel Company of Caledonia Springs* v. *Wilson* (1903), A.C. 103; 73 L.J., P.C. 1; but I think these cases are distinguishable on the facts. I might further add that if I am wrong in my conclusions, I would grant a new trial, on the ground that evidence of actual instances of confusion was rejected.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I do not propose to enter into any extended reference to the evidence in this appeal, but content myself with the statement that the evidence proves to a demonstration thereof that the incorporators of the North West Trading Company, Limited, the respondent Company, were fully aware of the existence of the Northwest Trading Company Limited, the appellant Company, and that it had a recognized position in the business world and was engaged in like business to that to be embarked in by the respondent Company, and there is express evidence of correspondence between the incorporators of the respondent Company and the appellant Company in 1918, previous to the respondent Company obtaining incorporation in British Columbia by a like name (the names being in fact exactly similar), save for what may be said to be really an indistinguishable difference, *i.e.*, "North West" being in two words in the case of the respondent Company and all one word in

the appellant Company, the difference, slight as it is, furnishing evidence that there was the semblance of an attempt to differentiate with the thought that perhaps it would be sufficiently effective. The appellant Company has American incorporation, and the action is one to restrain the respondent Company from the use of a name which is identical with that of the appellant Company or so nearly resembling as will deceive the public, the appellant Company being, at the time of the incorporation of the respondent Company, in existence and carrying on business to the knowledge of the respondent Company. There is provision for a company to change its name and the requirement to change in a proper case, and, in my opinion, this is a proper case for an injunction going and the requirement to change the name (Companies Act, R.S.B.C. 1911, Cap. 39, Sec. 18, Subsecs. (1) to (6); B.C. Stats. 1912, Cap. 3, Sec. 6; 1913, Cap. 10, Sec. 3). *Ewing* v. *Buttercup Margarine Company (Limited)* (1917), 33 T.L.R. 321, is a recent case indicating what should be done upon facts which are as cogent in this case as that. The Master of the Rolls (Lord Cozens-Hardy) there said:

"What was the duty of honest business men who had inadvertently taken a name used for a long time by another business dealing in the same kind of goods? One might expect them to write and say that they regretted having done so, and would abandon its use. Not only had the defendants not done so here, but they sought to justify their retention of the name. . . . . ."

GALLIHER, J.A.

In the present case the appellant Company offered to pay the respondent Company any reasonable costs and expenses they had been put to, but were met with a demand for the unconscionable sum of $10,000. The present case, though, was not one of "inadvertence." It was, as I view it, one of fraud, with a knowledge of conditions and the existence of the appellant Company operating in a large way of business; there was intentional user and incorporation in the name of the appellant Company; the evidence is incontrovertible. Even were I in error in arriving at the conclusion which I have as to fraud being existent, which is a firm conclusion, it is instructive to note the language of Jessel, M.R. in the *Guardian Fire and Life Ass. Co.* v. *Guardian and General Ins. Co.* (1881), 50 L.J., Ch 253 at p. 256:

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"Although actual fraud may not have been really in the contemplation of the defendants, yet I feel bound to impute to them what amounts to legal fraud in assuming the name complained of under the circumstances that I have mentioned; and although they did make an offer to do substantially that which they have now agreed to do, yet that offer was not made until after the service of the notice of motion. That being so, inasmuch as a successful party in a litigation is entitled to his costs, the plaintiffs must have their costs."

We have seen here the nature of the offer made by the appellant Company and the demand made by the respondent Company, evidencing premeditation and the intention to obtain large pecuniary advantage for the respondent Company at the expense of the appellant Company. In *"Singer" Machine Manufacturers* v. *Wilson* (1877), 3 App. Cas. 376, Lord Cairns, L.C. said at p. 391:

"If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them and perseveres in infringing upon them, as culpable as if he had originally known them."

The respondent Company knew full well that the appellant Company would be embarrassed, as the name so wrongfully and knowingly assumed was bound to produce the belief that the business of the respondent Company was the business of the appellant Company. I would refer to the judgment of the Master of the Rolls in *Lloyd's and Dawson Brothers* v. *Lloyd's, Southampton (Limited)* (1912), 28 T.L.R. 338, and the language of the learned Master of the Rolls at p. 339 is applicable to the facts of the present case.

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In the present case, the appellant Company, although of not long existence, has built up a very large business with foreign connections, and has a recognized substantial position in the business world, a fact unquestionably well known to the respondent Company. With great respect to the learned trial judge, evidence was admissible, in my opinion, to shew confusion or deception. However, such evidence was not essential to the establishment of the case for the appellant Company. I would refer to what Farwell, L.J. said, at p. 417, in *Ouvah Ceylon Estates Lim.* v. *Uva Ceylon Rubber Estates Lim.* (1910), 103 L.T. 416:

"In my opinion this is a very plain case. The action is a *quia timet* action, and no question, therefore, arises on evidence of persons who have or have not been actually deceived by anything which has been done by

the defendant company. The first duty of the Court in such a case appears to me to be to look at the words and to see whether the doctrine of *res ipsa loquitur* applies. In my opinion it does. Having been convinced by the words alone that there is a probability of deception, it is for the defendant company, if they can, to shew some reason why such deception would not arise."

The fact that the principal place of business of the appellant Company is Seattle, in the State of Washington, and that of the respondent Company is Vancouver, is not in any way a determining point; both places are Pacific coast cities where large business is engaged in in exportation and importation, and there is great interchange of business, and the cities are under one hundred miles apart. (See *Paine & Co.* v. *Daniells and Sons' Breweries* (1893), 2 Ch. 567 at pp. 575, 585).

I do not find it necessary to further elaborate the law or cite the relevant authorities that govern in the subject-matter of this appeal in view of the recent consideration of the question by this Court in *Guardian Assurance Co.* v. *Gunther* (1918), 25 B.C. 353; 2 W.W.R. 405, where the principle as established in *Hendriks* v. *Montagu* (1881), 17 Ch. D. 638; 50 L.J., Ch. 456 was applied, and, in my opinion, the *ratio decidendi* is equally applicable to the present case. There was an appeal to the Supreme Court of Canada in the *Guardian* case and the decision of this Court was reversed, but not upon any ground of disagreement with the principle of the decision of this Court as founded upon the *Hendriks* case, the learned Chief Justice of Canada (Sir Louis Davies) in his judgment at p. 50 saying (see *Matthew* v. *Guardian Assurance Co.* (1918), 58 S.C.R. 47):

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"At the same time I desire not to leave it open to be said that I had in any way, directly or obliquely, reversed or thrown doubt upon the judgment of the Court of Appeal in this case so far as the merits were concerned."

It was pressed strongly upon the Court by the learned counsel for the respondent Company that the appellant Company was disentitled to come to this Court and ask any form of relief, as they had been doing business in the Province without incorporation. I cannot see that that has been established. In any case, this action is not in respect of the enforcement of any contract or in respect to land or any interest therein (Cap. 10,

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Companies Act Amendment Act, 1917); further, the appellant Company attempted to get incorporation and the respondent Company's incorporation stood in the way, and these proceedings naturally followed. I cannot see that there is any bar to giving the appellant Company the relief claimed, namely, an injunction restraining the respondent Company from using or carrying on business under its present name. The appeal should therefore, in my opinion, be allowed.

The Court being equally divided, the appeal was dismissed.

Solicitors for appellant: *Tiffin & Alexander.*
Solicitors for respondent: *Taylor, Mayers, Stockton & Smith.*

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WEIR *ET AL.* v. WEIR *ET AL.*

Deed of gift—Mother to son and daughter—Undue influence—Subsequent expenditure by transferees in maintaining property—Notice of appeal—Amendment of.

An aged woman with five children sought advice from a son as to two pieces of encumbered property in Vancouver. The son examined into the properties and reported to his mother who then transferred the properties by deed to the son and a daughter with whom she lived, concluding that the properties were of substantially no value. She had previously made her will dividing her estate equally among her five children. On her death, in an action by the three other children, the transfer was set aside by MURPHY, J. on the grounds of the dependency of the mother under the circumstances, misrepresentation in the son's report and undue influence.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that the mother was capable of understanding her affairs; that there was no undue influence or misrepresentation and proof of independent advice was not necessary to support the deed.

Per MARTIN and MCPHILLIPS, JJ.A.: That the judgment should be sustained.

Held, further, unanimously, that in any case the transferees were entitled to allowance for moneys disbursed in preserving the property, *i.e.*,

taxes, interest on mortgages and repairs, and a lien on the land therefor, the result being that the judgment of the trial judge was affirmed owing to equal division, disbursements being allowed defendants subject to accounting for all rents and profits received.
[Affirmed by Supreme Court of Canada.]

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APPEAL by defendants from the decision of MURPHY, J., of the 10th of March, 1920, in an action by the legatees under the will of Margaret Weir, deceased, for a declaration that a conveyance of the 11th of October, 1918, of certain lands in Vancouver to the defendants is null and void on the ground that it was obtained by fraud, undue influence and without consideration. The Weir family (father, mother and five children) came from Ireland to Vancouver in 1902. The father died in 1908, intestate, but the children agreed to their mother having his property. The three plaintiffs left the mother earlier than the defendants. Then the defendant John went to San Francisco, Linda remaining until 1914, when she left. In 1918, the mother went to live with Linda, and about this time, it being doubtful whether she could continue to make payments on the lots in question, there being a substantial mortgage on each and back taxes to pay, she sent for John. On his coming to Vancouver she asked him for a report on the properties. Upon receiving this report she transferred the two lots to John and Linda, thinking them of very little value. The defendants then continued to keep the properties in good standing by payment of taxes and interest on the mortgages. The mother died in January, 1919, and by her will, dated the 4th of January, 1917, left all her property to be divided equally amongst her children.

Statement

Martin, K.C., and *Beck, K.C.*, for plaintiffs.
Woodworth, and *N. R. Fisher*, for defendants.

MURPHY, J.: In my opinion, the facts of this case are so nearly identical with those in the case of *Griffiths* v. *Robins* (1818), 3 Madd. 191, as to make the principle therein applied applicable here, and, therefore, there must be judgment for plaintiffs. There the donor was over 80 years old, blind, or nearly so, and altogether dependent on the kindness and assist-

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ance of others. Here the donor was of like age, of defective eyesight, and I think it is a fair inference, from the evidence, that she was wholly dependent on the kindness and assistance of others. So far as her property was concerned, the defendant, John Weir, was the person on whose kindness and assistance she depended at the time the gift herein in question was made. Thinking there was something wrong in connection with the property, she sent a request to him in California to come up, and when he arrived, stated the position, whereupon he assumed the duty of looking into and reporting upon it. As a result of his report, she denuded herself of everything she owned in his favour, making no reservation whatever for herself, the stipulation for her support admittedly being the result of a solicitor's suggestion. This phase of the case is stronger than the corresponding phase of *Griffiths* v. *Robins, supra.* The principle therein laid down, that where the donee stands in such a relation to the donor as to expose the donor to the influence of the donee the latter can maintain no deed of gift from the donor unless he can establish that it was the result of the donor's free will, and effected by the intervention of some indifferent person, is not affected, I think, by the cases cited by me. It is, I think, confirmed in *Smith* v. *Kay* (1859), 7 H.L. Cas. 750. The question of influence in *Griffiths* v. *Robins* was not rested on blood relationship, but on the position the donees were in in relation to the donor. Here also it is not, in my opinion, a question of parent and child, but of the relation of trust which John Weir assumed to his mother when she practically put the matter of her property into his hands. It is to be noted that it was only after she had done this and after his report, pursuant to such trust, that she declared her intention of giving him the property. But, if I am wrong in this, and the onus of shewing undue influence is on the plaintiffs, I think they have satisfied it. It is clear from the evidence, I think, that the mother placed herself in John Weir's hands with regard to her property. There was no suggestion of giving it to him on his arrival. It was only after he had so increased her uneasiness with regard to it by a report which shewed it to be in a worse condition than she thought it to be, that she decided to give it

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to him. Her conduct, up to that time, in making several wills, all on the principle of equal division amongst her children, who had received no benefit from her husband's estate, shews she, up to the time of John's report, never intended to specially benefit him. What changed her mind? In my opinion, John's report, which I think was of such a nature that she concluded the property would, in the near future, be a source of continuous vexation and annoyance, with its final loss a certainty. Such was not the true state of facts at all. The property, as times went, was in good shape and was a productive asset. Further, her remark, when the agreement to support her was read to her, that it was unnecessary as she had always been cared for, shews she did not realize the true position of affairs. It was her property that paid her way up to the time she parted with it, not voluntary assistance from her children, as I think would be the fair inference of her meaning in making this statement. I cannot attach any importance to the statement of the daughter Linda, that the mother said she was writing to one of the other sons stating what had been done. Such a letter it is stated, was never received. Linda is one of the beneficiaries under the attacked deed. Even if the remark were made, there is no evidence to shew that the mother had ascertained in the interval the real state of affairs in connection with her property. This applies also to the argument that she made no comment when assigning the insurance. Judgment for plaintiffs.

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From this decision the defendants appealed. The appeal was argued at Vancouver on the 14th and 15th of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Woodworth, for appellants, moved to add a new ground of appeal that the appellants should be allowed the moneys they disbursed for taxes and other expenses in connection with the upkeep of the properties in question, and that the judgment below should be varied to that extent. There should be a taking of accounts as to the disbursements made by the defendants.

Argument

Martin, K.C., for respondents, *contra*: They ask to raise an issue not raised in the Court below. They obtained the prop-

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erty under circumstances that the Court has declared illegal. They cannot get back money expended on property they obtained fraudulently: see *Scott* v. *Brown, Doering, McNab & Co.* (1892), 2 Q.B. 724 at p. 728; *Fordham* v. *Hall* (1914), 19 B.C. 80.

Woodworth, on the merits: The two defendants looked after the mother and assisted her financially, the others were not dutiful, and naturally she consulted John about the properties when difficulties arose. There was no undue influence exercised. The law is in May on Fraudulent Conveyances, 3rd Ed., 414; see also p. 431. The law of presumption against a voluntary conveyance unless there be independent advice and the parties are at arm's length does not apply in case of parent and child: see *May* v. *May* (1863), 33 Beav. 81; *Beanland* v. *Bradley* (1854), 2 Sm. & G. 339; *Hunter* v. *Atkins* (1832), 3 Myl. & K. 113; *Toker* v. *Toker* (1862), 31 Beav. 629 and on appeal (1863), 3 De G.J. & S. 487. The case of *Griffiths* v. *Robins* (1818), 3 Madd. 191, followed by the learned judge below, is a short report and not in accordance with the later decisions to which I have referred: see also *Lamoureux* v. *Craig* (1919), 3 W.W.R. 1101. The report submitted by John, and upon which the mother evidently relied, was a truthful one.

Argument

Martin: On the question of setting aside a conveyance on the ground of duress, compulsion, undue influence, etc., the law will be found in Halsbury's Laws of England, Vol. 7, pp. 357-9, pars. 736-7. As to the relationship of son and mother see *Smith* v. *Kay* (1859), 7 H.L. Cas. 750 at p. 771. When the property vests in the adviser, the rule that there must be independent advice applies. The effect of John's report was that he got the property. As to fiduciary relationship in the case of wills see Halsbury's Laws of England, Vol. 19, p. 404, par. 831; *Ingram* v. *Wyatt* (1828), 1 Hag. Ecc. 384; *Griffiths* v. *Robins* (1818), 3 Madd. 191; *Mackenzie* v. *Handasyde* (1829), 2 Hag. Ecc. 211; *Middleton* v. *Forbes* (1787), cited in 1 Hag. Ecc. 395; *Brydges* v. *King* (1828), *ib.* 256; *Mynn* v. *Robinson* (1828), 2 Hag. Ecc. 169 and 179; *Dodge* v. *Meech* (1828), 1 Hag. Ecc. 612.

Woodworth, in reply.

Cur. adv. vult.

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

I am in accord with the reasons to be handed down by my brother GALLIHER. I only wish to add this, that even if the judgment in the main should be held to be right, still the defendant would be entitled to a lien upon the property for the money expended by him in paying off the encumbrance which existed in the form of arrears of taxes.

MARTIN, J.A.: In my opinion the learned judge has in the main reached the right conclusion that the conveyance in question should be set aside. I do not place the case so much upon the ground of undue influence (as to the true nature of which see the leading case of *Boyse* v. *Rossborough* (1856), 6 H.L. Cas. 2; (1857), 26 L.J., Ch. 256; 3 Jur. (N.S.) 373; 5 W.R. 414, considered and followed by the Privy Council in *Baudains* v. *Richardson* (1906), A.C. 169, 184) as upon the stronger and here more appropriate ground that the defendant John Weir deceived his mother in the discharge of his duty, by making a false report to her upon the state of her property, thereby inducing her to execute the impugned conveyances.

But application was made to us to add a fresh ground of appeal, one not taken below, *viz.*, that the appellants should have been allowed the moneys they had disbursed for "taxes, expenses and upkeep of the lands and premises" in question, and that after an account taken thereof they should form a charge upon the estate in favour of the appellants. The evidence goes to shew that certain sums were paid for taxes, interest on mortgage and possibly insurance, and I am of opinion that the appellants, though guilty of fraudulent conduct, are yet entitled to such allowances as they were necessarily incurred in the preservation of the property and enure to the benefit of all concerned, and therefore an account should be taken to that end.

MARTIN, J.A.

The subject is conveniently considered in general in Kerr on Fraud and Mistake, 5th Ed., 392, but there is a striking case not there cited, *White* v. *Lightburne* (1722), 4 Bo. P.C. 181, on an appeal from Ireland, wherein certain articles and a con-

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veyance were set aside in part (so far as they imported an absolute conveyance) after over 18 years' enjoyment of the estate and death of the grantor because they had "been obtained by notorious fraud," and yet they were allowed to stand as a security for the sum actually advanced to one Pue, as also for such other sum and sums of money as the fraudulent grantees had "really and *bona fide* paid to or to the use of the said Pue or by his order or direction," etc., together with interest upon the same from the date of such payment or advances.

The still earlier case cited by the Chief Justice during the argument, *Addison* v. *Dawson* (1711), 2 Vern. 678, is based upon the same principle.

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It follows that the judgment should be varied to this extent, but as the appellants have succeeded upon a point which was not taken below, they are not, according to the established practice of this Court, entitled to any costs of this appeal.

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

In my opinion, the evidence in this case meets the standard alluded to by Sir John Nicholl in his judgment in *Ingram* v. *Wyatt* (1828), 162 E.R. 621 at p. 626, and which is expressed in these words:

> "The averment to be contained in a common condidit is, that the testator was 'of sound mind, memory, and understanding, talked and discoursed rationally and sensibly, and was fully capable of any rational act requiring thought, judgment, and reflection.' Here is the legal standard. When all this can be truly predicated of the person, bare execution is sufficient."

GALLIHER, J.A.

Mr. *Martin* urged strongly that to support the deed it must be shewn that the grantor had the benefit of the intervention of a third party, in other words, had independent advice, and relied upon *Griffiths* v. *Robins* (1818), 3 Madd. 191; 56 E.R. 480. The learned trial judge also relied upon this case.

I must confess that the proposition struck me as too broadly stated, but I find the *Griffiths* case so clearly dealt with by Brougham, L.C. in *Hunter* v. *Atkins* (1834), 40 E.R. 43 at pp. 52 and 53, that I need do no more than make reference thereto.

Smith v. *Kay* (1859), 7 H.L. Cas. 750, was also relied on by Mr. *Martin,* but the facts in that case are so different as to con-

stitute it no authority here. *Toker* v. *Toker* (1863), 46 E.R. 724, is in appellants' favour. The evidence in this case seems to me clear that Mrs. Weir, the deceased, was capable of fully understanding what she was doing in deeding her property to the appellants, and that she did what she intended to do without any undue influence on the part of the appellants. The fact that when she found her property getting out of repair and taxes piling up, she sent for her son, John Weir, to see what could be done, and that when he came and after examination told her the true state of affairs, surely cannot be used against him.

Mr. *Martin* made much of the circumstance that when John Weir made his report to his mother it convinced her that the property was in worse shape than she supposed, that this fact alarmed her and was the inducing cause of her turning it over to him. John Weir did exactly what I think an honest man should do—told her the truth as he saw it and found things. When told, she said: "Take the property, I am through with it," or words to that effect.

There is, as I view it, no evidence of undue influence or of any scheme or fraud practised by John Weir upon the mother. The fact that a will had been made and altered slightly from time to time and which after her death would give to appellants and respondents equal shares in the property, is, of course, a circumstance which must be taken into consideration, but where the evidence is so clear as to the mental disposing powers of the mother at the time the deed was executed, and in the absence of undue influence, it cannot be said that that fact should weigh very heavily against the deed unless we are to curtail the power of free disposition of property by persons in every way capable of understanding the nature of the transaction they enter into.

McPHILLIPS, J.A.: This appeal, in my opinion, should be dismissed. The mother, the grantor, conveys her whole estate, consisting of land of some considerable value, and rental-bearing, in the City of Vancouver to one son and daughter, to the exclusion of the plaintiffs. The plaintiffs in the action are also members of the family, being a son and two daughters, and all the parties litigant are legatees under the will of the mother

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executed on the 4th of January, 1917, all to participate equally in the distribution of the estate. The plaintiffs attack the conveyances made to the defendants, both executed on the 11th of October, 1918, alleging fraud and undue influence.

The mother, the grantor, was of a very advanced age, being about 87 years old at the time of the execution of the conveyances, yet the evidence does shew that she was of extraordinary mentality up to the end of her life. Still, there is evidence that she turned to the defendant John Henry Weir for advice as to the state, condition and future prospects relative to her real estate, which may be said to be the whole estate.

Now the report made upon the properties by the defendant John Henry Weir was by no means an optomistic one, and there was no independent advice given to the mother. One cannot look into the mind of another, but upon full consideration of the facts the learned trial judge arrived at the conclusion that the report upon the properties was not in accordance with the facts, and that it was established that there was evidence of fraud and undue influence. I cannot say that the evidence is so conclusive that but one opinion is capable of being taken in view of all the facts and circumstances, still I am of the opinion that it is not a case for disturbance of the judgment arrived at by the learned judge (*Coghlan* v. *Cumberland* (1898), 1 Ch. 904; 67 L.J., Ch. 402; 78 L.T. 540), there being evidence to support it. The transaction which is impeached being *inter vivos* admits of considerations that would not obtain if it was testamentary (see *Craig* v. *Lamoureux* (1920), A.C. 349, Viscount Haldane at p. 356; *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462).

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In my opinion, the present case may be said to be one of constructive fraud, taking all the facts as favourably as possible for the defendants, and the facts afford evidence of undue influence and imposition, and the burden of proof resting in this case on the defendants has not been discharged (see Lord Eldon, *Gibson* v. *Jeyes* (1801), 6 Ves. 266; *Hoghton* v *Hoghton* (1852), 15 Beav. 278 at p. 299; *Cooke* v. *Lamotte* (1851), *ib.* 234, and also see Indermaur's Equity, 7th Ed., 275-304).

I therefore cannot arrive at the conclusion that the judgment

is wrong and should be set aside. I do, however, think that it is a case where, in the proper exercise of equitable principles, an account should be directed and the defendants allowed, in the taking of the accounts, all payments made in respect of the lands for taxes or interest or other outgoings made in the proper preservation and upkeep of the properties, the defendants to be chargeable with all rents and profits actually received, and if there should be a balance in favour of the defendants, that the defendants should he held to be entitled to a lien against the lands for any such balance.

I would therefore dismiss the appeal and affirm the judgment with the variation that accounts be taken.

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Appeal allowed in part.

Solicitors for appellants: *Fisher & Johannson.*
Solicitor for respondents: *A. E. Beck.*

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Contract—Purchaser and builder—Intervening party—Privity—Agency.

The plaintiff, a Belgian, desiring to have ten vessels constructed in Canada, entered into a preliminary agreement with A in New York, whereby A was to enter into contracts with three builders for the construction of the vessels (the defendant being one of them for building three vessels), called "building contracts," and at the same time into contracts with the plaintiff, called the "vessel contracts," providing for the payments for vessels, the nature of their construction and due delivery thereof. The "building contract" and the "vessel contract" each expressly stated that a copy of the other was attached to, and made a part of it. By the "building contract" the defendant covenanted to build the vessels according to the terms of the "vessel contract" and this covenant was expressed to be made with the plaintiff as well as with A, and the defendant also confirmed provisions of the "vessel contract" for payment of the instalments of the purchase price

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to A and appointed A its agent to receive payments. Upon the signing of the contracts a first payment made by the plaintiff to A was distributed by A between the three "builders," who proceeded with the construction of the vessels. Upon the plaintiff's failure to make the next deposit as provided for in the "vessel contract," the defendant, in accordance with the provisions of the contract, gave notice terminating the contract, and work on the ships ceased. The plaintiff brought action for repayment by the defendant of moneys paid on account of the vessels, less such expenses as the defendant had incurred by virtue of the contract. On a point of law raised by the defendant, it was held by GREGORY, J. that the contracts set out in the statement of claim did not disclose that any contractual or other relationship ever existed between the plaintiff and the defendant.

Held, on appeal, *per* MACDONALD, C.J.A. and MARTIN, J.A., that there being no privity of contract, the plaintiff had no right of action.

Per GALLIHER and MCPHILLIPS, JJ.A.: That from the terms of the contracts the plaintiff and the defendant were the real principals, privity of contract was established, and the defendant should account to the plaintiff for the moneys received.

The Court being equally divided, the appeal was dismissed.

APPEAL by plaintiff from the decision of GREGORY, J. in an action for the return of money paid to the defendant under a shipbuilding contract which was not carried out. The plaintiff, a Belgian, residing in Paris, France, entered into a contract on the 8th of October, 1918, with The Anderson Company, of New York, reciting that the plaintiff, called the "buyer," desired to contract for the construction of ten vessels to be constructed in three certain Canadian shipyards (the defendant being one of them), The Anderson Company, called the "contractor," having arranged with said builders to enter into contracts for the construction of said vessels. It further provided, *inter alia,* that in consideration of $250,000 paid by the buyer to the contractor, the contractor should enter into three contracts with the three builders in the form of Schedule A, annexed to the agreement, and the contractor and buyer were to enter into three contracts between themselves in the form marked Schedule B. Upon the first payments made under the building contracts the contractor was to give the buyer credit for $250,000, the amount paid to the contractor by the buyer on the signing of the agreement, the time and place of execution of the contracts being fixed, and the buyer was then to make the first payments thereunder.

Statement

Pursuant to said contract The Anderson Company, called the "contractor," and the defendant Company, called the "builder," entered into a contract on the 16th of October, 1918, in said form A (called the building contract), which recited that the contractor had arranged with the plaintiff (the "buyer") to enter into a contract called the "vessel contract" (which was in said form B mentioned in the preliminary agreement between the contractor and the buyer), a copy of which was "hereto annexed and made a part thereof"; and further provided, *inter alia,* that the agreement should be effective immediately upon the execution and delivery of the "vessel contract." The contractor agreed to receive the payments to be made to him pursuant to the terms of the vessel contract, and upon receipt to remit the amount to the builder, but if the contractor failed to remit such payments as required, it should not relieve the builder of its obligation to construct the vessels or be deemed a breach of the contract or the vessel contract. The builder agreed with the contractor and, for and in consideration of the execution of the "vessel contract" by or on behalf of the plaintiff, covenanted and agreed directly to and with the plaintiff to construct each and every of the vessels provided for in the vessel contract in accordance with all the terms and provisions thereof and of the plans and specifications therein referred to, and to comply with and perform each and every stipulation, act and thing which it was agreed by said vessel contract should be complied with or performed by the builder, and to make each and every payment required of the builder by the terms of the vessel contract, and to be bound by and to observe each and every provision of the vessel contract so far as the same prescribed any duty or obligation to be observed or carried out or thing to be done by the builder, including all provisions therein contained as to certificates, etc., precisely as though it, the builder, had been expressly made a party to said contract and had signed, executed and delivered the same in place of the contractor. The builder ratified and confirmed the provision contained in the vessel contract for payment of instalments of the purchase price to the contractor instead of to the builder, and appointed the contractor its attorney and agent to

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collect and receive all payments falling due under the terms of the vessel contract, and receipt therefor in its name as fully to all intents and purposes as if said payments had been made to the builder direct; and agreed that the buyer's responsibility in regard to said payments should cease upon such payment to the contractor, and the buyer should be under no responsibility to see to the due application of such payments to the builder. In case of default on the part of the plaintiff in making any payment under the terms of the vessel contract, the contractor agreed, upon demand of the builder, to assign to the builder all right to receive and collect the same, and the builder agreed that all obligations of the contractor to receive and remit any such payment should be satisfied and discharged by such assignment. This contract was executed by The Anderson Company and by the defendant.

Statement

The plaintiff (the buyer) and The Anderson Company (the contractor) entered into a contract on the 16th of October, 1918 (called the vessel contract), in the form of Schedule B of the preliminary agreement first mentioned, the contract (vessel) reciting that the contractor had entered into the building contract with the defendant (builder), a copy of which was "annexed hereto and made a part thereof." This vessel contract provided, *inter alia,* for the buyer "to purchase from the contractor and builder three steam vessels . . . . which the builder has agreed by the building contract to construct, sell and deliver to the buyer said vessels to be constructed . . . . and to be paid for as herein provided . . . . and the contractor does hereby agree to sell and that the builder will deliver each of said vessels to the buyer as and when completed by the builder at the respective times hereinafter specified"; the builder to construct and deliver the vessels complete, ready for ocean service, to the buyer at New Westminster, B.C., free of and from all sums, liens and encumbrances, said vessels each being built and equipped according to the plans and specifications annexed to the agreement, a description of the vessels, with particulars, being set out in the agreement. The buyer agreed to pay to the contractor $640,000 for each vessel, with proviso for price basis and proportionate allowances; a time

being specified for delivery of each vessel, and in case of delayed delivery (except for certain causes) the builder was to pay the buyer, as liquidated damages, $250 per day for each day's delay in delivery; the purchase price to be paid by the buyer to the contractor in New York, "15 per cent. on the signing of this agreement," and further payments according to the progress of construction as notified by delivery of certificates to Brown Brothers & Co., New York, for the buyer; should the buyer make default for 20 days in payment of any instalment to the contractor, the contractor and builder to be "relieved of any and all responsibility hereunder and under the building contract with respect to any vessel or vessels as to which such default shall be made," and the builder to be at liberty to stop further work in connection with any vessel as to which default existed and the buyer to pay to the contractor the value of the work performed and the material furnished upon the vessels, credit being given the buyer for any instalments theretofore paid to the contractor. The builder could, at its option, sell, or complete and sell, with right to compensation for loss, credit being given for instalments paid, and with liability to pay to the buyer in case of a profit on such a sale beyond the profit under the contract; each vessel and all materials, fittings, etc., as delivered at the builder's yards and as work progressed to become the sole property of the buyer, subject to right to sell for default, to builder's lien, etc., and provision for buyer taking possession and completing on builder's default; also option to buyer to rescind should builder not proceed with reasonable despatch, in which case the builder was to refund to the buyer the full amount of instalments, with interest, paid by the buyer to the contractor and pay to the buyer damages; builder to insure, the underwriters to be approved by the contractor, policies to provide that loss be payable to the buyer and builder as their respective interests might appear and be kept by the contractor; should builder fail to insure, the buyer to have the right to do so and deduct the cost from next instalment, provision for guarantee to be given by the builder to the buyer; any notice to be given to the buyer to be given by delivering the same to Brown Brothers & Co. for the buyer; the buyer to

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deposit with Brown Brothers & Co. within 30 days from the date of the agreement an amount equal to 15 per cent. of the contract price for the three vessels, to be held by Brown Brothers & Co. "as security to the contractor and builder for the buyer's performance of all his obligations hereunder, ... it being mutually agreed that if the buyer shall fail to perform any of the obligations assumed by him" as to the deposit aforesaid "his default in that respect shall be treated precisely the same as though he had defaulted in the payment of an instalment due under terms" imposed therefor. The contract was signed by the plaintiff and The Anderson Company.

The plaintiff paid 15 per cent. of the purchase price on the execution of the contract, as provided, but did not deposit with Brown Brothers & Co. within 30 days, as provided, a sum of money equal to 15 per cent. of the contract price, nor did he make such deposit within 20 days after notification of his default, and the defendant thereupon sent to Brown Brothers & Co. a notice ending its responsibility, and the ships were not built.

The plaintiff alleged that as a result the contracts were put an end to so far as building the vessels was concerned and that the moneys spent by the defendant for materials and fixtures, prior to the contracts being so ended, were much less in amount than the money paid by the plaintiff, and the plaintiff claimed:

Statement

(a) A declaration that the defendant had elected to rescind the agreement with the plaintiff for the construction and sale of the vessels.

(b) A declaration that the defendant had exercised such options as it may have had under its agreement with the plaintiff to relieve itself from any and all responsibility under the said agreement with respect to any and all of the vessels covered by the said agreement.

(c) A declaration that upon the giving of the said notice the venture as to the building of the said ships was put an end to, and that the defendant thereupon became legally bound to pay back to the plaintiff the moneys received from him, less the value of any materials bought or ordered before the termination of such contracts for the purpose of the construction of the

said vessels, and an order for payment of such sum to the plaintiff.

The defendant pleaded, *inter alia,* as follows:

"The defendant will object that the contracts set out in the statement of claim disclosed that no contractual or other relationship has ever existed between the plaintiff and the defendant."

The point of law so raised in the defence was ordered to be set down for hearing to be disposed of forthwith, and before the trial of the issues of fact in the action. Pursuant to such order, the action was tried by GREGORY, J. at Vancouver on the 27th of April, 1920.

Davis, K.C., for plaintiff.
Mayers, for defendant.

28th April, 1920.

GREGORY, J.: It seems to me that effect must be given to the defendant's contention in paragraph 13a of its defence. While the three contracts are, in a sense, interwoven, they still remain three separate contracts, and to no one of them are the plaintiff and the defendants both parties. A person not a party to a contract cannot sue or be sued on it: *Tweddle* v. *Atkinson* (1861), B. & S. 393; *Dunlop Pneumatic Tire Company, Limited* v. *Selfridge and Company, Limited* (1915), A.C. 847. And in the first of these cases the contract distinctly provided that the plaintiff, who was not a party to the contract, but for whose benefit it was made, should have full power to sue, etc.

It is argued by the plaintiff that I must look at the plaintiff's reply, which had been served when the question was directed to be set down for hearing. The reply says:

"In the various transactions set out or referred to in the statement of claim, The Anderson Company was and acted as agent of the defendant."

In the face of the langauge of the order, I do not see how I can very well look at any other pleadings than the statement of claim and paragraph 13a of the defence, but assuming that I may, or that I must take it as true that The Anderson Company was the agent for the defendant, I do not see how the position is improved, for the rules of evidence would prevent the establishment of such a fact, if it, as I think it does, contradicts the written contract. In other words, the plaintiff seeks to prove that Anderson & Co., in executing the contract with the

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plaintiff, acted as agent for the defendant, its undisclosed principal. If it ever were the intention that the defendant should contract directly with the plaintiff, I cannot understand why the contracts were not drawn directly between them. The defendant Company was known to the plaintiff, for it is referred to in the preliminary contract of 8th October.

The following cases, *Humble* v. *Hunter* (1848), 12 Q.B. 310; *Formby Brothers* v. *Formby* (1910), 102 L.T. 116; and *Dunlop Pneumatic Tire Company, Limited* v. *Selfridge and Company, Limited,* already referred to, cited by Mr. *Mayers,* appear to me to establish the principle that where a party contracts in his own name, an undisclosed principal cannot sue or be sued on that contract, if the terms are such as import that the person so signing is the real and only principal. In the *Dunlop* case, Lord Parmoor at p. 864 says:

> "Parol evidence is admissible to prove that the plaintiff in an action is the real principal . . . . but . . . . [he] cannot claim to be a real principal . . . . if this would be inconsistent with the terms of the contract itself."

It is impossible for me to understand how it can be suggested that in the preliminary contract of October 8th it can be suggested that The Anderson Company acted as agent for the defendant. That contract is for ten vessels, and the defendant is only concerned in three of them, and of the $250,000 paid to The Anderson Company defendant was only to receive a portion. If the defendant and not The Anderson Company is the real principal in that contract, then clause 1 requires him to enter into a contract with himself, and clause 4 requires him to give the plaintiff credit for $250,000, the amount paid to him on the signing of the contract. No such sum was paid. It was, however, paid to The Anderson Company in connection with the construction of the 10 vessels.

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The building contract of the 16th of October between The Anderson Company and the defendant is surely entirely unnecessary if defendant is contracting directly with, and in its terms it is quite inconsistent with the idea that the defendant has any contract with the plaintiff, but it is wholly consistent with the idea that The Anderson Company has a contract with the plaintiff which the defendant agrees to perform. The

provision in clause 3, making the defendant covenant directly with the plaintiff, is of no more effect than the provision in *Tweddle* v. *Atkinson, supra,* enabling the son to sue in his own name. And the recitals on the several contracts making the other contracts part of that containing the recital can only bind the parties to the recital. It can give no rights against a third person, and can confer no rights upon a third person. In my opinion, the three contracts, taken together, are only consistent with the idea that plaintiff, while contracting directly with The Anderson Company, wished, through him, to control the actual building of the vessels, and the defendant, while also contracting directly with The Anderson Company, was willing to carry out all The Anderson Company's covenants in its contract with the plaintiff, but this establishes no privity between the plaintiff and the defendant.

From this decision the plaintiff appealed. The appeal was argued at Victoria on the 15th and 16th of June, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C., for appellant: The first question is whether a contractual relationship exists between the plaintiff and defendant, *i.e.,* whether the statement of claim fails to disclose a contract, and, secondly, whether the statement of claim discloses any cause of action. There are the three contracts, the first between Anderson and Van Hemelryck providing for the other two, the second being the building contract between The Anderson Company and the defendant (builder), and the third the vessel contract between The Anderson Company and the plaintiff (buyer), a copy of the third contract being attached to the second and made a part thereof, and a copy of the second contract being attached to and made a part of the third. I contend there is a straight agreement between plaintiff and defendant to be drawn from the two contracts in law, and in any event, The Anderson Company is made agent of the defendant for the purpose of receiving money to be paid for the building of the ships, and he is bound to pay over to the defendant, and if that money has not been spent, the plaintiff has a right

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to recover it back. As to there being an agreement set up by these two contracts (the building contract and vessel contract), you may be able to deduce a contract from two separate agreements on two separate documents: see *The Satanita* (1895), P. 248. Passages in the third contract shew the builder can be held liable under the second contract. The learned judge followed *Tweddle* v. *Atkinson* (1861), 1 B. & S. 394, but the facts in that case are quite different, as there the plaintiff was a stranger to the consideration, and there was no covenant between the fathers-in-law and the plaintiff. In this case Van Hemelryck gave the consideration. It is not necessary to have the signature: see *Carlill* v. *Carbolic Smoke Ball Company* (1893), 1 Q.B. 256. This is an action for money had and recovered: see *Wilson* v. *Church* (1879), 13 Ch. D. 1; (1880), 5 App. Cas. 176; *Royal Bank of Canada* v. *Regem* (1913), 82 L.J., P.C. 33. If you make a payment to a defendant, that is sufficient privity to recover: see *Calland* v. *Lloyd* (1840), 6 M. & W. 26; *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84 at p. 90; *Hitchcock* v. *Columbia Valley Land Co., Ltd.* (1919), 2 W.W.R. 969; *Sinclair* v. *Brougham* (1914), A.C. 398.

Argument

Mayers, for respondent: The main argument of the plaintiff is that the wording of section three of the second contract (building contract), in which it states "the builder covenants and agrees directly to and with Van Hemelryck to construct," etc., but my contention is, first, that a person cannot sue on a contract to which he is not a party, and secondly, there must be consideration from himself to the party sued. The consideration in paragraph three is not to the defendant but to The Anderson Company, and is a part consideration. The first contract between Van Hemelryck and The Anderson Company was previous to the "building" and the "vessel" contracts. *Tweddle* v. *Atkinson* (1861), 1 B. & S. 397, is an authority on this case. There are two classes of cases, first as to companies where a person not a shareholder seeks to enforce rights: see *Eley* v. *Positive Government Security Life Assurance Company* (1876), 1 Ex. D. 88; *In re Rotherham Alum and Chemical Company* (1883), 25 Ch. D. 103 at p. 111. Secondly, cases

between manufacturer, wholesaler and retailer: see *McGruther* v. *Pitcher* (1904), 2 Ch. 306 at p. 308; *Taddy & Co.* v. *Sterious & Co.* (1904), 1 Ch. 354; *National Phonograph Company, Limited* v. *Edison-Bell Consolidated Phonograph Company, Limited* (1908), 1 Ch. 335 at p. 345; *Dunlop Pneumatic Tyre Company, Limited* v. *Selfridge and Company, Limited* (1915), A.C. 847 at pp. 849-50. In *The Satanita* case the club was the agent, and is distinguished: see Pollock on Contracts, 8th Ed., p. 27. Van Hemelryck bound himself to The Anderson Company by the first contract, and the other two contracts were exhibits of the first: see Leake on Contracts, 5th Ed., 35 to 37. On the point raised by the plaintiff that The Anderson Company was agent for the defendant see *Cutter* v. *Powell* (1795), 6 Term Rep. 320 at p. 325; *Weston* v. *Downes* (1778), 1 Doug. 23 *a*; *Hulle* v. *Heightman* (1802), 2 East 145. On the question of recovery by one who by his own wrong-doing brought about the condition see *New Zealand Shipping Co. Lim.* v. *Societe des Ateliers et Chantiers de France* (1918), 87 L.J., K.B. 746. When the contract becomes impossible of performance they need not necessarily pay the money back: see *Anglo-Egyptian Navigation Company* v. *Rennie* (1875), L.R. 10 C.P. 271 at p. 284; *Chandler* v. *Webster* (1904), 1 K.B. 493 at p. 501. If he repudiates the contract he cannot recover: see *Ex parte Barrell. In re Parnell* (1875), 10 Chy. App. 512 at p. 514.

Argument

Davis, in reply.

Cur. adv. vult.

5th October, 1920.

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

After a careful analysis of the several agreements relied on by plaintiff's counsel, I am unable to discover privity of contract between the plaintiff and the defendant. The scheme of arrangement between the several parties to these agreements appears to me to have been to avoid privity of contract between the parties hereto, either directly or through agents.

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The other two cases, which, by consent of counsel, were to be governed by the result in this case, should be in like manner disposed of.

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MARTIN, J.A.: I agree in the dismissal of this appeal.

GALLIHER, J.A.: This is an appeal from an order of GREGORY, J., dismissing the plaintiff's action on the ground that there was no privity of contract between plaintiff and defendant. This was decided on a point of law raised under paragraph 13a of the amended defence. Mr. *Davis* argued two grounds:

(1) The several contracts read together constitute an agreement between plaintiff and defendant; and (2) In any event, The Anderson Company was the agent for the defendants for the purpose of receiving the moneys paid by the plaintiff for the construction of the vessels and payment to The Anderson Company was payment to the defendant, and plaintiff is entitled to sue for moneys had and received.

The defendant admits a breach of the contract with The Anderson Company of 16th October, 1918, entered into by the plaintiff. It also admits that notice was given in pursuance of the terms of said contract and that it was relieved from all responsibility under its contract with The Anderson Company of the 16th of October, 1918.

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For some reason, not explained, the plaintiff and defendant are not both parties signatory to any one of the contracts, and the learned trial judge held, on the authority of *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393, and *Dunlop Pneumatic Tyre Company, Limited* v. *Selfridge and Company, Limited* (1915), A.C. 847, that a person not a party to a contract cannot sue or be sued upon it. Unless the present case can be distinguished from these, that would be an end to the appeal on this ground.

Other cases cited to us in argument by Mr. *Mayers* were *McGruther* v. *Pitcher* (1904), 2 Ch. 306; *Taddy & Co.* v. *Sterious & Co.* (1904), 1 Ch. 354, and *National Phonograph Company, Limited* v. *Edison-Bell Consolidated Phonograph Company, Limited* (1908), 1 Ch. 335, all along the line of the *Selfridge* case, *supra*. In the *Selfridge* case it was held that, assuming the plaintiffs were undiscovered principals that no consideration moved from them to the defendants, and that the contract was unenforceable by them.

In the judgment of Lord Dunedin on this question of consideration, his Lordship dwells upon the fact that tyres in question at the time of the transfer to Selfridge & Co. were the property of Messrs. Dew, who sold them to Selfridge, and answers his own query: "What then did Dunlop do, or forbear to do, in a question with Selfridge?" as follows: "The answer must be, nothing."

His Lordship, in concluding his judgment, at p. 856 says, "that there are methods of framing a contract which will cause persons in the position of Selfridge to become bound, I do not doubt," but I take it we must read these words in the light of the language used by his Lordship earlier in his judgment, wherein he states (p. 855):

"Speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or in other words, that Dunlop was the undisclosed principal, and as such can sue on the agreement."

In *Tweddle* v. *Atkinson, supra,* the son was a stranger to the contract, and no consideration moved from him, nor had he entered into any covenant with any person in respect of the contract.

In *The Satanita* case (1895), P. 248, it was held that a contract existed between owners of competing yachts and that the plaintiff was entitled to maintain his action against the defendant, although each had made separate contracts with a third party, the Yacht Club, and there was no contract to which both were parties signatory. There the defendant, the owner of one of the yachts competing in the race, ran down and sank the plaintiff's yacht, and the Court, Lord Esher, M.R., and Lopes and Rigby, L.JJ., held that by reason of their respective contracts with the Yacht Club, in which they agreed to abide by the rules and regulations governing the racing and to pay all damages consequent on their negligence, the plaintiff was not limited in damages to those fixed under section 54 of the Merchant Shipping Act Amendment Act, 1862. Rigby, L.J. at p. 262 says:

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"The contract did not arise with any one, other than the managing committee at the moment that the yacht owner signed the document, which it was necessary to sign in order to be a competitor. But when the owner of the Satanita on the one hand, and the owner of the Valkyrie on the other, actually came forward and became competitors upon those terms, I think

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it would be idle to say that there was not then, and thereby, a contract between them, provided always that there is something in the rule which points to a bargain between the owners of yachts."

Let us see if we can bring the circumstances of this case within these words. To test this, we have to examine the respective contracts set out in the pleadings. The preliminary contract between the buyer and the contractor was (so far as it affects the present case) that if he, the contractor, would enter into a contract with the builder for the construction of three steam vessels, he, the buyer, would enter into a contract with the contractor to purchase and pay for the said three vessels. In pursuance of this, on the 16th of October, 1918, the contractor entered into a contract with the builder (hereinafter referred to as the building contract) for the construction of the three vessels in accordance with the plans and specifications and upon the terms and conditions set out in a contract of even date between the buyer and the contractor (hereinafter referred to as the vessel contract). Each contract was, in express words, made a part of the other, and a copy of each was attached to the other. The provisions of the building contract most pertinent to the question are found in paragraphs 1, 2, 3 and 4, which are as follow:

"(1) This agreement shall be effective and binding upon the contractor and builder immediately upon the execution and delivery of the vessel contract, provided that such contract be executed and delivered on or before October 16th, 1918, otherwise this agreement to be null and void.

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"(2) The contractor covenants and agrees with the builder to receive the payments to be made to the contractor pursuant to the terms of the vessel contract and immediately upon receipt of such payment to remit the amount thereof to the builder by exchange payable in Canadian currency at New Westminster, B.C., Canada, but if the contractor fails to remit such payments as required, it shall not relieve the builder of its obligation to construct the vessels or be deemed a breach of this contract or of the vessel contract.

"(3) The builder covenants and agrees with the contractor, and, for and in consideration of the execution of the vessel contract by or on behalf of Raymond Van Hemelryck covenants and agrees directly to and with Raymond Van Hemelryck to construct each and every of the vessels provided for in the vessel contract in accordance with all the terms and provisions thereof and of the plans and specifications therein referred to, and to comply with and perform each and every stipulation act and thing which it is agreed by said vessel contract shall be complied with or performed by the builder and to make each and every payment required of the builder by the terms of the vessel contract, and to be bound by and to observe

each and every provision of the vessel contract so far as the same prescribes any duty or obligation to be observed, or carried out or thing to be done by the builder, including all provisions therein contained in regard to certificates and inspectors or surveyors of the Bureau Veritas and the appointment and decision of matters by arbitrators, precisely as though it, the builder, had been expressly made a party to said contract and had signed, executed and delivered the same in place of the contractor.

"(4) The builder hereby expressly ratifies and confirms the provisions contained in said vessel contract for payment of instalments of the purchase price to the contractor instead of to the builder; and hereby expressly appoints the contractor its attorney and agent to collect and receive all payments falling due under the terms of the said vessel contract, and receipt therefor in its name, as fully to all intents and purposes as if said payments had been made to the builder direct; and covenants and agrees that the buyer's responsibility in regard to said payments shall cease immediately upon such payment to the contractor, and the buyer shall be under no responsibility to see to the due application of such payments to the builder."

Provisions were made in the vessel contract (in case of default in payments by the buyer) for relieving the contractor and builder from all responsibility thereunder and under the building contract upon notice as therein provided being given to the buyer. Such notice was given.

In the meantime, however, the builders had performed certain work and purchased certain materials to carry out the contract, and the buyer had paid certain sums to the contractor, who, by a term of the building contract, the builders had constituted their attorney and agent to collect and receive the moneys due under the terms of the vessel contract, and the plaintiff is bringing this action to recover as moneys had and received such moneys so paid as under the terms of the contract are in excess of what was due the builders.

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These contracts disclose three things which at all times during the negotiations were present to the minds of all parties thereto: (1) A definite and ascertained person who should build the ships—the builders; (2) a definite and ascertained person who was to become the purchaser of such ships and for whom they were actually to be built—the buyer; and (3) a definite and ascertained person who was to pay for the ships—the buyer.

In addition, the builders appointed the contractor their attorney to receive payment from the buyer and remit same to them.

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In the *Selfridge* case in the House of Lords, Lord Parmoor thus states the law (p. 864):

"There is no question that parol evidence is admissible to prove that the plaintiff in an action is the real principal to a contract; but it is also well established law that a person cannot claim to be a principal to a contract, if this would be inconsistent with the terms of the contract itself."

Now, while the appellant here is not in form a party to the building contract, nor the respondent in form a party to the vessel contract, yet each contract is in express terms made a part of the other, and upon reading these contracts it appears to me that it is consistent, and not inconsistent with the terms of the respective contracts, that the buyers and the builders are the real principals.

When certain preparations were made, certain material purchased and certain work done under the contracts by the builders and certain payments made by the buyer, there was a coming together for a common purpose or undertaking and a part execution by each; and substituting the word "contracts" for the word "rule" in the language of Rigby, L.J., in *The Satanita* case, *supra*, "something in the contracts (rule) which points to a bargain between the owners." Of course, the general rule is that persons not a party to a contract cannot sue or be sued upon it, but this is subject to certain exceptions, such as here, where, if I am right in my view of the contracts, the real principals have been shewn. If this view is correct, it seems to me there can be no question of the consideration moving from the appellant to the respondent. We have, then, privity of contract, consideration, and consequently, the right to sue.

GALLIHER, J.A.

Having arrived at this conclusion, it is unnecessary to deal with the second ground raised.

A like result follows in the cases of *Van Hemelryck* v. *Northern Construction Company* and *Van Hemelryck* v. *Pacific Construction Company*.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: There were three contracts in all entered into, having relation to the construction of vessels during the continuance of the war. My brother GALLIHER has,

in his judgment, specifically dealt with them, and I do not find it necessary to refer to them in detail, save to say that unquestionably, although there are three contracts, privity and contractual relationship between the appellant and the respondent is abundantly established, and it is evident, upon the reading of the contracts, that the real principals in the whole transaction are the parties litigant in this action, the appellant being, as described, the buyer, and the respondent being, as described, the builder. Further, it is plain that the moneys paid, *i.e.*, the consideration, went from the buyer to the builder. There was no concealment or non-disclosure of the true state of facts, and the respondent acted upon this well known state of facts, and when default took place in the making of the required deposit of moneys, as called for, the builder took the steps called for under the contract to bring the contractual relationship to an end, and under the terms thereof it follows that the builder must account for all the moneys received save the amount that it is entitled to retain under the provisions of the contract under which the notice was given. Even apart from the writings, the facts disclose a state of affairs that would call for an accounting. The builder received the moneys of the buyer and accepted the benefit of the contract for the construction of the vessels. In the face of these undoubted facts, it is difficult to see what foundation can be claimed for the bald contention put forward that no privity of contract was created, and the builder, the respondent, although in receipt of the moneys of the buyer, the appellant, is not called upon to account for the moneys received. We find it stated in Chitty on Contracts, 16th Ed., p. 56, dealing with the subject, "Implied contract to pay over money received":

"It is necessary, in order to maintain this action, that the money sought to be recovered should have been received by the defendant, under such circumstances as to create a privity of contract between him and the plaintiff (*Robbins* v. *Fennell* (1847), 11 Q.B. 248 and see *Cobb* v. *Becke* (1845), 6 Q.B. 930)."

It cannot be said that *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393, displaces any right in the appellant in the present case to sue, as it is abundantly proved that the appellant is no stranger to the consideration. Then it is not only that the appellant

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cannot be said to be a stranger to the consideration, but it is clear he provided and paid the consideration, and the respondent expressly, by the incorporation of the one contract in the other, created the privity and entered into contractual relationship. The consideration moved from the appellant to the respondent, the moneys were the moneys of the appellant to the knowledge of the respondent, and the vessels were to be built in consideration of the moneys received and further payments to be made by the appellant. It baffles one to understand, with all respect to contrary opinion, how, upon the facts of the present case, it can be effectively contended that no privity of contract was created. Upon the facts of the present case the contractual relationship commenced and the privity of contract arose between the appellant and the respondent when the appellant executed the contract referred to as the vessel contract, the respondent requiring that contract to be entered into by the appellant, and it was entered into by the appellant (*Carlill* v. *Carbolic Smoke Ball Company* (1893), 1 Q.B. 256). Upon the facts, as we have them, the builder elects, under the terms of the contract, to desist from building the vessels, but, in so doing, after the proper deductions are made from the moneys received from the buyer, that which remains is the money of the buyer and must be paid to him. This requirement is expressly set forth in the contract, and even independent of the contract, the moneys of the buyer have been had and received by the builder and paid for a consideration which has failed, and there is the right of recovery back. In *Royal Bank of Canada* v. *Regem* (1913), 82 L.J., P.C. 33, Viscount Haldane, L.C. said at p. 39:

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"It is a well established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration which has failed. It applies, as was pointed out by Lord Justice Brett in *Wilson* v. *Church* (1879), 48 L.J., Ch. 90; 13 Ch. D. 1, when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment and which has become abortive. The lender has in this case a right to claim the return of the money in the hands of the borrowers as being held to his use. *Wilson* v. *Church*, which was affirmed

in the House of Lords under the name of *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176, is an excellent illustration of the principle. A loan had been raised to make a foreign railway, on a prospectus which set out a concession by the foreign Government in virtue of which the bondholders were to have the benefit of certain Customs duties. The foreign Government, finding that the railway had not been made, revoked the concession. The trustees, to whom the money had been paid to be expended on the gradual construction of the railway, contended that it was not apparent that they could not with certain variations substantially carry out the scheme. It was held that, while the Government had a right to revoke the concession which could not be questioned, the effect of its so doing was to vary materially the prospects and terms of security of the bondholders, and that the question whether the scheme had become so abortive that the consideration for the advances had failed must be determined not merely by a survey of physical or financial considerations, but by reference to the conditions originally stipulated for. The bondholders were declared to be entitled to recover their money."

As previously pointed out, it is impossible for the builder to deny that the money received was not the money of the buyer. The notice of the election to desist from building the vessels was given by the builder to the buyer, and unquestionably the very large sum, I think $960,000, was money received by the builder which "in justice and equity belongs" to the buyer, subject, of course, to all just deductions and allowances. It is to be remembered that the contract to build the vessels is with the appellant, and the respondent bound itself to and with the appellant to build them, in that the vessel contract is to be read with and form part of the contract, and the obligations of the vessel contract are rightly enforceable by the appellant as against the respondent, complete privity being thereby established. In *Calland* v. *Loyd* (1840), 6 M. & W. 26, Lord Abinger, C.B. at p. 31 said:

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"This rule was granted on the supposition that some contract existed, by which the defendants, the bankers, were bound to pay over this money to another person than the plaintiff . . . . The question is whether the bankers, when the plaintiff has given them notice that it is his money, have a right to set up the *jus tertii*. The answer is that there is no *jus tertii*: it is admitted that the money is the plaintiff's, and the defendants are merely setting up an unlawful title in answer."

In the result, the rule in the above case was not made absolute. In the present case, it cannot be gainsaid that the moneys are the moneys of the appellant, and the respondent is attempting to evade or escape from paying back to the appellant money

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which "in justice and equity belongs" (Viscount Haldane in *Royal Bank of Canada* v. *Regem, supra*) to the appellant. The fact that payment was made through another does not avail and give rise to any effective answer that no privity exists as between the appellant and the respondent, the facts of the present case being ample to establish privity. In *Sinclair* v. *Brougham* (1914), A.C. 398 at p. 436 we have Lord Dunedin saying:

"It is here that I think the importance of the action for money had and received comes in. That cannot be founded on a *jus in re*, for you cannot have a *jus in re* in currency. It shews that both an action founded on a *jus in re*, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him."

In *Brown* v. *Walsh* (1919), 45 O.L.R. 646, it was held that money paid by a purchaser, who ultimately fails to carry out his contract, belongs to the seller only if the purchaser has agreed that it shall, and even in such a case, the Court may relieve against a forfeiture. In the present case the contract specifically provides for repayment after the stipulated-for deductions, but even apart from the contract there would be the requirement to make repayment, as there never was an agreement that the moneys paid by the buyer should, upon default, become the property of the builder. Meredith, C.J.C.P., who delivered the judgment in the Appellate Division, at p. 648 said:

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"The Court's first duty is therefore to find whether there was in fact any agreement that the payments which were made should be the seller's if the purchaser failed to carry out the contract: and there is no evidence of any such agreement."

And at p. 649, Meredith, C.J.C.P. further said:

"In the case of *Brickles* v. *Snell* (1916), 2 A.C. 599; 30 D.L.R. 31, the Judicial Committee of the Privy Council seemed to take it for granted that the defaulting purchaser would have been entitled to recover the 'deposit' if he had sued for it."

The learned counsel for the respondent greatly relied upon the form of the contracts and the parties thereto, and that the form of the contracts displaced any possible contention of there being privity of contract which would admit of the bringing of

the action by the appellant against the respondent, and cited, amongst other cases, *Dunlop Pneumatic Tyre Company, Limited* v. *Selfridge and Company, Limited* (1915), A.C. 847. In that case, though it was

"held, assuming that the plaintiffs were undisclosed principals, that no consideration moved from them to the defendants, and that the contract was unenforceable by them,"

but in the present case the consideration did move from the appellant to the respondent, and that being the case, it would seem to follow that the contract should be capable of enforcement by the appellant against the respondent. In my opinion, what the Lord Chancellor (Viscount Haldane) said at p. 853 in the *Dunlop* case is peculiarly applicable to the facts of the present case, and the facts irresistibly establish the right of action here brought by the appellant against the respondent.

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our laws know nothing of a *jus quæsitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it."

Then, it was strongly urged here that the default was the default of the appellant and that the appellant "cannot take advantage of the existence of a state of things which he himself produced" (Lord Finlay, L.C. in *New Zealand Shipping Co. Lim.* v. *Societe des Ateliers et Chantiers de France* (1918), 87 L.J., K.B. 746 at p. 748), but can that be effectively said in the present case? There was default in providing the moneys to constitute the agreed upon security, and that not being provided, the respondent elected, under the terms of the contract, to put the contract at an end. It was optional upon the part of the respondent, and being done, there arose, in accordance with

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the contract, the right in the appellant to have an accounting and payment back of the moneys, less all proper deductions. I would, for the reasons here stated, allow the appeal.

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The Court being equally divided, the appeal was dismissed.

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Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *Taylor, Mayers, Stockton & Smith.*

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VAN HEMELRYCK v. NEW WESTMINSTER CONSTRUCTION AND ENGINEERING CO.

Judgment—Final order—Appeal to Privy Council—Application for—Consolidation of actions—Similar contracts—Separate contract with each defendant—Privy Council Rule 15.

Actions were brought by the plaintiff against three companies based on separate contracts for the construction of ships. The contracts were precisely similar in form.

On appeal to the Judicial Committee of the Privy Council, an application to the Court of Appeal to consolidate the appeals was refused, MCPHILLIPS, J.A. dissenting.

Statement

MOTION to the Court of Appeal for leave to appeal to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal of the 5th of October, 1920, reported *ante*, p. 39, and for an order, under rule 15 of the Privy Council rules, consolidating this appeal with the appeals in the case of *Raymond Van Hemelryck* v. *Pacific Construction Company, Limited,* and in the case of *Raymond Van Hemelryck* v. *Northern Construction Company, Limited.* The affidavit in support of the motion recited that judgment was pronounced in this action by the Court of Appeal on the 5th of October, 1920, dismissing the plaintiff's action; that the plaintiff was desirous of appealing from said judgment to the Judicial Committee of the Privy

Council; that the matter in dispute was far in excess of the sum of £500 sterling; that judgment was pronounced in the Court of Appeal on the same day in the actions of *Raymond Van Hemelryck* v. *Pacific Construction Company, Limited* and *Raymond Van Hemelryck* v. *Northern Construction Company, Limited*; that the question of law raised in each of the appeals is the same, and when this appeal was heard it was agreed by counsel that the other two appeals hereinbefore mentioned were to be governed by the result of this appeal and disposed of in a like manner; that the question of law to be determined by the Judicial Committee of the Privy Council will be exactly the same in each case and it will be a great convenience and saving of expense to all parties should the appeals be consolidated, and that the solicitors for the respondents in both cases, on application, refused to enter into a like arrangement in regard to the hearing before the Judicial Committee of the Privy Council. The actions are with relation to contracts between the plaintiff and each of the defendant Companies. These contracts are precisely similar, but a distinct and separate contract was made with each of the defendant Companies.

Statement

The motion was heard at Vancouver on the 21st of October, 1920, by MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C., for the motion: We are entitled to appeal as a matter of course, as the amount involved is far in excess of £500. As to the application for consolidation, the cases are identical, and come within rule 15 of the Privy Council rules.

Mayers, for respondent: This is an interlocutory judgment: see *Salaman* v. *Warner* (1891), 1 Q.B. 734. The same argument was used in *Chilliwack Evaporating & Packing Co.* v. *Chung* (1917), 25 B.C. 90; see also *Ward* v. *Clark* (1895), 4 B.C. 71 at p. 73; *Denny* v. *Sayward*, *ib.* 212 at p. 217; *Edison* v. *Edmonds* (1896), *ib.* 354 at p. 379; *Koksilah* v. *The Queen* (1897), 5 B.C. 600 at p. 605; *Brigman* v. *McKenzie* (1897), 6 B.C. 56; *Frumento* v. *Shortt, Hill & Duncan, Ltd.* (1916), 22 B.C. 427 at p. 429; *Bank of Vancouver* v. *Nordlund* (1920), 28 B.C. 342. There is not sufficient proof that the

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amount involved exceeds £500: see *Wenger* v. *Lamont* (1909), 41 S.C.R. 603. The case does not fall within section 2 (*a*) of the rule. There are three distinct contests against three distinct parties.

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Davis, in reply: It is for us to shew by affidavit that we have an appealable case. This was done, and it cannot be controverted. We have a later case in point overruling *Salaman* v. *Warner* (1891), 1 Q.B. 734, *Bozson* v. *Altrincham Urban Council* (1903), 1 K.B. 547; Annual Practice, 1919, p. 437. The effect of the judgment is that it finally disposes of the rights of the parties: see *In re Croasdell and Cammell, Laird & Co., Limited* (1906), 2 K.B. 569 at p. 573. The cases he refers to were decided before 1903, and the *Bozson* case has been followed in this Court.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: As to the application to consolidate, I feel this difficulty about it, that the rule appears to give us power to consolidate only where the several actions arise out of the same matter. Now I am quite clearly of opinion that in this case they do not arise out of the same matter; they are entirely distinct. That being so, the rule, in my opinion, is not applicable. As I stated a moment ago, this is a case where, if the rule were applicable, the Court, in my opinion, should make an order to consolidate. It is an order which eminently would be just and fair and in the interest of the saving of expense, but I put my opinion as to consolidation entirely upon the inapplicability of the rule.

With regard to leave to appeal, I think leave should be granted. At the present moment I do not find it necessary to decide as to whether this was a final or an interlocutory judgment. I will assume that it was interlocutory. I think under this rule it is competent for a party to prove by affidavit the amount involved, and we cannot, I think, fairly shut our eyes to the facts which came out in the argument, which shew that the matter was one of very considerable importance. There are three cases also depending upon this, and while that is not of itself ground for leave, it may be given some weight.

There will be security for $300 in each case.

GALLIHER, J.A.: I agree. I feel very strongly inclined, if the rule gave us power, to consolidate these actions in appeal; and, to my mind, one question runs through it all, through each case, and there is only the one matter to be decided, and it was so argued before us. The argument of counsel who argued one case was accepted by counsel in the other case. However, reading the rule, I am inclined to take the same view as the Chief Justice. It is not a matter arising out of the same contract. They are each distinct and separate in themselves, and while I think it is eminently a case for consolidation, I question whether we have the power to do so. I therefore agree with the result arrived at by the Chief Justice.

MCPHILLIPS, J.A.: I am of opinion that the motions ought to be acceded to. I am also of opinion that the order is a final order. In my view, the judgment has the effect of disposing of the plaintiff's action and there is no power left in the Court to make any further disposition of the actions, such as indicated in other cases where a reference might be directed, or something of that nature.

With regard to the matter at issue, the amount involved, I cannot see how this Court, after a long and elaborate argument indicating the actual payment of very large sums of money, aggregating almost a million dollars, should be addressed upon the point that there is no large amount in controversy. Unquestionably we are seized of these facts, and cannot disguise our minds from these facts, and it would be highly technical, if nothing else, to give any adhesion to such an argument.

Now, with regard to consolidation, I think these appeals have no separate features. The appeal was argued in the one case, and it was stated that the disposition of the one appeal would be the disposition of the other two appeals. In the face of that, can this Court be affected at all by an argument to the effect that there would be prejudice or anything of that character?

Application to consolidate refused, McPhillips, J.A. dissenting.

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HAWKS v. HAWKS

HAWKS v. HAWKS.

Detinue—Title deeds—Lands in Ontario—Action to recover deeds—Husband and wife—Jurisdiction.

The defendant purchased the rights of a certain applicant for Crown lands in Ontario, and subsequently made the remaining payments due the Crown, but having previously exhausted his own right of acquirement of further lands under the land laws, he had the patents issued in his wife's name and upon receiving them he kept them in his own possession. He entered on the lands with his wife, laboured and spent further money of his own in improvements. Later he and his wife quarrelled and she came to British Columbia, to which Province he followed her in order to recover his property. Upon his arrival she brought action for delivery and return of the patents for said lands, and obtained judgment.

Held, on appeal, reversing the judgment of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that as the wife's evidence is that she does not claim the property as her own in fact, but bases her claim on the doctrine of the common law that husband and wife are one, she cannot succeed, and it is therefore unnecessary to deal with the question of jurisdiction.

Per MCPHILLIPS, J.A.: The action is one of detinue and does not involve the determination of title; the defendant is within the jurisdiction and this fact gives jurisdiction to this Court.

[Affirmed by Supreme Court of Canada.]

Statement

APPEAL by defendant from the decision of MORRISON, J., of the 3rd of May, 1920, in an action for the delivery over of three land title patents in the name of the plaintiff to certain lands in the Province of Ontario. In 1904 the defendant, plaintiff's husband, purchased the rights of certain properties in Indian lands in Ontario. He made the remaining payments to the Government and under his instructions the patents were issued in his wife's name, but they were delivered to him and he kept them. Husband and wife entered upon the lands together and the husband expended considerable money and labour in the improvement of the property. Later they quarrelled, and the wife went to Vancouver, where she lived with her mother. The husband later followed her to Vancouver in an endeavour to obtain from her a transfer of the property. On his arrival she brought this action. All the money used in acquiring and

improving the property was advanced by the husband and he left the title deeds in safe keeping in Ontario. The learned trial judge gave judgment for the plaintiff.

The appeal was argued at Victoria on the 17th and 18th of June, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

D. Donaghy, for appellant: The husband's money and labour only went into the lands and she held the lands for him. There is a resulting trust. On the question of jurisdiction, I say the patents savour of the realty and are considered part of it by law and is an immovable, so there is no jurisdiction: see Russell on Crimes, 7th Ed., 1262-3; Dicey on Conflict of Laws, 2nd Ed., 497-8. A mortgage has been held to be an immovable: see Halsbury's Laws of England, Vol. 6, pp. 199, 200 and 202; Dicey, 357-8. The Court cannot declare who is entitled to the Crown grants without first determining who is entitled to the land. If these documents are lands, we have to look upon them as lands in Ontario. As to an action in trespass on lands in a foreign jurisdiction see *Companhia de Mocambique* v. *British South Africa Company* (1892), 2 Q.B. 358 at pp. 398-9; (1893), A.C. 602 at p. 623. The action lies in the *rei sitæ*: see *Reiner* v. *Marquis of Salisbury* (1876), 2 Ch. D. 378; *In re Hawthorne. Graham* v. *Massey* (1883), 23 Ch. D. 743; *Sydney Municipal Council* v. *Bull* (1909), 1 K.B. 7; *Norwich Corporation* v. *Norwich Electric Tramways Co.* (1906), 75 L.J., K.B. 636 at p. 639. The evidence shews there is a genuine dispute as to title that must be decided in Ontario.

Argument

Dorrell, for respondent: This is an action of detinue: see Halsbury's Laws of England, Vol. 27, p. 888. The defendant said it was illegal to take the lands in his name as he had all he could get under the laws, and he put it in his wife's name. As to jurisdiction, this is a remedy over which the Courts will exercise jurisdiction and any one can avail himself of the jurisdiction if effectual relief can be obtained. The action being one of detinue is transitory in its nature: see *Parshley* v. *Hanson* (1912), 17 B.C. 364; *Jackson* v. *Spittall* (1870), L.R. 5 C.P. 542 at p. 549. The case of *British South Africa*

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Co. v. *Companhia de Mocambique* (1893), 63 L.J., Q.B. 70 at pp. 75 and 79 turned on the question of trespass, so that the *lex situs* is involved, but here it is not: see Smith's Leading Cases, 12th Ed., Vol. 1, p. 699; *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161. Further, on the question of jurisdiction, see Snell's Principles of Equity, 17th Ed., 41; *Norris* v. *Chambres* (1861), 3 De G.F. & J. 583; *In re Piercy* (1894), 64 L.J., Ch. 249; *Whitaker* v. *Forbes* (1875), 44 L.J., C.P. 332.

Donaghy, in reply.

Cur. adv. vult.

5th October, 1920.

MACDONALD, C.J.A.: I do not find it necessary to decide the question raised by the appellant as to the jurisdiction of the Court below to entertain this action, because in my opinion, assuming such jurisdiction, the appellant must succeed.

The respondent has completely failed to make out her cause of action. The learned trial judge has given no reasons for his conclusion, but since my opinion is founded on respondent's own evidence, the question of demeanour does not come into the case. It is not even necessary to express an opinion as to the extent of respondent's own interest, if any, in the lands referred to in the pleadings. She does not claim them as her own in fact, but bases her claim on the doctrine of the common law that husband and wife are one, and she contends that what is her husband's is hers. In my opinion she could succeed, if at all, only upon shewing that the husband is a bare trustee for her of the title deeds in dispute, and this she has entirely failed to do.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree in allowing the appeal. It is apparent from the plaintiff's own evidence that the defendant is at least as much entitled to the custody of the patents in dispute as she is, and therefore she cannot succeed, whatever may be the answer to the vexed question of jurisdiction, which, in the view I take, is not necessary to pursue.

MARTIN, J.A.

GALLIHER, J.A.: In the view I take of the evidence, I do not find it necessary to deal with the point of law raised. Even on

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the plaintiff's own testimony she fails to make out a case. Her view seems to be that because she was defendant's wife, any property acquired belonged to her as much as to him. She sets up no agreement between them by which property put in her name was to belong to her. The husband explains the reason why this method was pursued, and while this devious way of acquiring property from the Crown for himself may be a matter of comment, we are not very much concerned with that here. This fact stands out clear and uncontradicted, that the husband acquired all this property, carried through the transactions, paid all moneys out of his own funds for obtaining the property and for improvements hereon and all taxes on the property up to 1915. None of the plaintiff's money went into this; in fact, she had none except what was given her from time to time or what she was permitted to take out of her husband's business. It is true she paid some $978.36 taxes on the parcels held in her name in 1919, and a letter from the husband was written her notifying her of these taxes and that if she did not pay them they would be liable to an additional impost of 10 per cent. on other taxes, also stating that if she needed his assistance in paying them it would be necessary to make business arrangements at once. The defendant explains this letter by saying that he was trying to bring pressure upon her to deed to him these properties, which she was refusing to do, and which by verbal agreement she had undertaken to hold in trust for him. The plaintiff denies this verbal trust, but I think the facts are against her being considered the real owner. It is true she went out on the property to fulfil settlement duties, but that would be quite natural for a wife to do. Besides, in all property her husband might acquire in that way, she would be bettering her own condition to the extent of her dower interest in the property acquired.

The learned trial judge has given no reasons, but with every respect, I am unable, upon the evidence, to see upon what principle she can claim to be the owner of these lands or to have the title deeds delivered over to her.

I would allow the appeal.

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McPHILLIPS, J.A.: I am of the opinion that the judgment of the learned trial judge should be affirmed. The subject-matter of the action is the right to the possession of certain Crown grants, the respondent, the wife of the appellant, being the grantee therein. The contention of the appellant is, that he is really the owner of the lands, *i.e.*, that there is a resultant trust in the lands, and that he is entitled to the possession of the Crown grants as against the respondent. Unquestionably *prima facie* the respondent being the grantee, possession should follow the title. It is contended that the subject-matter of the action is one in relation to immovables, and the lands being in the Province of Ontario, there is no jurisdiction in the Courts of British Columbia to pass upon the question as to who is entitled to the possession of the Crown grants, as it will involve the determination of title in the lands. The action, in my opinion, is one of detinue (Halsbury's Laws of England, Vol. 27, par. 1566, p. 888), and does not involve the determination of title. Admittedly, the respondent has the legal estate in the lands, and this gives her the right to the possession of the title deeds, *i.e.*, the Crown grants (see Tindal, C.J. in *Barclay* v. *Collett* (1838), 4 Bing. (N.C.) 658 at p. 668). This is not an action to recover land situate in the Province of Ontario, and no obstacle would appear to me to be in the way of deciding merely the possessory title to the deeds. The appellant is attempting to set up what may be a matter which is solely for the determination of the Courts of the Province of Ontario, the *forum rei sitæ* (Dicey on Conflict of Laws, 2nd Ed., 357, 358), *i.e.*, involving the determination of the title to the foreign immovables. Here there is the absolute title to sue, and the relief accorded to the respondent does not in any way involve the determination of any trust or outstanding equity in the lands that the appellant may have. I look upon the action in the present case as a personal action and transitory; the defendant is in this jurisdiction, and this fact gives jurisdiction (see Lord Herschell, L.C. in *British South Africa Company* v. *Companhia de Mocambique* (1893), A.C. 602 at p. 623):

> "It has been already stated that by the common law personal actions, being transitory, may be brought in any place where the party defendant can be found . . . ."

The present action is not one that involved the assessment of any damages for trespass to land situate abroad. It involved only the determination of the right to the custody of the title deeds. I would refer to what Wright, J., at p. 366, said in the *British South Africa Company* case ((1892), 2 Q.B. 358), the decision of Lawrance and Wright, JJ. being restored in the House of Lords (1893), A.C. 602:

"It does not in any way involve a denial of jurisdiction to give relief *in personam,* or against property in this country, in any case where title to the foreign land is not directly involved, or can be proved as a fact by the judgment of a competent Court in the foreign country."

The action, as brought by the respondent, may be also supported on the ground of the relief claimed and the remedy being strictly *in personam,* and the judgment under appeal did not decide the title to foreign immovable property. (See *Re Clinton; Clinton* v. *Clinton* (1903), 88 L.T. 17, Joyce, J. at p. 19.) The most recent pronouncement upon the question of the exercise of jurisdiction in any way relating to foreign lands is that of Viscount Finley in the House of Lords in *Brown* v. *Gregson* (1920), A.C. 860 at pp. 875-6:

"It is quite true that the Courts in Scotland or in England may, with regard to persons within their jurisdiction, make orders in certain cases with reference to land in a foreign country. A contract with regard to land bought may be enforced here *in personam* so long as it is not contrary to the *lex situs* which, with regard to real property, must be the governing law."

In passing, it is a matter for remark that the case the appellant sets up discloses illegal conduct upon his part—the illegal acquirement of lands as against the *lex situs, i.e.,* the attempted acquirement of the lands by and through his wife (the respondent), he having exhausted his right of acquirement of further lands under the existent land laws. It is conceivable that the appellant is not anxious to resort to the Courts of the *lex situs,* but in this jurisdiction attempts to withhold title deeds to land to which he has no right, having the insecure and ineffectual foundation of an illegal transaction (see *Farmers' Mart, Lim.* v. *Milne* (1914), 84 L.J., P.C. 33, Lord Dunedin at p. 36). I am clearly of the opinion that the learned trial judge arrived at the right conclusion and that there was juris-

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dition to adjudge that the appellant should deliver up the title deeds to the respondent, and I would dismiss the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *D. W. F. McDonald.*
Solicitor for respondent: *Donald Smith.*

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R. P. RITHET & Co. v. SCARFF

R. P. RITHET & COMPANY LIMITED v. SCARFF.

Bill of sale—Hire-purchase agreement—Substance of transaction to be considered—R.S.B.C. 1911, Cap. 20, Secs. 3 and 7; Cap. 203, Sec. 27.

C. purchased an automobile, paying for it partly in cash and the balance with post-dated cheque. Later, requiring money to finance his business, he borrowed $1,400 from the plaintiff, giving in return a hire-purchase agreement as to the automobile. C. continued in possession of the car and later sold it to the defendant, who was a *bona fide* purchaser for value. In an action to recover possession of the car under the hire-purchase agreement:—

Held, that the transaction is not one that comes within the purview of the Sale of Goods Act, as it was never the intention of the plaintiff to become the owner of the car except in the event of its requiring to invoke the agreement. The document was an assurance and came within the Bills of Sale Act, but as registration and the other necessary essentials required by the Act had not been complied with, the action should be dismissed.

APPEAL by plaintiff from the decision of MACDONALD, J., of the 7th of July, 1920, dismissing an action to recover a motor-car. The car in question was purchased by one W. D. Cartier in Vancouver on the 15th of October, 1919. He brought the car to Victoria, and on the 28th of the same month, requiring money, the plaintiff Company advanced him $1,400 on his signing a "hire-purchase agreement," which recited, *inter alia*, that "The title to and ownership and right of property of and in the said motor-car shall remain in and with the owner (plaintiff Company) and no title to or property in said motor-

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car shall pass to the hirer, or to such third person (in the event of the hirer agreeing to sell the said car) until the price mentioned in clause one hereof and interest and all moneys due to the owner under this agreement have been paid to it and the terms of this agreement have been fully complied with by the hirer." The agreement further provided that if default were made by the said Cartier in payment of the price mentioned, or interest, or if default was made in the observance of any other term of the agreement, the plaintiff Company, the owner, could resume possession of the car. The hire-purchase agreement was registered in the County Court at Victoria on the 28th of October, 1919. Cartier continued to use the car until the 28th of November following, when he sold it to the defendant for $1,950.

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Statement

Aikman, for plaintiffs.
D. S. Tait, for defendant.

MACDONALD, J.: The plaintiff seeks to recover possession of an automobile. It appears that William D. Cartier bought the automobile, being a Saxon Six Touring Car, from one Cameron, in Vancouver, on the 15th of October, 1919. He either paid at the time the full purchase price, namely, $1,600, by two cheques, or he gave a cheque for $500 and a post-dated cheque for the balance, namely, $1,100. He states, and I accept his evidence on this point, that immediately upon the transaction being carried through, he obtained possession of the motor-car, and thus became, not only the absolute owner, but had the actual possession of the property. He then brought it over to Victoria, and on the 28th of October, being short of money, on account of the issuance of the last cheque, applied to the plaintiffs for assistance. The plaintiffs, upon a "hire-purchase agreement," which forms the subject of this action, and upon which they base their claim, paid to Cartier the sum of $1,400. It is contended that this agreement was quite sufficient to enable the plaintiffs to successfully assert a right to possession as against any subsequent *bona fide* purchaser or mortgagee. After the $1,400 had been paid Cartier continued in possession of the car, and in the ordinary course of his busi-

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ness sold it to the defendant on the 28th of November, 1919, for $1,950. I am quite satisfied that this purchase was *bona fide*, and that the defendant, finding the car in possession of Cartier, apparently at his disposal for sale, after payment of the full purchase price, considered that he became the owner, free from any liens, charges or incumbrances.

If, however, the transaction that is sought to be upheld on the part of the plaintiffs was not one that could be properly carried out under the agreement, but should have been expressed in terms and complied with the Bills of Sale Act, then the position of the defendant is secure. If, on the contrary, the agreement is effectual under the Sale of Goods Act, and the transaction is not hit by the Bills of Sale Act, then the defendant loses the right to the possession to the car so purchased in good faith.

The whole situation, then, depends upon whether or no this agreement should have been one that complied with the provisions of the Bills of Sale Act. To put it a shorter way, was it a sale between the plaintiffs and Cartier which could have been carried out under the Sale of Goods Act, or was it really a loan made by the plaintiffs to Cartier of the $1,400?

A number of cases have been cited in support of the contention of the plaintiffs, that this transaction is one coming within the purview of the Sale of Goods Act. The case principally relied upon is *Manchester, Sheffield and Lincolnshire Railway Co.* v. *North Central Waggon Company* (1888), 13 App. Cas. 554. If the facts in this case were similar to those outlined in the case cited, I would of course have no hesitation, and would be bound to follow the decision. I find, however, that the facts are not similar, and each case must depend upon its own particular facts. This distinction was discussed in a subsequent case of *In re Watson. Ex parte Official Receiver in Bankruptcy* (1890), 25 Q.B.D. 27. In this case, Cotton, L.J., referring to the *North Central Waggon Co.* case, in which he was one of the judges giving judgment, points out the difference in the facts, and the conclusions to follow on that account. He says at p. 39:

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"In that case, after examining the facts, I came to the conclusion that in fact there was a real transaction of sale. Here, according to the finding of the County Court judge, which, so far as I can see, was quite cor-

rect, Love never was in any way owner of the goods apart from the supposed hiring agreement. If he had any title to them, it depended entirely on that agreement. If that agreement gave him any title to the goods, it would be an assurance, and therefore a bill of sale. But I look on it not in that light, but that, the supposed hirer and not Love being the real owner of the goods, the agreement was really a licence by the owner to take possession of the goods in default of payment of the loan."

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Compare Lindley, L.J., referring to the County Court judge having found "that the transaction was in fact one of loan with a security."

I think the document in question was an assurance and came within the Bills of Sale Act, and required registration under that Act, with the necessary essentials accompanying a bill of sale by way of mortgage. I add further in this connection, that I do not think it was ever the intention of the plaintiffs to become the owners of the car, except in the event of their requiring to invoke the provisions of the agreement, not so much for the purpose of acquiring ownership, as with a view of recovering money that it had loaned on the strength of the security. It seems ridiculous, on the face of it, that it could be successfully argued for a moment, that Cartier would buy a car in Vancouver for $1,600 and within a few days afterwards sell the same car for $1,400 (which would have to be the result) in order to make a real sale between the plaintiff and Cartier. As a matter of fact, to shew you how far away from resale this transaction was, Mr. Barnes, in giving his evidence, very properly did not suggest for a moment that either he or anyone of those who might be employed by the plaintiffs, ever saw this car until the time they sought to take possession to satisfy the security. He never had real possession of it, never inspected it, as one would expect if a real purchase was taking place. He trusted to his intended borrower, and drew up what he thought, under the form provided, would properly secure him for the money advanced.

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It is quite true as contended, that a statute which interferes with common law rights can be successfully evaded; but in such attempted evasion, the Court had a perfect right to look at the whole transaction and endeavour to determine the true intention of the parties.

I may add that the case of *In re Watson, supra,* is approved

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of and followed by Lord Esher, M.R. in *Madell* v. *Thomas & Co.* (1891), 1 Q.B. 230. In referring to his judgment in *In re Watson,* the learned Lord said as follows, repeating his previous remarks (p. 234):

"'I do not deny that people may evade an Act of Parliament if they can; but, if they attempt to do so by putting forward documents which appear to be one thing, when they really mean something different, and which are not true descriptions of what the parties to them are really doing, the Court will go through the documents in order to arrive at the truth.'"

And then he again refers to the finding of the County Court judge, in the *Watson* case.

MACDONALD, J.

I think in this case the transaction was in truth a loan, and that the plaintiff was to be repaid the loan, and take as security for such repayment the motor-car in question. There thus being nothing in this transaction at the time, but a loan, and not a sale, it should have complied with the Bills of Sale Act. That has not been done. And as between these two innocent parties, the one who has failed to comply with the statutory provision, and thus afford himself protection, must suffer.

Judgment for defendant, with costs.

From this decision the plaintiffs appealed. The appeal was argued at Vancouver on the 5th and 6th of October, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Aikman, for appellants: This was a conditional sale agreement between the plaintiff and Cartier under section 27 of the Sale of Goods Act, which was duly registered. The goods were appropriated to the contract. Rithet & Company bought the machine, and it was not necessary to have a bill of sale to Rithet & Company; it was a transfer of goods in the ordinary course of business of any trade or calling. Cartier was a dealer in cars. As to the transaction coming within the purview of the Sale of Goods Act see *Manchester, Sheffield and Lincolnshire Railway Co.* v. *North Central Waggon Company* (1888), 13 App. Cas. 554. The question is what the bargain was, and the transaction was by word of mouth: see *Mercantile Bank of Sydney* v. *Taylor* (1893), A.C. 317.

D. S. Tait, for respondent: The document in question comes within the Bills of Sale Act, and was so found in the Court below: see *Phillips* v. *Gibbons* (1857), 5 W.R. 527. [He also referred to *Thomson* v. *Barrett* (1860), 1 L.T. 268; *In re Watson. Ex parte Official Receiver in Bankruptcy* (1890), 25 Q.B.D. 27; *Maas* v. *Pepper* (1905), A.C. 102; *Johnson* v. *Rees* (1915), 84 L.J., K.B. 1276.]

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

MARTIN, J.A.: I agree.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The judgment in the main proceeds upon a question of fact, and it has not been shewn to be wrong, and we must have some good reason to hold to the contrary. I cannot see any good reason in this case.

EBERTS, J.A.

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

Appeal dismissed.

Solicitors for appellants: *Aikman & Shaw.*
Solicitors for respondent: *Tait & Marchant.*

MACDONALD, J.

1920

Nov. 16.

CANADA WEST LOAN CO. v. VIRTUE

CANADA WEST LOAN COMPANY, LIMITED v. VIRTUE.

Company law—Contract for shares—Statement of general manager—Misrepresentation—Unpaid balance on shares—Interest.

In answer to the plaintiff Company's claim for the balance due on the purchase of shares in the Company, the defence was raised that the contract of purchase made many years before was induced by the representation of the general manager of the Company that he would not be called upon to make any further payment but that the dividends would be sufficient to wipe out the balance due on the shares.

Held, that the statement should not be deemed misrepresentation in the absence of proof that the person making it made it dishonestly or did not believe it was warranted.

If the memorandum of association of a company gives the directors power to fix a rate of interest on the balance unpaid on shares and a shareholder's certificate provides that he holds the shares subject to the memorandum and articles of association, he is liable for such interest.

Statement

ACTION to recover the balance due on five shares in the plaintiff Company that had been purchased by the defendant. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Victoria on the 16th of November, 1920.

Maunsell, for plaintiff.
Aikman, for defendant.

Judgment

MACDONALD, J.: In this action, the plaintiff seeks to recover the amount of $219.53, alleged to be the balance due by defendant on five shares of the capital stock of the plaintiff Company. This amount is arrived at by taking into account the five shares of $100 each, amounting to $500, then adding a premium of $50 and giving various credits, namely, a credit of a certain share in another company, and a bonus of 80 per cent. profit, practically in all $282 and three dividends, credited from time to time, making a net balance due by the defendant of $219.53. The plaintiff also claims interest on this amount from the 16th of February, 1913, until payment. Various defences are raised. The first one being that the shares were

never allotted; this, however, has been abandoned, on it being proved that the share certificate was not only in the possession of the defendant since its issuance in December, 1911, but he had acknowledged receipt on the stub of the certificate book, from which the share certificate was issued. So the question of allotment is fully covered, and counsel for defence was well advised to abandon that point, as not being worthy of further consideration. A second defence was raised, that these shares were sold and issued on the strength of a false representation, made by one D. C. Reid, who was at the time the general manager of the plaintiff Company. It appears that the defendant being the owner of shares in the B.C. Interior Company, was approached with a view of assisting in an amalgamation of the two companies, presumably in order to decrease the overhead expenses. He acceded to the proposition as far as he was concerned, as a small shareholder. He says, however, in effect, that he was induced to make the exchange and to accept five shares in the plaintiff Company on the representation by Reid that he would not be called upon to make any further payment, and that the dividends would be sufficient to wipe out the balance, still payable upon these five shares in plaintiff Company. This representation, alleged to have been made by Reid, occurred very many years ago, and, giving all due credit to the party interested, as the defendant would be at the time, in a transaction of this kind, there is very great danger of his being in error as to the conversation. However, assuming that the conversation has the full effect which he suggests, what does it amount to? In my opinion it is not a misrepresentation, or in other words, it has not been proved to be such. The outcome of the transaction was, that it was not until years afterwards, when he was called upon to make payment on the balance due upon the shares he received, that objection is raised. He recounts a conversation with Reid at one time, when he was being importuned for payment and states that he was justified in disregarding this demand, to support, I presume, the position as to his not being called upon for further payment. In order to render a person liable for deceit, or as in this case, to avoid liability for balance on shares, received by a party, which

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are not fully paid, it is necessary to shew that the statement made, though not necessarily the sole inducement, was, if not fraudulent, at any rate untrue and induced the purchase of the shares or other exchange.

In the oft-cited case of *Peek* v. *Derry* (1887), 37 Ch. D. 541 at p. 567, the following citation by Bowen, L.J., in *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459 at p. 481, covers the ground:

> "'In order to sustain his action he must first prove that there was a statement as to facts which was false; and secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false.'"

While the judgment was dealing particularly with an action for deceit, the same basis applies to an action where the party is seeking to rescind and evade a contract, on the ground of misrepresentation. There must be a misrepresentation, even though innocent, as to facts. I have no evidence in this case to shew that D. C. Reid, at the time he made the statement, did not thoroughly believe, that the finances of the Company and the business at the time, warranted him in making the statement. I have no evidence to shew there was any dishonesty on his part in making the statement, nor that it was untrue. Even if I assume that the defendant acted upon that statement, it was not a misstatement as to any then existing fact, but was simply an opinion as to the future prospects of the Company, given by the party seeking to bring about the exchange. I might add it was not a business contract or agreement upon which the Company or Reid should be held liable. This is aside from the point, however, as to whether it was a misrepresentation which voided the contract. I agree with the proposition of law as stated by Mr. *Aikman* in a broader case, that as a party seeking to evade a purchase of shares, may shew that the contract was based on fraud, so it is open to him to defend an action on that ground, even although considerable time has elapsed. When you view the evidence tending to support such alleged misrepresentation, the lapse of time might have some effect in coming to a decision. Here, as I mentioned, I do not require to discuss that phase of the situation. I am quite satisfied that the defendant during all these years was liable,

Judgment

had he been sued, to pay the amount of the balance from time to time due under these five shares.

Now, as to the question of interest, it appears that the authority contained in the memorandum of association gave the directors power to fix a rate of interest. When the defendant became a shareholder, he was, according to the certificate he received, the holder of such shares subject to the memorandum and articles of association. Being so controlled as to the amount due under this certificate, he was also liable in respect of the interest, that might be payable under the provisions of the memorandum and articles of association.

There will be judgment for the plaintiff, but in view of the amount involved, I only allow County Court costs on the appropriate scale.

Judgment for plaintiff.

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1920

Nov. 16.

CANADA WEST LOAN CO. *v.* VIRTUE

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GREGORY, J.

1920

Sept. 30.

REX x. SPERO PANASES.

Criminal law—Arrest on telegram by a peace officer—Criminal Code, Secs. 646 and 647.

REX v. SPERO PANASES

A peace officer may arrest without a warrant, a person suspected of committing an offence within sections 646 and 647 of the Criminal Code, if he has reasonable and probable grounds for believing that an offence within said sections has been committed. Telegraphic instructions may be accepted by a peace officer as a sufficient ground upon which to proceed.

MOTION for a writ of *habeas corpus*. The chief of police at Victoria arrested the accused at Victoria, acting on a telegram from the chief of police at Winnipeg, stating that the accused had stolen $3,000 in Winnipeg, having collected that sum for his employer and converted it to his own use and absconded. Heard by GREGORY, J. at Victoria on the 30th of September, 1920.

Statement

Cassidy, K.C., for the accused.
C. L. Harrison, for the prosecution.

GREGORY, J.: The alleged offence as described comes within the meaning of sections 358 and 387 of the Criminal Code and therefore falls within subsection (*k*) of section 646 of the Code. Any person can arrest another should he find such other committing the alleged offence, by virtue of section 646 and by virtue of section 647. A peace officer has that power, together with the power to arrest any person when he has reasonable and probable grounds for believing that an offence within sections 646 and 647 has been committed, and has reasonable and probable grounds for believing that such person has committed such offence. This being established in this case by virtue of telegraphic instructions, the accused was properly arrested and detained, and the motion is discharged.

Judgment

Motion discharged.

GOLD v. EVANS.

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1920

Oct. 8.

GOLD v. EVANS

Practice—Appeal—Application to extend time for setting down—Delay in approval of appeal books—Costs of application.

On a motion to extend the time for setting down an appeal owing to delay in settling the appeal book:—

Held, per MACDONALD, C.J.A., and MARTIN, J.A., that as the only default was in not setting the case down, a default which, though not prejudicing the respondent, occurred through gross negligence, the appellant should be relieved, but payment of costs by the appellant should be a condition precedent to the entry of the appeal.

Per GALLIHER, MCPHILLIPS and EBERTS, JJ.A.: That the extension of time for setting down the appeal should be granted, the appellant to pay the costs of the motion, but the payment of costs should not be a condition precedent to the setting down of the appeal.

MOTION to the Court of Appeal for an extension of time for setting down the appeal for hearing. Judgment was delivered in the action on the 25th of June, 1920, and notice of appeal was served on the 17th of September following. The appeal book (containing 230 pages) was delivered for approval on the 29th of September, the sittings of the Court of Appeal commencing on the 5th of October. At the time of the hearing of this motion the appeal book had not been returned approved. Counsel for respondent complained that owing to the number of mistakes in the book it could not be returned promptly. Heard by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A. at Vancouver on the 8th of October, 1920.

Statement

E. A. Lucas, for the motion.
Mayers, contra.

MACDONALD, C.J.A.: The rule of the Court is to relieve against mistake where no substantial wrong will be done thereby. In granting that relief the costs are usually ordered to follow the event. In this case the notice of appeal was given and the only default was in not setting it down, a default which, while not prejudicing the respondent, yet occurred through

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gross carelessness. We ought to relieve the appellant in this case. I therefore think, in the circumstances, the costs of this application ought to be paid by appellant before the appeal is set down. I am strongly of the opinion expressed a moment ago, that the payment should be a condition precedent to the entry of the appeal. My brother MARTIN is of the same opinion. Where there is no reasonable excuse at all offered for the default, I think we ought to mark our disapproval by compelling the party in default to pay the costs as a condition precedent, and not, after bringing the other party before the Court, leave him doubtful whether he will ever receive a cent or not. However, the majority of the Court think the order should be made unconditionally, and therefore the order will be, appellant pay the costs to the respondent in any event of the cause.

MACDONALD, C.J.A.

MARTIN, J.A.

MARTIN, J.A.: I agree.

GALLIHER, J.A.: I agree as to the order the Chief Justice has made. I would add to that, I do not attach any importance to whether the respondent may or may not be able to recover the costs. If we were guided by that we would put every person, in case of appeal, in the same position. For my part I cannot see any distinction between this and any other case where we have allowed an extension of time without the penalty of payment of costs as a condition precedent.

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: On the question of costs, I may say the Legislature has given three months for an unsuccessful litigant to decide whether he should appeal or not, and in this case that time was not exhausted; and aside from that, the legal vacation intervened; and, as far as I can see, from the material, there was no substantial error. I cannot see any possibility of any substantial wrong. I do not think it is a proper case in which costs should be made a condition precedent.

EBERTS, J.A.

EBERTS, J.A.: I would allow the motion, but I would not insist on the costs being made a condition precedent.

Motion allowed.

CHASSY AND WOLBERT v. MAY AND GIBSON MINING COMPANY, LIMITED.

GREGORY, J.

1920

June 30.

COURT OF APPEAL

Oct. 27.

CHASSY AND WOLBERT v. MAY AND GIBSON MINING CO.

Mining law — Foreign judgment — Domicil — Movables — Foreign mineral claims—Partnership—R.S.B.C. 1911, Cap. 175, Sec. 25.

W. and M. being equally interested in certain mineral claims procured a loan to pay for them from C. who in addition to a mortgage on the properties was to be given a bonus of 100,000 shares in a company to be formed to take over the claims. The claims when purchased were in M.'s name. In an action brought by W. against M. in a foreign Court it was decreed that W. was indebted to M. for a certain sum on account of expenditure on the claims, that W. should pay this sum to M. within 60 days and that M. should within 30 days thereafter convey a one-half interest in the claims to W., the deed to contain a "defeasance" clause to the effect that W.'s right to the one-half interest should cease and be forfeited to M. should W. fail to pay his share of the mortgage to C. should C. take proceedings to enforce same. W. did not pay his debt and C. did not take any proceedings. M., then assuming he was absolute owner of the claims, incorporated a company to which he transferred the claims. C. having in the meantime acquired a one-half interest in W.'s half interest in the claims, then brought action with W. against M. and the Company to determine their rights, C. also claiming 100,000 shares in the company under the terms of his loan agreement. It was held by the trial judge that the plaintiffs were entitled to succeed.

Held, on appeal (affirming the decision of GREGORY, J., except as to the one-quarter interest claimed by C.), that W. had not forfeited his interest in the claims under the foreign judgment but in any case as the interest is an interest in lands the claims were immovables and a foreign Court can make no decree whereby the ownership of an interest in immovables outside of its territorial jurisdiction shall be taken from one person and vested in another, this not being a case, on the facts, where a foreign Court in its equitable jurisdiction acting *in personam* might decree specific performance, and as the Company was aware of the facts relating to the title, it is not a *bona fide* purchaser for value without notice and W. is therefore entitled to a one-quarter interest in the claims.

Held, further (MCPHILLIPS, J.A., dissenting), that C.'s claim for a one-quarter interest in the property was inconsistent with his claim for 100,000 shares in the Company, his right to shares being under an arrangement which had contemplated a company to be formed to own certain claims in their entirety; and as he had insisted on his right to the shares and had obtained judgment therefor in the Court below he was estopped from disputing the legality of the transfers to the Company and was not entitled to a one-quarter interest in the claims.

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CHASSY AND WOLBERT v. MAY AND GIBSON MINING CO.

APPEAL by defendants from the decision of GREGORY, J., in an action tried by him at Vancouver on the 11th, 12th, 16th and 17th of June, 1919, in respect to eight mineral claims in the Slocan, about twelve miles west of Kaslo, the plaintiff Wolbert claiming an undivided one-half interest in the claims subject to the interest of the plaintiff Chassy, who claimed that he was entitled to 100,000 shares in the defendant Company. In August, 1915, Wolbert obtained an option to purchase two of the claims in question, known as the "Winthrop" and "Butte," called at that time the "Gibson Group," and in January, 1916, approached the defendant May with a view to obtaining money to take up the option. They entered into an agreement to share equally in the properties, and they then borrowed $3,500 from the plaintiff Chassy, with which they purchased the claims, and gave Chassy a mortgage on the properties, May giving a further mortgage on certain properties of his in Spokane as additional security. In addition, Chassy was promised as a bonus 100,000 shares in a company to be formed for the purpose of operating the properties. The mortgage was eventually paid off by May. After the purchase was completed Wolbert went to the property to do the assessment work, and during this time he and May acquired six other claims, five of which adjoined the Gibson group, namely, the "Jennie," "Ida," "Oxide," "Frances" and "Spokane," the sixth claim, "Hercules," being a short distance away. On the 26th of June, Wolbert and May entered into a further agreement, declaring themselves equally interested in the eight claims. A few days after this May and Wolbert quarreled, May claiming Wolbert had run unnecessary bills in operating, and that although he claimed to be a practical miner, he in fact had no knowledge of mining at all. In the following June, Wolbert commenced action in Nelson, B.C., in the County Court, but both he and May being American citizens, dropped the action and brought suit in the Supreme Court of the State of Washington at Spokane, the judgment declaring that Wolbert was indebted to May in the sum of $579.65 expended by May on the claims, and that each was entitled to a one-half interest in the claims in question. It further decreed that Wolbert should pay said debt within 60 days and that May

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should within 30 days thereafter execute and deliver to Wolbert a conveyance of his said one-half interest in the claims, the deed to contain a defeasance clause to the effect that Wolbert's right to the said one-half interest should cease and be forfeited to May should Wolbert fail to pay his share of the Chassy mortgage in case Chassy should take proceedings to enforce same. Wolbert did not pay his debt to May within the time specified, nor did Chassy bring proceedings to enforce payment of his mortgage. May, then regarding himself as absolute owner of the properties, incorporated the defendant Company, and on the 31st of March, 1918, transferred all the claims to the Company.

Robert Smith, and *R. P. Stockton,* for plaintiffs.
A. H. MacNeill, K.C., and *Hamilton, K.C.,* for defendants.

30th June, 1919.

GREGORY, J.: The plaintiff Chassy is entitled to judgment for the 100,000 shares, with costs. Mr. *MacNeill,* at the opening of the trial, said the defendants were willing to hand over these shares upon receiving from Chassy the abstracts of title, etc. But I find that those documents were delivered to May at the time of the payment of the mortgage money, together with a release of the mortgage. I cannot accept Mr. May's testimony that this was so; he and the Company have therefore improperly withheld them. The mortgage itself may not have been delivered, but it was of no value, and May evidently attached no importance to its possession after he got the release. He may, however, have it if still in Chassy's possession.

GREGORY, J.

Practically the only question argued before me was the effect and the binding force of the judgment rendered in the Supreme Court of the State of Washington between the same parties (other than Chassy) and concerning the same subject-matters. It is agreed that as between Wolbert and the Mays the actions are substantially the same. All parties are United States citizens resident in the State of Washington, and it seems clear to me that in such case the Washington Court had full jurisdiction to dispose of the question in dispute between them so far as they were matters *in personam,* and that I am bound by that

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decree. This covers all questions of partnership account and indebtedness of one to the other, and leaves only the question of the title to the mineral claims in dispute.

It will not be questioned that the rule is that the Courts for foreign countries have no jurisdiction to adjudicate upon the title or the right to the possession of any immovable not situate in such country: Dicey's Conflict of Laws, 2nd Ed., p. 357. A mineral claim would clearly seem to be immovable, but in any case the rule covers leaseholds (*De Fogassieras* v. *Duport* (1881), 11 L.R. Ir. 123), and by section 18 of our Mineral Act it is declared that the interest of a free miner in his mineral claim, not Crown granted, shall be deemed to be a chattel interest, equivalent to a lease for one year and thence from year to year, etc. This appears to dispose of the argument that it is a chattel interest pure and simple, over which foreign Courts have jurisdiction, provided they have jurisdiction of the person of the owner, as here.

Upon the facts before me I quite agree with the decree of the Washington Court that Wolbert and May were co-owners of the mineral claims. That Court may have had no jurisdiction to make any such decree, but it seems to me clear from a reading of the whole decree that that Court recognized its limitations in the matter of making a declaration as to title. It does not, as urged at the trial, declare that that interest shall be forfeited upon non-payment by Wolbert of the sum of $579.65 within 60 days from the date of the decree.

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The declaration is unhampered in any way. It is true that in a subsequent paragraph it declares that subject to the payment by Wolbert of the sum of $579.65 May should execute a conveyance to him of the claims, which conveyance should contain a defeasable clause declaring Wolbert's interest in the claims to be forfeited to May unless he should pay one half of the amount of the Chassy mortgage in case Chassy attempted to collect the amount by foreclosure proceedings. That is the only place in the decree where any mention is made of forfeiture, but no such condition ever arose, for Chassy never found it necessary to take any such proceedings.

If the Court thought that Wolbert's interest should be for-

feited upon the non-payment of that comparatively small item of money and realized that it would not enforce a forfeiture it would say just what it has said in effect. We will not order May to make a conveyance unless Wolbert pays the money and Wolbert will have to go to the Courts of British Columbia in order to get his title, for we will not direct a conveyance upon any other terms. A foreign Court can direct persons subject to its jurisdiction to do anything it sees fit, *e.g.*, make a conveyance, to give title to property outside its jurisdiction, because if such order is not complied with it can enforce its decrees by process of contempt, etc., but it cannot adjudicate effectively upon the question of title to immovable property outside its jurisdiction, for that title depends upon the *lex sitæ*. For me to declare a forfeiture of Wolbert's interests would, I think, be contrary to natural justice. May has no lien upon the claims for the amount of his claim, $579.65, that I know of, and in fact, so far as any information before me is concerned, it may not be in any way connected with these mineral claims. It would not perhaps be rash though to assume that it did, but even so that would not justify me. The Mineral Act provides a means for depriving a free miner of his interest in a claim if he refuses to pay his proper share of moneys properly expended on it by his partners, and if May's claim falls within the Mineral Act, he should have used that Act to enforce his rights. May's excuse for attempting to deprive Wolbert of his interest is trivial in the extreme, and I do not believe it is genuine, but is merely an excuse to justify him in trying to take advantage of the position he believes he finds himself in. As between Wolbert and May, there is no doubt that Wolbert is entitled to a half interest in the claims, but the question now arises, can he insist upon it as against the defendant Company, and I think he can, although at first I was inclined to hold differently.

The officers, directors and solicitor of the Company were fully informed of all the dealings of May and Wolbert, that May was not disclosing to Wolbert the fact of the sale. The only reasonable inference to draw from this very full and detailed knowledge is, that the Company knew May fully

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intended to retain the whole sale price for his own benefit—such complete knowledge seems to me to impress upon the legal title obtained by the Company the same trust that May held it under, notwithstanding the fact that the sale was practically the sale originally contemplated by both May and Wolbert.

I find that the power of attorney under which May purported to get rid of the recorded agreement of January was in fact executed by Wolbert. I am, however, clearly of opinion that it gave May no authority to execute the transfer to the Company, so the Company can take nothing under it. The value of that agreement is open to serious question, for I cannot resist the conclusion that Wolbert altered it after it was executed and added the words "and said parties to be co-owners." In this connection I wish to say that I equally cannot resist the conclusion that May altered his copy of the agreement after execution by striking out the words and inserting others, so as to make the agreement apply only to the "Winthrop" and "Butte" claims, instead of to any other property in British Columbia. It is only fair, however, to say that I arrive at these conclusions solely from the circumstances of the case, and not from the demeanour, etc., of the witnesses. I could not choose between them, and from appearances and manner, etc., alone in the box, I could not say that either of them was deliberately telling what they knew to be untrue. The agreement of the 26th of June,

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1916, was not recorded, but though it purported to supersede that of January, there was no need to record it, provided the January agreement was effective, as it gave to Wolbert the same interest as the January agreement, enlarging the number of claims and, in fact, making it of the same effect as the January agreement as altered by Wolbert, if he did alter it.

The defendants must be declared a trustee for Wolbert as to an undivided one-half of the claims, subject to Chassy's interest therein. There must be an injunction restraining May from parting with any of the shares to which Chassy is entitled, and the Company will be enjoined from registering any transfer of May's shares until he shall have delivered Chassy the 100,000 shares before referred to.

It may be that I have not fully set out the relief to which

the plaintiffs are entitled, but in case of any such omission or any other matter has not been fully dealt with, there will be leave to apply.

The plaintiffs are entitled to their costs of the action.

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From this decision the defendants appealed. The appeal was argued at Vancouver on the 16th to the 21st of April, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. H. MacNeill, K.C., for appellants: The agreements between Wolbert and May and the surrounding circumstances shew a partnership existed between them, and under section 25 of the Partnership Act the mineral claims must be treated as movables. The judgment of the Washington Court, if this is so, did not exceed its jurisdiction and should not be interfered with: see *Boyd* v. *Attorney-General for British Columbia* (1917), 54 S.C.R. 532 at p. 556; *Stainton* v. *The Carron Company* (1855), 21 Beav. 152; *The Carron Iron Company* v. *Maclaren* (1855), 5 H.L. Cas. 416. These were two Americans and that Court dealt with their rights in mines in British Columbia: *Maunder* v. *Lloyd* (1862), 2 J. & H. 718; *Taylor* v. *Hollard* (1902), 1 K.B. 676 at p. 681; Halsbury's Laws of England, Vol. 6, p. 282, par. 418; *Henderson* v. *Henderson* (1843), 3 Hare 100; *Mutrie* v. *Binney* (1887), 35 Ch. D. 614; *Ostell* v. *Lepage* (1851), 21 L.J., Ch. 501; *Ricardo* v. *Garcias* (1845), 12 Cl. & F. 367 at p. 400. Has Wolbert the right to relitigate the whole matter? See *Re Klaukie's Will* (1873), 1 B.C. (Pt. I.) 76. Dealing with the extent to which our Courts recognize foreign Courts see *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414 at p. 429; *Cammell* v. *Sewell* (1860), 5 H. & N. 728 at p. 746; *Alcock* v. *Smith* (1892), 1 Ch. 238; *In re Trufort. Trafford* v. *Blanc* (1887), 36 Ch. D. 600; *Bank of Australasia* v. *Nias* (1851), 16 Q.B. 717; *Doglioni* v. *Crispin* (1866), L.R. 1 H.L. 301; Halsbury's Laws of England, Vol. 6, p. 295, pars. 439-41; *Emanuel* v. *Symon* (1908), 1 K.B. 302 at p. 309; *Phillips* v. *Batho* (1913), 3 K.B. 25; Dicey's Conflict of Laws, 2nd Ed., 309-10. We have proved that the judgment in Washington is final and

Argument

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binding on the parties under the laws of Washington State. Wolbert did not pay his indebtedness to May, and my contention is there was abandonment of his alleged interest in the claims: see *Rule* v. *Jewell* (1881), 18 Ch. D. 660; MacSwinney on Mines, 4th Ed., 144-5. There must be more promptness in case of dealing with mines: see *Macbryde* v. *Weekes* (1856), 22 Beav. 533. There is the further phase as between Wolbert and the Company. There are three grounds why the Company's title to the claims should be upheld, first, by reason of the agreement securing the loan from Chassy; second, by the agreement between Wolbert and May of January, 1916, and subsequent agreement made in June; and thirdly, a valid transfer was made to the Company under a power of attorney from Wolbert that the learned judge below found was duly executed by Wolbert.

Argument

Wilson, K.C., for respondent Chassy: Section 25 of the Partnership Act is not a universal section and does not apply here; the rule is that the Court in Washington State has no jurisdiction over property here (*i.e.,* leasehold property in a foreign country). Mineral claims are real property under the Mineral Act: see *De Fogassieras* v. *Duport* (1881), 11 L.R. Ir. 123. Neither acquiescence nor request will give jurisdiction: see Bigelow on Estoppel, 3rd Ed., 51 (note). On the question of *res judicata* in the case of a foreign judgment see *Law* v. *Hansen* (1895), 25 S.C.R. 69. You cannot consider the rights of the shareholders here as there was actual notice of the outstanding interests. There are only two questions to be considered, first, the effect of the foreign judgment; and secondly, laches. As to the first, the law is that a Court will not assume jurisdiction over immovables in another country (Dicey's Conflict of Laws, 2nd Ed., 357), and as to dealing with a foreign judgment and its effect see p. 411; *Freke* v. *Lord Carbery* (1873), L.R. 16 Eq. 461 at p. 466; *British South Africa Company* v. *Companhia de Mocambique* (1893), A.C. 602; *Norris* v. *Chambres* (1861), 30 L.J., Ch. 285; *Duder* v. *Amsterdamsch Trustees Kantoor* (1902), 2 Ch. 132; *Deschamps* v. *Miller* (1908), 1 Ch. 856 at p. 864. As to what are immovables see Story's Conflict of Laws, 639, par.

447. As to notice of the trust see Halsbury's Laws of England, Vol. 28, p. 46, par. 88; Vol. 13, p. 393, par. 556. On the question of *res judicata* see *In re Hawthorne. Graham* v. *Massey* (1883), 23 Ch. D. 743; *In re Hoyles. Row* v. *Jagg* (1910), 2 Ch. 333. No partnership existed, they were merely co-owners and still are: Halsbury's Laws of England, Vol. 22, p. 5, pars. 2 to 7; *Davis* v. *Davis* (1894), 1 Ch. 393 at p. 401. The power of attorney confers no power to do anything except to take money: see *Mynn* v. *Joliffe* (1834), 1 M. & Rob. 326; *Howard* v. *Chapman* (1831), 4 Car. & P. 508. It only gives him power to affix his signature. He should have consulted Wolbert: see *Chadburn* v. *Moore* (1892), 61 L.J., Ch. 674. The document should be strictly construed: *Bryant, Powis, & Bryant* v. *La Banque du Peuple* (1893), A.C. 170. As to the Company's knowledge the promoters had full knowledge of all the interests of the parties to this action.

Craig, K.C., for respondent Wolbert: The properties were put in May's name to assist him in raising money. The first question is, whether May could convey a good title to the Company on the power of attorney from Wolbert. My submission is he could not, and we have a case for equitable relief. The shareholders are only interested by being members of the Company. As to the Company being distinct from its shareholders see Palmer's Company Law, 10th Ed., p. 55. The question of innocent shareholders would only arise if Wolbert laid by without asserting his rights. As to the Washington judgment, a foreign Court cannot make an order affecting title in respect to land. The order is of no value outside the jurisdiction: see Encyclopædia of the Laws England, 2nd Ed., Vol. 6. p. 176. This applies to any order affecting title outside the jurisdiction. In the case of *Law* v. *Hansen* (1895), 25 S.C.R. 69 the parties were within the jurisdiction of the Court also the subject-matter of the action. Argument

MacNeill, in reply.

Cur. adv. vult.

27th October, 1920.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff Wolbert and the defendant May entered into an agreement to acquire the mineral

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claims "Winthrop" and "Butte," situate in this Province. The first written document evidencing their agreement is dated the 20th of January, 1916. This shews an agreement on their part to share alike in the profits to be made and disbursements to be incurred in connection with the said two claims "or any other property in the Province of British Columbia." They had already agreed verbally to purchase the two claims, and they appear to have contemplated the acquisition of other adjoining claims. Each retained a duplicate part of said agreement and, without the knowledge of the other, made changes in it. Wolbert added the words, "and said parties to be co-owners," and in this condition he recorded it in the mining recorder's office. May struck out of his duplicate part, the words first above quoted but did not record it. With the effect of these alterations I do not feel much concerned, because it is not in dispute that the parties were to have equal interests in the "Winthrop" and "Butte" and the like interests in after-acquired claims, as appears by a subsequent written agreement of the 26th of June, 1916.

In my opinion it was intended by the parties that all these claims should be held by them as tenants in common and not as partnership property. This view is, I think, borne out by what appears in the said agreement of the 26th of June, wherein it is stated that Wolbert had disposed of part of his interest in the claims, an act to which May took no objection, and which was inconsistent with the assumption that the claims were partnership property. I would refer also to the attitude of the parties in the foreign suit referred to hereinafter.

MACDONALD, C.J.A.

Wolbert and May then borrowed $3,500 from one Chassy, now plaintiff in this action, to enable them to pay for and make other expenditures upon the original claims, the others at that time not having been acquired, and as a bonus for granting the loan they agreed to give Chassy 100,000 shares in a company which they intended to incorporate to take over the claims. Subsequently and after the new claims had been acquired, a dispute arose between Wolbert and May, whereupon Wolbert brought suit against May in the Supreme Court of the State of Washington, and a decree was made therein. It adjudged that

Wolbert was indebted to May in the sum of $579.65 expended by him on the claims; that each was entitled to an undivided half interest in all the claims in question in this action as tenants in common and liable to Chassy in like proportion. It decreed that Wolbert should pay his said debt to May within 60 days and that May should within 30 days thereafter execute and deliver to Wolbert a "conveyance" of his said half interest, the deed to contain a "defeasance" clause to the effect that Wolbert's right to the said half interest should cease and be forfeited to May should Wolbert fail to pay his share of the Chassy obligation, in case Chassy should take proceedings to enforce same.

Wolbert did not within the time specified pay his debt to May, and May therefore was not obliged to and did not execute and deliver the conveyance. Neither has Chassy taken proceedings to enforce repayment of his loan.

The terms of the decree not having been complied with, May assumed to regard himself as the absolute owner of the claims, and without the consent of Wolbert caused the defendant Company to be incorporated and on 21st of March, 1918, transferred the claims to it in full ownership, ignoring Wolbert's right to a half interest therein.

The plaintiff Chassy comes into the litigation in this way: He acquired one half of Wolbert's interest in the several claims on the 20th of May, 1918, and asserts that interest in this action. He is also making a claim to 100,000 of the defendant Company shares, under the terms of said loan agreement. The plaintiffs brought this action to determine their rights, which their solicitors have endeavoured to set forth in some 30 pages of pleadings, in which they have exhausted in ear-marking their several prayers for relief all the letters of the alphabet except three. Shortly stated, they claim a declaration that they are entitled to their said respective interests in the claims amounting in all to an undivided moiety thereof and in the alternative an account of the consideration received or which ought to have been received by May for the transfer of the said claims to the defendant Company, and the appropriate relief to which they may further be entitled on such accounting.

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Plaintiff Chassy, in addition, makes claim to the said 100,000 shares.

The defences set up in argument were *transit in rem judicata* by reason of the said decree; that by default under that decree plaintiff Wolbert ceased to have any interest in the claims, and that his transferee, the plaintiff Chassy, is in no better position than Wolbert; laches in not asserting their claims earlier than they have done; that the transfers from May to defendant Company were properly made under a power of attorney given to May by Wolbert and dated 22nd January, 1916, which power, however, refers only to the "Winthrop" and "Butte" claims; and finally, that the defendant Company having expended large sums of money and having sold shares in their capital stock to the public, it would be inequitable to grant any relief except that alternatively claimed by the plaintiffs, *viz.*, an accounting by May of the consideration received from the Company for the transfers.

The defence of *res judicata* must, I think, fail. It has been decided in our Courts and has long been the law of this Province, that the interest of a free miner in his mineral claim is an interest in land. The claims in question therefore must be considered to be immovables.

MACDONALD, C.J.A.

A foreign Court can make no decree whereby the ownership of or an interest in immovables, outside its territorial jurisdiction, shall be taken from one person and vested in another. The general rule is referred to in Dicey's Conflict of Laws, 2nd Ed., p. 357 *et seq.* There are exceptions, however, to this rule, which are referred to at page 203 of the same work. They are in respect of cases where there has been either a contract to do the particular thing ordered to be done, for instance, a contract between parties for the sale of land in another country, which may be ordered to be specifically performed, or where there is something in the transaction in the nature of a trust.

Now the Washington decree dealt first with the debt owing by Wolbert to May of $579.65. That subject-matter was entirely within the jurisdiction of that Court and is not in question in this action. It further declared that each of said parties were tenants in common, a declaration which it is not

necessary in this case to examine. It further declared that each was liable equally as between themselves upon the obligation to Chassy. That again was a matter entirely within the jurisdiction of that Court and is not in question here. Then comes the matter to which Mr. *MacNeill* mainly directed his argument, *viz.*, the order respecting the conveyance and forfeiture already referred to. Whatever the effect of that order might have been had Chassy taken proceedings and Wolbert made default in paying his share of the obligation, in the absence of such proceedings and default, there could of course be no forfeiture.

It is hardly necessary in this case to say so, but in my opinion the facts do not bring the case within the exceptions to the general rule referred to above. The only default which was made by Wolbert was in the payment of his said debt to May, which was not due upon a contract affecting the land or charged thereon. Moreover, a forfeiture of the land in the circumstances, for non-payment of that debt, would be contrary to our jurisprudence. As to the other obligation, it had as between these parties themselves not then arisen, and has not yet arisen.

Mr. *MacNeill* pressed very strongly the argument that as Wolbert had resorted to the foreign Court, he ought to be left to his remedies in that Court, but in my opinion he cannot there obtain effective relief. What he complains of in this action has occurred since the decree, his interest, then intact, has been transferred by his trustee May to the defendant Company, who is applying for Crown grants to the claims. He was obliged to take proceedings here to oppose the issuing of such grants and make good his adverse claim.

That the transfers of the claims to the defendant Company can be supported under the power of attorney relied upon by Mr. *MacNeill,* is, I think, untenable. The power of attorney was given in relation to the "Winthrop" and "Butte" only, and at a time when the title to them was in Wolbert, and for the purpose, as I see it, of facilitating the borrowing of the money afterwards borrowed from Chassy, as aforesaid. The power was "to do anything I might or could do were I present in all matters relating to the securing of funds for the 'Winthrop' and 'Butte' mining claims . . . . and to sign my name to all

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necessary papers and documents and in the event of a sale to give a good and sufficient deed to the property." The power to raise money is immaterial to this litigation; the power to execute deeds was superseded by the subsequent transfer of the claims by Wolbert to May. It is unnecessary to consider whether the power of attorney was wide enough to include the transfer to a purchaser, because admittedly the transfers made by May to the defendant Company was on the assumption that he was the owner, and the signing of the name "Wolbert" to them *per prox* was merely to add another string to May's bow. There was a breach of trust to which both defendants were privy. May in his evidence on discovery admitted that the defendant Company, when it entered into the transaction with him, had full knowledge of the facts relating to the title, and this fact is clearly established by the evidence generally. The Company was therefore not a *bona fide* purchaser for value without notice. The alleged laches, because of delay in taking proceedings to set the transfers to the Company aside, have no existence in fact.

I find more difficulty in dealing with respondent Chassy's position. By his pleadings he claims, and his claim has been conceded, the 100,000 shares already mentioned, which must necessarily be on the footing that the defendant Company is the company which Wolbert and May had agreed to incorporate, shares in the capital of which they had agreed to give him, whereas, in my opinion, it is not that Company. It is a Company incorporated by May and his associates in breach of trust. Chassy further claims, but not in the alternative, a quarter interest in the property transferred to the defendant Company. These claims are quite inconsistent with each other. The company which Wolbert and May were to have incorporated was clearly intended to have the "Winthrop" and "Butte" claims in their entirety and not a partial interest in them and some others. On the one hand Chassy in effect says, "I assent to your claim of entire ownership," on the other, "I dispute it." He cannot have the shares and the quarter interest as well. He cannot be allowed to approbate and reprobate, and as he has insisted on his right to the 100,000 shares and has obtained

MACDONALD, C.J.A.

judgment therefor in the Court below, and as no appeal has been taken from that term of the judgment, I think he is estopped from disputing the legality of the transfers to the Company.

There was some inaptitude in the frame of Wolbert's statement of claim which in places appears to father his co-plaintiff's inconsistent demands. This, I think, may be regarded as inartificial pleading, since reading the whole, it is clear that Wolbert insisted on his right to his quarter interest and put forth any other claims inconsistent therewith in the alternative merely. Moreover, no point was made of this in argument.

As regards the submission that it would be inequitable to disturb the Company's title in view of the expenditure of money by it in developing the property and of sales of its shares to the public, this is in reality a plea that the parties cannot be restored to their original positions and that therefore the plaintiffs ought to be left to their other remedies. This is not, in my opinion, a case to which the doctrines of *res integra* is applicable; it is the defendants who must make restitution, not the plaintiffs. The trust property is admittedly in the possession of the wrong-doers. In so far as they have expended moneys for annual assessments necessary to keep the claims in good standing, defendants should have the lien given by the Court below. They have no right to relief in respect of other moneys expended by them. If the plaintiff Wolbert is content to recover his quarter interest in the claims in their present condition, that is his affair. It may be that the money expended in exploration has either lessened or destroyed any apparent value which the property had theretofore, a result which frequently follows the exploration of prospective mines.

The result is that, in my opinion, the appeal so far as respondent Wolbert is concerned, should be dismissed with costs, that that portion of the judgment which declares that Chassy is entitled to a quarter interest in the claims should be set aside. The judgment for the 100,000 shares should not be disturbed, but Chassy in addition thereto is entitled to one-quarter of the consideration which May received or is entitled to receive from

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defendant Company for the transfer of the claims, after deducting therefrom the said 100,000 shares.

Chassy should pay appellant's costs of the appeal, except such as were occasioned by Wolbert being made a party thereto.

MARTIN, J.A.

MARTIN, J.A.: I agree in the disposition of this appeal, and only add that while I think the appellant's counsel is warranted in asking us to carry out the provisions of the decree of the Spokane Court, on the basis of the subject-matter of the litigation being really movables by the operation of our Partnership Act, R.S.B.C. 1911, Cap. 175, Sec. 25, yet the result of that decree was not to deprive Wolbert of the half interest in the claims therein specified unless he paid the $579.65 as a condition precedent to the execution of a bill of sale in his favour by the defendant: the forfeiture of that half interest would only become operative in the circumstances set out in the judgment of the Chief Justice, which did not happen, and so we have still to deal with the matter on the basis of an existing partnership or half interest in Wolbert, of record, under the original agreement, in the office of the mining recorder.

GALLIHER, J.A.

GALLIHER, J.A.: I am in agreement with the Chief Justice.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should fail. Elaborate arguments have been addressed to the Court from both sides upon the very intricate questions of *lex loci* and *lex domicilii* as well as the question of *res judicata*. I do not, however, find it necessary to go into these questions at any length, as, with deference, I do not consider they are at all of importance in arriving at a decision upon this appeal.

In this jurisdiction in the *forum rei sitæ*, as well as by the judgment of the Supreme Court of the State of Washington, the respondent Wolbert has been held to be entitled to an undivided half interest in the mining claims in question in this action. The appellants, however, rely upon the judgment of the Supreme Court of the State of Washington to oust the respondent Wolbert from his title, claiming that by virtue of the judgment of that Court, such is the legal position.

In passing, let me say that there could be no effective judg-

ment in the Supreme Court of the State of Washington which would be determinative of the actual title to land or an interest in land in British Columbia (see *Barinds* v. *Green* (1911), 16 B.C. 433; Dicey's Conflict of Laws, 2nd Ed., pp. 357-9; *British South Africa Company* v. *Companhia de Mocambique* (1893), A.C. 602; *Boyd* v. *Attorney-General for British Columbia* (1917), 54 S.C.R. 532, Duff, J. at pp. 564-5). In saying this, though, I do not wish to be understood as denying the jurisdiction of the Supreme Court of the State of Washington to enforce contracts respecting foreign lands as well as pass upon equities existing between residents of the State of Washington, as presumptively the same powers would be capable of exercise as the Courts of England have always exercised in this connection. It is instructive to observe what was said in the judgment of Viscount Finlay in *Brown* v. *Gregson* (1920), A.C. 860 at pp. 875-6:

"It is quite true that the Courts in Scotland or in England may, with regard to persons within their jurisdiction, make orders in certain cases with reference to land in a foreign country. A contract with regard to land bought may be enforced here *in personam* so long as it it not contrary to the *lex situs* which, with regard to real property, must be the governing law. The law on this point was laid down by Lord Cottenham, L.C. in the case *Ex parte Pollard* (1840), Mont. & Ch. 239, 250, 251: 'It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the Courts of Equity to operate *in rem*; but in contracts respecting lands in countries not within the jurisdiction of these Courts they can only be enforced by proceedings *in personam*, which Courts of Equity here are constantly in the habit of doing; not thereby in any respect interfering with the *lex loci rei sitæ*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities.' "

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Then what is the position? Admittedly the respondent Wolbert (as held in both jurisdictions) is held to be entitled to an undivided half share in the mining claims (divided as we will see later with Chassy). The Supreme Court of the State of

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Washington so held on the 16th of July, 1917, and Mr. Justice GREGORY, whose judgment is now under appeal, held likewise, and of course the judgment of Mr. Justice GREGORY is a judgment fully effective in all respects as affecting the title, unless reversed. Now has such a case been made out upon this appeal as would warrant its reversal? My answer is unquestionably in the negative.

The defendants undertake to say that there was a forfeiture of title by Wolbert owing to his failure to pay the money he was called upon to pay under the judgment of the Supreme Court of the State of Washington, before a conveyance would be made to him by the appellant D. K. May of the undivided half interest in the mining claims, yet when the bill of sale of the mining claims was made to the appellant Company, the appellant D. K. May executed the bill of sale transferring the interest of the respondent Wolbert, as the attorney in fact of Wolbert. This transaction is absolutely contradictory to any forfeiture of title; further, it is an admission of that which was the true position, namely, that Wolbert was still the owner and entitled to an undivided half interest in the mining claims.

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As pointed out by the learned trial judge, the appellant Company, through its directors and officers, was and is affected by all the facts and circumstances and cannot be said to be a purchaser for value without notice of the interest of Wolbert. It is true that some of the facts and circumstances would appear to present a situation of inequitableness against both of the respondents, in that it would appear that throughout the incorporation of a company was contemplated and what has been called pre-organization stock was sold and moneys obtained to work and develop the mining claims. This feature of things, at times, when anxiously considering this appeal, has given me difficulty, but I cannot see that it is a case for any equitable relief. The defendants adopted a course which really precludes consideration of this aspect of the matter. There was a denial throughout and a wrongful denial of any interest in the mineral claims in the respondents. It is conceivable that the respondents would have readily enough, if consulted, agreed to the incorporation of the company and would have accepted

in consideration of their interests in the mineral claims, their proper proportion of the share issue which went to the appellant D. K. May.

It is significant that the appellant Company fully appreciated the legal position and that the respondent Wolbert was interested in the mining claims sold to it, as the agreement for sale of the properties was between it, the purchaser, and May and Wolbert, the vendors, and the consideration was $100,000 payable by delivery of one million shares of the capital stock of the appellant Company to the vendors. Apparently there never was any willingness to at any time recognize the respondents' interests or right to any of these shares—they would appear to have been wholly taken by the appellant D. K. May and dealt with as his sole property. The appellant Company cannot, upon the facts, be held to be an innocent purchaser for value when all these facts are weighed and considered. Further, there was no good and sufficient power of attorney from the respondent Wolbert to the appellant D. K. May, admitting of the execution of the bill of sale and agreement for sale on Wolbert's behalf by D. K. May. It is plain that any authority that D. K. May at any time had, had relation to other properties, not those in question in this action.

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Then comes the question of the relief given to the respondent Chassy by the learned trial judge. It is contended that Chassy is not entitled to the quarter interest in the mining claims derivable by contract between himself and the respondent Wolbert (Wolbert's interest being a half interest, he disposed of one half of that interest—a quarter interest in all the properties—to Chassy), and the right to the 100,000 shares of the capital stock of the appellant Company as well.

I must admit that this matter gave me considerable thought at one time, and would seem to offer insuperable difficulty in supporting the judgment of the learned judge, that Chassy was entitled to the interest in the properties as well as the shares. In the end, though, I cannot see that there is difficulty, and I say this with the greatest deference to all contrary opinion. Chassy is entitled to the declared interest in the properties by reason of his right thereto from Wolbert, Wolbert being held

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by the learned judge (and in this I agree) to be entitled to a half interest, it follows that Chassy's interest is a quarter interest and this interest is quite independent of the further right to the 100,000 shares. Chassy is really the loser in respect to the share interest in this respect, that he was entitled to the 100,000 shares in a company which would have vested in it the complete estate in the mineral claims, but as matters are now a half interest only is in the appellant Company.

There is, it is true, some inconsistency in the position taken by Chassy, but nothing though that would operate to deprive him of the full benefit of the judgment in his favour. I am not of the opinion that it has been demonstrated that the learned trial judge arrived at a wrong conclusion; on the contrary, I am of the opinion that the conclusion he arrived at was a correct conclusion and that the judgment should not be disturbed. No error in law has been shewn and there is ample evidence supporting the learned judge in his findings of fact.

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

> "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 see no reason here to doubt the soundness of the judgment under review. I would therefore dismiss the appeal.

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

Solicitor for appellants: *E. C. Wragge.*

Solicitor for respondent Chassy: *A. Whealler.*

Solicitors for respondent Wolbert: *Taylor, Mayers & Company.*

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Sale of land—Agreement for—Default by purchaser—Subsequent agreement varying time of payment—Original agreement to remain in full force except as to variation—Default by purchaser as to subsequent agreement—Notice by vendor to cancel—Forfeiture.

The plaintiffs sold certain lands to the defendants under an agreement for sale which provided that "if the purchaser shall make default . . . . for 30 days the said sum . . . . and all subsequent payments . . . shall at the option of the vendors upon giving notice hereinafter mentioned . . . . belong absolutely to the vendors any rule of law or equity to the contrary notwithstanding, and the vendors may thereupon resume possession of the said premises and all improvements thereon and hold the same freed from these presents without any right on the part of the purchaser to any compensation therefor." It further provided that the notice referred to "shall be a notice in writing . . . . to the effect that at the expiration of 30 days . . . . the vendors intend to exercise their rights under this agreement in consequence of some default made by the purchaser under the terms thereof." The vendors gave notice that "at the expiration of 30 days . . . . the said vendors . . . . intend to exercise their rights under the said agreement in consequence of the default made by the purchaser as aforesaid under the terms of said agreement and that the said vendors intend to cancel the said agreement to enter into possession and to exercise all the powers given to them by the said agreement with respect to all moneys paid thereunder and the lands comprised therein as are conferred upon them by the terms of the said agreement." In an action by the purchasers for payment of the balance due or in default a sale or foreclosure and possession of the lands it was held by the trial judge that if within three months the moneys still due be not paid the rights of the defendants should be foreclosed.

Held, on appeal, affirming the decision of MACDONALD, J. (MARTIN, J.A. dissenting), that the vendors are entitled to sue for and obtain judgment and in case of continuation of default in payment the agreement should be deemed to be cancelled, the sale null and void, the vendors entitled to recover possession and the moneys paid under the agreement remain the property of the vendors.

APPEAL by defendants from the decision of MACDONALD, J. in an action tried by him at Victoria on the 26th of February, 1920, to recover $36,500 and interest, being the balance due on an agreement for sale made to the defendant Eliot on the

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7th of October, 1911, of lots 590 and 591 and the East half of lot 589 in the City of Victoria. The purchase price was $150,000, $40,000 in cash, which was paid, and the balance in four yearly instalments of $27,500 each, the first being due on the 7th of October, 1912. On the 9th of December, 1911, Eliot assigned his interest in the agreement to the British Investments Limited. The instalment due on the 7th of October, 1912, was paid and on the 15th of January, 1913, the defendant Company agreed to sell lot 591 and the East eight feet of lot 590 to one Andrew Wright for $90,000, $30,000 being paid in cash and the balance in three yearly payments of $20,000 each, the first being payable on the 1st of January, 1914. The second instalment under the original agreement not being paid on the 7th of October, 1913, the parties entered into an agreement on the 24th of November, 1913, whereby the defendants assigned to one Emerson their rights under the agreement of the 15th of January, in order to raise funds to pay the plaintiffs what was due, and said agreement contained further stipulations in regard to payments on the original sale, including a payment of $36,500 to be made on the 1st of January, 1914. This agreement contained a proviso "that save and in so far as the said agreement of the 7th of October, 1911, shall have been directly varied in its terms by this indenture, such agreement and all its terms conditions and the powers and privileges conferred upon the parties of the third part [plaintiffs] thereunder and thereby shall be and the same are hereby confirmed." The payment to be made on the 1st of January, 1914, of $36,500 was not made and thereafter proposals and counter proposals were made until finally the plaintiffs brought this action in February, 1915.

A. D. Crease, for plaintiffs.
Mayers, and *Twigg,* for defendants.

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MACDONALD, J.: On the 7th of October, 1911, the plaintiffs sold to the defendant Eliot lots 590, 591, and the East half of lot 589, according to the official map of Victoria. The purchase price was $150,000, of which $40,000 was paid at the time of the execution of the agreement, and the balance was

payable by instalments of $27,500 each, on the 7th of October in the years 1912, 1913, 1914, and 1915, with interest in the meantime at the rate of 7 per cent., payable quarterly.

There is no evidence before me to shew that this was a speculative purchase, but I presume I am entitled to bring to bear some knowledge of what occurred in this Province between the years 1911 and 1919. The fact that the payments were not promptly met in any event as to this property is some evidence that the real estate market was, to put it mildly, inactive during the years following the execution of this agreement. The result was that the payments not having been made at the time stipulated, the purchaser and those claiming through him by way of sub-purchase were required to apply from time to time for extensions. They were enabled to make a sale of a portion of the land purchased at a very good price. A large portion of the moneys that accrued from this sale were paid to the plaintiffs, and with these moneys and other amounts paid on account of principal and interest, it left a balance that is now sought to be recovered (according to the evidence of Lee Kum) of $36,500 principal and $15,230 of interest, also taxes paid of $1,820, making a total of $53,650. There are also taxes due and which form a lien upon the property of some $9,000. This was, to say the least, an interesting state of affairs as far as the vendors of the property were concerned. It is quite evident that the great anxiety was to receive payments and not to enforce a conclusion by legal proceedings, which, during the period I have mentioned, might not bring any satisfactory result, especially if their purchaser was not a man of substance who might have been held for such a large amount upon the covenant of the agreement. However, as time rolled on, sundry efforts were made to realize substantial payments, and in November, 1913, a further agreement was entered into which contains a saving clause providing that "except in so far as the original agreement is specifically varied, all other terms remain in full force and effect." These may not be the exact words, but they are sufficient to indicate the intention of the document.

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Then following this latter agreement of November, 1913,

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the last effort towards payment culminated in November of 1914, when the solicitors for the plaintiffs advised the Western Dominion Land & Investment Company, Limited, which appears to have represented the defendants, the British Investments Limited, in Victoria, that if the arrears of interest, amounting to $1,916.25 were paid, and monthly payments of interest were secured out of the rents, these would be the best terms they could advise their clients to accept and would be satisfactory. On the 19th of November, the Western Dominion Land & Investment Company wrote stating that this company personally did not reply, and were only acting as agents, and they could not come to any conclusion as to whether the proposition made by the solicitors for the plaintiffs would be carried into effect or not. On the 21st of November defendant Eliot wrote stating that he hoped to be able to arrange matters satisfactorily. No result following and on the 2nd of December solicitors for the plaintiffs wrote to the Western Dominion Land & Investment Company that as it appeared that they were unable to raise $2,000 of arrears of interest, their clients instructed them to take the necessary proceedings with the cancellations. In reply to this letter the Western Dominion Land & Investments Company wrote on the 3rd of December acknowledging receipt of the letter, and stating that they were making every possible endeavour to raise the arrears of interest, but it was naturally not easy under some circumstances. They then add these words at the conclusion of the letter: "We trust, however, to be able to pay it over before the foreclosure proceedings are instituted." As they were only agents for the British Investments Limited, and did not purport to act for the defendant Eliot, I do not think this statement can be considered binding or as an invitation to take proceedings in the nature of a foreclosure. This is, however, some evidence to indicate a knowledge that proceedings that would affect the rights of the parties would likely be taken within a very short time. Following their letter of the 2nd of December, solicitors for the plaintiffs, on the 7th of December, served a notice directed to both defendants, which, after reciting the essential features of the agreement for sale, states that at the expiration of thirty days from the date of

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such notice the plaintiffs intend to exercise their rights under the agreement in consequence of the default made by the purchaser under such agreement, and to enter into possession and exercise all the powers given to them respecting the moneys payable thereunder and the lands comprised therein, as are composed by the terms of the agreement. No moneys were paid upon service of this notice, and this action was commenced on the 12th of January, 1915. Appearances were entered in due course and statement of claim delivered. It was amended and redelivered on the 24th of February, 1915. Defendants joined issue and delivered a counterclaim seeking a declaration that the agreements of October, 1911, and November, 1913, were rescinded, and that they were entitled to a return of the moneys paid, which, after allowing for certain deductions, was $77,348.

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According to the terms of the original agreement, time was of the essence of the agreement. I think that this condition remained even after the agreement of November, 1918. That it never ceased to exist as a term between the parties. It was apparent that from time to time the plaintiffs were lenient, perhaps through a selfish motive, with a view of enabling the defendants to make payments of the amounts that were then in arrears as well as those that might accrue due. As the payments became in arrears the right became vested in the plaintiffs to enforce the agreement, whether in its original state or as varied. In November, 1914, they had a right as vendors, irrespective of the particular term contained in paragraph 9 of the original agreement, to ask for specific performance of the contract to sell, and in default of the payment of the balance due them within a reasonable time, to obtain a rescission of the contract and become reinstated in their position as owners of the property, without any claim of the defendants thereon. They did not see fit, however, to pursue that course, but through their solicitors endeavoured to avail themselves of the specific provision contained in the ninth paragraph. It is now contended that a fair construction to be placed upon this notice of cancellation (so called) is that it operated as a rescission of contract; and in that event that the defendants need do nothing

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further but simply await further action on the part of the plaintiffs, or if they saw fit to do so themselves, commence action for the return of the moneys already paid. They asserted this position on the basis that the contract being rescinded, the parties should be placed in the original position, which involved payment not simply of a deposit but the substantial amount that had been paid on account of the purchase price. If this notice so served in December, 1914, operated, automatically, as it were, to bring about the rescission of the contract, then the contention of the defendants is based on strong grounds. I must bear in mind, however, that this return of moneys paid, that have been apparently forfeited, is only by way of equitable relief. According to the strict terms of the contract, these moneys were paid in not to be returned but to be forfeited in the event of the purchaser failing to complete the contract according to its terms. Defendants say, however, that this relief should be afforded, and that there was no abandonment on their part of the agreement until the plaintiffs saw fit to rescind it. This brings me to a consideration as to whether this notice was a rescission or not. It does not so state in its terms, but refers to an intended or prospective cancellation. I do not think the power was vested in the plaintiffs, through their solicitors, of this rescinding of contract. I think they were required to apply to the Court to establish their rights, and certainly could not expect otherwise to obtain a marketable title to their property. The defendants who have thus been in default, virtually say, "yes, we offer no opposition to you becoming renewed in your ownership of the property," but as a result you require to pay the large sum to which I have referred. This would seem to be a most inequitable and unfair proceeding. During the period since this contract for sale was made the plaintiffs could not dispose of it should it have risen in value in the meantime; but the defendants, being the owners of the equity, could take advantage of a rise in the market value of the property. I assume, however, the property has not risen in value but has diminished as a saleable property. So then, the defendants having had this benefit, are, if they succeed in their contention, to obtain a return of all the moneys

risked upon this unsuccessful venture, and the plaintiffs have the balance of the property, undisposed of, back on their hands. Returning, however, to the consideration of the notice that was served, while its terms refer to cancellation, I think it was not intended to be a complete destruction of the contract, not only because it does not so state and could not bring about that end, but because if that were the result, it would be defeating its very purpose. The intention of serving the notice was either to bring about payment or to form the basis that would enable the plaintiffs to renew their position as owners of the property, with the moneys already paid to be forfeited to them as well. I have been referred to a number of authorities, but in the numerous decisions relating to cases of this kind I do not observe any one exactly on the same basis as far as the facts are concerned. There are certain principles to which I have endeavoured to give consideration. I repeat that I do not think the notice of cancellation could deprive the defendants of the right they possess to still redeem the property—using the term perhaps more applicable to a mortgage action. They do not seek to redeem by their pleadings, nor through their counsel. An old axiom in principles of equity is "that he who receives equity should do equity." I think they are simply relying altogether upon a claim of rescission as supported by the notice, which I do not think has that result, nor was it so intended. I think, under the circumstances, the judgment of the Court should be that within three months after the registrar has made his certificate the moneys still due should be paid, or in default, the rights of the defendants should be foreclosed. There should also be a declaratory judgment in order to enable the plaintiffs to clear their title. They are entitled to costs.

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From this decision the defendants appealed. The appeal was argued at Vancouver on the 30th of April and 3rd of May, 1920, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellants: The vendor gave notice of cancellation. There are four grounds of defence, first, when notice was given there was no power under which it could be given;

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second, the vendor was precluded by his conduct from exercising the power if it existed; third, the notice exceeded the scope of the power; and fourth, we pray for relief against forfeiture. The parties went into a joint adventure in order to get funds, which was the second sale; they entered into a new agreement. When a vendor and purchaser engage together they cannot resort to the original power. The original power ceases to be applicable when the whole conditions of payment have been by agreement changed: see *Hamilton and Co.* v. *Mackie and Sons* (1889), 5 T.L.R. 677. What can be done is an action on the covenants: see Williams on Vendor and Purchaser, 2nd Ed., 1059. In the case of a sale they are always entitled to credit for the amount paid: see *Shuttleworth* v. *Clews* (1910), 1 Ch. 176. Dealing with the position created by the notice given I am entitled to accept rescission and ask for a return of payments made: see *Lawton* v. *Lindsay* (1918), 12 Sask. L.R. 203 at p. 206. Some mention was made that we abandoned but there is no evidence of this. As to the irregularity of the notice, it not being within the powers of the agent, see *March Brothers & Wells* v. *Banton* (1911), 45 S.C.R. 338. In any case we are entitled to relief against forfeiture: see *Verma* v. *Donahue* (1913), 18 B.C. 468 at p. 470.

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A. D. Crease, for respondents: The whole frontage is 150 feet and we sold 68 feet. Even the second payment was not made in full and payments after that were very slow, in fact pressure was constantly kept up for nine years. There were no extensions in fact after the second agreement, which was merely a readjustment of payments and no other variations. The last payment was made in 1914. We did not have power to terminate the contract by notice, but we could bring action and create the position that they either had to pay or run the risk of the Court declaring the contract ended. As to the notice being rescission see *Cowie* v. *McDonald* (1917), 2 W.W.R. 356 at p. 360. The whole proceeding up to the present shews there was no repudiation. On the question of restitution see *Enkema* v. *Cherry* (1911), 18 W.L.R. 641 at p. 644; *Sprague* v. *Booth* (1909), A.C. 576 at pp. 578-80. There is no case where relief from forfeiture has been given when the purchaser has

not offered to complete: see Bullen & Leake's Precedents of Pleadings, 6th Ed., 714. Waiver must be expressly pleaded: see Halsbury's Laws of England, Vol. 27, p. 89; *Davidson* v. *Sharpe* (1920), 1 W.W.R. 888.

Mayers, in reply, referred to *Gullischen* v. *Stewart Brothers* (1884), 13 Q.B.D. 317, and *North-Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited* (1913), 3 K.B. 422.

Cur. adv. vult.

27th October, 1920.

MARTIN, J.A.: I regret that I am compelled to dissent from the view taken by my brothers of this appeal, but I regard the notice given on the 7th of December, 1914, as being one quite outside of, and unauthorized by, the agreement for sale, in fact a deliberate disregard of the limited powers conferred thereby, and so I am unable to take the view that in the circumstances we are justified in saying that the vendors intended to give a notice inside the contract if they in fact gave one outside of it. The preceding letter of their solicitors (by which of course they are bound, they indeed admitting they "left it all to them"), dated December 2nd, says, "our clients have instructed us to do all that is necessary to proceed with the cancellation." The statement of claim erroneously alleges a "cancellation" of the agreement "in pursuance of the terms" thereof, and also a forfeiture of payments thereunder, by means of said notice given, and plaintiffs served notice upon the defendants to admit this "notice of cancellation," and it was admitted "in pursuance of the terms of the said agreement." But there is no power to cancel thereby conferred upon default, but merely at the option of the vendors and after specified notice to forfeit payments already made, to resume possession, and to resell and recover any deficiency. The notice they gave says:

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"This is to notify you that at the expiration of thirty days from the notice the said vendors Kum Jow Lee Dye and Lee Kow intend to exercise their rights under the said agreement in consequence of the default made by the purchaser as aforesaid under the terms of said agreement and that the said vendors intend to cancel the said agreement, to enter into possession of the premises and to exercise all the powers given to them by the said agreement with respect to all moneys paid thereunder and the lands

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comprised therein as are conferred upon them by the terms of the said agreement."

The power to give this notice is contained in clause 9, thus:

"If the purchaser shall make default in complying with any of the terms of this agreement for thirty days the said sum of $40,000 (forty thousand dollars) and all subsequent payments on account thereof shall at the option of the vendors upon giving the notice hereinafter mentioned, and notwithstanding any previous forbearance by the vendors, or demand by the vendors of the whole unpaid purchase price, belong absolutely to the vendors, any rule or law or equity to the contrary notwithstanding, and the vendors may thereupon resume possession of the said premises and resell," etc.

And clause 10 provides that:

"The notice referred to in clause 9 hereof shall be a notice in writing given on behalf of the vendors to the purchaser to the effect that at the expiration of thirty days from the date of such notice the vendors intend to exercise their rights under this agreement in consequence of some default made by the purchaser under the terms thereof."

The strange feature of the matter is that though notification was thus given of intention to "exercise all the powers given to [the vendors] by the said agreement," yet there is no evidence, and not even any allegation in the statement of claim, that they had or have in fact exercised the power that was given them "at their option" to elect that all the payments already made should "belong absolutely to" themselves, *i.e.,* to be forfeited; all that paragraph 9 of the claim alleges is a repetition again of "the intention to exercise all the powers," etc., without averring the actual exercise in any respect. Now as the forfeiture could only occur after the exercise of the power conferred in that behalf, it follows that the payments never have been forfeited and no other power to forfeit is given in the agreement. Nor have we been referred to any authority that would justify the view that such an option may be exercised after action brought. Being the exercise, extra-judicially, of a special power conferred upon the vendor himself, it is, in my opinion, an election of quite a different kind from that dealt with in, *e.g., Standard Trusts Co.* v. *Little* (1915), 8 Sask. L.R. 205; 8 W.W.R. 1112; 31 W.L.R. 769, wherein is considered the postponement of election of the remedies which the vendor is entitled to ask the Court for in specific performance of an existing contract. I therefore regard the unusual situation as one where a notice of cancellation, *i.e.,* rescission, has been

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given (there can be no stronger evidence of rescission than cancellation, which is the extreme act of repudiation) and accepted by the purchaser because the notice that the vendors "intend to cancel" was followed up by the bringing of the action on January 12th thereafter, to cancel and forfeit in the alternative failing payment, as well as to foreclose, and in their defence and counterclaim the defendants formally accept that intention to repudiate and cancel the contract and on their part also ask that it may be declared to be rescinded.

The learned judge below was oppressed by this very unusual situation (apart from the point of failure to forfeit which was not drawn to his attention, nor to ours), and said that he could not find any decision "exactly on the same basis as far as the facts are concerned," but attempted to get over the difficulty by saying that he did not think the vendors "intended" to cancel, *i.e.,* rescind the agreement by said notice but "intended" that the notice should be given as one in pursuance of the contract. Since that judgment the respondents' counsel have still been unable to find a case resembling this, but rely on cases wherein there was a power to cancel in the agreement; such as *Cowie* v. *McDonald,* 10 Sask. L.R. 218; (1917), 2 W.W.R. 356; *Brickles* v. *Snell* (1916), 2 A.C. 599; 86 L.J., P.C. 22; (1917), 1 W.W.R. 1059; and *Davidson* v. *Sharpe,* 60 S.C.R. 72; (1920), 1 W.W.R. 888, which cases therefore do not support the respondents' contention; on the contrary, the expressions, *e.g.,* of Mr. Justice Mignault in the last case at p. 900, assist the appellant in principle. And *Brickles* v. *Snell* is important as shewing that if the purchaser had set up an alternative claim for a return of his deposit of $500 it would have been granted (p. 604 (1916), 2 A.C.), and, of course, the subsequent instalment—see also on this point *Brown* v. *Walsh* (1919), 45 O.L.R. 646, and *Steedman* v. *Drinkle* (1915), 85 L.J., P.C. 79; 9 W.W.R. 1146; 33 W.L.R. 483; (1916), 1 A.C. 275, and the subject is well treated, but before the latest cases, in McCaul on Vendors and Purchasers, 2nd Ed., 54 *et seq.,* and 82 *et seq.*

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In the view I take of the matter the case comes down, in effect, to rescission by mutual consent, and there can, I pre-

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sume, be no doubt, at least none was suggested during the argument, that if, *e.g.,* I agree to sell Blackacre to John Doe for $3,000 payable in three annual instalments and give him possession, and after Doe has taken possession and paid me one instalment, I were to notify him that I repudiated and desired to cancel the contract and he agreed to my proposal, then the contract would *ipso facto* be rescinded and I should have to repay him his money and he would have to give up to me his possession of, and relinquish any interest in, Blackacre. And if in the meantime he had sold part of Blackacre to Richard Roe, with my consent, that transaction would have to stand because it is not wholly a question of *restitutio in integrum* but simply that I, the vendor, and Doe, the purchaser, have agreed to cancel our contract, thus placing ourselves in our original position so far as may be possible having regard to the rights of third parties which have intervened with our consent. In such case the assistance of the Court cannot be invoked to keep alive something the parties have put an end to, and they must work out their own salvation in accordance with the rescission they have agreed to, whatever may be its terms. I see no difference in principle between the case I have postulated and that at bar; here a portion of the land was sold by the purchaser with the approval of the vendors (at, I observe, the learned judge finds, "a very good price," *viz.*, $90,000 for 68 of the 150 feet originally sold, of which $46,000 went to the plaintiffs, who have in all been paid over $77,000), and so that transaction must stand, but that does not prevent the application of the cancellation or rescission *pro tanto,* in default of a more exact term: it is another "form of rescission," to adopt that convenient expression in Anson on Contracts, 15th Ed., 334, 336.

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The learned judge below seems to have been impressed with the view that it would be inequitable to hold a vendor to the consequences of his repudiation on the ground that he would lose the benefit of the instalments that had already been paid to him, which might, indeed, in certain facts be the case, but in the first place it is, after all, only a matter of agreement between the parties, and if they agree to cancel or take such steps as have that effect, that is their affair; and, in the second

place, it would often, on a rising market, be greatly to the great benefit of the vendor if he could cancel and be free to sell again at a greatly increased price to another prospective purchaser, after returning the payments made by the original purchaser; or if, for example, he since the sale believed that he had discovered or become entitled to very valuable coal areas on the lands, worth a large fortune, as happened in the recent case before us and the Privy Council of *Bing Kee* v. *McKenzie* (1919), [26 B.C. 509]; 2 W.W.R. 172; (1919), 3 W.W.R. 221; it might turn out that he was mistaken in his belief, but if the parties chose to rescind in that frame of mind it is their own business, not ours. But whatever the benefit might or might not be, this question turns not upon special cases but upon the general principal which I have endeavoured to apply, as I conceive it, to the unusual case before us. It must not be overlooked that, apart from that principle, I am of the opinion that the payments have not been forfeited herein, for the reason before set out, and so the remaining one of the three intentions set out in the notice, *i.e.*, to resume possession, is in harmony with rescission.

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The appeal therefore should, I think, be allowed.

GALLIHER, J.A.: I am in agreement with my brother MCPHILLIPS in dismissing the appeal.

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MCPHILLIPS, J.A.: The learned trial judge has, in his reasons for judgment, set forth the facts with great clearness, and I see no need for any further statement of them. After all, the present case is a simple one and one that has the usual familiar features—the purchase of property in a rising market followed by a break, or what is popularly termed a "slump." Although the present case differs from many in that the property is productive, *i.e.*, rental bearing, it is evident though that it will not carry itself. The rents and profits derivable therefrom will not meet the payments under the agreement for sale, and the vendors, the plaintiffs in the action (the respondents), commenced this action, claiming the purchase price remaining due and accrued interest, and in default of payment being made, sale of the land or foreclosure and

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possession thereof, the appointment of a receiver, and in the alternative that in default of payment an order cancelling the agreement for sale, and the subsequent agreement relative thereto, and that all moneys already paid be declared the property of the plaintiffs without any right in the defendants (the appellants) to any compensation or abatement.

The defence to the action, besides the usual and customary denials, sets up that the plaintiffs seek to enforce agreements which they, the plaintiffs, have repudiated and denying the right to any foreclosure thereof, and by counterclaim it is contended at this Bar, and I assume it was so contended in the Court below, that the contracts being repudiated by the plaintiffs, that the resultant effect as between the parties was that rescission of the contracts took place, *i.e.*, that there was express notice of intention to cancel the agreement for sale of the 7th of October, 1911, which entitled the defendants to a return of all moneys paid in respect thereof.

The learned counsel for the appellants in an excellent and elaborate argument carefully presented the case as one that partook in its later phases of a joint adventure between the parties and that the payments to be made were as set forth in the later agreement of the 24th of November, 1913, and cancellation could not take place in case of default in the absence of such a stipulation in the second agreement.

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I would not, with deference, think that any such result was occasioned by the entry into the second agreement. By a provision therein all the terms of the first agreement except as varied in the second agreement were confirmed and it would be quite unreasonable to so construe the transaction, *i.e.*, that the entry into the second agreement resulted in the abrogation of the provision in the first agreement for resuming possession of the lands upon default and the right upon the part of the plaintiffs to the purchase-moneys already paid. It would not seem to me that that which took place could be at all said to have any such resultant effect. In any case this submission on the part of the appellants is really met in this way—granted that there was no effective cancellation by the act of the plaintiffs alone and the giving of the notice there was the

power in the Court to direct rescission in default of payment of the moneys found to be due upon the taking of the accounts, which is the judgment under appeal.

The judgment as entered in the action may be said to be the customary and usual judgment following suit for payment of the moneys due in respect to sales of land, and this case does not differ at all in respect to the relief usually claimed and granted. It may be said that the form of judgment is stereotyped and well known in practice. In *Standard Trust* v. *Little* (1915), 8 Sask. L.R. 205; 8 W.W.R. 1112; 31 W.L.R. 769; Lamont, J. (now Lamont, J.A.), at p. 209 said:

"The failure of the purchaser to obey the decree and pay the money found to be due, is a sufficient abandonment or repudiation of the contract by him to justify rescission without restitution. *Dunn* v. *Vere* [(1870)], 19 W.R. 151; *Henty* v. *Schroder* (1879), 12 Ch. D. 666."

In *Davidson* v. *Sharpe* (1920), [60 S.C.R. 72 at p. 84]; 1 W.W.R. 888, Anglin, J., at p. 896, said:

"Mr. Justice Lamont states the law very clearly and accurately, if I may say so, in delivering the judgment of the Court *en banc* in *Standard Trust* v. *Little* [(1915)], 8 Sask. L.R. 205; 8 W.W.R. 1112; 31 W.L.R. 769."

It will be seen upon an examination of the *Standard Trust* case and the *Davidson* case, that the judgment here under appeal is in a form which is supported by the Supreme Court of Saskatchewan and the Supreme Court of Canada (also see *Jackson* v. *Scott* (1901), 1 O.L.R. 488). At p. 896 in the *Davidson* case, *supra* [60 S.C.R. 83], Anglin, J. said:

"When the vendor sought and obtained a judgment fixing a period for payment and providing that on default 'the agreement shall be cancelled and at an end and all moneys paid thereunder forfeited to the plaintiff,' he elected in my opinion, on that event happening, to take the property in satisfaction of so much of the purchase-money as then remained unpaid."

In the present case, the judgment provides that in case of default in payment of the amount found due upon the taking of the accounts,

"the said agreement for sale of the 7th of October, 1911, and the said agreement of the 24th of November, 1913, be deemed to be cancelled, and the sale in the said agreement mentioned shall thereafter be null and void and of no effect, and that the plaintiffs recover possession of the said lands hereditaments and premises and that the moneys paid under the said agreement for sale of the 7th of October, 1911, and the said agreement of the 24th of November, 1913, shall remain the property of the plaintiffs and that any registration of the said agreement for sale or the agreement

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of the 24th of November, 1913, and all assignments thereof respectively in the Land Registry office at Victoria, B.C., be cancelled."

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The terms of the judgment would appear to be quite unobjectionable in form and the relief accorded is quite, in my opinion, in conformity with the decided and controlling cases (*Lysaght* v. *Edwards* (1876), 2 Ch. D. 499 at p. 506; *Jackson* v. *Scott* (1901), 1 O.L.R. 488; *Cameron* v. *Bradbury* (1862), 9 Gr. 67; *Sprague* v. *Booth* (1909), 78 L.J., P.C. 164 at p. 165; *Steedman* v. *Drinkle* (1916), 1 A.C. 275; *Brickles* v. *Snell* (1916), 2 A.C. 599).

Finally, upon the point taken that upon the facts that there was wrongful repudiation of the agreement for sale by the plaintiffs and that the defendants, having elected to accept that position, were entitled to the return of all the moneys paid: This contention is wholly untenable. There was no wrongful repudiation, the notice of cancellation being in effect merely a notice of intention under the terms of the agreement for sale upon the part of the plaintiffs of the exercise of the option given in paragraph 9 of the agreement for sale and the exercise of their right thereunder, and it is in express terms recited therein that,

"the said sum of $40,000 and all subsequent payments on account thereof shall at the option of the vendors upon giving the notice hereinafter mentioned, and notwithstanding any previous forbearance by the vendors, or demand by the vendors of the whole unpaid purchase price belong absolutely to the vendors any rule of law or equity to the contrary notwithstanding, and the vendors may thereupon resume possession of the said premises and all improvements thereon and hold the same freed from these presents without any right on the part of the purchaser to any compensation therefor."

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Therefore it is plain that exercising the option there is the right in the plaintiffs to retain all moneys paid by the defendants. There is no particular magic in the words used in the notice, "cancel the agreement," the notice was, after all, as previously stated, merely a notice of the exercise of rights granted under the agreement for sale. It is true there is a power of sale given in the agreement for sale, but that is in no way mandatory.

The defendants have no position upon the facts that would entitle the Court to grant any relief. The evidence shews that

the plaintiffs were pressing for the payment of at least the arrears of interest, the defendants were greatly in default, and finally, the plaintiffs bring the action which admitted of the defendants redeeming the property upon payment, and even now, under the terms of the decree, all that the defendants need do is to make payment of the moneys due upon the taking of the accounts to entitle them to a conveyance of the lands. It is only in default of payment that cancellation of the agreements will take place, and in the Court alone is there authority to cancel the agreements. It rests with the defendants to comply with the judgment as entered, and paying what is found to be due upon the taking of the accounts they get the land, otherwise as is provided they shall "stand absolutely debarred and foreclosed." Time was of the essence of the contract in the present case, and there was implied repudiation upon the defendants' part by the failure to complete (*Howe* v. *Smith* (1884), 27 Ch. D. 89, 95, 103).

There has been no breach of contract upon the part of the plaintiffs, the plaintiffs have not rescinded the contract, the plaintiffs invoked the judgment of the Court to decree compliance with the contract, and in case of default that the contract be rescinded, and the Court has so decreed, and following the terms of the contract as decreed by the Court all the moneys paid by the defendants are declared, the default continuing, to remain the property of the plaintiffs (*Hamand* v. *Best* (1879), 48 L.J., Ch. 503).

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Upon the facts of the present case it may well be said that the defendants have on their part repudiated the contract without colour of right, in fact by their conduct, have abandoned the contract, and there can be no relief such as claimed. Here the contractual obligations are plainly and specifically set forth in the contract and the plaintiffs have been guilty of no breach of contract, the defendants, on the other hand, have, yet notwithstanding their breach of contract, the defendants contend that they are entitled to *restitutio in integrum*. I cannot persuade myself that the defendants are entitled to any such

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relief, and in any case, upon the facts, entire restitution is impossible.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

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Solicitor for appellants: *H. Despard Twigg.*

Solicitors for respondents: *Crease & Crease.*

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Judgment debtor—Examination of—Unsatisfactory answers—Committal—Conduct of counsel on examination—R.S.B.C. 1911, Cap. 12, Secs. 15 and 19.

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On the examination of the defendant as a judgment debtor under the Arrest and Imprisonment for Debt Act it was disclosed that he was manager of a hotel with salary of $100 a month and a percentage of the profits averaging $150 a month, half of which was paid his wife who assisted him. His average monthly expenses included food $80 (including $10 for fruit), flat $25, drugs $10, tobacco $10, charwoman $8, shoes $14, shirts and hose $6, shoe-shines $6. On motion to commit on the ground that he had concealed or made away with his property, or some part thereof in order to defeat or delay the judgment creditor, it was ordered by HUNTER, C.J.B.C., that he be committed to prison for twelve calendar months from and including the day of his arrest unless the judgment be sooner satisfied.

Held, on appeal, MACDONALD, C.J.A. dissenting, that as the examination took place before the registrar, the Court of Appeal was in as good a position to determine the matter as the learned Chief Justice below, that although some of the items referred to may amount to unjustifiable expenditure, viewing all the evidence the case as a whole is not brought within the statute and the order for commitment should be set aside.

It is not within the province of counsel on cross-examination of a judgment debtor to indulge in lecturing, browbeating or threatening the witness with drastic proceedings.

Statement

APPEAL by defendant from an order of HUNTER, C.J.B.C. of the 27th of October, 1920, committing the defendant to

prison for twelve calendar months from and including the date of his arrest unless the judgment debt be sooner satisfied. Judgment was signed by the judgment creditor in default of defence on the 14th of November, 1918, for $1,387.10 and costs. The debtor had borrowed $1,000 and gave a mortgage on two vacant lots in North Vancouver to secure the debt and judgment was obtained on his personal covenant in the mortgage to pay. On the 12th of October, 1920, the judgment debtor was examined by order of MORRISON, J. of the 29th of September, 1920, made under section 19 of the Arrest and Imprisonment for Debt Act. The judgment debtor was engaged in managing the Hudson Hotel in Vancouver. He was paid $100 a month and in addition 25 per cent. of the net profits, half of which was paid to his wife who assisted him in the management of the hotel. The share of profits received averaged $150 a month. His average monthly expenses included rent of apartments (outside hotel) $25, food $80 (including $10 for fruit), tobacco and cigars $10, charwoman $8, shoes $14, shirts and hose $6, shoe-shines $6, drugs $10. The examination was interspersed with lectures by examining counsel as to the debtor's duty to pay and at the end of the examination witness stated that possibly in a week or two he might make overtures as to payment in answer to which counsel said "something further is going to happen unless I hear pretty quick, Mr. Chiffey." Summons was then issued by the judgment creditor for an order that the judgment debtor be committed to prison on the ground that he concealed or made away with his property or part thereof in order to defeat or delay payment to the judgment creditor under sections 15 and 19 of said Act. Upon the said order being made committing the judgment debtor, he appealed.

Statement

The appeal was argued at Vancouver on the 18th and 19th of November, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

F. R. Anderson, for appellant: There was no personal appearance before the learned Chief Justice and judgment was given from the written evidence before him. The sole question is

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whether the debtor was making away with, or concealing his property. The examination made the fullest disclosure and there was, I submit, no evidence to bring the defendant within the Act. There was a mortgage debt, the money going into the property that the plaintiff held as security for the debt.

Harvey, for respondent: There was not a satisfactory disclosure of the moneys he received: see *Crooks* v. *Stroud* (1883), 10 Pr. 131 at p. 133; *McKay* v. *Atherton* (1888), 12 Pr. 464; *Millar* v. *Macdonald* (1892), 14 Pr. 499; *Lemon* v. *Lemon* (1874), 6 Pr. 184. I contend the examination shews an attempt to make away with his money.

MACDONALD, C.J.A. (oral): I think the order below should be sustained. With regard to the point which has just been discussed and which was raised by my brother MARTIN, the Court has not had an opportunity to consider it since it has not been raised in the notice of appeal. Neither has Mr. *Harvey* had an opportunity to reply to it, so that, not having been raised in the notice of appeal, I think I ought to regard it as non-existent as far as this judgment is concerned. I therefore express no opinion upon it.

On the general question argued, it appears that a summons was taken out against the debtor, who had borrowed the sum of $1,000 from a woman who is described in these proceedings as a poor woman and who has not been repaid the money. The summons was under the Arrest and Imprisonment for Debt Act and charged that the judgment debtor had concealed or made away with his property or some part thereof in order to defeat or delay the above-named judgment creditor. In the order committing him to prison, are these words: "That the judgment debtor did not thereupon" (upon his examination) "make satisfactory answers concerning his transactions respecting his property and that he had concealed or made away with some portion of his property in order to defeat, delay or defraud the judgment creditor." In addition to that the learned trial judge seemed to have thought that he had made unsatisfactory answers, but that question was not raised in the summons and it is not for me to deal with it now; so that anything I have to say upon the matter is founded upon

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the summons for concealment or making away with the property or a portion thereof in order to defeat or delay. Then the question is, is there evidence to support a conviction that this man did conceal or make away with a portion of his property for the purpose of delaying the judgment creditor. I think the evidence is sufficient to sustain the affirmative. I refer to certain portions of his evidence, sustaining what I have just said. We find him giving an account of his expenditures. Now, it must be remembered that the defendant is the manager of a hotel and his wife is there assisting him and that their remuneration per month is $250; that they have their rooms in the hotel and that beyond ordinary pin money or personal expenses from day to day they would have very little need of spending much, but in these circumstances what do we find him doing? He says he will give the details of his expenditures and the first one is rent $25. He is asked:

"What is the sense of having another house? There is really not any sense in it, I know, but it is more for the wife. She is a little bit nervous and it is good for her.

"How much time has she spent in all down there last month? She goes in and out. She has the key to the door and goes when she can.

"How many nights has she slept there? Well, I can't tell you because we sleep in different rooms, as a matter of fact.

"And how many nights has your wife slept at 613 Helmcken Street? I couldn't tell you."

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It would be proper for a man who was spending his own money, but not for one spending that which ought to go to his creditor, as he puts it himself: "living the life." What further do we find? His bill for fish and chickens is $30 a month, condiments, beverages, tobacco, cigars, cigarettes, one pair of shoes a month, two pairs of hose a month, two shirts $6 apiece and $6 for shoe-shines. I do not think there are many of us who spend $6 a month upon shoe-shines.

From this list of his monthly cost of living it is found that he has got some $38.22 left that he has not been able to get rid of in this way and he is asked this question: "How much does that total, all these items that are referred to? One hundred and sixty-seven dollars and fifty cents." "That leaves $38.22? Leaves how much, you say"—and this is his answer: "Never mind what it leaves, get my expenses! That is some note

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of my own. That is the balance I had." Well, of course, if a man can assume that attitude, it is very well if the law permits him to carry it off. I do not think the law does. I think that this man had made up his mind that he would not pay his debt. He had made it up for this reason. After having borrowed money on his property and the boom having subsided, he offers to give his creditor the property for the debt. Well, it has been suggested here (and I suppose it appears in the evidence) that the property was worth practically nothing. The creditor did not choose to give up her debt of a thousand dollars—money which she had loaned him. Then he said:

"I am going to pay you when I get ready. I am going to spend my money just as I please, I am going to live the life. I have been accustomed to living well and I am back to that position now where I can live well and I am going to do it, and that is the way I am spending it."

Whatever view, with great respect, others may take of such conduct, I think that wilful spending of money in that way and in that spirit is tantamount to making away with it for the purpose of defeating or delaying the creditor.

In the Ontario case of *Crooks* v. *Stroud* (1883), 10 Pr. 131, the eminent judge who decided it in dealing with a similar case where it had been shewn that the debtor had been gambling and betting on horse races, came to the conclusion without any hesitation at all that such conduct was within the statute.

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Now, what is the difference so far as it affects this case, between spending money betting on horse-racing or upon cards and spending it in the manner in which this man has, by his own shewing, been spending his money? It is true the learned judge in that case refers to the immoral conduct of the defendant in betting his money instead of paying his debts. The moral aspect is not different in this case. The question is, was defendant making away with his money for the purpose of delaying the creditor, whether he does that in betting upon horse races or upon cards, or in maintaining, or pretending to maintain an apartment which, on his own shewing, was not necessary for him at all is immaterial. In either case he commits a breach of the Act. For these reasons I think the judgment of the learned judge below should be sustained.

I just want to make one observation with regard to what has

been said about Mr. *Harvey*. Without making any observations about what has just fallen from the lips of other members of the Court, I wish to say this, what Mr. *Harvey* is criticized for is to be found at the end of the examination. The witness says:

"Possibly in a week or two I might make some overtures to you, but in the meantime I can't see my way clear because I want too many things."

Mr. *Harvey* replied:

"Something further is going to happen unless I hear pretty quick, Mr. Chiffey. That is all."

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Now, while I do not suggest that counsel ought to say that to a witness and while I am just as anxious as any member of the Court to maintain and to see maintained the high standing and integrity and good breeding of the Bar, yet I must say that in the circumstances I have no criticism to offer of Mr. *Harvey's* conduct. The usual order as to costs; of course, the costs will follow the event.

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MARTIN, J.A.: When oral judgment was pronounced herein at the end of the hearing I said that, in view of the importance of the case, I should at a convenient time give my reasons in writing, which I now proceed to do.

By the order of Chief Justice HUNTER, made under sections 15 and 19 of the Arrest and Imprisonment for Debt Act, R.S.B.C. 1911, Cap. 12, the debtor was "forthwith committed to prison for the term of twelve calendar months from the date of his arrest, inclusive of the day of his arrest, unless the said judgment be sooner satisfied," which order was made, as it recites, because upon reading the examination of the judgment debtor taken before the district registrar, under said section 19, it was "proved to my satisfaction from said examination that the judgment debtor did not thereupon make satisfactory answers concerning his transactions respecting his property and that he concealed or made away with some portions of his property in order to defeat, delay or defraud the judgment creditor."

Though in this order of committal two grounds of offence under said sections are given to support it, yet in the summons to commit only one ground is charged, the second, and I am

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of opinion that the objection taken to the committal that it cannot be supported on the first ground (*viz.*, as to unsatisfactory answers) which was not charged in the summons, is valid, and so only the second and quite distinct ground of concealing or making away with property, etc., can be relied upon to sustain it.

It must be borne in mind in dealing with committal proceedings of a penal nature that they have always been regarded, as Mr. Justice Hagarty put it so long ago as 1864, in *Hobbs* v. *Scott,* 23 U.C.Q.B. 619 at p. 623, "as it were, a trial of defendant and conviction as for an offence," and Chief Justice Draper said:

"I am required to find the facts which subject the defendant to punishment. I think, if there be a ground for reasonable doubt, the defendant is entitled to the benefit of it."

This principle has never been departed from in Ontario, as appears by many cases cited, and the lenity of our jurisprudence as affects imprisonment for debt has certainly not decreased since 1863, and so I think it is the only safe one for us to follow, and it has been applied here in the cognate proceeding of contempt of Court, in the case of *In re Scaife* (1896), 5 B.C. 153, wherein Mr. Justice WALKEM said (p. 154):

"I cannot commit a man unless he is charged with something. It is a delicate matter and involves the liberty of the subject. You must prove, step by step, that the party charged is guilty, and then the responsibility is cast on me to determine the punishment to be imposed."

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So much of the order, therefore, as convicts the defendant on the first ground must be struck out as not being founded on any charge, and I proceed to consider the quite distinct remaining charge of concealing or making away with his property or any part of it "in order to defeat, delay, or defraud his creditors or any of them." The gist of the offence is embodied in the words "in order," which are equivalent to "with intent," so it is necessary, as Vice-Chancellor Strong pointed out in *Lemon* v. *Lemon* (1874), 6 Pr. 184, following *Hobbs* v. *Scott, supra,* to establish a "fraudulent disposition" on the part of the debtor. I have examined carefully a number of Ontario cases cited by counsel on both sides, as well as others, chiefly, *Hobbs* v. *Scott, supra; Lemon* v. *Lemon, supra; Schneider* v. *Agnew* (1876), 6 Pr. 338 (wherein the authorities are

reviewed); *Metropolitan Loan and Savings Co.* v. *Mara et ux.* (1880), 8 Pr. 355; *Crooks* v. *Stroud* (1883), 10 Pr. 131; *McKay* v. *Atherton* (1888), 12 Pr. 464; *Foster* v. *Van Wormer, ib.* 597; *Gananoque Carriage Co.* v. *Bincett* (1888), 8 C.L.T. 411; *Graham* v. *Devlin* (1889), 13 Pr. 245; *Watson* v. *Ontario Supply Co.* (1890), 14 Pr. 96; *Millar* v. *Macdonald* (1892), *ib.* 499, and *Bullock* v. *Collins* (1901), 8 B.C. 23, and in considering them it must not be overlooked that, in the great majority of them at least, there were two charges against the debtor and not one only as here, so care must be taken to differentiate over-lapping expressions in these cases which could have no application here. The distinction is well brought out by Chief Justice Wilson in *Crooks* v. *Stroud, supra.* It is clear from a study of all these cases that not only must the debtor not be left penniless but that the due and reasonable appropriation of his property or income to the maintenance and health of himself and his family, according to circumstances, is not defeating, delaying or defrauding his creditors, which indeed was not disputed, and that improvidence or "great carelessness" in expenditure do not of themselves import a fraudulent intent; but the plaintiff here relies upon establishing a case of continuous wilful and extravagant squandering of the debtor's income in self-indulgence to such a gross degree as would manifest a fraudulent intention to "make away with" his property in order to defeat and delay his creditors, and as I do not doubt that such reprehensible conduct would contravene the statute, I have carefully examined the depositions in that light. It appears that the debtor has no property except his salary as manager of a hotel at $100 per month plus a bonus on net profits which has amounted to $150 per month. But out of this bonus he has to hire some one to relieve him in his duties when "off shift" and he employs his wife for this service at $75 per month, a very moderate charge, in my opinion, for the responsible work she does. This reduces his personal income to $175 per month and he has given particulars of his expenditure of that sum at the time of his examination, last September, when the cost of living was here still at its highest. To retain the position he occupies it is essential for it and

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the business that he should maintain a good appearance and be constantly in attendance for very long hours, and though he has a room in the hotel (without board) he deposes that it is essential in order to obtain sleep and rest, free from constant disturbance, for himself and wife, so as to properly perform their duties, that they should have rooms in another place to which they can go as occasion permits, and for this purpose he rented a small suite of rooms for $25 per month. This item was chiefly attacked as an unwarrantable extravagance, but in view of the explanation given I am unable to regard it as such, bearing in mind the long hours he works to help to earn his bonus and the exacting nature of his duties which afford very little opportunity for proper exercise or recreation. Some of the other items he gives seem to be unduly large, but on the other hand he has omitted to take into account some obviously proper allowances, *e.g.,* medical attendance, dentistry, medicine, etc., which every one must provide for, and he has named no sum for the new clothing which he swears he is in need of after a long period of financial adversity. Without going further into details I shall content myself by saying that after a careful scrutiny of his evidence, I am unable to say, in all the circumstances, that it is sufficient to convict him of the charge preferred against him as the matter stood at the time of his examination: it is not enough that there may be "suspicions" as to his conduct—*Hobbs* v. *Scott, supra;* he is entitled to the benefit of reasonable doubt, and as Chief Justice Draper put it (p. 622):

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> "I have been unable . . . . . to arrive at a sufficiently assured conviction to justify my passing a sentence of imprisonment, which is in effect what I am called upon to do."

I note the debtor here expresses his desire and intention to begin to pay off this debt (which apparently is the only one of consequence that he owes) as soon as it is possible for him to spare money for that purpose, and I cannot help thinking that, apart from other things, the motion for his committal was too precipitate. In my opinion, therefore, the order made for committal should be set aside, and the appeal allowed, the costs following the event, but, as is directed in several of the cases cited, without prejudice to a further examination at a later date if that should become advisable.

In reaching this conclusion, I desire to add that as the examination upon which the committal was made was taken before the registrar we have as good an opportunity to weigh the evidence as the learned judge appealed from, and also that I am entirely in accord with the observations of Chief Justice Draper in *Hobbs* v. *Scott, supra,* and in *Bullen* v. *Moodie* (1863), 13 U.C.C.P. 126 at p. 139, affirmed in *Ponton* v. *Bullen* (1864), 2 E. & A. 379, concerning the advisability of such examinations being held orally before the judge or officer who has the power to commit, in view of the special difficulty experienced in deciding such matters upon depositions, of which in former years I have had much actual experience, both in the Court appealed from and when as a judge of it, I discharged the functions of a County Court judge at Victoria and upon circuit in various parts of this Province.

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GALLIHER, J.A. (oral): Reading the evidence, I am not satisfied that the judgment debtor here has done everything he might to reduce his debt. By living a little more economically he could, I think, pay something on account; and if this were an application to order a payment of something on account it might very well be that I would take that view. However, that is not the application before us. The application before us is one that has to come under the statute that he is doing away with his money or squandering it or something of that nature—supposing there was property—he was doing away with his property in order to defeat his creditor. Now, I have read the evidence and I might say it permits the remark that he might have been more economical; but in my view, it does not shew enough to warrant the judge below in ordering his imprisonment. I do not think, as a matter of fact, it comes within the statute; and it is my duty in sitting on an appeal, if such is my opinion, to say that the judge below, with great respect, has made an error which I do not think we should uphold. I might say for my part (I am only expressing my own view upon this and without making any reference at all to what any other member of the Court has said), it strikes me in this way that possibly, as we know young practitioners

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sometimes do, Mr. *Harvey* may have in a sense made his client's case his own. I know that often happens in the case of a young practitioner, and he was possibly a little vehement in the matter, believing, as he might, that his judgment debtor was trying to avoid his liabilities; and under those circumstances, for myself, I have no criticism to make.

MCPHILLIPS, J.A. (oral): I would allow the appeal. I consider the case a painful one. It is fundamental, that a man's liberty should not be taken away except upon a fair trial, upon a proper information, a proper indictment. Here we have a man's liberty in question—sentence of 12 months in gaol with hard labour—without even being charged with the offence of which he is convicted. It may be said that there is the charge of one offence, although convicted of two, but the unvarying authority is that that which amounts to duplicity voids the conviction. The enormity of it here is that a man is to go to gaol and be deprived of his liberty—a citizen of credit, as far as I can see—to be incarcerated in gaol, because he is in debt. I do not need to go into the merits at all, because the conviction is void—an illegal conviction on its face, being convicted of something with which he was not charged.

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Further, my brother MARTIN has pointed out another fatal objection going to jurisdiction, and there is no merit in it being said that the point was not raised below. The duty, the bounden duty of His Majesty's judges is to take the point of jurisdiction. In all these cases, the same strictness of proof is required as cases under the Criminal Code: the Ontario decisions shew this.

Then, I have this to say (and I say with regret), that the forensic conduct of the counsel who examined this judgment debtor is to be deplored. I hope that what I say may have a good effect. I think, perhaps, it is owing to inexperience at times that it is indulged in. I wish to maintain the traditions of the Bench and the traditions of the Bar; they ought to go down unsullied. Browbeating was indulged in with this witness, counsel threatened him; could there be anything worse than this in the King's Court, with the witness sworn. I hope

it will have a wholesome effect to make these observations, and I do not hesitate to make them; I would be recreant in my duty if I did not make them.

No higher duty devolves upon a judge than to maintain the liberty of the subject. The liberty of the subject cannot be taken away capriciously. The judgment debtor is brought before the registrar, who swears him. Then he retires to his private room and leaves the witness in the hands of the counsel. The witness is left powerless, with no one to turn to to rule on questions of evidence, and is threatened with the dire consequences of the law. The witness, unlettered in law, does not know quite what will happen to him; and I do not wonder if that happens to him which has already happened to him—twelve months' imprisonment with hard labour for doing nothing that I can see that in the slightest manner or form contravened the statute.

Now, I am not called upon to enter into the details at all. I might say, in passing, that I wonder at the ability of this defendant, with a wife, to live as economically as the evidence shews when you consider the high cost of living. This man has about $5.80 a day, and he is a criminal because he spends $6.90 on milk and cream in a month; $6.00 on butter in a month; $1.10 on tea in a month; bread $7.50; meat, fish, chicken, $30—an average of a dollar a day. Who can live on it?

It is not an enormity to have your shoes shined. And the man is the manager of a hotel, meeting the public. Can he go round with unpolished shoes and down at the heels? That is not reasonable. This man could not earn his salary unless he looked decent. This creditor seems to think that he should be in the stocks.

Now, I have adverted during the hearing to a number of cases, and to the language of eminent judges in the Province of Ontario shewing the need for strictness of proof; I will not repeat them. The evidence here shews no infraction of the statute; it is a case of slovenliness of practice. The extraordinary situation here is, he is not charged with that of which he is convicted. It can only be that through some inadvertence

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the learned judge was misled, but I will not say designedly misled. The appeal should be allowed.

EBERTS, J.A. (oral): I would allow the appeal. I have no criticism so far as Mr. *Harvey* as counsel is concerned in this matter.

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

Solicitors for appellant: *Russell, Hancox & Anderson.*
Solicitors for respondent: *Bayfield & Harvey.*

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REX v. KRAMER

REX *EX REL.* CLINE v. KRAMER.

Criminal law—Game Act—Seizure of beaver pelts in close season—No permit—Confiscation—B.C. Stats. 1914, Cap. 33, Secs. 33, 50, 51 and 54.

The accused having been found with 70 beaver skins in a sleigh during the prohibited season without a permit, was convicted under section 33 of the Game Act and the skins were confiscated.

Held, on appeal, that although the words "any part of the animal" are not included in section 51 of the Act in construing the section regard must be had to the whole Act and the objects for which it was enacted and the magistrate was right in ordering the confiscation of the skins under said section.

Statement

APPEAL by the Crown from the decision of MURPHY, J. of the 20th of April, 1920, quashing the conviction of Kramer for having in his possession 70 raw beaver skins during the close season in contravention of section 33 of the Game Act. The constable at Hazelton obtained a search warrant on the 7th of February, 1920, which recited that the beaver pelts were in the sleigh of or on the person of a man whose name was not known. On the same day the constable intercepted the accused in a sleigh at Hazelton and found three packs containing 70 beaver skins, the accused admitting he had no permit giving

him the right to have them in his possession. The previous open season was from November 1st, 1918, to the 30th of April, 1919. The accused admitted he was a fur dealer and had purchased the skins a short time previously from various persons, but contended they were skins of beaver killed in the last open season. The Justice of the Peace fined the accused $20 and costs, and ordered the confiscation of the skins, and that they be forwarded to the Provincial game warden at Victoria. On *certiorari* the conviction was quashed before MURPHY, J. and the skins were ordered to be returned to the accused.

Statement

The appeal was argued at Vancouver on the 9th of November, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Carter, for appellant: The last open season was two months previous to the seizure and he admitted he had bought the skins from several parties a short time before the seizure. The objections taken were that under sections 33 and 51 of the Game Act the beaver skins were not "part of the animal"; and secondly, Kramer was illegally arrested and not being properly before the Court there was no jurisdiction, *i.e.,* the search warrant was illegally issued, the name of the person under suspicion not being given. But I contend, first, that section 55 of the Act takes away the right to proceed by way of *certiorari.* The learned judge held the skins were not part of an animal but section 33 expressly includes the words "any part thereof," and section 9 defines "fur-bearing animals"; see also *The Queen* v. *Strauss* (1897), 1 Can. Cr. Cas. 103.

Argument

Stuart Henderson, for respondent: The real point in the case is under section 54 of the Act. The learned judge below held that as the skins were seized in a sleigh under section 50 it was an illegal seizure. The search warrant was illegally issued, and I am asking that it be set aside as such warrant was only issued to search on a premises and not in a sleigh. As to section 51 it does not allow him to search for skins. It is distinct from section 50 and is limited to the carcass of animals. The words "any portion thereof" are not in section 51, and the seizure is therefore bad.

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MACDONALD, C.J.A.: I would allow the appeal. I have no doubt at all about the correctness of the conviction. There are two factors in this case. The conviction is for a breach of section 33 of the Game Act, B.C. Stats. 1914, which reads as follows:

"No person shall have in his possession any game, whether alive or dead, or any part thereof during the close season. . . . ."

There is no doubt in my mind that the accused had in his possession part of the game, namely, the skins, at the time he was apprehended, and that he was guilty, therefore, of a breach of section 33, and had been properly convicted and fined.

The other phase of the case is as to the confiscation of the skins. That depends on the construction to be placed on sections 51 and 54.

I may say I do not think that the fact that a search warrant was obtained has anything to do with this appeal. A search warrant was useful only if the skins had been in a building or premises, and admittedly they were not; they were in this man's sleigh. Therefore, the question of the regularity of the search warrant may be put aside, because apart from the search warrant the game warden had a right to make a search under section 51:

"It shall be lawful for any Game Warden or constable, without a warrant, to search any person whom he shall suspect of having in possession any animal, bird," etc.

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Now, the difficulty that I find in the case arises out of this section. Reading the section as it stands alone it appears to be directed against having in possession the carcass and that there is a distinction between an animal and the fur or skin. Under section 33 the skin is to be deemed part of the animal, but under this section there is no reference to "any part of the animal," and what follows is aimed at the export of the carcass and the use of the carcass for the purpose of food. The words are:

"Having in possession any animal, bird, or eggs, killed, taken or had in possession in violation of the provisions of this Act, or about to be illegally exported, and to stop and search any cart, automobile, or other conveyance in or upon which he shall suspect that any such animal, bird, or eggs are being carried by any person, and also to enter and search any shop, public market, market-stall, market place, storehouse, warehouse, restaurant, hotel, eating-house, logging camp, construction camp,

or social club, or the premises thereof, or any dining-car or other car belonging to any railway company, or any steamship, vessel, or boat, in or upon which he shall suspect that any such animal, bird or eggs are being had; and to seize any such animal, bird or eggs, or any portion thereof, there found, and the same may be disposed of as in this Act provided."

Having regard to the whole Act and the objects of it, which we must look to in construing the Act, it would be an anomalous thing to hold that the whole animal should be subject to confiscation but not the skins.

It is quite clear to me, reading from section 54, that had the seizure been made in any building or premises confiscation could have been made of any animal, speaking broadly. Under section 51, I am of the opinion the magistrate had the right to convict and order the confiscation of the skins. The confiscation order is therefore restored.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree very largely with what the Chief Justice has stated and in the result, but I take a somewhat wide view of the Act. It is not, in my opinion, primarily aimed at export but it is just as much aimed at the possession of animals or portions thereof within the Province. This view is supported by the recital in section 51, "having in possession any animal, bird or eggs," and then it goes on, alternatively or disjunctively, "or about to be exported," and "to stop and search any cart, automobile or other conveyance and also any shop, storehouse or warehouse." That would indicate a wider interpretation than simply to mean to have for illegal export any animal or any part thereof which shall be used for eatable purposes.

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Under section 51 the game warden has the right to search any person whom he shall suspect of having unlawful possession of any animal, and confiscation is covered by the latter part of the section.

GALLIHER, J.A.: I agree in allowing the appeal. Mr. *Henderson* has argued the appeal very ably and were we confined to section 51 only, there might be a good deal in his contention, but we have to look at the whole Act and consider the intention of the Legislature in giving effect to this section.

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McPHILLIPS, J.A.: In my opinion the appeal should be allowed. I cannot see any real difficulty in interpreting the Act. The prosecution was under section 33:

"No person shall have in his possession any game, whether alive or dead, or any part thereof, during the close season."

That indicates that "pelts" are covered in the word "game." Then with regard to the seizure. Mr. *Henderson* admitted that there could be a seizure independent of a search warrant. The fact that a search warrant issued presents no difficulty. Considering sections 51 and 54, I think there can be no question about the meaning of the words "or any portion thereof," that is to say, "pelts" are clearly covered.

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

Appeal allowed.

Solicitor for appellant: *Wm. D. Carter.*
Solicitor for respondent: *Stuart Henderson.*

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IN RE THE JAPANESE TREATY ACT, 1913

IN RE THE JAPANESE TREATY ACT, 1913.

Constitutional law — Japanese Treaty Act — Provincial Government contracts—Term forbidding employment of Japanese—Authorization of Provincial Legislature—Ultra vires—British North America Act (30 & 31 Vict., c. 3), Secs. 91, 92 and 132.

The Legislative Assembly of the Province of British Columbia has no jurisdiction to legislate as to the rights, duties and disabilities of the subjects of His Majesty the Emperor of Japan within this Province, as in all matters which directly concern aliens and naturalized persons resident in Canada the Dominion Parliament is invested with exclusive jurisdiction by virtue of section 91(25) of the British North America Act.

It is not competent to the Legislature of British Columbia to authorize the Government of the Province to insert as a term of its contracts for the construction of public works or as a term of its contracts and leases conferring rights and concessions in respect of the public lands belonging to the Province including the timber and water thereon

and the minerals therein, a provision that no Japanese shall be employed upon, about, or in connection with such works or premises. *Union Colliery Company of British Columbia* v. *Bryden* (1899), A.C. 580; 68 L.J., P.C. 118 followed.

REFERENCE by His Honour the Lieutenant-Governor to the Court of Appeal in pursuance of an order in council approved by His Honour on the 8th of June, 1820, and passed under authority of chapter 45 of the Revised Statutes of British Columbia, 1911, the Honourable the Attorney-General having reported as follows:

"That the Treaty of Commerce and Navigation between the United Kingdom of Great Britain and Ireland and Japan was signed at London, April 3rd, 1911, and ratifications were exchanged at Tokio, May 5th, 1911, pursuant to Article XXVII. The said Treaty entered into operation July 17th, 1911:

"That Article XXVI. of the said Treaty provides that the stipulations of the Treaty shall not be applicable to any of His Britannic Majesty's Dominions (including the Dominion of Canada) unless notice of adhesion shall have been given on behalf of any such Dominion by His Britannic Majesty's Representative at Tokio before the expiration of two years from the date of the exchange of the ratification of the said Treaty:

"That The Japanese Treaty Act, 1913, being chapter 27 of the Acts of the Parliament of the Dominion of Canada, 1913, was assented to April 10th, 1913, and by section 3 provision was made for the said Act to come into force on a day to be fixed by Proclamation of the Governor-General in Council published in the Canada Gazette:

"That pursuant to section 3 of said Act a Proclamation was issued April 24th, 1913, and was published in the Canada Gazette April 26th, 1913, by which it was directed that the said Act should come into force on May 1st, 1913:

"That prior to the time of the enactment, Proclamation, and coming into force of the said Act no notice of adhesion to the said Treaty on behalf of the Dominion of Canada had been given, but notice of adhesion, pursuant to Article XXVI. of the said Treaty, was given on behalf of the Dominion of Canada by His Britannic Majesty's Representative at Tokio May 1st, 1913:

"That a resolution was passed by the Legislative Assembly of the Province of British Columbia April 10th, 1902, as follows:

" 'That in all contracts, leases, and concessions of whatsoever kind entered into, issued, or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith':

"That in conformity with the said resolution the Government of the Province has continuously since the passing of the same caused to be inserted as a term of its contracts for the construction of Provincial public works a provision that no Chinese or Japanese shall be employed upon, about, or in connection with such works:

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"That in conformity with the said resolution the Government of the Province has continuously since the passing of the same caused to be inserted as a term of its contracts and leases conferring rights or concessions in respect to the public lands belonging to the Province, including the timber and water thereon and the minerals therein, a provision that no Chinese or Japanese shall be employed in or about such premises:

"On the recommendation of the Honourable the Attorney-General and under the powers conferred by section 3 of chapter 45 of the Revised Statutes of British Columbia, 1911, His Honour the Lieutenant-Governor of British Columbia, by and with the advice of His Executive Council, doth refer to the Court of Appeal for hearing and consideration, with reference to the foregoing statement of facts, the following questions:

"1. Does the said The Japanese Treaty Act, 1913, operate or apply so as to limit or affect the legislative jurisdiction or powers of the Legislative Assembly of the Province; and, if so, in what particular or respect?

"2. If the said Act does not operate or apply so as to limit or affect the legislative jurisdiction or powers of the Legislative Assembly of the Province, does the said Treaty itself operate or apply so as to limit the legislative jurisdiction or powers of the said Legislative Assembly; and, if so, in what particular or respect?

"3. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to insert as a term of its contracts for the construction of Provincial public works a provision that no Japanese shall be employed upon, about, or in connection with such works?

"4. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to insert as a term of its contracts and leases conferring rights and concessions in respect of the public lands belonging to the Province, including the timber and water thereon and the minerals therein, a provision that no Japanese shall be employed in or about such premises?"

Statement

The Reference was argued at Victoria on the 22nd, 23rd and 24th of June, 1920, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Argument

Farris, K.C., A.-G., for the Province of British Columbia: The question is whether the Province is precluded by reason of the Treaty and the Treaty Act from passing the orders in question. On the 26th of April, 1913, the Act came into force by proclamation. The Minister of Justice says we are precluded because of the Dominion's action with relation to Japan under section 132 of the British North America Act, but our contention is this was a trade and commerce treaty under section 91(2) of the Act. The Dominion Government were zealous to see the treaty was carried out in order to deprive the Province of its constitutional rights. The Treaty Act does

not go as far as the Treaty, and if there is no legislation to support the Treaty the Treaty does not affect our law under section 92 of the British North America Act. If this is so, the Dominion Act of 1913 does not interfere with us in what we have done. Next, I contend that if the Act was passed under section 132 they had no jurisdiction to do so: see Keith's Responsible Government in the Dominions, Vol. 3, p. 132. The Act is bad if intended to invoke section 132, as Great Britain had not adhered for Canada, and the Act was passed before the Treaty came into force here: see *In re Adam* (1837), 1 Moore, P.C. 460. There is authority to shew that certain legislation may be good as a whole but some branches of it may be *ultra vires* as in the case of its interfering with Provincial rights: see Clement's Canadian Constitution, 3rd Ed., 491. As to the position if there were no Dominion Act, but there being a Treaty, and Britain having given cohesion both for herself and Canada, see Clement's Canadian Constitution, 3rd Ed., 135 *et seq.*; Lefroy's Canada's Federal System, 67. In the case of *In re Insurance Act, 1910* (1913), 48 S.C.R. 260, it was held that sections 4 and 70 of the Insurance Act were *ultra vires* but the whole Act was not for that reason *ultra vires.* The Minister of Justice bases his contention on clause 3 of Article 1 of the Japanese Treaty Act, 1913, which states that "they shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as subjects or citizens of the most favoured nation," but my contention is that when we say they shall not work on the public works we are not interfering with that section. We are dealing with our own property and the beneficial user in these lands are in the Province: see *Dominion of Canada* v. *Province of Ontario* (1910), A.C. 637 at p. 645; Clement's Canadian Constitution, 3rd Ed., 602; *Ontario Mining Company* v. *Seybold* (1903), A.C. 73. There is in the Province a beneficial use in its lands exercised by the people of the Province and freedom of contract has not been taken away from its Legislature. There is, then, the right to make such restriction in contracts as is deemed proper.

Argument

Luxton, K.C., for the Minister of Justice: My submission

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is that the orders in council in so far as they direct that a provision that no Japanese be employed be inserted in all contracts, leases, licences and in other instruments specified in the said orders, entered into, issued or made by the Provincial Government are in contravention of the Treaty and especially clause 3 of Article 1 thereof: see *In re Nakane and Okazake* (1908), 13 B.C. 370.

Wilson, K.C., for Shingle Agency of British Columbia: The Attorney-General states he is not bound by the Treaty unless there is express Dominion legislation. Treaty-making power is a Royal prerogative and has fallen into the hands of the King's ministers. Under section 132 of the British North America Act the Dominion has power to carry out all treaty obligations unless it interferes with Provincial rights under section 92. Provincial legislation must bow to Dominion legislation. He says the Province owns its lands the same as the Canadian Pacific Railway, but that is unsound. The Province has no such control but holds and disposes of lands pursuant to statute. This Court is bound by the judgment in *Union Colliery Company of British Columbia* v. *Bryden* (1899), A.C. 580. The principle underlying the fourth question is discussed in *Smylie* v. *The Queen* (1899), 31 Ont. 202; (1900), 27 A.R. 172. The proposed legislation is aimed at a certain class of foreigners and the submission is that this is prohibitive: see *Re Coal Mines Regulation Act* (1904), 10 B.C. 408. As to the case of *Cunningham* v. *Tomey Homma* (1903), A.C. 151, this is distinguished by Lord Watson, following the argument of Christopher Robinson, K.C., in the *Tomey Homma* case, *supra.* See Lefroy's Canada's Federal System, p. 308, the distinction being that one is a natural right and the other is an authority. The Provincial Legislature can circumscribe a man's rights but cannot destroy them.

Argument

Sir. C. H. Tupper, K.C., for the Canadian Japanese Association: There is (a) the Crown Imperial; (b) Crown Dominion, and (c) Crown Provincial. The Crown is bound by a treaty gone into with another country. A treaty is a contract not a statute. The treaty is the fundamental matter before the Court. A treaty is binding on the Crown. The Attorney-General in his

argument attempts to get away from the Crown: see Keith's Responsible Government in the Dominions, Vol. 3, pp. 1102-3. As to the effect of treaties see Hall's International law, 7th Ed., 356; Clement's Canadian Constitution, 3rd Ed., 135-143; *In re Nakane and Okazake* (1908), 13 B.C. 370. As to Acts discriminating against aliens see Lefroy's Canada's Federal System, 48-9. The Treaty Act by necessary intendment extends to each Province: see *Chirac* v. *Chirac* (1817), 2 Wheat. 259; *Hauenstein* v. *Lynham* (1879), 100 U.S. 483; *Geofroy* v. *Riggs* (1889), 133 U.S. 258. In face of the Treaty it would be repugnant for any one to enter into a contract not to employ Japs. If they said no foreigners then they would not be discriminating: see *Gandolfo* v. *Hartman* (1891), 49 Fed. 181. In reference to "most favoured nation" see *Succession of Rixner* (1896), 19 South. 597. The *Bryden* case (1899), A.C. 580, must be followed here; see also *Tai Sing* v. *Maguire* (1878), 1 B.C. (Pt. I.) 101 at p. 109 *et seq.* *Re Coal Mines Regulation Act* (1904), 10 B.C. 408; Lefroy's Canada's Federal System, 303-12; *Quong-Wing* v. *Regem* (1914), 49 S.C.R. 440.

Argument

Farris, in reply.

Cur. adv. vult.

16th November, 1920.

MACDONALD, C.J.A.: The first and second questions submitted are as follows:

"1. Does the said The Japanese Treaty Act, 1913, operate or apply so as to limit the effect of the legislative jurisdiction or powers of the Legislative Assembly of the Province; and, if so, in what particular or respect?

"2. If the said Act does not operate or apply so as to limit or affect the legislative jurisdiction or powers of the Legislative Assembly of the Province, does the said Treaty itself operate or apply so as to limit the legislative jurisdiction or powers of the said Legislative Assembly; and, if so, in what particular or in what respect?"

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These two questions are general and comprehensive but the argument of counsel was confined to the concrete question of the effect of the Treaty and the Treaty Act upon the powers of the Provincial Legislature in relation to the rights, duties and disabilities, in pursuit of their callings in this Province, of subjects of His Majesty the Emperor of Japan.

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In my opinion, the answer to both questions is to be found in the judgment of the Privy Council delivered by Lord Watson in *Union Colliery Company of British Columbia* v. *Bryden* (1899), A.C. 580. The Provincial legislation in question in that case prohibited the employment of Chinamen underground in coal mines. The decision makes it clear that in all matters which directly concern aliens and naturalized persons resident in Canada, the Dominion Parliament is invested with exclusive jurisdiction by virtue of section 91, subsection 25, of the British North America Act, 1867.

Neither the Treaty nor the Treaty Act can, in view of that decision, in strictness be said to operate or apply so as to limit or affect the legislative powers of the Province in the premises. They cannot limit or affect that which has no existence.

My answer, therefore, is that the Legislative Assembly of the Province has no jurisdiction in the premises, not because of the Treaty or the Treaty Act, but because power to legislate was withheld by the British North America Act.

The third and fourth questions are as follows:

"3. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to insert as a term of its contracts for the construction of Provincial public works a provision that no Japanese shall be employed upon, about, or in connection with such works?

"4. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to insert as a term of its contracts and leases conferring rights and concessions in respect of the public lands belonging to the Province, including the timber and water thereon and the minerals therein, a provision that no Japanese shall be employed in or about such premises?"

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It follows from the answer to the first and second questions that it would not be competent to the Legislature to pass a law prohibiting the employment of Japanese in or about the works and premises referred to in the questions, but it was argued by the Attorney-General that the Government might, with propriety, insert in its contracts terms placing the other party under obligation to refrain from employing persons of a particular race, just as the Government itself might, if it were the employer, pick and choose its employees.

The answers to the other two questions, I think, apply as well to these, but if not, then as the Treaty Act has made the

Treaty the law of Canada, in so far as the subjects embraced in it are within the legislative powers of Parliament, any Act or resolution of the Provincial Legislature repugnant thereto would be contrary to the Dominion statute and, therefore, beyond the competence of the Provincial Legislature to enact or pass.

It is necessary to refer to this difference between the two sets of questions: The first and second questions affect only Japanese subjects; the third and fourth questions refer to "Japanese," a description which may refer not only to nationality but to race, irrespective of nationality.

In the case to which reference has already been made, the Privy Council had to determine what was meant by the description "Chinaman" in the statute there in question, and came to the conclusion, in the circumstances of that case, that the statute was aiming at both alien and naturalized Chinese and that, as to both classes, their rights and disabilities were in the hands of the Dominion Parliament. It may, therefore, be accepted that the description "Japanese" in the third and fourth questions embraces both alien and naturalized Japanese. Those of that race who are natural born British subjects, may, and I think do, in relation to their civil rights, in the pursuit of their callings, come within a class by themselves. No argument was presented by counsel upon this aspect of the matter, and the questions themselves do not go the length of requiring the Court to determine the powers of the Provincial Legislature in respect of the civil rights in the Province of any race whose rights lie outside the subject of "naturalization and aliens" assigned to the Dominion.

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GALLIHER, J.A.: I agree in answering the questions submitted to the Court in the above matters with the conclusion of the Chief Justice, for the reasons given by him in his judgment just handed down.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The questions submitted have been very ably presented at the Bar by the Attorney-General for British Columbia and the learned counsel representing interests claimed

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to be affected by the inhibitory clauses as contained in contracts and leases of the Crown entered into by His Majesty in the right of the Province of British Columbia. The learned Attorney-General contended that The Japanese Treaty Act, 1913 (Can. Stats. 1913, Cap. 27), was not passed in pursuance of section 132 of the British North America Act, 30 & 31 Vict., c. 3 (Imperial), but that it must be assumed to have been passed in exercise of powers under section 91(2) of the British North America Act relative to "The regulation of trade and commerce" and be confined to such matters. With deference, I do not so view the legislation; it would seem to be in conformity with section 132 of the British North America Act, and the ambit of the legislation is to legalize and implement the provisions of the Japanese Treaty and render it obligatory throughout Canada to the full extent of the powers delegated by the Sovereign Parliament to Canada, and all the Provinces, save as in the Act is provided (see Can. Stats. 1913, Cap. 27, Sec. 2, Subsecs. (*a*) and (*b*)). The manner and form of the legislation is not of moment and cannot be the subject of any judicial comment or restriction. The Sovereign Parliament of Canada in the full exercise of its powers, as extensive as the Imperial Parliament in such matters, has by statutory enactment given its adhesion to and imposed upon Canada and all the Provinces the Treaty obligations as contained in the Japanese Treaty. Neither do I consider that it is the province of the Court to observe upon, nor attempt to hold, that the enactment was in its nature anticipatory in respect to any Provincial obligations. None being, as is contended, then existent, the legislation must, according to the true application of the canons of construction of statute law, be given effect to wherever possible, and I see no insuperable or other barriers in the way. The Japanese Treaty, "to have the force of law in Canada," must be held to be destructive of all that has gone before, save as in the Act is provided, *i.e.*, it is legislation affecting all enactments *in præsenti* as well as *in futuro*. Nothing can be done in derogation of this statute law to the end that the Treaty obligations may be conformed to by Canada and the Provinces. I cannot see that anything is to be gained by, nor do I, with

the greatest of deference to His Honour the Lieutenant-Governor and His Executive Council, consider that it should be required of the Court of Appeal to answer in detail questions 1 and 2; they are purely academic and it may possibly be that it is not so intended, as at best the views of the Court could not be said to be other than *obiter dicta*: see Lord Loreburn, L.C. in *Dominion of Canada* v. *Province of Ontario* (1910), 80 L.J., P.C. 32 at p. 34. The concrete matters are set forth in questions 3 and 4, which read as follows: [already set out in statement and in the judgment of MACDONALD, C.J.A.].

That the inhibitory provisions are not contained in any statutory enactment of the Province, in my opinion, is not an effective answer, as admittedly they have been inserted following the passage of a resolution of the Legislative Assembly of the Province of British Columbia, of date the 15th of April, 1902, which resolution was in the following terms:

"That in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith."

Following this resolution an order in council was passed, of date the 16th of June, 1902, which provided:

"That a clause embodying the provisions of the resolution be inserted in all instruments issued by officers of the Government for the various purposes above quoted."

The application of the resolution, by order in council, referred to was to be held to extend to all instruments issuing under the Land Act, Coal Mines Act, Water Clauses Consolidation Act, Public Works contracts, the terms of which are not prescribed by statute, and the Placer Mining Act. In practice the resolution was given general application and imposed in all contracts, leases and other instruments executed by and on behalf of His Majesty in the right of the Province of British Columbia. Turning to the Interpretation Act (R.S.B.C. 1911, Cap. 1, Sec. 26, Subsec. 4) we see that the "'Lieutenant-Governor-in-Council' means the Lieutenant-Governor of British Columbia, or person administering the Government of British Columbia for the time being, acting by and with the advice of the Executive Council of British Columbia." It follows that

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the order in council, in its terms, cannot any longer "have the force of law" (Can. Stats. 1913, Cap. 27) in the Province if it, at any time, had the force of law. In view of the provisions of The Japanese Treaty Act, 1913, and section 132 of the British North America Act, *i.e.*, the "Lieutenant-Governor-in-Council" must perform the obligations of the Province as contained in the Japanese Treaty given the force of law throughout Canada and the respective Provinces as set forth in The Japanese Treaty Act, 1913.

I do not find it necessary to enter into the detail as to what powers relative to say "Property and Civil rights in the Province" (B.N.A. Act, Sec. 92(13)) may not still be exercised without thereby infringing upon the obligations imposed by the Japanese Treaty when the legislation is general in its application to all residents of the Province.

We have seen that "political rights" are not beyond the powers of the Provinces and, in passing, it might be said that the Japanese Treaty does not impose any obligations of this nature. The Lord Chancellor (Earl of Halsbury) in *Vancouver City Collector of Voters* v. *Tomey Homma* (1902), 72 L.J., P.C. 23 said:

"A child of Japanese parentage born in Vancouver City is a natural-born subject of the King, and would be equally excluded from the possession of the franchise. . . . ."

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At p. 24:

"Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that Province? . . . . . The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality. . . . . It is obvious that such a decision [*Union Colliery Co. of British Columbia* v. *Bryden* (1899), A.C. 580; 68 L.J., P.C. 118] can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the Province in which he resides."

It follows that wherever there is legislation, be it legislation of the Parliament of Canada or legislation of any of the Parliaments of the Provinces of Canada, in conflict, repugnant and inconsistent with any of the terms of the Japanese Treaty (save such as is preserved by The Japanese Treaty Act, 1913), all such legislation is displaced, as The Japanese Treaty Act, 1913, declares that the Japanese Treaty is "to have the force of law

in Canada." *Lex posterior derogat priori. A fortiori* this same effect is applicable to all orders in council, which presumptively are only passed and have the effect of law if founded upon constitutional authority and statute law admitting of their passage. Lord Parker of Waddington in *The Zamora* (1916), 2 A.C. 77 at p. 90, said:

"The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statutes which creates the power, and not from the executive body by which they are made. . . . . ."

At p. 93:

"It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own Sovereign State. . . . . The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the Executive orders of the King in Council."

Now the order in council here in question and which has to be considered, in answering questions 3 and 4, is in plain conflict with the Japanese Treaty, and it must be held to be displaced following the passage of The Japanese Treaty Act, 1913, and any existent legislation in conflict is displaced, and during the continuance of the Japanese Treaty, no legislation would have validity which, by its terms, or in effect, derogated from the statutorily validated Japanese Treaty, a Treaty now effective throughout the whole British Empire (Hall's International Law, 7th Ed., 356, and Clement's Canadian Constitution, 3rd Ed., 135-44). The analogy of the reasoning in *The Zamora* case is apparent if applied to the questions here to be considered. Lord Parker, continuing at p. 97, said:

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"There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an order in council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even

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in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions. . . . . Further, the Prize Court will take judicial notice of every order in council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such order short of treating it as an authoritative and binding declaration of law."

Therefore, it is for the Court to say what the state of the law is in respect to the questions propounded, and the Court may reject as invalid and *ultra vires* an order in council which, even if valid, at the time of its passage, is now invalid by reason of subsequent legislation. In my opinion, the order in council never had validity wherein it was provided:

"That in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith,"

quite apart from the Japanese Treaty and the effect of The Japanese Treaty Act, 1913. This conclusion, it seems to me, must be the only conclusion one can arrive at after careful study of *Union Colliery Company of British Columbia* v. *Bryden* (1899), 68 L.J., P.C. 118. There it was held that

"An enactment by a Provincial Legislature that no Chinaman shall be employed in mines is beyond its competence, inasmuch as by the British North America Act, 1867, s. 91, sub-s. 25, legislation with respect to 'naturalization and aliens' is reserved exclusively to the Parliament of the Dominion."

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The order in council, authorizing and directing the inhibition in all contracts, leases and concessions reads "no Chinese or Japanese," and turning to questions 3 and 4 submitted to the Court for answer the words are "no Japanese shall be employed." It is impossible to have a decision which would be more complete than the *Bryden* case, and it being the judgment of the Privy Council, it is absolutely binding upon this Court. The *Bryden* case was considered in *Quong-Wing* v. *Regem* (1914), 49 S.C.R. 440.

Referring to the *Bryden* case and subsequent cases, Mr. Justice CLEMENT, in his admirable work, before referred to, at pp. 486-7, said:

"In a provincial Act (British Columbia) dealing with the working of coal mines a clause prohibiting the employment of Chinamen in such mines underground was considered by the Privy Council not to be aimed at the regulation of coal mines at all but to be in its pith and substance a law to prevent a certain class of aliens or naturalized persons from earning their living in the Province. In other words the enactment was not really in relation to local works or undertakings (Sec. 92, No. 10) or to property and civil rights in the Province (Sec. 92, No. 13) or to a matter of a local or private nature in the Province (Sec. 92, No. 16); but it was in fact an enactment in relation to aliens and naturalization (Sec. 91, No. 25), and therefore *ultra vires* of a Provincial Legislature. *Union Colliery Company of British Columbia* v. *Bryden* (1899), A.C. 580; 68 L.J., P.C. 118. In a later case, on the other hand, an enactment of the same Legislature denying the franchise to Japanese was held to be legislation in relation to the Provincial Constitution (Sec. 92, No. 1), and as having no necessary relation to alienage; and discrimination, in other words, being based upon racial not national grounds. *Tomey Homma's* case (1903), A.C. 151; 72 L.J., P.C. 23. As will appear later, it is difficult to reconcile these two decisions; and in a recent case in the Supreme Court of Canada a provision in a Provincial Act (Saskatchewan) forbidding the employment of any white woman or girl in any restaurant, laundry, or other place of business or amusement owned, kept, or managed by any Chinaman, was upheld as within Provincial competence as a law for the suppression or prevention of a local evil (Sec. 92, No. 16), or as touching civil rights in the Province (Sec. 92, No. 13). It did not in the opinion of the majority of the Court present any aspect particularly affecting Chinamen as aliens; for a natural born British subject of the Chinese race (and there are many such in Canada) would be under the ban of the Act. (*Quong-Wing* v. *R.* [(1914)], 49 S.C.R. 440. The Privy Council refused leave to appeal. See *post*, p. 671. In *Re Insurance Act*, 1910 [(1913)], 48 S.C.R. 260, the question of legislative aspect and purpose also appears; see particularly *per* Brodeur, J., at p. 313)."

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It is to be observed that their Lordships of the Privy Council refused leave to appeal in the *Quong-Wing* case, but it cannot be assumed that there has been any change of view of the law when, as here, we have exactly similar verbiage, *i.e.*, "no Chinese or Japanese shall be employed"—"No Japanese shall be employed." In the *Quong-Wing* case, Davies, J. (now Chief Justice of Canada), said at pp. 448-9:

"The regulations impeached in the *Union Colliery* case (1899), A.C. 580, were, as stated by the Judicial Committee, in the later case of *Tomey Homma* (1903), A.C. 151 at p. 157, 'not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and in effect, to prohibit their continued residence in that Province, since it prohibited their earning their living in that Province.'

"I think the pith and substance of the legislation now before us is

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entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the Provincial Legislatures in the case of *The Union Collieries* v. *Bryden* (1899), A.C. 580."

The order in council is clearly *ultra vires* and it would be *ultra vires* of the Legislative Assembly to enact or authorize the passage of any order in council providing for the insertion in any contracts, leases, or concessions any inhibitory provision that no Japanese shall be employed. Plainly, the provision would be exactly similar in effect to that declared to be *ultra vires* in the *Bryden* case, and as interpreted in the later *Tomey Homma* case by the Lord Chancellor (Earl of Halsbury), the language of the Lord Chancellor being quoted above by the Chief Justice of Canada in the *Quong-Wing* case (49 S.C.R. at p. 448). Mr. Justice Duff, at pp. 466-8, in the *Quong-Wing* case deals with the *Bryden* and *Tomey Homma* cases.

It will, therefore, be seen that, according to the interpretation put upon the *Bryden* case by the Supreme Court of Canada, there can be only negative answers to questions 3 and 4. It would not be competent for the Legislature of British Columbia to authorize the Government of the Province to insert as a term of its contracts for the construction of Provincial public works, a provision that no Japanese should be employed upon, about or in connection with the works, nor would it be competent to the Legislature to authorize the Government to insert, as a term of its contracts and leases, conferring rights and concessions in respect of the public lands belonging to the Province, including the timber and water thereon and the minerals therein, a provision that no Japanese should be employed in and about such premises. It would be *ultra vires* legislation, quite apart from being in conflict with the Japanese Treaty and unquestionably now in view of The Japanese Treaty Act, 1913, any such legislation would be invalid.

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With respect to questions 1 and 2, no concrete cases have been put, and, with the greatest deference and respect, as previously pointed out, there is no necessity for any specific answers to be

made thereto, but without venturing to limit the horizon or define the ambit of the Japanese Treaty, as validated by The Japanese Treaty Act, 1913, it may be said that it has the force of law in Canada and throughout the Provinces of Canada, and any legislation, which, in its terms, is in conflict with, or repugnant to the Japanese Treaty, as validated by The Japanese Treaty Act, 1913, must be held to be repealed by necessary implication, and any future legislation limiting the privileges guaranteed by the Japanese Treaty, during the life of the Japanese Treaty, would be *ultra vires* legislation, in that the Treaty, as long as it is existent, has the effect of inhibiting legislation, Federal or Provincial, which would be in conflict with the terms of the Treaty, *i.e.*, to that extent the powers of the Parliament of Canada and the Parliaments of the Provinces of Canada, as conferred by the British North America Act, 1867, are curtailed.

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Contract—Life insurance—Agreement to share commission—Illegality—Can. Stats. 1910, Cap. 32, Sec. 87; 1917, Cap. 29, Secs. 83 and 84.

The plaintiff, an insurance agent, induced the defendant to apply for a life-insurance policy. The defendant having no money, the plaintiff agreed to pay the first premium and allow the defendant a portion of the commission. The plaintiff paid the premium (less the commission) and a policy issued and was delivered to the defendant. A few days later the defendant gave the plaintiff three notes in payment of the premium for $35 each. The notes not being paid at maturity the plaintiff obtained judgment in an action for the amount of the premium.

Held, on appeal, reversing the decision of GRANT, Co. J., that as the plaintiff had offered the insured a rebate of premium as an inducement to take the policy the contract sued upon was illegal, being prohibited by section 83 of The Insurance Act, and the action should be dismissed.

APPEAL by defendant from the decision of GRANT, Co. J., of the 12th of May, 1920, in an action by the plaintiff, an insur- Statement

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ance agent, to recover $150, the first premium on an insurance policy on the life of the defendant which was paid by the plaintiff (less his commission), the policy having been issued and delivered to the defendant, or in the alternative to recover $105 on three promissory notes. The plaintiff had solicited insurance from the defendant, but he having no money at the time, the plaintiff undertook to pay the first premium and the defendant promised to pay $40 in cash at the time of delivery of the policy and gave three promissory notes of $35 each to cover the balance. The policy was duly issued and delivered to the defendant, who neither paid the $40, nor the notes when they came due.

The appeal was argued at Vancouver on the 27th of October, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Miss *Paterson,* for appellant: The notes were given after the transaction at the respondent's request. A past consideration is no consideration and my submission is he has no right of action on the notes: see *Eastwood* v. *Kenyon* (1840), 11 A. & E. 438; *D. E. Brown's Travel Bureau* v. *Taylor* (1918), 26 B.C. 82. This transaction was in contravention of section 83 of The Insurance Act and illegal, and is therefore void: see *Cope* v. *Rowlands* (1836), 2 M. & W. 149; *Waite* v. *Jones* (1835), 1 Bing. (N.C) 656 at p. 662; *Nontefiore* v. *Menday Motor Components Company* (1918), 2 K.B. 241; *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1912), 107 L.T. 439; *Guilbault* v. *Brothier* (1904), 10 B.C. 449; *Collins* v. *Blantern* (1767), 2 Wils. K.B. 347.

Sugarman, for respondent: Section 83 of the 1917 Act is the same as section 87 of the Act of 1910, Cap. 32, and my submission is this is only directory and the penalty is provided by the statute. There is nothing illegal in the arrangement between the parties. Subsection (3) of section 84 of the 1917 Act provides for the penalty.

Miss *Paterson,* in reply, referred to *Victorian Daylesford Syndicate, Limited* v. *Dott* (1905), 2 Ch. 624.

Cur. adv. vult.

MACDONALD, C.J.A.: By section 83 of The Insurance Act, 1917, being Cap. 29 of the Statutes of Canada of that year, discrimination and rebating are forbidden. The statute forbids any insurance agent to "assume to make any contract of insurance, or agreement as to such contract, whether in respect of the premium to be paid or otherwise, other than as plainly expressed in the policy issued," and it further declares, "nor shall any such company or any officer, agent, solicitor or representative thereof pay, allow or give, or offer to pay, allow or give, directly or indirectly, as inducement to insure, any rebate of premium payable on the policy."

There are no special provisions in the policy with regard to transactions of the character in question in this action. The policy provides that it shall not come into force until the premium is paid; it provides a special form of receipt of premium to be signed by designated officers, and provides for payment at the head office unless specified otherwise.

The plaintiff, an insurance agent, induced the defendant to make application for insurance in the Confederation Life Association on the promise that he would share his commission with the defendant. I quote the plaintiff's own words:

"Did you give him any other valuable thing, no matter of how slight value, in connection with this transaction, other than this policy you have mentioned? Yes, I told him I would give him a commission off some of my commission."

The defendant confirms this and says the plaintiff agreed to a rebate of $40 or $50 if he (defendant) would accept the policy. Some time after the policy was delivered, promissory notes were taken by the plaintiff for three sums of $35 each, totalling in all $105, but none was taken for the difference between this sum and the premium, which was $150. The plaintiff in his evidence says that that sum was to have been paid in cash, but it never was paid, and on the evidence referred to I find that it was not to be paid. Respondent's counsel referred us to *Farmers' Mart, Limited* v. *Milne* (1915), A.C. 106 at p. 113. What is discussed at that page is not in point here, since here the premium sued for formed part of the forbidden transaction. The plaintiff cannot get on without invok-

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ing the contract, which was that the premium should be $105 instead of $150.

I would, therefore, allow the appeal and dismiss the action.

MARTIN, J.A.: This appeal should, I think, succeed upon the ground that the contract sued upon is illegal as being prohibited by section 83 of The Insurance Act, 1917, Cap. 29, the plaintiff here having clearly offered the insured a rebate of premium as an inducement to take the policy. It was submitted that as a penalty was imposed by the following section, recoverable by civil action, the protection of the revenue was only aimed at, but as Baron Parke said in *Cope* v. *Rowlands* (1836), 2 M. & W. 149 at p. 158; 2 Gale 231 (46 R.R. 532), cited and followed in *Victorian Daylesford Syndicate, Limited* v. *Dott* (1905), 2 Ch. 624; 74 L.J., Ch. 673, and *Bonnard* v. *Dott* (1906), 1 Ch. 740; 75 L.J., Ch. 446, the question to determine is whether the Act is

"meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers?"

In the *Victorian Daylesford* case, *supra,* Mr. Justice Buckley said, at p. 630 ((1905), 2 Ch.):

"If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal."

MARTIN, J.A.

And he goes on to say:

"There is another consideration. Not a bad test to apply is to see whether the penalty in the Act is imposed once for all, or whether it is a recurrent penalty imposed as often as the act is done. If it be the latter, then the act is a prohibited act. Now here the penalty is imposed every time the act is done. Further, the Act goes on to provide that on a second or subsequent conviction a man may be imprisoned with or without hard labour for a term not exceeding three months. The act is an illegal act."

In the case at Bar there is present in section 84 this element of a recurrent penalty for "a second or subsequent offence." I have no doubt that one at least of the objects of this statute is to protect the public, and therefore the action should have been dismissed. The very recent case of *The City of Montreal* v. *Morgan* (1920), 60 S.C.R. 393; (1920), 3 W.W.R. 36, is instructive on this question and supports my view.

GALLIHER, J.A.: I think it is established by the evidence that as an inducement to the defendant to take out the insurance the plaintiff agreed to allow the defendant a part of his commission. This is prohibited by section 83 of Cap. 29, Can. Stats. 1917. Section 84 of the same Act imposes a penalty for so doing and it is a recurring penalty, as it provides for a first and for a second and subsequent offences. It is not a provision affecting revenue such as the Customs or Inland Revenue Acts, and I think we must therefore take it to be an Act for the protection of the public, and if such, what is here set up in defence is prohibited by statute and consequently illegal. *Victorian Daylesford Syndicate, Limited* v. *Dott* (1905), 2 Ch. 624. See also the remarks of their Lordships of the Privy Council in *Farmers' Mart, Limited* v. *Milne* (1915), A.C. 106.

GALLIHER, J.A.

The appeal should be allowed.

McPHILLIPS, J.A.: This appeal is in small compass, and in my opinion must succeed.

The evidence as adduced at the trial fails to establish any liability upon the appellant to repay the moneys the respondent claims he paid to the Confederation Life Association, being the premium upon a policy of life insurance, no previous request, express or implied, being shewn. The principle of law is dealt with by Cozens-Hardy, M.R. in *In re National Motor Mail-Coach Company Limited* (1908), 2 Ch. 515 at p. 523. We have the Master of the Rolls saying:

> "In my opinion Swinfen Eady, J. was quite right when he said: 'There is no foundation for any such general proposition. Indeed the contrary is well settled. If A. voluntarily pays B.'s debt, B. is under no obligation to repay A. There must be a previous request, express or implied, to raise such an obligation, and in this respect I can see no difference between the discharge of a statutory liability and the discharge of a contractual liability.'"

MCPHILLIPS, J.A.

Further, even if there had been a sufficient request in law, payment of the premium was not proved. The mere procurement of the policy and even the delivery thereof by the company, would not establish an enforceable contract against the company unless payment was made and evidenced by the issuance of the official receipt. The terms of the policy so provide, and the *onus probandi* was upon the respondent to prove this, which

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was not done. But apart from the non-establishment of any obligation upon the part of the appellant to repay the respondent, there is an insuperable difficulty in the way of the respondent in being entitled to sustain the judgment under appeal. The facts prove an illegal transaction. The Insurance Act, 1917, Can. Stats. 1917, Sec. 83 (1), reads as follows:

"No such life insurance company shall make or permit any distinction or discrimination in favour of individuals between the insured of the same class and equal expectation of life in the amount of premiums charged, or in the dividends payable on the policy, nor shall any agent of any such company assume to make any contract of insurance, or agreement as to such contract, whether in respect of the premium to be paid or otherwise, other than as plainly expressed in the policy issued; nor shall any such company or any officer, agent, solicitor or representative thereof pay, allow or give, or offer to pay, allow or give, directly or indirectly, as inducement to insure, any rebate of premium payable on the policy, or any special favour or advantage in the dividends or other benefits to accrue thereon, or any advantage by way of local or advisory directorship where actual service is not *bona fide* performed, or any paid employment or contract for services of any kind, or any inducement whatever intended to be in the nature of a rebate of premium; nor shall any person knowingly receive as such inducement any such rebate of premium or other such special favour, advantage, benefit, consideration or inducement; nor shall any such company or any officer, agent, solicitor or representative thereof give, sell or purchase as such inducement, or in connection with such insurance any stocks, bonds, or other securities of any insurance company or other corporation, association or partnership."

MCPHILLIPS, J.A.

The evidence disclosed that the respondent, the agent, made a contract with the appellant to give him the benefit of a rebate of the premium:

"Yes, I [the respondent] told him [the appellant] I would give him a commission off some of my commission."

It is clear upon the facts that an illegal transaction has been proved. To establish the amount that the respondent claimed from the appellant, it was necessary to give in evidence how the amount was made up. Therefore the Court is precluded from giving effect to the transaction, it being an illegal one.

I cannot accede to the contention of the learned counsel for the respondent that the judgment of Lord Dunedin in *Farmers' Mart, Limited* v. *Milne* (1915), 84 L.J., P.C. 33 at p. 36, would enable the respondent to escape from the situation the facts place him in.

The illegality of the contract was pleaded by the appellant,

but even if it had not been, it was the duty of the Court to deal with the illegality of its own motion (see *North-Western Salt Co.* case (1912), 107 L.T. 439).

In my opinion the appeal should be allowed, and I wish to add my sense of indebtedness for the argument of Miss *Paterson,* the learned counsel for the appellant, being a brief but most cogent argument, which greatly assisted the Court.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellant: *J. E. H. Jeremy.*
Solicitor for respondent: *A. H. Fleishman.*

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SHAW v. THE GLOBE INDEMNITY COMPANY OF CANADA.

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1920
May 26.

Insurance—Accident policy—Loss of sight of eye—"Entire sight irrecoverably lost"—Interpretation.

The plaintiff who held an accident insurance policy in the defendant Company sustained an accident whereby he lost all useful sight of his right eye, although he was still able to distinguish light from darkness and to "see a shadow" if an object were placed close to the eye.

Held, that he was entitled to recover under the policy as coming within the words "entire sight of one eye, if irrecoverably lost."

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APPEAL by defendant from the decision of GREGORY, J., in an action tried by him at Vancouver on the 26th of May, 1920, for indemnity for loss of an eye under a policy of insurance issued by the defendant Company in favour of the plaintiff. The facts are sufficiently set out in the judgment of the learned trial judge.

Statement

Armour, K.C., for plaintiff.
S. S. Taylor, K.C., for defendant.

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GREGORY, J.: This is an action upon a policy of insurance against accident. The plaintiff has met with an accident through which he has lost all useful sight of his right eye, though he is still able to distinguish light from darkness, and the question is whether this condition is covered by the policy, and this depends upon the construction of the contract. The language to be construed is as follows: "Entire sight of one eye, if irrecoverably lost." The policy of insurance was put in evidence, but the above is the only portion of it to which even the slightest reference has been made by counsel. I assume, therefore, that there is no other language in the contract which lends any assistance to the construction of the clause. In such a case the rule of interpretation is, I think, that the language must be construed strictly against the insurers who issue the policy and for whose benefit they are introduced: Halsbury's Laws of England, Vol. 17, p. 569; *Shera* v. *Ocean Accident Corporation* (1900), 32 Ont. 411.

Sir James Murray's New Dictionary, Vol. IX., defines sight as "The perception or apprehension of something by means of the eyes; the presentation of a thing to the sense of vision." Again, as "The faculty or power of seeing, as naturally inherent in the eye." The Encyclopædic Dictionary, Vol. IV., defines it as "The act of seeing; perception of objects by the organs of vision; view. The power of seeing; the faculty of vision or of perceiving objects by the eyes; vision"; and the same dictionary defines vision as "1. The act of seeing external objects; actual sight. 2. The faculty of seeing; that power or faculty by which we perceive the forms and colours of objects through the sense of sight."

GREGORY, J.

The plaintiff has no power of seeing, perceiving or recognizing the form or colour of anything placed before his eyes, however close. If an object is placed before his eyes he cannot name it—he does not perceive what it is. If placed very close to his eye he says he can see a shadow and that is all. This is, I think, an erroneous expression of his perception. All he perceives is the absence of light in a certain space surrounded by light and this apparently only when the object is moved. He does not perceive the object cutting off the light in the sense

that his brain tells him what it is. He does not perceive it, but he does perceive that something, which he cannot name, has the effect of producing darkness in a certain area. I do not think that it can properly be said that he sees light and darkness and that therefore his sight is not entirely gone. We do not see light, though, with normal eyes, we see the source of light. It is light which enables us to see; nor do we see darkness, we simply perceive the absence of light, which if present would enable us, in the language of the dictionary, to perceive the form and colour of objects placed before us.

To me, it seems clear that the plaintiff has lost the entire sight of his right eye and that it is irrecoverably lost. It is true that the doctor testifies that it might be possible to remove the lens of the eye and with a very strong glass to enable him to see something, but he says that would simply augment his existing trouble of a certain amount of double vision, so long as the left eye functions. If the left and good eye were removed by accident or design, such an operation might be recommended but not in the present circumstances. I do not think the law is so absurd as to hold that sight is not irrecoverably lost, because by removing the good eye an operation might be performed which, if successful, would restore a certain amount of sight to the injured eye.

There will be judgment for the plaintiff, with costs.

GREGORY, J.

As the Company might be severely criticized for defending an action of this nature, I think it only fair to say that it offered no factious opposition to the plaintiff, frankly admitted the policy, the proof of injury, correspondence, etc., with its local agents, and offered no testimony in contradiction of the plaintiff or his technical medical advice; in fact, called no witnesses. As stated by its counsel, and admitted by plaintiff, it offered to pay on the basis of weekly loss from cessation of plaintiff's business. Counsel stated it only defended in order to obtain an interpretation of the language of the policy, as it could be easily understood that in many cases it would be entirely at the mercy of a plaintiff claiming to have less useful sight than he really possessed.

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From this decision the defendant appealed. The appeal was argued at Vancouver on the 1st of November, 1920, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

S. S. Taylor, K.C., for appellant: The question is whether he is entitled under the policy for total loss of one eye when, in fact, there is not a total loss of sight. He can distinguish darkness from light and "see a shadow" when placed close to the eye. The question is, has he lost the entire sight of one eye, and is it irrecoverably lost? My submission is that in order to recover he must be totally blind in one eye.

Davis, K.C., for respondent: They say there is not entire loss of sight and that it can be restored by operation. The evidence of the doctor is that they might restore sight by an operation but he would not recommend an operation owing to the danger of injurious result. The policy must be construed strictly against the insurer.

Cur. adv. vult.

4th January, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal for the reasons given by the learned trial judge, who has, if I may say so, stated the facts and his conclusions of law thereon with great clearness and accuracy.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal. I cannot accept the view so strongly urged by Mr. *Taylor,* that where there remains the faintest glimmer of sight and where by a delicate operation that might be improved, that the insured cannot recover under the wording of the policy.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The clause in the policy which needs to be construed is numbered 9, and reads as follows: "Entire sight of one eye if irrecoverably lost." Now the facts would appear to be clear and conclusive that one eye has lost its usefulness for all time. Such may reasonably be said upon the evidence of the respondent and Dr. Crosby, a specialist, and one circumstance that cannot fail notice is this, that the respondent submitted himself at the request of the appellant to another

specialist, Dr. Anthony, selected by the appellant, but the appellant did not call Dr. Anthony, in fact, called no evidence. Upon the facts it is demonstrated to a certainty that the sight of one eye is "irrecoverably lost." The eye itself is there but not in its natural state—it is injured and sightless. To be able to distinguish light from dark and notice shadows is not seeing, it is not the possession of "sight," in my opinion, as at present advised, although in the present case it is unnecessary to go that far. It must be sight that is useful in relation to the avocation of the respondent, *i.e.*, "Train despatcher (office duty only)" as set forth in the policy.

Can it be said at all successfully upon the facts of this case that there has not been "loss of sight" within the meaning of the policy? It would seem to me that there can be but one answer to this question, and that must be that the sight is lost and cannot be recovered or got back; there would not appear to be any possible remedy nor is any operation recommended that would afford any reasonable belief that the sight would be restored, a miracle only could restore the sight. As I read Dr. Crosby's evidence, no human skill would appear to afford any remedy of a situation which would appear to be hopeless. That being the situation, the final analysis must result in the determination that that which was insured against has happened and the indemnification under the terms of the policy is payable.

MCPHILLIPS, J.A.

The general principle upon which the Court must proceed in determining liability is admirably and trenchantly set forth in the judgment of Vaughan Williams, L.J., in *In re Etherington and Lancashire &c., Accident Insurance Co.* (1909), 78 L.J., K.B. 684 at pp. 686-7.

In the present case the argument that has been so forcefully pressed by the learned counsel for the appellant cannot, with deference, be given effect to—it would be destructive of the true principle of indemnification as defined by the authorities. Here it is contended that owing to the fact that there is a mere sensibility of light and shadow, with really no capability to see at all, and no hope of recovery of sight, that the "entire sight" of the eye is not "irrecoverably lost"; it would seem to me, upon the facts, to be a most untenable contention.

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In my opinion, therefore, the learned trial judge arrived at the right conclusion, and the judgment should be affirmed.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

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Solicitors for appellant: *Taylor, Mayers, Stockton & Smith.*
Solicitors for respondent: *Davis & Co.*

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BRITISH AMERICA PAINT CO. v. PALITTI

BRITISH AMERICA PAINT COMPANY v. PALITTI.

Negligence—Collision between motor-cars—View of locus in quo by trial judge—Taken alone and without knowledge of counsel—New trial.

In an action for damages owing to a collision between motor-cars, where it is shewn that the trial judge took a view of the *locus in quo* in the course of the trial without counsel being present, and without their knowledge, a new trial will be ordered.

APPEAL by defendant from the decision of RUGGLES, Co. J., of the 17th of May, 1920, in an action for damages resulting from the defendant who was driving his motor-car in a northerly direction on Granville Street in Vancouver, running into the plaintiff's motor-car when he was driving south on said street at a point about 30 feet south of Pacific Street. The defendant intended to turn east into Pacific Street and the accident took place as he was crossing Granville to enter Pacific Street a short distance north of the junction of the Granville Street and Pacific Street tracks. The learned trial judge in delivering judgment stated that after the first day's hearing he went out and took a view of the *locus in quo*. Neither counsel was present when the view was taken by the learned judge nor did they have any knowledge of such view having been taken until judgment was delivered in favour of the plaintiff.

Statement

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The appeal was argued at Vancouver on the 29th of October, 1920, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Housser, for appellant: The plaintiff's car had stopped behind a street-car just before reaching Pacific Street and when the street-car started, Davie, who was driving the plaintiff's car, speeded up to get ahead of the street-car, his car being a small runabout. The defendant's car was a heavy seven-passenger car and he slowed down as he turned to go east on Pacific Street. The accident took place at six o'clock in the evening on the 10th of December, 1919, and it was dark, the lights being on. The learned judge took a view of the place where the accident occurred without the knowledge of counsel. We first learned of his having done so at the trial on the following day through a chance remark from the Bench. This is irregular and a new trial should be granted. Argument

Mayers, for respondent, referred to *Scott* v. *Fernie* (1904), 11 B.C. 91.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: We have decided in this case that there should be a new trial, and that the successful appellant should be deprived of his costs in this Court.

Now, with regard to the appeal, I only want to add this to what I have already said. This is a case where the learned judge, no doubt inadvertently, and without having in his mind the decision of this Court in the case of *Rex* v. *Crawford* (1913), 18 B.C. 20, and other cases of like nature, made the mistake of taking a view behind the backs of the parties. That is a very grave irregularity. His reasons for judgment shew that he was greatly influenced in coming to his decision by the view which he had taken. I am not overlooking in any way the position which counsel for the defendant occupied. He had an intimation, before the evidence was closed, that the judge had done this. True, it was not in a very direct fashion; it was in a manner which only suggested a view. One can quite well understand why, in the bustle of a trial, it should not Judgment

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immediately come to the mind of counsel that it was irregular to do what the learned judge had done. In view of that, one is not surprised that the learned counsel overlooked taking objection. When giving his judgment, however, the learned judge further referred to the view he had taken and based his opinion on it. It was then open to counsel to object again and ask then and there for a new trial, which would have obviated the costs of an appeal. And I take it, the learned judge, if the *Crawford* case had been drawn to his attention, would at once have granted a new trial, either before himself or before one of the other judges, the latter being, in my opinion, the proper course in the circumstances. But again, I think the only penalty we ought to impose upon defendant for his failure to take the objection is that he should not have the costs of this appeal. Personally, I would be prepared to go so far as to make the order that he should pay respondent's costs of appeal. We have power to make that order where there is good cause. Here good cause is shewn that costs should not follow the event, because counsel did not perform his whole duty in the Court below. But my learned brothers are not prepared to make that order in this case; therefore, the judgment of the Court will be for a new trial, the successful appellant not to have costs of this appeal.

Judgment

New trial ordered.

Solicitors for appellant: *Williams, Walsh, McKim & Housser.*
Solicitors for respondent: *Taylor, Mayers, Stockton & Smith.*

REX v. CHONG KEE *ET AL.*

CAYLEY, CO. J.

1920

Sept. 20.

COURT OF APPEAL

Nov. 1.

REX v. CHONG KEE

Statute, construction of—Factories Act—"Factory," meaning of—R.S.B.C. 1911, Cap. 81, Secs. 2(d.) and 3—B.C. Stats. 1919, Cap. 27, Sec. 2.

Four chinamen who lived and prepared their meals in a house in which were two bedrooms upstairs, an ironing-room, dining-room and kitchen on the ground floor and a washing-room in the basement, obtained a licence under the City by-laws to operate a laundry on the premises. They were convicted by the magistrate for operating in prohibited hours under the Factories Act.

Held, on appeal, that section 2, subsection (*d.*) of the Factories Act contemplates the existence of a "dwelling-house" and a "factory" in the one building and the conviction should be sustained.

APPEAL by accused from the decision of CAYLEY, Co. J., dismissing an appeal from a conviction by the police magistrate at Vancouver of four Chinamen for operating a laundry for profit on the 30th of April, 1920, after 7 o'clock in the afternoon and before 7 o'clock on the following morning contrary to the provisions of section 3 of the Factories Act, argued before him at Vancouver on the 20th of September, 1920. The accused occupied premises at 956 Hastings Street, Vancouver, where they operated a laundry and divided the profits. They lived on the premises and cooked their own meals there. There were three rooms on the ground floor; one was used for ironing and one as a dining-room, the basement, one large room, being used for washing. Two rooms upstairs were used as sleeping apartments. The accused held a licence to operate a laundry on the premises under the City by-laws. They were found by the inspector of factories operating their laundry in prohibited hours.

Statement

Baird, for appellants.

Haviland, for respondent.

CAYLEY, Co. J.: Laundries come within the operation of this Act with certain exceptions, shewing the intention of the Legislature in preparing the Act not to operate against certain persons, or in the restriction of such persons, whom the Legislature wishes to protect. You may read section 3 of the Factories Act (R.S.B.C. 1911, Cap. 81), where it says:

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"Where children, young girls, or women are employed at home, that is to say, in a private house, place, or room used as a dwelling, wherein neither steam, water, nor other mechanical power is used in aid of the manufacturing process carried on there, and wherein the only persons employed are members of the same family dwelling there, this Act shall not apply."

This section was amended in 1919, not so as to obscure or blind the intention of the Legislature. The premises used primarily for laundry purposes should be considered factories. It was also amended in 1920. The amendment in 1920 does not obscure the same intention. Laundries are intended to come within the Factories Act, and the exceptions seem to be confined to families doing their own laundering.

Now, the accused in this case took out a licence to operate a laundry, and having done so they ostensibly submitted to the City regulations in respect of such laundry. What the regulations of the City are, as contained in the by-law, is evident, as suggested by counsel on both sides—section 9, by-law 95—which prohibits the use of a laundry for dwelling-house purposes. Notwithstanding this provision the appellants claim they are using this laundry, for which they took out a licence, as a dwelling-house. I think they have no right to do so. I think they cannot come into this Court and contend it is a dwelling-house when they have taken out a licence for the premises as a laundry. They have made their election in classing it as a laundry, and now because they do not run their laundry within the hours prescribed by law, they contend in this Court that it is a dwelling-house, although its use as a dwelling-house is forbidden by law. This distinguishes this case from *Rex* v. *Chow Chin* (1920), 2 W.W.R. 997. The appeal is dismissed.

CAYLEY, CO. J.

From this decision the accused appealed. The appeal was argued at Vancouver on the 29th of October, 1920, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Baird, for appellants: The question is the interpretation of section 2(*d*) of the Factories Act. It was held that as we had taken out a licence under the by-law we are precluded from

saying this is a dwelling-house. The by-law should not be brought into this case. We are entitled to shew it is a dwelling-house and comes within the exception under the above section of the Act. Families are excluded and also premises used as a dwelling. The learned judge says section 3 is the only exception intended, but this is not correct.

Haviland, for respondent: Section 2(*d*) particularly applies to such a case as this when a dwelling and a factory are in the same building. The premises are primarily used as a laundry. They took out a licence and incidentally used part of the premises as a dwelling.

Baird, in reply.

MACDONALD, C.J.A.: I think the appeal should be dismissed. It is quite clear to me that section 2, subsection (*d*), of the Act contemplates the existence of a dwelling-house and a factory in the one building. That is to say, part of the building may be used for a dwelling-house and part may be used for a factory or for a laundry; and that would be so whether the building was originally built for dwelling purposes or whether it was originally built for factory purposes. It is a question of segregation.

This Court, of course, can only deal with the question of law; and the question of law as stated by counsel for the appellant is this, that the evidence disclosed no ground for conviction. That is to say, there is no legal evidence of a violation of the provisions of the Act. The evidence to which we have been referred shews that the accused used the upper storey of the house as sleeping apartments; that they used the ground floor partly for the purpose of a laundry and partly for the purpose of preparing and taking their meals there. There were three rooms, we were told, on the ground floor, one of them used by the occupants for doing their ironing; one was used as a dining-room. The basement of the building was used for the washing process. Now in these circumstances, with these facts established, it seems to me that the Act is applicable, and that that part of the building which was used for the washing and the ironing was a distinct part of the building, and falls within

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the statute as being a "factory"; and that part of the building which was used for the purpose of a dwelling was also distinct, and therefore was a dwelling-house, and I think the conviction upon the facts must stand.

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GALLIHER, J.A.: I agree.

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MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the evidence warranted the Court below in holding the building was a factory; that is, it was not a dwelling-house, and that being a question of fact, this Court is not entitled to disturb it. We can only deal with a question of law. Where there is no evidence, or insufficient evidence to warrant the decision, that would be a point of law. I think that there was sufficient evidence. But apart from that, I am of the opinion that there was estoppel. It was impossible for the Court below to listen to evidence that it was a dwelling-house when a licence was taken out to maintain and operate a laundry on the premises, and it is not permissible that there be a dwelling-house in a factory. Nothing being established to the contrary, the presumption is that the municipal by-law is valid.

A dwelling-house imports sleeping premises. You may have meals elsewhere, but where you sleep is your dwelling-house. And how can a Court allow a person to come in and say he has got a dwelling-house, which the law says he shall not have in certain premises? The by-law has the force of statute law. Therefore on these two grounds I would direct that the appeal should stand dismissed.

EBERTS, J.A.

EBERTS, J.A.: I think the evidence goes to shew me that it was a laundry. There is the evidence of Mr. Stewart, who says he went to the laundry at a certain part of the night and it was carried on by four Chinamen. The Act specifically says that that comes under the Factories Act, and if that is so I think you are contravening the Act by keeping it open hours you should not do so. I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *W. J. Baird.*
Solicitor for respondent: *J. A. Haviland.*

DOMINION TRUST COMPANY AND GWYNN v. ROYAL BANK OF CANADA.

MACDONALD, J.

1920

Dec. 10.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA

Company law — Winding-up — Action to recover securities given bank — Securities given when company not entitled to do business—Onus of proof—Status of liquidator—Evidence—Books of company—Power to borrow — Right to assume proceedings regular — Security given by insolvent company — Absence of knowledge by lender — Evidence of "pressure"—Effect of—R.S.C. 1906, Cap. 144, Sec. 98.

In an action by the liquidator of a company being wound up under the Winding-up Act, attacking the right of a bank to retain securities given by the Company on the ground that the conditions imposed on the company before it became entitled to do business were not complied with, namely, that the minimum stock subscription had not been obtained nor had the minimum amount been paid thereon:—

Held, that the liquidator had a *status* to attack the right of the bank to retain the securities but the onus was on him to shew that the conditions imposed had not been complied with.

Information derived from the books, papers and documents of the company produced for examination is not sufficient evidence of such non-compliance. Section 175 of the Dominion Companies Act does not give the right to use the books of a company as evidence against strangers.

If a bank in loaning to a company, receives letters from the Company's solicitors indicating that all the requirements as to borrowing have been complied with and also receives copies of the by-laws and resolutions, properly certified, authorizing the borrowing, the genuineness whereof it has no reason to doubt, the bank is justified in concluding that the borrowing powers have been properly exercised, and that as against the company all matters of internal management have been duly complied with.

Section 98(1) of the Winding-up Act is inapplicable to set aside securities given by a company, in the absence of evidence to shew that they were given "in contemplation of insolvency under the Act." Securities are not deemed to have been so given merely because the company's manager knew of the insolvent condition of the company if the person receiving them had no such knowledge.

The presumption created by section 98(2) of said Act that a deposit of securities if made within 30 days next before the commencement of the winding up of the company is made in contemplation of insolvency, is rebuttable: the onus is on the depositee of the securities to shew he had no such contemplation in mind. Evidence that the securities were obtained by "pressure" exercised upon the company may be material in discharging such onus.

ACTION for an account of all securities deposited or pledged Statement

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by the plaintiff Company with the defendant, and for an order directing a return of such securities and repayment by the defendant of any moneys it may have received in respect thereof. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 7th of September, 1920.

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

Sir C. H. Tupper, K.C., and *Alfred Bull,* for defendant.

10th December, 1920.

MACDONALD, J.: Plaintiffs seek to have an account taken of all securities deposited, or pledged, by the plaintiff Company with the defendant, and for an order, directing a return of such securities, and repayment by the defendant, of any moneys it may have received in respect thereof. The action, as originally commenced, was based upon the effect of section 98 of the Winding-up Act, but it was subsequently extended, so as to include an averment, that the Company never became entitled to commence business. It was submitted, that, in that event, it had no right to transfer to the defendant any property, or securities, that it may have received, while thus illegally carrying on business, and that the defendant could not retain them as against the liquidator.

Judgment

As an initial ground of objection, defendant contended, that the liquidator could not attack this position and that he was not in any better position than if the Company were seeking a return of its securities. Some support is afforded to such a contention by the judgment of Riddell, J. in *Re Canadian Shipbuilding Co.* (1912), 26 O.L.R. 564, but in that case the rights of the liquidator were asserted under a particular statute, and such decision was followed in *The Security Trust Co., Ltd.* v. *Stewart* (1918), 1 W.W.R. 419. The rights of a liquidator are succinctly indicated by Street, J. in *Re Canadian Camera* (1901), 2 O.L.R. 677 at p. 679 as follows:

"It is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, *viz.*, that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights, because their right to prosecute actions themselves against the company and to recover their claims directly out of the property of the company is taken away by the Winding-up Act."

Teetzel, J. followed this judgment in *National Trust Co.* v. *Trusts and Guarantee Co.* (1912), 26 O.L.R. 279. Then Lord Davey in *Kent* v. *La Communaute des Sœurs de Charite de la Providence* (1903), A.C. 220 at p. 226 refers to the duties and powers of the liquidator as follows:

"The office of the liquidator has in fact a double aspect. On the one hand he wields the powers of the Company, and on the other hand he is the representative for some purposes of the creditors and contributories. There are therefore many cases in which he may sue in his own name, as, *e.g.*, to impeach some act or deed of the company before winding-up which is made voidable in the interest of the creditors and contributories."

I do not think this contention of the defendant is tenable. I am confirmed in this conclusion by the fact, that no objection of this nature was raised in a similar action of *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.* (1882), 22 Ch. D. 61. In that case, it was alleged, that an overdraft of the Building Society had been illegally obtained and an action was brought by the official liquidators seeking, practically, the same remedies as the plaintiffs herein.

The liquidator, having thus, in my opinion, a *status* to attack the defendant and contest its right to retain such securities, I next consider the terms and conditions affecting the incorporation of the plaintiff Company and their fulfilment or otherwise.

Judgment

It appears, from the premable to the Dominion Act of incorporation, that the Dominion Trust Company Limited, hereafter called the "Old Company," had been incorporated by Letters Patent of this Province, and that such incorporation was subsequently confirmed and extended by B.C. Stats. 1908, Cap. 59. Such old Company, in 1912, obtained Dominion incorporation of the Dominion Trust Company (Can. Stats. 1912, Cap. 89), hereafter called the "New Company," and certain directors of the old Company were named as the provisional directors of the new Company. The Company thus formed by Dominion legislation was a separate entity from that of the Company which applied for its incorporation, and could not be termed its successor. It was given power to acquire the stock and business of the old Company, conditional upon the assumption of its debts, obligations, and liabilities. The capital stock of the new Company was declared to be

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$5,000,000, divided into 50,000 shares of $100 each. While the new Company, by virtue of such Act, became a corporation, still, there were certain conditions imposed, before it became entitled to commence business. It was provided by section 5 that:

"The Company shall not commence business until at least two hundred and fifty thousand dollars of stock have been *bona fide* subscribed and one hundred thousand dollars paid thereon in cash into the funds of the Company, to be appropriated only for the purposes of the Company under this Act."

The plaintiffs take the ground, that these provisions operate, as conditions precedent, to the right of the new Company to do business, and that it failed to comply with such conditions, with the result that all its transactions were illegal and capable of being attacked. It was also submitted, that such failure, brought into play another section of the Act of Incorporation and constituted a forfeiture of the charter, through the operations of the Company not having been legally commenced within two years from the passage of the Act. These provisions, as to forfeiture, are as follows:

"17. The powers granted by this Act shall expire, and this Act shall cease to be in force, for all purposes except for the winding up of the Company at the end of two years from the passing thereof unless the Company goes into actual operation within such two years."

Judgment

This contention, as to the new Company illegally carrying on business, was not advanced until about two years after the commencement of the action. It was, at the trial, featured as a very strong point in their favour by the plaintiffs, though it was admitted that up to the time it was thus raised, no one had questioned the right of the new Company to do business. There is no doubt that, as a fact, whether legally entitled to do so or not, the new Company virtually stepped into the shoes of the old Company. It operated through the same officials, used the same office, and adopted the same books with slight exceptions. It exercised the powers granted by its Act of incorporation, and its existence, as a corporation, was recognized by Dominion legislation, Can. Stats. 1913, Cap. 107, containing provisions dealing with shares and share warrants and giving the important and additional power to the Company of borrowing, under certain conditions. Then when application was made to wind

up the Company, in October, 1914, it was not on the ground that it had no right to do business, but because its business was in such a state as to require the intervention of the statute, primarily in the interest of the creditors. The right of the Company to do business was conceded, and the liquidator was authorized in the winding up, to utilize all the powers vested in the new Company by its Act of incorporation. Under these circumstances, thus shortly outlined, an argument is presented by the defendant, that it is not open to the plaintiffs to now allege that the new Company did not lawfully commence business. The determination of such objection would involve a decision, as to whether non-compliance with the conditions precedent, as to commencing business, is an irregularity or an illegality, affecting the Company. It only, however, becomes necessary for me to arrive at such a decision in the event of it being proven as a fact that such non-fulfilment took place on the part of the new Company.

I should first reach a conclusion on the important point, that the onus of shewing fulfilment of such conditions rests upon the defendant. This position is not consistent with that assumed during the trial, and is at variance with the pleadings. I think, considering the form of the action, that the plaintiffs properly undertook the task, of proving that the new Company did not comply with the requisite conditions, prior to their commencing business.

Have the plaintiffs satisfied such burden and afforded proper proof on this branch of their case? The nature of the evidence tendered, for this purpose, came under consideration early in the trial. The liquidator, while giving his evidence, in referring to the necessity for $250,000 of stock being *bona fide* subscribed and $100,000 paid thereon, in cash, into the funds of the Company, stated that neither of these events had occurred. It was quite apparent that these statements were not based on his own knowledge, but on information derived from the books, papers and documents of the new Company, which had come into his possession. It was contended that, under these circumstances, no weight should be attached to such statements.

I thought the proper course to adopt, was to allow evidence

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of this kind, to be given provisionally by the liquidator, as well as by Mr. Carmichael, an accountant, called as a witness by the plaintiffs. I also permitted various books of the Company to be filed as exhibits. I made it quite clear, however, that I was not accepting such statements or books as evidence, and that, in giving my judgment, I might discard them altogether. In pursuing this course, I referred to the case of *Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13, where Lord Esher, M.R., indicates, that even where there is no objection made to evidence, which has been wrongly admitted, "it was the duty of the judge to reject it when he came to give his judgment . . . . . ; or if it were objected to and admitted, this Court was bound to reject it." Fry, L.J., and Lopes, L.J., agreed, as to the duty of the Court, where such evidence had been improperly admitted, and as to the necessity of a case being decided upon legal evidence.

Was such evidence offered by plaintiffs legal, and should it be relied upon to prove that the plaintiff Company commenced its business illegally. It is almost needless to say, that I should, in coming to a conclusion on this important issue, not be satisfied with merely forming an opinion in the matter, but should feel certain that my finding was supported by proper legal evidence. I do not think that the oral evidence on the point can be treated as more than hearsay, and so the source, or basis, for such evidence must be considered, and its admissibility determined.

Judgment

There was no direct proof as to the genuineness of the cash book, share register, and other books of the plaintiff Company tendered in evidence; but assuming that they were as represented, can they be adduced by the plaintiffs as evidence against the defendant? It was sought, by their production and perusal, assisted by explanatory oral evidence, to prove that the requisite shares had not been subscribed, nor the stipulated amount paid into the funds of the plaintiff Company. Ordinarily, a plaintiff undertaking, by the form of his action and pleading, to prove the existence or non-existence of an essential act, is required to do so, by primary evidence, if available. If this is to be accomplished, through witnesses, then, they should speak

from their own knowledge. He is not allowed to establish the truth of such fact by a self-made unsworn statement, such as his own cash books. There may be circumstances which will permit the introduction of secondary evidence. In this case, it is not suggested that the evidence tendered comes within the latter category. It must then, if receivable, be an exception to the general rules of evidence, and sanctioned by some statutory provision, giving such a privilege to a corporation, as distinguished from a private individual. A number of authorities have been cited, as tending to support the plaintiffs in their contention that such evidence should be accepted, but practically all of them were either actions for calls or litigation amongst the members of a company. The decision in *Reg.* v. *Nash* (1852), 21 L.J., M.C. 147, gives some assistance to the plaintiffs, but the statute there considered (8 & 9 Vict., c. 16), allowing the share register to be used as evidence, does not correspond in this respect with provisions for a like purpose in the Dominion Companies Act. A comparison of the two sections, dealing with such evidence, shews the distinction, and that the Imperial Act is much broader in its terms. Section 28 of 8 & 9 Vict., c. 16, is as follows:

"The production of the register of shareholders shall be *prima facie* evidence of such defendant being a shareholder, and of the number and amount of his shares,"

whereas in the Companies Act, R.S.C. 1906, Cap. 79, the section is as follows:

Judgment

"175. All books required by this Part to be kept by the Secretary or by any other officer of the company charged with that duty shall, in any suit or proceeding against the company or against any shareholder, be *prima facie* evidence of all facts purporting to be therein stated."

The necessity for placing a strict construction upon legislation of this nature was referred to, by Lord Brougham, in *Bain* v. *Whitehaven and Furness Junction Railway Company* (1850), 3 H.L. Cas. 1 at p. 22. He was there discussing the effect of a section in the Companies Clauses Consolidation Act for Scotland (8 & 9 Vict., c. 17), similar to the section referred to in *Reg.* v. *Nash, supra,* and stated as follows:

"A great privilege is bestowed by the Act upon the company, neither more nor less than that of making evidence for itself. The books of the company are made evidence for the company, and, unless rebutted by

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counter-evidence, will be sufficient to warrant a verdict in each case. It must be admitted that this is a very great privilege, and an exception to the ordinary rules of evidence. By those rules, and the rules of common sense and justice, what a man writes is evidence against him, but not evidence in his favour: but here the proposition is reversed. So that the company, by writing in the books that 'A.B. holds' a certain number of shares, can go into Court and make A.B. answerable for them, and can produce the entry as evidence against him. This is a great privilege, and in order to justify the exercise of it, the conditions on which it is given, namely, the provisions of the statute as to the making of these entries, must be strictly complied with; and I hold that it is much safer to consider each of those provisions as a condition precedent, as a provision imperative, and not merely directory, on account of the great importance of the privilege itself, and on account of its being an exception to all ordinary rules of evidence. If therefore, I had not found a distinct compliance with the requisitions of the 9th section, I should not have considered that the 29th section was of any avail to the applicant in making these books evidence for him, and against his adversary."

I do not think, that the Dominion legislation goes further, nor was intended to go further, than to develop the principle that the books of a partnership are evidence, as between the partners, but it gives no support to a contention that they can be used for such purpose as against strangers. In that event, the situation is thus, shortly outlined, in Corpus Juris, Vol. 22, p. 898:

"In the absence of a statute, the rule generally prevailing is, that corporation books are not admissible in matters of a private nature, to establish or support a right or claim of the corporation or its members against a stranger . . . . except as memoranda in connection with the evidence of a witness who has testified from personal knowledge."

Judgment

Amongst the numerous authorities there cited, in support of this proposition of the law, the judgment of the majority of the Court in *Chesapeake & O. Ry. Co.* v. *Deepwater Ry. Co.* (1905), 50 S.E. 890 is well worthy of consideration. In that case, after referring to a portion of Mr. Thompson's work on Corporations, as to whether the books and records of a corporation are evidence as against strangers, and pointing out that it is, in a measure, so stated in one paragraph and the contrary, in effect, outlined in another; the judgment then quotes, with approval, two further extracts from such work as follows (p. 909):

"'But where it is sought to use the records of a private corporation as evidence of the facts which they recite, for the purpose of concluding, or even influencing, the rights of third parties, who are strangers to the

record, then such records are not admissible, on the same principle which operates to exclude the records of legal judgments, when offered for a similar purpose, on the principle that they are *res inter alios acta*.' "

" 'The sound rule, then, is that the records of a private corporation cannot be used in evidence, for the purpose of sustaining a claim of the corporation against persons who are not members of it, or to defeat a claim of such a person against the corporation, or to affect strangers any way.' "

The judgment then deals with the inconsistency of the author, as follows:

"There is, at least, an apparent contradiction in the language quoted, but this may be due to more inaccuracy of expression. If it be shewn by competent evidence that a resolution was passed, that a meeting was held, that an organization was effected, then the record made of the resolution, the by-law, or the organization would undoubtedly be at least admissible evidence to shew, what by-law was passed, what resolution was adopted, and the character of the organization effected; but this is a very different matter from admitting these records to shew that they were made. Proof of the creation of a thing differs widely from proof of the identity or character of a thing after it has been made."

An excerpt from Wigmore on Evidence, Vol. 3, par. 1661, is then discussed, but, it is stated, that there were no cases cited, illustrating what is meant by the citation. Another view of the author, as to the weight to be attached to the records of the proceedings and acts of an ordinary private corporation, is referred to as follows (p. 910):

" 'According to the other theory, they are merely entries of the oral doings, and are thus analogous to any ordinary persons contemporary entries of his doings.' "

Judgment

Considered in that light, they can be taken as part of the oral testimony of the party who made them, but not as proof that the statements therein contained are true or "were made at the time, in the manner and by the authority recited therein."

In *London* v. *Lynn* (1789), 1 H. Bl. 206, an effort was made to use the books of the corporation as evidence of their contents. They were refused for that purpose, as appears by the foot-note at p. 214:

"The defendants were not permitted to give in evidence their corporation books to prove their own rights."

Here, the plaintiff sought to take a similar course, as to the non-performance of the conditions, giving the new Company the right to commence business. The failure, to adequately subscribe for shares, or make the necessary payment, was, as

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I have mentioned, sought to be proven, not by witnesses conversant with the facts, but by those who did not even make the entries in the books, and who based their belief on these points, simply upon statements therein contained. I fully appreciate the importance that attaches to an exclusion of such evidence, and how seriously it affects the position of the plaintiffs. In my opinion, however, under the circumstances, the books of the Company should not be received, as proper legal evidence, and any statements they contain, or deductions to be derived therefrom by witnesses, as to such requisite payment or subscription, should be ignored.

There is thus no evidence, which I should consider, as satisfying the burden of proof, which I think the plaintiffs properly undertook, that the new Company illegally commenced and carried on its business. I have thus no evidence before me, which I should consider as preventing the new Company from commencing business.

It is, however, contended, that the officials of the defendant should have made inquiries, which would have resulted in shewing that the plaintiff Company was not entitled to do business. This contention involves the question, as to which party should bear the onus of proof, which has already been discussed. It is, in any event, of no avail, in the light of my finding, that there is no evidence as to illegality existing and, consequently, that any such inquiry would have brought the suggested result.

Judgment

It was then submitted that the plaintiff Company had no power to borrow money from the defendant, or if it had such power, that it had not been properly exercised. There is no doubt that the first advances, by the defendant to the new Company, were made at a time when it had no power to borrow. These moneys, however, were repaid and do not form a portion of the moneys loaned by defendant to plaintiff Company, upon which defendant bases its right to receive and retain the securities. In August and September, 1914, a substantial amount was loaned during the great stress at the commencement of the War. At this time, power had been acquired by the plaintiff Company to borrow under certain restrictions. Such power was conferred in 1913 by 3-4 Geo. V., Cap. 107, through

an amendment to the Act of incorporation of the plaintiff Company, and is as follows:

"19. For the purposes of carrying out the objects of the Company as authorized by chapter 89 of the statutes of 1912, and for no other purpose, the directors of the Company may, if authorized by by-law, sanctioned by a vote of not less than two-thirds in value of the subscribed stock of the Company, represented at a general meeting duly called for that purpose,—

"(*a*) borrow money upon the credit of the Company; (*b*) limit or increase the amount to be borrowed; (*c*) hypothecate, mortgage or pledge the real or personal property of the Company, or both, to secure any money borrowed for the purposes of the Company."

The exercise of such borrowing powers was questioned by the plaintiffs. It was not contended, that the borrowing was not within the general powers thus granted, as not being properly "incident to the course and conduct of the business" of the Company. See on this point, *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.* (1882), 22 Ch. D. 61, and *Re Farmers' Loan and Savings Co.* (1899), 30 Ont. 337. The manner of borrowing was, in this connection, the sole subject of attack. In view of the facts, I do not think this position is tenable. The defendant, through its local manager, took the precaution of having letters from the solicitors, indicating that all the requirements as to borrowing had been complied with. He also received copies of the by-laws and resolutions, properly certified, authorizing the borrowing of moneys and transacting the usual and necessary banking business. He had no reason to doubt the genuineness of these documents and was justified in concluding that the borrowing powers had been properly exercised.

Judgment

The defendant Bank, in dealing with the plaintiff Company, had a right to assume, as against the Company, "that all matters of internal management have been duly complied with." *Royal British Bank* v. *Turquand* (1855), 5 El. & Bl. 248; S.C. (1856), 6 El. & Bl. 327 at p. 332, Jervis, C.J.:

"And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

Plaintiffs contend that, in any event, the provisions of section 98 of the Winding-up Act are effectual to support a recovery of all or a portion of the securities held by the defendant. Such section reads as follows:

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"If any sale, deposit, pledge or transfer is made of any property, real or personal, by a company in contemplation of insolvency under this Act, by way of security for payment to any creditor, or if any property, real or personal, movable or immovable, goods, effects or valuable security, are given by way of payment by such company to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void; and the subject thereof may be recovered back for the benefit of the estate by the liquidator in any Court of competent jurisdiction.

"2. If such sale, deposit, pledge or transfer is made within thirty days next before the commencement of the winding-up under this Act, or at any time afterwards, it shall be presumed to have been so made in contemplation of insolvency."

The first subsection is inapplicable upon the facts, as there is no evidence, to shew that the securities were deposited with the defendant Bank by the Company "in contemplation of insolvency under the Act." The managing director of the Company doubtless was aware of the true financial position of his Company at the time of obtaining the advances in question. Unless the defendant had knowledge that the condition of affairs of the Company was such as to border on insolvency, it could not be affected by the pledging of the securities under such first subsection. There might be circumstances, where there is such neglect to inquire, that it would amount to constructive notice, but I do not think this condition of affairs existed, when I bear in mind the period, when the defendant assisted the plaintiff Company. At the beginning of the war, a situation had arisen which necessitated co-operation amongst financial institutions to avoid disaster. The managing director of the plaintiff Company, then applying for a loan, must have excited suspicion, if not actual knowledge, on the part of the officials of the defendant Bank, that trust funds which should be available, had been diverted for some other purpose than was originally intended. Reasons were given for making advances and thus protecting depositors of plaintiff Company, which, in normal times, I am satisfied, would not have influenced any bank. So whatever knowledge may have been possessed by the managing director of plaintiff Company, as to the insolvency of his Company, it was not imparted to the defendant when the securities were deposited.

Judgment

Plaintiffs then invoke the provisions of the second subsection

of section 98, as to certain of the securities, and contend that the presumption, as to their deposit, or pledge, in contemplation of insolvency has not been destroyed. They further submit, that such presumption is irrebuttable. A number of authorities were cited, but I do not think they support this latter contention. The presumptions created are capable of being controverted. This involves the burden being cast upon the defendant of proving that, as to securities deposited, or pledged, within 30 days of the commencement of the winding up, they were not so deposited or pledged in contemplation of insolvency. With respect to the presumptions, arising under sections of the Winding-up Act, and in supporting my conclusion, as to the effect of the second subsection of section 98, I need only refer to *Hammond* v. *Bank of Ottawa* (1910), 22 O.L.R. 73, where it was held that the presumption, under section 94 of the Act, was rebuttable. See Moss, C.J.O. at p. 81:

"The mortgage having been made within three months next preceding the commencement of the winding-up, there is a presumption that it was made with intent to defraud the company's creditors. But the presumption is not a conclusive or irrebuttable presumption. It places upon persons, whether creditors or not, to whom a mortgage is given within the prescribed limit of time, the onus of shewing the absence of intent to defraud the creditors of the company."

Has the defendant, then, satisfied the onus it must assume in connection with such deposit or pledge of securities? It only requires to shew that, in so obtaining securities, it had not such contemplation in mind. It seeks to overcome the presumption, by shewing the circumstances and that the securities were received by "pressure," exercised upon the plaintiff Company. The remarks of MARTIN, J. in *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314 at p. 319, are appropriate, *viz.*:

Judgment

"Transactions of this nature must, I think, be viewed and judged as a whole, and a circumstance here and there in the chain of events, which standing by itself might be of much weight, should not be singled out and magnified into undue importance."

As to what took place at the time of the advances, and subsequently, the local manager of the defendant Bank was examined *de bene esse,* but was not cross-examined, as the ground was taken that the examination was irregular. The

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order, for his examination was, however, on appeal, sustained. He stated that, after the advances had been made, his head office required further security to be given. He, in turn, made a demand for such securities and a number were deposited with the Bank within the 30 days before the commencement of the winding up. He then outlined the circumstances, and the extent of the pressure. Were they sufficient to destroy the presumption? The doctrine, as to pressure, was discussed in *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314; (1901), 32 S.C.R. 719. I accept the statements of the bank manager, as to what took place with respect to the securities. I think such evidence establishes that this demand, by the defendant, for, and receipt of the securities, within the 30 days, was not in contemplation of insolvency and the presumption, to that effect, is destroyed. While the "pressure" exerted to obtain the securities was slight and received a ready response, still, it would appear to come within the authorities.

Plaintiffs also rely upon the provisions of section 94 of the Winding-up Act. The evidence necessary to support its application was considered in *Hammond* v. *Bank of Ottawa, supra.* Suffice for me to say that the plaintiffs have failed to adduce any evidence to sustain its position on this point.

The result is, that, in my opinion, while the plaintiffs might be entitled to call for accounting in the future, they have failed to shew any right to recover the securities deposited, or pledged, with the defendant, or to interfere with the defendant in realizing upon them.

The action is dismissed with costs.

Action dismissed.

IN RE JOHNSTON BROTHERS LIMITED, IN LIQUIDATION.

COURT OF APPEAL

1920

Nov. 16.

IN RE JOHNSTON BROTHERS LTD.

Company law—Contributory—Contract to take shares—Allotment—Call—Statute of Limitations—R.S.C. 1906, Caps. 79 and 144.

The liability of a contributory to pay for shares under the Winding-up Act commences on the date when a call is made, and until that time the Statute of Limitations does not begin to run against the company. *Ex parte Canwell.—In re Vaughan* (1864), 4 De G.J. & S. 539 distinguished.

APPEAL by A. W. Johnston, a contributory, from an order of MACDONALD, J. of the 12th of July, 1920, varying the certificate of the district registrar by placing the said A. W. Johnston upon the list of contributories in respect of 200 shares ($100 each) in Johnston Brothers Limited, in liquidation. Johnston was one of the incorporators, a promoter and director of this Company, also a majority shareholder. In 1912 the directors decided to launch out further in manufacturing and Johnston claimed that at the time he verbally asked that he be allowed to take 200 more shares if he wanted them, his intention being only to take them if he required them in order to keep control of the Company. A resolution was passed by the Company allotting the 200 shares to him and he was charged $20,000 in the ledger for the shares but the allotment was never entered in the stock-book. A further defence was that as the allotment was made in August, 1912, more than six years had elapsed without anything further being done and the claim was outlawed.

Statement

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

Gillespie, for appellant: In 1912 the Company intended to branch out further and do some manufacturing. Johnston was a majority shareholder and in order to keep control he asked to be allowed to take 200 more shares in case he required them to control the Company, and a resolution was passed allotting

Argument

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him 200 shares and it was entered up in the ledger charging him with $20,000 but not entered in the stock-book. There was a contingency that he was not to have the shares unless paid for and delivered. In any case it was in the nature of a simple contract and as six years has elapsed and nothing done in the meantime the claim is barred by the Statute of Limitations: see Emden on Winding-up, 8th Ed., 183; *Ex parte Canwell.—In re Vaughan* (1864), 4 De G.J. & S. 539; *Nicol's Case* (1885), 29 Ch. D. 421.

Argument

Russell, K.C., for respondent (Official Liquidator): A contract was established, there being an offer for the shares and an allotment by the Company. This is all that is required to make Johnston liable. The Statute of Limitations does not run until a call is made: see *In re The Haggert Bros. Manufacturing Co.* (1892), 19 A.R. 582.

Gillespie, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. There are only two points involved in this case as I see it. The first question is whether the contract between Johnston and the Company was not a mere option, as was contended by Mr. *Gillespie,* or whether on the other hand it was a sale of shares by the Company to Johnston. The form the contract takes is clearly one of sale. If it had been one of option a very different contract would have been drawn up from that which we find here. An application or offer to take the shares was made by Johnston and was accepted by resolution of the Company, and the Company made an allotment of the shares, which could only properly be done if it were a sale, and the time of payment is fixed, the time being when a call is made. Johnston then became liable to pay for the shares whenever a call was made. I am not going to say anything on the point as to whether directors would be authorized in law to enter into a transaction of the kind put forward by Mr. *Gillespie,* that is to say, to give an option on shares to one of the directors. I do not enter upon that at all. I found my judgment on this branch of the case, on the conclusion that there was an actual sale of the shares to Johnston.

Then the other question is as to whether or no the allotment has been outlawed? On that point I have not the slightest difficulty. The contention that the statute runs not from the date of the beginning of the liability to pay but from the date of the allotment is not borne out by authority. The case referred to by Mr. *Gillespie* is not in point at all. I refer to *Ex parte Canwell—In re Vaughan* (1864), 4 De G.J. & S. 539. The question we are now considering is not involved in that case. The question there was whether the liability had been incurred prior to the coming into force of the Bankruptcy Act, and it had nothing to do with the Statute of Limitations. The circumstances were entirely different from those in this case. In this case a contract has been established, and the Statute of Limitations would begin to run from the due dates of the instalments which may be called from time to time by the company. The contention which Mr. *Gillespie* advanced upon the Statute of Limitations is without substance.

MACDONALD, C.J.A.

The appeal is dismissed with costs.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

MCPHILLIPS, J.A.: It is not without some hesitation that I am of the view that the appeal should be dismissed.

MCPHILLIPS, J.A.

EBERTS, J.A.: I am of opinion the appeal should be dismissed. I think there was no option. The statute would only run from the time a call was made. I have come to the conclusion that it was an actual sale of the shares to Johnston.

EBERTS, J.A.

Appeal dismissed.

Solicitor for appellant: *W. D. Gillespie.*
Solicitor for respondent: *F. R. McD. Russell.*

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GODDARD v. BAINBRIDGE LUMBER COMPANY, LIMITED.

Forestry—Right of way—Expropriation—Construction commenced prior to completion of expropriation proceedings—Trespass—B.C. Stats. 1912, Cap. 17.

GODDARD v. BAINBRIDGE LUMBER CO.

The defendant Company after commencing expropriation proceedings under the Forest Act for right of way across the plaintiff's lands held the expropriation proceedings in abeyance and proceeded to construct the right of way on an alleged understanding with the plaintiff pending negotiations with a view to agreeing on a purchase price for the right of way. In an action for damages for trespass and for an injunction:—

Held, that the defendant Company was not entitled to proceed with the work and an action was maintainable, but in the circumstances the Company should have an opportunity of doing what they ought to have done in the first instance and proceed with due diligence under the Forest Act and upon ascertainment and payment of the amount of compensation awarded to the plaintiff under the Act the plaintiff can then sign judgment for $25, and costs.

Dominion Iron and Steel Company, Limited v. *Burt* (1917), A.C. 179 followed.

ACTION for damages for trespass and for an injunction restraining the defendant from interfering with lot 129, Alberni District, the property of the plaintiff. On the 14th of August, 1919, the defendant Company commenced proceedings under the Forest Act to expropriate a right of way through the north-east corner of said lot, notice and statutory declaration being duly served on the plaintiff as provided in the Act. The defendant claimed that proceedings under the Forest Act were held in abeyance pending negotiations between the parties with a view to agreeing on a purchase price for the right of way, and that the plaintiff agreed with the defendant's solicitors that pending an agreement as to price, or failing in this, an assessment and award by arbitration, the defendant Company should be at liberty to construct and use a right of way across the corner of said lot, and they proceeded to construct the right of way. The defendant further claimed that it was willing to proceed with the arbitration and paid into Court $350 to

Statement

satisfy the plaintiff's claim. Tried by GREGORY, J. at Victoria on the 24th of November, 1920.

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GODDARD v. BAINBRIDGE LUMBER CO.

W. J. Taylor, K.C., and *W. A. Brethour,* for plaintiff.
Harold B. Robertson, and *Finland,* for defendant.

6th December, 1920.

GREGORY, J.: There can be no doubt that the defendant acted illegally and was therefore a trespasser upon the plaintiff's land. The fact that the Company thought it had the right to go upon the land cannot affect the plaintiff's common law action, though in the circumstances it may affect the question of damages. The defendant took steps to expropriate under the Forest Act. These proceedings were stopped by the plaintiff who waived his claim to an injunction pending trial. It would be unfair to now compel the defendant to pay full damages for the injury to the land, which would give him no title and no right to continue the occupation of the land, and then compel him to proceed under the Forest Act to expropriate and pay again.

Judgment

The decision in *Dominion Iron and Steel Company, Limited* v. *Burt* (1917), A.C. 186, appears to govern the case. The injunction against the defendant granted on the 22nd of October, 1919, will be dissolved and the defendant will be required to proceed with due diligence with its proceedings under the Forest Act, and upon ascertainment and payment of the amount of compensation awarded to the plaintiff under that Act, the plaintiff can sign judgment for $25 with costs herein. Upon failure of the defendant to so proceed with due diligence, say within two months, or such further time as the Court may before the expiration of the said two months, order, the plaintiff will be entitled to a mandatory injunction to remove the logging railroad and to general damages, to ascertain which there will be a reference to the registrar. Leave to apply.

Order accordingly.

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REX *EX REL.* CLERKE v. DOBIE.

Criminal law—Prohibition—Occupant of premises—"Permitting or suffering drunken persons to consume liquor or assemble or meet"—Duplicity—B.C. Stats. 1915, Cap. 59, Secs. 12(3), 14, 80, 99 and 102; 1916, Cap. 49, Sec. 38.

A guest in a hotel went to his room late at night with bottles of liquor, bringing a friend with him. They drank the liquor and made some disturbance until arrested about half an hour later. The accused who was proprietor of the hotel went to bed before the guest had arrived and knew nothing of what took place. He was convicted on a charge that being the owner or occupant of a hotel he did "permit and suffer drunken persons to consume liquor therein" and did "permit and suffer drunken persons to assemble or meet therein" contrary to section 24 of the British Columbia Prohibition Act. The conviction was quashed on *certiorari*.

Held, on appeal, affirming the decision of MORRISON, J., that irrespective of the question of duplicity, the accused cannot be convicted on said charge where the consumption of liquor or meeting of persons was without any knowledge, connivance or carelessness on his part.

Per MACDONALD, C.J.A.: The magistrate reserved his decision for the purpose of obtaining the opinion of the Attorney-General upon the construction of the statute. Now, while the Attorney-General may properly advise executive officers of the Government, he cannot be appealed to for advice by judicial officers.

Per MARTIN, J.A.: Conviction on such a charge is objectionable because of duplicity, there being two offences charged, but the Court has power to cure the defect by striking out one of the charges; as to what charge should be struck out depends upon the facts in the case.

Statement

APPEAL by the Crown from the decision of MORRISON, J., of the 30th of June, 1920, quashing a conviction by the police magistrate at Vernon, B.C., in that the accused being the owner of the Vernon Hotel at Vernon, did permit drunken persons to consume liquor in said hotel in contravention of sections 24 and 38 of the British Columbia Prohibition Act and did permit drunken persons to assemble or meet in said hotel not being a private dwelling-house. The facts are that one Westerbury who was bar-tender in the Vernon Hotel, had a room there and at about three o'clock in the morning he carried to his room three bottles of whisky, bringing with him a friend named

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Felton. After being there for about half an hour, during which time they took a number of drinks, they were arrested and taken to the police station. The evidence shewed they were indulging in loud talking while in Westerbury's room. The accused Dobie was in bed in the hotel when the two men went to Westerbury's room and knew nothing of what took place until after they were arrested.

Statement

The appeal was argued at Vancouver on the 9th of November, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Wood, for appellant: The conviction was quashed on the ground of duplicity, but my submission is that assuming there was, it is cured by the curative sections of the Act, particularly section 99 of the Act of 1915, Cap. 59, which is similar to section 1124 of the Criminal Code: see *Rex* v. *Toy Moon* (1911), 21 Man. L.R. 527; 19 Can. Cr. Cas. 33 at p. 36; *Rex* v. *Richard* (1920), 2 W.W.R. 14; *Rex* v. *Leahy* (1920), 28 B.C. 151; *Whimster* v. *Dragoni, ib.* 132; *Rex* v. *Bell* (1920), 2 W.W.R. 535.

R. L. Maitland, for respondent: I rely on section 12(3) of the Act. There must be one offence. The cases cited differ, as in this case they brought evidence to prove both charges: see *Rex* v. *Code* (1908), 13 Can. Cr. Cas. 372. When the statute sets out a course upon which a magistrate is to proceed and he deviates from that course, the conviction will be quashed. He has no jurisdiction: see *Rex* v. *Nurse* (1904), 3 O.W.R. 224. It is owing to the departure from the procedure set out. The magistrate found Dobie knew nothing about the trouble. The *Whimster* case differs as there they let the man sell liquor. On the question of *scienter* see *Somerset* v. *Wade* (1894), 1 Q.B. 574; *Rex* v. *Pomerleau* (1917), 28 Can. Cr. Cas. 7; *Rex* v. *Creighton* (1917), 3 W.W.R. 499.

Argument

Wood, in reply.

4th January, 1921.

MACDONALD, C.J.A.: I would affirm the judgment of Mr. Justice MORRISON quashing the conviction.

MACDONALD, C.J.A.

The offences charged against the accused were that being the

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owner and occupant of the Vernon Hotel he did "permit and suffer drunken persons to consume liquor therein" and did "permit and suffer drunken persons to assemble or meet therein" contrary to section 24 of the British Columbia Prohibition Act.

Two persons, a guest in the hotel and his friend, being drunk did consume liquor in the room of the guest but without the knowledge, connivance, carelessness or wilful blindness of the accused, as was clearly proven in the proceedings before the magistrate and so found by him.

It was argued that there was duplicity in these charges, but in my view of the case I am not concerned with this phase of it. The magistrate in making the conviction, relied upon section 38 of the Act, but in my opinion that section has no application to the offences charged in the information. Shortly stated, section 38 provides that the occupant shall be personally responsible for the illegal sale or act of another, proof of which shall be conclusive evidence against the occupant. It is the other person's offence which may be saddled upon the occupant.

Now, what was the offence committed by the other person or persons in this case? Clearly not the offences charged here but offences embraced within the provisions of sections 11 and 12 of the Act. The offences charged in the information are laid under section 24 of the Act; they are chargeable only against the owner, tenant or occupant of a house or premises. Could the guest and his friend commit the offences by suffering and permitting themselves to assemble and to consume liquor? If not, then we cannot apply the provisions of section 38 to this prosecution.

MACDONALD, C.J.A.

The question therefore is, was the accused properly convicted under the provisions of section 24? I think he was not. He did not "permit" or "suffer." The construction to be put upon these words is to be found in *Somerset* v. *Wade* (1894), 1 Q.B. 574. It was there held that a person could not be convicted of "suffering" gaming in the absence of knowledge, connivance or carelessness on his part and that "suffers" is not distinguishable from "permits." A like decision was rendered by Mr. Justice Hyndman in *Rex* v. *Creighton* (1917), 3 W.W.R. 499.

During the trial the magistrate gave utterance to some obser-

vations condemnatory of the Prohibition Act, and I think I ought to say that judges and magistrates are not at liberty to criticize the justice of the legislation which they are called upon to interpret. I also notice that the magistrate reserved his decision for the purpose of obtaining the opinion of the Attorney-General upon the construction of the statute. Now, while the Attorney-General may properly advise executive officers of the Government, he cannot be appealed to for advice by judicial officers.

MACDONALD, C.J.A.

MARTIN, J.A.: There are two objections to this conviction under section 24 of the British Columbia Prohibition Act, Cap. 49 of 1916, the first for duplicity, in that there are two offences charged therein contained, one for permitting or suffering drunken persons to consume liquor on the accused's premises, and the other for permitting or suffering drunken persons to assemble or meet therein. It is clear, on the authority of *Rex* v. *Toy Moon* (1911), 21 Man. L.R. 527; 1 W.W.R. 50; 19 W.L.R. 480; 19 Can. Cr. Cas. 33, followed in *Rex* v. *Richard* (1920), 2 W.W.R. 14; *Rex* v. *Leahy* (1920), [28 B.C. 151] 2 W.W.R. 95, and *Rex* v. *Bell* (1920), 2 W.W.R. 535; and corresponding sections 64, 79, 80 and 99 of the Summary Convictions Act, Cap. 59 of 1915, and that we have the power to cure the defect by striking out one of the charges. If the decision in *Rex* v. *Code* (1908), 1 Sask. L.R. 295; 7 W.L.R. 814; 13 Can. Cr. Cas. 372, should be construed as being to the contrary, I feel, with respect, unable to follow it. As to what charge ought to be struck out, that depends upon the facts in each case, which here, shortly, are, that one Westerbury lived in the accused's hotel and that he and another named Felton had early on a Sunday morning, while intoxicated, become involved in a drunken brawl in a cafe and were being followed up by the police for arrest; that they both went to Westerbury's room on the third floor of the accused's hotel about three a.m. and conducted themselves there in a noisy and drunken manner and were found there by the police about half an hour later, intoxicated, and with several bottles of whisky in their possession; the accused stated that he went to bed about half past

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one that morning in a wing of the building and that he heard no noise and knew nothing of the entry of the two men or of the carousing in Westerbury's room. There was no night clerk employed in the hotel but the accused had an employee who slept on the first floor of the main building at the foot of the landing, but he also heard nothing, which seems strange, because when the police came into the building they located the men they were after by the noise they were making on the top floor, and later on in the same morning the occupant of the room below had complained about the noise. However, as the magistrate has found that the accused had no knowledge, his finding will have to be accepted.

In view of these facts I am of opinion that the charge that ought to be retained in the conviction is the second one, *i.e.*, for permitting or suffering drunken persons to assemble or meet on said premises, and so the first one for consuming liquor therein, though it is also proved by the evidence, should be struck out, and the conviction appropriately amended.

The second objection is that the accused should not have been convicted under section 24 because he cannot have "permitted" that which he had no knowledge of, and it is submitted that section 38 does not apply to offences under section 24: it is conceded by the Crown that if it does not the conviction cannot be sustained—*Cf. Somerset* v. *Wade* (1894), 1 Q.B. 574; 63 L.J., M.C. 126; *Rex ex rel. Hammond* v. *Cappan* (1920), 2 W.W.R. 135.

MARTIN, J.A.

Section 38 is directed solely to making the occupant (even though personally innocent) liable for two classes of offences committed upon his premises by others, who also in so doing contravene the Act; the first as regards "any sale, barter, or traffic of liquor," the second as regards any "matter, act or thing in contravention of any of the provisions of this Act." In *Whimster* v. *Dragoni* (1920), [28 B.C. 132] 2 W.W.R. 185, we recently held that a conviction of an innocent occupant under section 10 for selling liquor by the occupant's servant could be supported under section 38, that being a conviction "in the absence of knowledge on the occupant's part" within the first class of offences above mentioned, and doubtless the same prin-

ciple would apply to an offence under the second class. But in the case at Bar there has been no contravention of the Act by the "other persons" who "assembled or met" on the occupant's premises and so no charge was laid against them, and, in my opinion, section 38 does not apply to an occupant where he is charged with an offence which he alone could have committed personally or in certain cases by his servants, such as that now charged under section 24. If the "other persons" had been convicted under section 11 the matter would be very different.

I have not failed to observe that there is one offence at least under section 24, the giving of liquor to a drunken person, that section 38 would apply to, but that is not charged here. It follows that the appeal should be dismissed.

Since writing the above I have noticed the recent decision of the Manitoba Court of Appeal in *Rex* v. *Armstrong* (1920), 3 W.W.R. 977, which might, without examination, be thought to be in conflict with the previous decision of the same Court in *Rex* v. *Toy Moon, supra.* Such is not the case, however, because it is a decision upon The Manitoba Temperance Act, 1916, Cap. 112, and the curative statutory provisions which were present in *Toy Moon's* case, and are correspondingly present in the case at Bar, are absent in the *Armstrong* case: this accounts for the fact that in the reasons of the Court the *Toy Moon* case is not mentioned.

MARTIN, J.A.

GALLIHER, J.A.: Section 38 of the British Columbia Prohibition Act, Cap. 49, B.C. Stats. 1916, does not, in my opinion, apply and therefore we are not within the *Whimster* case [(1920), 28 B.C. 132] recently decided in this Court.

I agree with the views expressed by the Chief Justice and would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS and EBERTS, JJ.A. concurred in dismissing the appeal.

MCPHILLIPS, J.A.
EBERTS, J.A.

Solicitors for appellant: *Lane, Wood & Company.*
Solicitors for respondent: *Cochrane, Ladner & Reinhard.*

MORRISON, J.

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ARON v. SPROAT.

Contract—Subsequent altered circumstances—Impossible of performance—Implied term—Right of action.

ARON v. SPROAT

A contract for the removal of a house became impossible of performance owing to the refusal of the city engineer to grant a permit for its removal. In an action for damages for non-performance:—

Held, that the altered circumstances were such that had it occurred to the parties that the refusal of a permit were imminent it would have been made a term of the contract and the action should be dismissed.

F. A. Tamplin Steamship Company, Limited v. *Anglo-Mexican Petroleum Products Company, Limited* (1916), 2 A.C. 397 applied.

Statement

ACTION for damages for non-performance of a contract for the removal of a house intact. The application of the contractor for a permit to move the house was refused by the engineer of the City of Vancouver, and he was unable to proceed with the performance of the contract. Tried by MORRISON, J. at Vancouver on the 16th of December, 1920.

Fleishman, and *Sugarman,* for plaintiff.

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

4th January, 1921.

Judgment

MORRISON, J.: The contract was for the removal of the house intact. This contract became impossible of performance owing to the refusal of the city engineer to grant a permit for its removal in that way. Upon an examination of the contract, and after hearing the parties and their respective witnesses, and thus upon a consideration of all the surrounding circumstances, including the previous occupation of the plaintiff and his present *status,* I am of opinion that the parties made their bargain on the footing that the necessary permission, pursuant to the city by-laws, to remove the house in question, would be given. Had it occurred to either of them that such a contingency as a refusal was imminent, a term would have been inserted in the contract as against its occurrence.

The altered circumstances in the case at Bar were such that had the parties thought of them as being necessary to be inserted

they would have said "If that happens, of course, it is all over between us." That is the true meaning of the contract herein. *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited* (1916), 2 A.C. 397 at p. 403; Anson on Contracts, 15th Ed., 371 and 373. The grounds put forward by the plaintiff, upon which he bases his claim for damages, would make good material for the formation of an entirely new contract.

Judgment

The action is dismissed.

Action dismissed.

GAVIN v. THE KETTLE VALLEY RAILWAY COMPANY.

Negligence—Collision—Train and motor—Jury—Refuse to answer specific questions—Verdict—Damages to be equally borne by parties—Application to dismiss action refused—Appeal—Marginal rule 868.

On the second trial of an action for damages to an automobile through collision with a train of the defendant Company, the jury did not answer specific questions put by the Court but found that there was negligence on the part of both parties and concluded with the words: "Evidence on the point as to the distance the train was from the automobile when it became apparent there was danger of a collision is so conflicting that the jury are unable to determine whether the train could have been stopped in time to avoid the accident and recommend that the damages be equally borne by both parties to the action." The trial judge discharged the jury and refused to enter judgment for either party. The defendant then moved for dismissal of the action which was refused.

Held, on appeal, MCPHILLIPS, J.A. dissenting, that although not asked for, it is in the interest of the parties that there be an order for a new trial. A preliminary objection to the Court's jurisdiction to hear the appeal on the ground that no judgment had been pronounced in favour of either party was overruled, MARTIN and MCPHILLIPS, JJ.A. dissenting.

Per MACDONALD, C.J.A.: A further attempt should have been made to have the jury explain their finding and it was open to the trial judge

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to have dismissed the action on the ground that the plaintiff had failed to get a verdict in his favour, leaving it to the plaintiff to appeal for a new trial.

Per MCPHILLIPS, J.A.: Judgment should be entered for the defendant. Only one conclusion could properly be drawn, that being that the plaintiff was disentitled to recover (*Rickards* v. *Lothian* (1913), A.C. 263-4; *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53; *Winterbotham Gurney & Co.* v. *Sibthorp & Cox* (1918), 87 L.J., K.B. 527).

GAVIN *v.* KETTLE VALLEY RY. CO.

APPEAL by defendant from the decision of HUNTER, C.J.B.C. and the verdict of a jury in an action for damages to a motor-car owing to the negligence of the defendant's employees. The action was first tried by MACDONALD, J. and a jury on the 26th and 27th of October, 1917, when judgment was entered for the plaintiff for $1,485, and costs. On appeal to the Court of Appeal a new trial was ordered: see 26 B.C. 30. On appeal to the Supreme Court of Canada the order for a new trial was upheld: see 58 S.C.R. 501. The facts relevant to the issue are that on the 9th of June, 1917, at about 7 o'clock in the evening the plaintiff's wife was driving the motor-car in question southerly on Winnipeg Street in Penticton. She approached the defendant Company's track at about 10 miles an hour. A train of the defendant's was backing down from the west at about 10 miles an hour. A brakeman on the rear end of the train saw the motor-car when it was about 60 feet from the track, the train being at that time about 60 feet from the crossing. The brakeman thought that as the train was in full view the motor-car would stop, but when reaching about 20 feet from the crossing, realizing a collision was imminent, he shouted to the driver of the motor-car to stop, at the same time signalling to the engineer to stop the train. The motor-car continued on and stalled in the middle of the track when the train was about 15 feet away. The train struck the car and carried it about 25 feet when it turned over. Mrs. Gavin admitted that she saw the train when she was about 35 feet away from the track and that she could stop her car in less than 25 feet. Questions were put to the jury but were not answered, the jury bringing in the following verdict:

Statement

"Jury find on the evidence submitted that the driver of the motor-car was at fault in not stopping his car more quickly and also consider the

Company negligent in not having the most efficient tail-end equipment. We also consider that the brakeman should have been in such a position on the rear end of the train that he could have applied the brakes himself by means of the cord instead of depending on the signal to the engineer. The evidence on the point as to the distance the train was from the automobile when it became apparent there was danger of a collision is so conflicting that the jury are unable to determine whether the train could have been stopped in time to avoid the accident and recommend that the damages be borne by both parties to the action."

The learned Chief Justice then refused to direct judgment to be entered for either party, and the defendant then formally moved for dismissal of the action. This was refused and the appeal was taken from the order so made.

Statement

The appeal was argued at Vancouver on the 10th and 11th of November, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Davis, K.C., for appellant.

A. H. MacNeill, K.C., for respondent, raised the preliminary objection that there was no jurisdiction to entertain the appeal. On the question of the right of appeal, the case is improperly before this Court. There was no verdict upon which any action could be founded: see *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512.

Davis, contra: The case of *McKelvey* v. *Le Roi* (1901), 8 B.C. 268, and the case therein referred to, *Eves* v. *Genelle,* not reported, are referred to as authority for want of jurisdiction, but in these cases neither party moved after the verdict, whereas here I made a formal application that the action be dismissed, which was refused, and I have a right of appeal from that order: see section 6 of the Court of Appeal Act, R.S.B.C. 1911, Cap. 51. The case of *Skeate* v. *Slaters, Limited* (1914), 2 K.B. 429, is important on this question.

Argument

MACDONALD, C.J.A.: This preliminary question as to jurisdiction is rather troublesome. One has to consider the decision of the Full Court in the case of *McKelvey* v. *Le Roi Mining Co.* (1902), 32 S.C.R. 664. In that case the Full Court held that the Court had no jurisdiction, but the circumstances of that case were quite different, I think, from the circumstances of

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this case. In that case the learned Chief Justice MCCOLL who conducted the trial, instead of giving judgment for one party or the other at the close of the case, having some doubt as to how the case ought to be disposed of, said he would refer it for the Full Court's decision. No objection was taken by either side to it being so referred to the Full Court and it was referred, and the Full Court held it had no jurisdiction to deal with the matter. In that case there was no appeal; there was no order made for one party or the other which could be appealed from.

It is different in this case. An appeal is taken from the order of the trial judge refusing to entertain the motion for judgment.

Now, if the defendant was entitled to judgment, that refusal was wrong and it seems to me the proper place to put that wrong right is in this Court.

There can be no question in my mind that this Court has jurisdiction to entertain an appeal against the order refusing to enter judgment for the defendant and to set aside such order.

MACDONALD, C.J.A.

What is the order which ought to have been made by the trial judge? If Mr. *Davis* is right, he ought to have dismissed the action. Instead of doing that he refused to make any order. I quite appreciate the point taken by my learned brother MARTIN, that there was no judgment at all, there was not a complete trial, but here either party was entitled to ask for judgment, and a refusal of a motion for judgment, it seems to me, falls within the provisions of the Court of Appeal Act, and either party can appeal from the refusal of the Court below to enter judgment for either party. We have therefore jurisdiction to hear this appeal.

MARTIN, J.A.

MARTIN, J.A.: This is a very exceptional case indeed. In my opinion it is perfectly clear what ought to be done. We have this situation that the jury (to quote from the learned judge himself) brought in a verdict which was absolutely inconclusive. It does not find the main issue at all, which is as to which of these parties was guilty of the decisive act which could have averted the calamity. That was in answer to a

motion made by the defendant for judgment, and exactly the same consequences would have followed from what he says more strongly if the plaintiff had moved for judgment, and he announces his intention of giving judgment for nobody, and that has been carried out in the formal judgment:

"This Court doth order that the said motion of the defendant to enter judgment for them dismissing the action be and the same is hereby refused, and doth not see fit to make any further order thereon,"

carrying out the intention, as expressed orally by the learned trial judge, in refusing to give judgment for either party.

The suggestion made by counsel for the appellant, though very ingenious, is, in my opinion, utterly fallacious, because when a judge fails in his duty (speaking judicially) in refusing to dismiss an action, that therefore we are given jurisdiction. The answer to that, of course, is that you cannot confer jurisdiction by acceding to a suggestion, that because a judge should have given judgment for somebody, because he refused to do that, on motion by either party, that there is then the right of appeal, that this Court then has jurisdiction to adjudicate upon the matter, where the judge below has not done his duty, has not completed his duty, and there has not been a trial, the trial has not been completed.

I cannot find anything in the cases cited or in the principles cited upon which that is based. Where there has been judgment for nobody how can you have an appeal? What ought to be done is perfectly clear. This Court ought to refer it back, as the Court did in *McKelvey* v. *Le Roi* (1901), 8 B.C. 268, where the judge declined to exercise his function, in a judicial sense. This case ought to be as was done in that case, referred back to the Court below, with liberty to both parties to take such steps as advised.

MARTIN, J.A.

This Court must assume that when a matter is referred back to the learned judge below to complete his full duty, to enter judgment for somebody, that he will perform that duty. There is no difficulty in this case and therefore in my opinion we have no jurisdiction to entertain this matter, because neither party has obtained judgment. There must be judgment for somebody before you can come to this Court.

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GALLIHER, J.A.

GALLIHER, J.A.: At the conclusion of the trial, Mr. *Davis* being of opinion that his client was entitled to judgment, so moved the Court, and the Court stated that on the verdict rendered Mr. *Davis's* client was not entitled to judgment in his favour and refused the application, and there was an order made accordingly.

Now, the learned judge may have been right or wrong in refusing the application; if wrong, I do not see why this Court has not jurisdiction to set the wrong right. Under the circumstances I think we have absolute jurisdiction to deal with the matter, notwithstanding there is no judgment for the plaintiff or for the defendant, but there is judgment against the defendant, refusing his application. Surely it is for this Court to decide whether the learned judge was right or wrong. I would proceed to hear the argument.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would have preferred that the question should have been reserved and the appeal heard.

The matter is one of great moment. As it is, I am compelled to give my opinion now. I am of the same opinion as my brother MARTIN. It is the duty of the trial judge to give judgment one way or the other when he accepts the verdict of the jury (there are cases where the jury are sent back from time to time or discharged or new jury called), and if I were at this time called upon to say which way judgment should have been given, I would say judgment should have been for the defendant. It is the bounden duty of the plaintiff to get the necessary finding from the jury to entitle him to judgment. This is well laid down in *Rickards* v. *Lothian* (1913), A.C. 263. I therefore think the proper course would be to send the case back to the learned Chief Justice (the trial judge) to enter judgment one way or the other, the order made and under appeal to be set aside, and the appeal to that extent allowed.

EBERTS, J.A.

EBERTS, J.A.: I am of opinion the appeal should proceed.

Preliminary objection overruled, Martin and McPhillips, JJ.A. dissenting.

Argument

Davis (*Colquhoun*, with him), on the merits: The only difference as to the evidence from the first trial is that an additional witness was called, but was of no importance, the

additional woman was called, but it was of no importance, the jury substantially paying no attention to it. The Court of Appeal have the power and should make the order that ought to have been made in the Court below on the finding of the jury, which is that the action should be dismissed: see Order LII., r. 4; Yearly Practice, 1919, p. 982; *Skeate* v. *Slaters, Limited* (1914), 2 K.B. 429; *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43; *Gavin* v. *Kettle Valley Ry. Co.* (1918), 26 B.C. 30; (1919), 58 S.C.R. 501.

MacNeill: My contention is that the finding of the jury was one of ultimate negligence. The words "at fault" may include negligence. A new trial is not necessary: see *Rowan* v. *The Toronto Railway Company* (1899), 29 S.C.R. 717. On the question of inconclusive verdicts see *Hinsley* v. *London Street R.W. Co.* (1907), 16 O.L.R. 350; *Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361; Archbold's Q.B. Practice, 13th Ed., pp. 394, 398-9; *Rex* v. *Woodfall* (1770), 5 Burr. 2661; *Arnold* v. *Jeffreys* (1914), 1 K.B. 512; *Bird* v. *Appleton* (1800), 1 East 111.

Argument

Davis, in reply: It is argued we deliberately ran into the plaintiff. The evidence shews we could not stop in less than 30 feet. The case of *Rickards* v. *Lothian* (1913), A.C. 263 at p. 274 holds that if the plaintiff does not obtain judgment on the findings the action must be dismissed.

Cur. adv. vult.

4th January, 1921.

MACDONALD, C.J.A.: At the hearing of this appeal the preliminary objection was taken that the Court had no jurisdiction to entertain it. This objection was founded on the refusal of the trial judge, HUNTER, C.J.B.C., to direct judgment to be entered for one party or the other. The appellant (defendant) thereupon made a formal motion to him for judgment for the dismissal of the action. This was refused and the appeal is taken from the order thereupon made. The Court, my Brothers MARTIN and MCPHILLIPS dissenting, overruled the objection.

MACDONALD, C.J.A.

The verdict is inconclusive, the jury found negligence on both sides but did not say whose negligence was the proximate cause of plaintiff's injury. They could not agree upon the

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answers to all the questions submitted to them, nor did their findings amount to a general verdict. They brought in the following: [already set out in statement.]

After the foreman had stated that there was no hope for an agreement upon the answers to the questions, the jury were discharged and apparently the above was accepted as their verdict.

Had both parties submitted to the order, it may be, though I have grave doubts of it, that the action could have again been brought on for trial without an order for a new trial. If I could say that the so-called verdict was in reality tantamount to a disagreement of the jury the proper course would be to permit the parties to bring the action on again for trial. But in view of the fact that the jury did agree to something, inconclusive and unsatisfactory though it be, and which purports to be their verdict, precludes me from saying that the parties could have avoided a resort to this Court for relief. With respect, I think the request of Mr. *MacNeill,* counsel for the respondent, that the jury should be sent back with instructions to reconsider their finding, should have been acceded to, particularly their recommendation that the damages be borne by both parties. If that were intended to be part of their verdict, it meant that in the jury's opinion the plaintiff was entitled to succeed for half the amount of damage proven. Such a finding would amount inferentially to a declaration that it was the negligence of the defendant that caused the plaintiff's injury. On the other hand, it might be read as a declaration that Mrs. Gavin was as much to blame as the defendant's servants. In any view of the so-called verdict, it is on its face a compromise and cannot be allowed to stand.

MACDONALD, C.J.A.

Although we were not referred to them on the argument, I have looked at the cases of *Faulknor* v. *Clifford* (1897), 17 Pr. 363; *Stevens* v. *Grout* (1894), 16 Pr. 210, and *McDermott* v. *Grout, ib.,* therein referred to and which had to do with situations not unlike the present one, but those were cases clearly of disagreement in the full sense of the term, since there was no general verdict and some of the questions remained unanswered.

It was open to the trial judge to have dismissed the action on the ground that the plaintiff had failed to get a verdict in his favour, and I think in the circumstances that that course ought to have been pursued, leaving it to the plaintiff to appeal to this Court for a new trial. The learned trial judge had no power to grant the appropriate relief, and the embarrassment that has arisen in this appeal because there was no judgment in the action would have been happily avoided.

The question of the costs of the appeal has given me some difficulty. The appellant did not ask for a new trial. We might dismiss its appeal, but to my mind that course would not be in the interests of justice. I think the obstacle to another trial should be removed, although that is not what was asked for by the appellant, nor by the respondent, who has made no motion at all to the Court. The order for a new trial is in the interest of both parties, if my view of the so-called verdict be the correct one.

MACDONALD, C.J.A.

Neither party has pursued the proper course to remove the obstacle to the determination of their rights, and I would deprive both of them of the costs of the appeal. The circumstances set out above furnish good cause for this.

MARTIN, J.A.: At the hearing a majority of the Court overruled the objection to our jurisdiction to hear this appeal (based upon the fact that no judgment was pronounced in favour of either party by the learned trial judge), so now it is necessary to consider what is the proper order to make under such circumstances.

What happened is that certain questions were submitted to the jury, but instead of answering them they, after stating through their foreman that it was not possible to agree upon some of them, returned the following written verdict, so-called, which their foreman stated was not intended to be a general verdict in favour of the plaintiff: [already set out in statement.]

MARTIN, J.A.

A discussion arose upon the meaning of this verdict and plaintiff's counsel unsuccessfully moved the Court that the jury should be asked what they meant by the word "recommend,"

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but the defendant's counsel opposed this and asked that they be discharged forthwith and the effect of their finding argued later, and the learned trial judge adopted this course as follows, according to the official stenographer's notes:

"THE COURT: At all events, that is their view; that the damages should be equally borne by both parties. I presume that is the case. [To the jury]: What do you think ought to be done, that the damages should be borne equally?

"The Foreman of the jury: That was the opinion of the jury.

"THE COURT: Now the legal effect of that will have to be determined, I suppose. Well, gentlemen of the jury, whatever may happen to this verdict I think I am safe in saying without fear of contradiction, that you have given the matter very full and lengthy consideration. You will be discharged."

It is much to be regretted that the jury were discharged without further attempt to elucidate the matter, because the making of such an attempt is the proper course to pursue in such circumstances: *Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361; 14 W.L.R. 414; *Wabash Ry. Co.* v. *Follick* (1920), 60 S.C.R. 375; in the former of which it was said appropriately to this case, that if that course had been adopted "then instead of the judge below speculating as to what the jury meant to say, a definite answer could have been obtained before they were dismissed, and this appeal avoided."

MARTIN, J.A.

After the discharge defendant's counsel moved next morning for judgment, which was resisted by plaintiff's counsel who submitted, first, that it was a general verdict in plaintiff's favour for half the damages; or, second, if there was no general verdict then the jury had disagreed upon vital points and therefore the trial must proceed *de novo* before another jury, because it was not ended before an agreement upon all material questions was reached and verdict returned thereon by the jury, and no judgment could be entered in default of a verdict. I express no opinion upon these submissions, but they are undoubtedly weighty, particularly that relating to the disagreement.

After argument the learned judge reached this conclusion:

"With regard to the verdict itself, I am of the opinion that it is absolutely inconclusive. It does not find the main issue at all, which is as to which of these parties was guilty of the decisive act of negligence; that is, the decisive act which could have averted the calamity. Being in that position, I am unable to enter judgment for either party and shall leave

it to either party to take such steps as advised in applying for a new trial, as I have no jurisdiction to order a new trial."

The formal judgment was entered as follows, after the appropriate recitals:

"And counsel for the said defendant having this day moved the Court to enter judgment for the defendant, upon the said findings of the jury dismissing the action with costs, and the Court having heard counsel aforesaid on behalf of the defendant and plaintiff respectively.

"This Court doth order that the said motion of the defendant to enter judgment for them dismissing the action be and the same is hereby refused, and doth not see fit to make any further order thereon."

In my opinion, with all due respect, that refusal to do more than dismiss the defendant's application was not that full discharge of the duty of the trial judge to which the parties are entitled. Unless it could be said that the jury had disagreed it was the clear duty of the trial judge to complete the unfinished trial by giving judgment upon the record in favour of one party or another, and till that has been done the trial has not been completed; in fact, there has been no trial at all in the true legal sense. Save in certain special cases, *e.g.*, where a Court on grounds of public policy refused its assistance to the parties (as in *Guilbault* v. *Brothier* (1904), 10 B.C. 449; *Huntly* (*Marchioness of*) v. *Gaskell* (1905), 2 Ch. 656; 75 L.J., Ch. 66; 22 T.L.R. 20), the parties are entitled *ex debito justitiæ* to judgment one way or another, and it is a situation unknown to our jurisprudence that a trial should be left unfinished and in mid-air without the parties being able, because of judicial inaction, to know their position. It is manifest that the learned judge did not regard or deal with the situation as being one of a disagreement by the jury, because if that were the case he should and could not legally have attempted to deal further with it by entertaining premature motions for judgment or otherwise pending a new trial before another jury, the order for which still remains in force and must be exhausted: *Nantel* v. *Hemphill's Trade Schools* (1920), [28 B.C. 422] 3 W.W.R. 408. I am, of course, excepting a motion to dismiss the action on the ground that there is no case to go to the jury, which motion is not affected by any disagreement or agreement of the jury, but here, in my opinion, the case was properly left to the jury, and if the learned judge dealt with the situation

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at all it must have been on the assumption that some kind of a verdict had been agreed upon (otherwise there was no verdict at all in default of agreement), and in such case it was his duty to enter judgment upon that verdict in favour of the party entitled to it and so complete the trial. Upon the argument before him after the verdict and dismissal of the jury, there were three submissions (or motions) presented for his adjudication; one by the defendant for a judgment of dismissal, and two by the plaintiff, the first being that there was a disagreement and therefore a new trial must be had before any judgment could be pronounced, the second, that the verdict was a general one for half the damages claimed. Of these three distinct submissions the learned judge acted upon one only, *viz.*, refusing that of the defendant and "not seeing fit to make any further order" upon the other two submitted by the plaintiff. This is an attitude which, with all respect, cannot be justified, and for which there is no precedent—a trial cannot be frustrated and rendered abortive by judicial inaction and the rights of litigants are not satisfied by an incomplete negative judgment dealing with the claim of one party only, but by a complete positive judgment in favour of every party who is entitled to it, and till that has been done there has been in law no trial and there can be no appeal from a judgment which has not been pronounced. The position here, by the refusal to act, has been converted into a dead-lock; the defendant cannot get judgment against the plaintiff and the plaintiff cannot get judgment against the defendant, though one of them was unquestionably entitled to judgment in his favour. In such unprecedented circumstances I should think the strictly logical and proper course would be to remit the case back to the learned trial judge (as was done in the largely analogous case of *McKelvey* v. *Le Roi* (1901), 8 B.C. 268) to enable him to complete the trial and pronounce some positive judgment, whatever he may deem to be right, upon the verdict before him, because it is not for us to attempt to substitute our appellate jurisdiction for his original one, and though by rule 868 we have the power, subject to the principles enunciated in *Skeate* v. *Slaters, Limited* (1914), 2 K.B. 429; 83 L.J., K.B. 676, "to make any order

MARTIN, J.A.

that ought to have been made," yet that rule does not contemplate and does not apply to such a situation as exists here, but presupposes that there has been a completed trial and that judgment has in fact been pronounced; in other words, the trial must be finished before we can review it. If this be not the correct view, then it is open to any trial judge, when he is deciding the issues of fact (without a jury) as well as law, simply to say that he is "unable" to determine the issues of fact and consequently refused to enter any judgment at all upon the "inconclusive" testimony before him and thereby throw the whole unfinished trial into this Court and compel us to discharge his duty for him, because in principle there is no distinction between facts found by a jury and the law applied to them by a judge, and the same facts found by a judge alone with the same application of law; when the learned judge below has fully discharged his trial duty then our appellate duty will begin, if invoked, to review his complete judgment. There is much in a somewhat similar case before the Ontario Court of Appeal, *Faulknor* v. *Clifford* (1897), 17 Pr. 363, which supports this view, though there the difficulty as to the incomplete trial and consequently no judgment to appeal from, was got over by the consent to treat the case as an appeal—p. 365. My brothers, however, think that in the unusual circumstances, the justice of the case will be best met and delay and expense avoided by ordering a new trial direct, and I am prepared to agree with their view, especially since there have been two trials already.

MARTIN, J.A.

With respect to the costs of this appeal: I doubt very much in the unprecedented circumstances if there is any "event" in the true sense of section 28 of the Court of Appeal Act, R.S.B.C. 1911, Cap. 51, though technically there is, because the appellant has not succeeded in setting aside the order complained of. But, on the other hand, we cannot for the reasons mentioned, enter judgment for either party in the ordinary way, and the plaintiff is not in the position of supporting a judgment because what he complains of is that there is none in the true sense, and therefore he is placed in a position where he cannot obtain his rights, and in that he is, in my opinion, correct. The

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strange situation is that neither party supports the action taken by the learned trial judge, the defendant actively appealing against it and the plaintiff remaining passive *pro tem.*, waiting, I suppose, and not unreasonably, to take appropriate action to obtain a new jury in case his submission as to a disagreement should prevail. Nevertheless, the action of the defendant has brought about the breaking of the dead-lock and to this extent the plaintiff has benefited by the appeal even though the defendant erred greatly in opposing the plaintiff's application that the jury be asked to explain their meaning as above noticed. The position of the matter before us is one of unusual difficulty and embarrassment brought about by the learned judge, whose method of dealing with the case is objected to by both parties, and therefore I think there should be no costs of this appeal. If his judgment had been supported by either of the parties, then that party would be liable for costs of the judicial error which resulted in his favour in accordance with the rule given effect to, *e.g.*, in *Guilbault* v. *Brothier, supra,* and *Mills* v. *Hamilton Street R.W. Co.* (1896), 17 Pr. 74. The costs of the abortive trial should follow the result of the new trial.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I am agreeing with the Chief Justice in the disposal of this appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: When this appeal was opened I was of the opinion that the case should be sent back to the learned trial judge. However, the majority of the Court held otherwise, and the appeal was proceeded with upon the basis that it would be open to the Court to dispose of the appeal as in all other cases where the appeal follows a final judgment and that the Court could give the judgment the learned trial judge should have given, or otherwise dispose of the appeal in the exercise of the jurisdiction conferred on the Court of Appeal: see *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, Duff, J. at p. 53; and *Winterbotham, Gurney & Co.* v. *Sibthorp & Cox* (1918), 87 L.J., K.B. 527; 62 Sol. Jo. 364.

I further expressed myself at the time that if called upon

then to say what judgment should be entered upon the findings of the jury, that judgment should be entered for the defendant. I am still of that opinion. This action has now been tried a second time, and it is plain that no jury acting reasonably can find that the responsibility for the accident, *i.e.*, the injury to the motor, rests upon the defendant. Specific questions were submitted to the jury following the judgment of this Court, affirmed by the Supreme Court of Canada, a new trial having been directed: see *Gavin* v. *Kettle Valley Ry. Co.* (1918), 26 B.C. 30; (1919), 58 S.C.R. 501. The jury refrained from answering the questions *seriatim* but returned a somewhat general answer not fully covering the questions submitted, but not amounting to a general verdict. In any case, having made specific answers, these are to be looked at to determine what the jury have really found upon the facts: see *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512; *Newberry* v. *Bristol Tramway and Carriage Company Limited* (1912), 29 T.L.R. 177 at p. 179.

Now, the question is, what have the jury found? The questions put to them were as follows:

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

"2. If so, in what did such negligence consist?

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

"4. If she might, in what respect was such driver negligent?

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

"6. If so, in what manner or by what means could they have prevented the accident?

"7. Could the driver of the automobile after she became aware, or ought (if she had exercised reasonable care) to have become aware, that the automobile was in danger of being injured, have prevented such injury by the exercise of reasonable care and skill?

"8. If so, how or by what means could she have prevented the accident?

"9. Amount of damages?"

MCPHILLIPS, J.A.

The jury in answer to the questions said: [already set out in statement.]

The jury have undoubtedly "told the Court what they meant by their verdict": see Cozen-Hardy, M.R. in *Newberry* v.

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Bristol Tramway and Carriage Company, supra, at p. 179, and that unmistakably is that the driver of the motor-car was negligent. It is true the jury find that the defendant was negligent, but in what way? In not having "the most efficient tail-end equipment" and that the brakeman should have been able to apply the brakes himself by means of the cord instead of by way of signal to the engineer. The Railway Act provides for the precautions to be taken when a train is moving backwards and no breach of any statutory condition has been established, and what the jury have said in this regard may be effectively met by referring to the language of Lord Sumner (then Lord Justice Hamilton) in *Newberry* v. *Bristol Tramway and Carriage Company, supra,* at p. 179:

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

In any case if there be any value attachable to these latter findings, they are findings of negligence against the defendant coupled with a finding of negligence against the plaintiff, that is, that the case is one of joint negligence and in such a case the plaintiff cannot recover.

MCPHILLIPS, J.A.

The essential finding, *i.e.,* the "ultimate negligence," was not found by the jury (see Anglin, J., *Gavin* v. *Kettle Valley Ry. Co., supra,* at p. 508) against the defendant. The answer as made, in my opinion, is in favour of the defendant and should be so construed. Lord Moulton, in *Rickards* v. *Lothian* (1913), 82 L.J., P.C. 42 at p. 47, said:

"This is an issue of fact in which the burden is upon the plaintiff and he has obtained no finding from the jury in support of it."

It is competent for the Court of Appeal to enter judgment for the defendant even against the findings of the jury or where there has been failure to make the requisite findings: see *McPhee* v. *Esquimalt and Nanaimo Rway. Co., supra,* Duff, J. at p. 53.

It is true the Court of Appeal must not "usurp the province of a jury." In *Paquin Lim.* v. *Beauclerk* (1906), 75 L.J., K.B. 395 at pp. 401-2, Lord Loreburn, L.C., said:

"Obviously the Court of Appeal is not at liberty to usurp the province

of a jury; yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the Court may enter judgment."

I was of the opinion, upon the hearing of the appeal to this Court, following the first trial that it was a proper case in which to enter judgment for the defendant, and I am still of that opinion (see *Gavin* v. *Kettle Valley Ry. Co., supra,* at p. 45), but a new trial only was asked, but now it is submitted that judgment should be entered for the defendant. In the present case the Court of Appeal has all the facts before it, and it is not suggested that there are other relevant facts capable of proof should a new trial be directed. That being the situation, and this being an appeal following two trials had between the parties, with an appeal to the Supreme Court of Canada and two appeals to this Court, it occurs to me that the proper course, if it be a case "that only one conclusion can properly be drawn" (Lord Loreburn in the *Paquin* case, *supra,* at pp. 401-2; Duff, J. in the *McPhee* case, *supra,* at p. 53) that judgment should be entered for the defendant. It is clear to me that only one conclusion can properly be drawn and that is that the plaintiff is disentitled to recover upon the facts. The driver of the motor-car was reckless and careless in approaching the railway crossing, but admits seeing the railway train when she was at a distance from the crossing that well admitted of her stopping the motor-car, nevertheless she elects to proceed and becomes the author of the damage that ensues to the motor-car consequent upon the inevitable collision as I view it, with the exercise upon the part of the servants of the Railway Company of every possible effort to obviate the collision. Now upon these facts is there any possibility of fixing liability upon the defendant? In my opinion there is not. I would refer to what Lord Sumner said in *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J., P.C. 23 at p. 25:

MCPHILLIPS, J.A.

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

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I would also refer (to save repetition) to my reasons for judgment in *Gavin* v. *Kettle Valley Ry. Co., supra,* at pp. 43-44; and see *M'Allester* v. *Glasgow Corporation* (1917), S.C. 430; *Frasers* v. *Edinburgh Street Tramway Co.* (1882), 10 R. 264; *Macandrew* v. *Tillard* (1909), S.C. 78; *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536.

I am therefore of the opinion that the learned trial judge should have entered judgment for the defendant upon the answers of the jury, but if I should be wrong in this, then upon the evidence "only one conclusion can properly be drawn" and that conclusion is, that the accident was consequent upon the negligence of the driver of the motor-car and the servants of the defendant could not, by the exercise of reasonable care, after becoming aware of the danger, have avoided the accident, and this Court should enter judgment for the defendant.

I would, therefore, allow the appeal, the order of the learned trial judge to be set aside and judgment entered for the defendant.

EBERTS, J.A.

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

New trial ordered, McPhillips, J.A. dissenting.

Solicitor for appellant: *N. F. Tunbridge.*
Solicitors for respondent: *Martin Griffin & Co.*

DOMINION TRUST COMPANY v. INGLIS AND INGLIS.

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DOMINION TRUST CO. v. INGLIS

Evidence—Gift from deceased person—Proof of claim—Corroboration—R.S.B.C. 1911, Cap. 78, Sec. 11.

One Arnold, purchased a premises under agreement for sale in 1911, and the defendants (man and wife, the wife being Arnold's sister) immediately went into possession. The house being in a state of disrepair they made such improvements as were necessary to render it habitable. A certificate of title issued to Arnold in 1913. He died in 1914, and subsequently a certificate of title was issued to the plaintiff Company as trustee of his estate. In an action to recover possession of the premises the defendants claimed that Arnold had said he was desirous of making a gift of the property to his sister and that if she and her husband would complete the construction of the dwelling-house he would convey the property to her free of encumbrances. The wife's evidence is corroborated by the vendor of the property to Arnold and three other witnesses in that at different times Arnold made statements shewing that he was giving the property to his sister. The action was dismissed.

Held, on appeal, affirming the decision of MACDONALD, J. (MACDONALD, C.J.A., and GALLIHER, J.A. dissenting), that the defendants' claim is amply supported by corroborating evidence and the action should be dismissed.

Where the evidence of a party requires corroboration by law before he can obtain judgment, it is not necessary that his credibility be established before corroboration can be resorted to or relied upon.

APPEAL by plaintiff from the decision of MACDONALD, J. of the 1st of June, 1920, in an action by the plaintiff Company as trustee for the estate of W. R. Arnold, deceased, to obtain possession of certain land claimed as belonging to Arnold. The land in question was purchased by W. R. Arnold in 1911, from one Rorison, a certificate of title being issued in Arnold's name in June, 1913. Mrs. Inglis was Arnold's sister, and shortly after Arnold had purchased in 1911, the defendants went into possession of the lands and premises. At that time the house was in a state of disrepair and the defendants claim that Arnold gave them possession and promised that if they completed the house and put the premises in a proper state of repair he would give them the property. On going into possession the defend-

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ants repaired the house, made other improvements and continued in possession. Arnold died in 1914, and subsequently a certificate of title was issued to the plaintiff Company. A mortgage which had been registered against the property prior to Arnold's purchase still remained on the record. There was evidence of four witnesses that Arnold had stated on a number of occasions that he was giving the property to his sister. The learned trial judge dismissed the action, holding that the defendants were entitled to the property and that the encumbrances should be paid off by the trustees of Arnold's estate.

The appeal was argued at Vancouver on the 15th, 21st, 22nd and 25th of October, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Sir C. H. Tupper, K.C., for appellant: The evidence of the defence is not supported by a single memorandum of any nature and I submit the Statute of Frauds applies to this case. The judgment is based on *verba in præsenti*, the submission is that it is *verba in futuro*. The evidence must be beyond question: see *McKinnon* v. *Shanks* (1916), 26 Man. L.R. 427; 28 D.L.R. 77. There must be corroborative evidence: see *Bessela* v. *Stern* (1877), 2 C.P.D. 265 at p. 271; *In re Whittaker* (1882), 21 Ch. D. 657 at pp. 662-3; *Ledingham* v. *Skinner* (1915), 21 B.C. 41; *In re Estate of George Fraser* (1918), 52 N.S.R. 122. As to the effect of the improvements made by the defendants see *The Unity Joint-Stock Mutual Banking Association* v. *King* (1858), 25 Beav. 72 at p. 78. As to the evidence of the former owner see Halsbury's Laws of England, Vol. 13, p. 459, par. 636, foot-note (*j*), and p. 463, par. 640; *Smith* v. *Smith* (1836), 3 Bing. (N.C.) 29; Taylor on Evidence, 11th Ed., par. 684; Phipson on Evidence, 6th Ed., p. 241; *Lalor* v. *Lalor* (1879), 4 L.R. Ir. 678; Wigmore on Evidence, Vol. 3, p. 2288, par. 1777 *et seq.* In addition Rorison's evidence is vague as to what Arnold said. This is a promise *in futuro*. There is estoppel only in the case of a gift *in præsenti* followed by possession. The case of *Loffus* v. *Maw* (1863), 32 L.J., Ch. 49 was followed by *Collyer* v. *Isaacs* (1881), 51 L.J., Ch. 14 and *Coles* v. *Pilkington* (1874), 44

L.J., Ch. 381; L.R. 19 Eq. 174, but was overruled by *Maddison* v. *Alderson* (1883), 8 App. Cas. 467 at pp. 473 and 483. As to the Court giving relief on ground of contract see Fry on Specific Performance, 6th Ed., par. 315. In *Cross* v. *Cleary* (1898), 29 Ont. 542 it was held the Court could not act on the evidence of two witnesses. As to the requirements to take the contract out of the operation of the Statute of Frauds see Fry, pars. 580-1, 584 and 612; *George Whitechurch, Limited* v. *Cavanagh* (1902), A.C. 117. The law is that the gift must be proved up to the hilt: see *Frame* v. *Dawson* (1807), 14 Ves. 386; *Miller & Aldworth, Limited* v. *Sharp* (1899), 1 Ch. 622 at pp. 624-5. On the question of laches on defendants' part see Fry, pars. 1102 and 1108; *Verma* v. *Donahue* (1913), 18 B.C. 468 at pp. 470-1. Leave was required for the counterclaim and not obtained: see *Keating* v. *Graham* (1895), 26 Ont. 361 at p. 370; Mitchell's Canadian Commercial Corporations, 1477. On the question of costs see *Sutcliffe* v. *Smith* (1886), 2 T.L.R. 881; Annual Practice, 1920, p. 1194.

J. A. MacInnes, for respondents: There is no evidence on which this Court can reverse the finding of the trial judge, who has found that there was corroborative evidence to satisfy the Act: see *Voigt* v. *Groves* (1906), 12 B.C. 170. There was one condition to the gift, *i.e.,* that the house and premises were to be made habitable. My submission is that it was a gift and there is equitable estoppel. I rely on *Dillwyn* v. *Llewelyn* (1862), 4 De G.F. & J. 517; 10 W.R. 742, which is the same as this case. The Statute of Frauds does not apply; see *Ungley* v. *Ungley* (1877), 5 Ch. D. 887. If it is a gift by analogy it would be a gift clear of encumbrances: Halsbury's Laws of England, Vol. 15, p. 430, par. 854; *National Trust Co. (Heichman Estate)* v. *Heichman* (1920), 2 W.W.R. 1012; Fry on Specific Performance, 6th Ed., p. 288, par. 608. There is no distinction between marriage cases and those of brother and sister: see *Sharman* v. *Sharman* (1892), 67 L.T. 834 at p. 835; *Radford* v. *Macdonald* (1891), 18 A.R. 167. The action was brought by the Company as a trustee and is not a part of the liquidation proceedings, so that leave to bring the counterclaim is not necessary: see *Dominion Trust Co.* v.

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Brydges (1920), 28 B.C. 451. We are bringing the counterclaim as a shield not as a sword. As to the admissibility of Rorison's evidence, he having sold to Arnold see Taylor on Evidence, par. 794; *Woolway* v. *Rowe* (1834), 1 A. & E. 114; *La Touche* v. *Hutton* (1875), Ir. R. 9 Eq. 166.

Tupper, in reply, referred to Fry on Specific Performance, 6th Ed., par. 324.

Cur. adv. vult.

4th January, 1921.

MACDONALD, C.J.A.: The plaintiff sues as executor and trustee under the will of the late W. R. Arnold, to recover possession of a house and land of which at the time of his death the deceased was registered owner. The defendant, Clara Inglis, sister of the deceased counterclaimed, alleging that the said house and land was a gift to her from her brother. The learned trial judge in his reasons for judgment in her favour said:

"Now if the evidence of the defendant, Clara Inglis, stood by itself, I would not feel disposed to accept it as satisfying me that her brother did actually intend to give her the property. Neither do I think that the evidence of her husband and co-defendant would assist in that direction. Without going too much into matters of detail, I think, however, that her statement should not be refused, and I accept it, because to my mind it has been corroborated by witnesses who are credible."

MACDONALD, C.J.A.

The principle question argued was one of fact and as I have come to the conclusion that the defendants have failed to satisfactorily prove the gift, it is therefore not necessary that I should consider any of the other questions relevant only in case of a contrary opinion in respect of the main issue.

The first mention of the alleged gift was at Christmas time 1910. At that time the deceased was under agreement to purchase the property in question from one Rorison, and had offered to sell it to the defendant James Inglis, the husband of Clara Inglis. In these circumstances a conversation took place between the deceased and Clara at Christmas aforesaid. In her evidence she recounts the following conversation with her brother:

"'Well, Clara,' he said, 'I do not think this house [speaking of the one she then occupied] is big enough for you and the children, why not take

that house in South Vancouver' [the one in question here]. I said, that I would see.

"You said you would see? I would think it over, I really think that was the words I used.

"Now that is word for word? Yes."

The next conversation between them was on the 15th of March following, at his office; the lease of the house she was occupying was expiring, she told him she had no place to go to, and the following conversation took place between them. She said:

"Well, when I went into the office and he said to me, 'Well, Clara,' he says, 'What are you going to do about the house?' 'Well,' I says, 'I don't know,' I said, 'I have not really decided just yet what I am going to do.' 'Well,' he says, 'I think you had better,' he says, 'Just make up your mind,' he says, 'and take that house up there.' He says, 'you go into it,' he says, 'and I will give it to you.' He says, 'you go into it and fix it up,' he says, 'and I will give it to you.' He says, 'don't bother.'

"That is the arrangement on which you rely? Yes.

"And you have given me that word for word? Yes."

It appears that the house was not entirely finished, the plumbing and some small matters had not been put in. That is what was meant by the expression, "you go into it and fix it up." The defendants moved into the house and the evidence shews that they did the "fixing up." They paid no rent; there is evidence that James Inglis at some subsequent time asked for a deed and that defendant intimated that a deed would be forthcoming. The defendants paid no taxes, nor did they make any inquiries concerning the same. More than a year after the last recited conversation, Arnold obtained a deed of the property from his vendor and registered the title in his own name, obtaining a certificate of indefeasible fee. The inference to be drawn from that fact is strongly against the sister's contention. After Arnold's death and with a knowledge of the plaintiff's executorship, no claim was made on the plaintiff for conveyance. It was three or four years later that his executor discovered that the deceased had been the registered owner of this property and ascertaining that defendants were in possession, an officer of the plaintiff had a conversation with James Inglis on the telephone. The statements made by Inglis on that occasion are set forth in a letter written by the plaintiff to the defendant James Inglis, and dated the 7th of August, 1918, the receipt of which by Inglis though not admitted is not

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denied. In this letter, confirming the telephone conversation, it is recited that Inglis informed Miller, the plaintiff's officer, that he had purchased the property from Arnold, first at $1,400 subject to a mortgage of $300; that that purchase had fallen through, and Inglis had repurchased it at $2,150, but that later Arnold had agreed to a reduction of the price to $1,400; that Inglis had paid the whole purchase price with the exception of the $300 owing on the mortgage. The writer of the letter then requested Inglis to produce evidence in support of his statements as to payment and suggested the production of receipts for the moneys paid. That letter was not answered nor were others, the receipt of which Inglis did not admit, asking him to call at plaintiff's office and discuss the matter. Plaintiff then brought this action for possession and the defence set up was that the property was a gift from Arnold to Mrs. Inglis. Mrs. Inglis professes ignorance of her husband's statements to the plaintiff, but she knew he was in communication with the plaintiff, and it is, I think, a fair inference to draw from her own and her husband's evidence that she was not kept by him in the dark as to what was going on. It is instructive to compare what Inglis told the plaintiff as set out in said letter with his evidence in which he details his negotiations with Arnold for the purchase of the property.

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The learned judge discards the evidence of Inglis and treats it as valueless in support of his wife's claim, but it is more than that, it is the most cogent evidence in the case against her claim. The inferences to be drawn from it, coupled as it must be with his statements on the telephone, throws light upon the conversations between the brother and sister, it supports my conclusion that the deceased was simply suggesting to his sister that his offer of sale made to her husband should be accepted. I think that the suggestion of a gift was an after-thought conceived when Inglis found that his statement that he had paid the purchase price would not be accepted without proof, and as he had not the proof, since the statement was utterly false, the defence and counterclaim of gift was resorted to.

Now the learned judge has said that he would not believe the story of Mrs. Inglis standing alone, but that the corrobora-

tive evidence satisfied him that she had told the truth. The statute requires corroborative evidence and if I believed that the claim of the defendants was founded in good faith, I should have to consider the corroborative evidence to determine its sufficiency under the statute. I will, however, assume in defendant's favour that there are no legal obstacles to the reception of the corroborative evidence and shall have regard only to its weight as cumulative evidence. Four witnesses were called to corroborate defendants' story of a gift. The evidence on this point of Rorison, the deceased's vendor, is that some time after the 25th of October, 1909, deceased said to him: "I am going to give the property to my sister as a present." Now the property which Rorison and the deceased were then discussing was not the house in question alone, but that house and another property included in the same transaction, so that giving Rorison credit for remembering a casual remark, a mere expression of intention, made eight years prior to his giving his evidence, the intention thus expressed embraces property as to which clearly there was no intention to make a gift to Mrs. Inglis. I do not doubt the honesty of Rorison, but having regard to the then or their recent negotiations between deceased and Inglis for the purchase by the latter of this house, something may have been said about not making a profit, since the house was to go to the sister, which Rorison construed to mean a gift of the house and not a relinquishment of profit.

George Roxborough relates a conversation he overheard between Inglis and deceased, when deceased is alleged to have said to Inglis: "When I get everything fixed up I will give a deed to Clara." This is quite consistent with Inglis's first statement to the plaintiff that the transaction was a sale. F. P. Arnold, brother of the deceased and of Mrs. Inglis, referring to an alleged statement concerning the house by deceased, was asked:

"And the words you remember are? 'I intend to turn that over to Clara.' I remember them words distinctly. The actual words."

This is consistent with sale. C. S. Arnold, another brother of deceased, relates a conversation with him during which deceased said:

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"'I am pretty well fixed now and I think Clara should get something. I have got a place out in South Vancouver that I bought that I am giving her.'"

He says that this conversation was in 1909 or 1910. It will be remembered that according to Mrs. Inglis's own evidence it was at Christmas, 1910, that the deceased first broached the matter to her.

Had it not been for the admitted negotiations for sale and purchase aforesaid and the clearly proven statements made by Inglis, set forth in the letter of the 7th of August, 1918, I should have some hesitation in reversing the finding of fact, but in view of these two circumstances and of the manner in which Mrs. Inglis answered her brother's suggestion made at Christmas as well as on the 15th of March, that she should take the house and to which she answered, "I will see, I will think about it"—inapt answers to the offer of a gift but entirely appropriate to an invitation to buy, I think she has failed to satisfy the onus which rests upon a party making a claim of the character in question.

The evidence for the defence and counterclaim is, to my mind, entirely unsatisfactory. To give effect to it would be to discard those rules of prudence which have long been followed by the Courts in cases of this character.

I would direct judgment to be entered for the plaintiff in the action and would dismiss the counterclaim, costs to follow the event.

MARTIN, J.A.

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

With respect to the objection taken that there has not been corroboration of the defendant's "own evidence" by "some other material evidence" as required by section 11 of the Evidence Act, R.S.B.C. 1911, Cap. 78, while it may be that the learned judge has not altogether expressed his meaning on the point in the most appropriate way, yet he is essentially correct in viewing the corroborating evidence as "supporting" the defendants' testimony, and I am quite unable to accept the submission of the appellant's counsel that the credibility of a witness must be

established before corroboration can be resorted to or relied upon; the principal case indeed, upon which he relies, *Bessela* v. *Stern* (1877), 2 C.P.D. 265; 46 L.J., C.P. 467, in the Court of Appeal, is to the contrary effect when examined, Chief Justice Cockburn saying (p. 271):

"The evidence given in corroboration need not go the length of establishing the contract: if the evidence support the promise it is enough . . . . . I think the verdict is against the evidence, but I cannot say that there was no evidence to go to a jury corroborating the plaintiff's testimony."

And as Lord Justice Brett says (p. 272):

"It was not necessary that the evidence should shew a mutual promise to marry. The evidence need not prove a promise; all that is wanted is corroborative evidence of it."

Much reliance also was placed upon the Manitoba case of *McKinnon* v. *Shanks* (1916), 26 Man. L.R. 427; 10 W.W.R. 895; 34 W.L.R. 761, but it is sufficient to say that in that case, as Mr. Justice Perdue put it, p. 443, "as regards the whole of the plaintiff's claim, he did not furnish at the trial the slightest corroboration of his own verbal testimony"; the observations of these learned judges upon such a state of facts could not apply to those before us which fully justify the learned trial judge in the view he took of the whole evidence. It may very well, indeed often, be that the testimony of the plaintiff might disclose a claim that unsupported by other evidence would fail to carry conviction as being improbable or otherwise, but yet, *e.g.*, upon the mere production of a single document the improbable becomes credible beyond all doubt; now upon what principle can it be said that the document which effects that legal transformation cannot be regarded as corroboration? I confess I know of none, I have been unable to discover any: the case of *Thompson* v. *Thompson* (1902), 4 O.L.R. 442, is instructive on this point.

MARTIN, J.A.

The proper and binding view of corroboration that we should take is contained in the following extract from the judgment of Chief Justice Taschereau of the Supreme Court of Canada in *McDonald* v. *McDonald* (1903), 33 S.C.R. 145 at p. 152, on a section practically identical in terms:

"The statute does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inferences of fact arising

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from other facts proved, that render it improbable that the fact sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence."

That case was followed in *Thompson* v. *Coulter* (1903), 34 S.C.R. 261, a case on a section of the Ontario Evidence Act, which is identical with ours, and the judgment on it by Mr. Justice Killam was (p. 263):

"In my opinion this enactment demands corroborative evidence of a material character supporting the case to be proved by such 'opposite or interested party' in order to entitle him to a 'verdict, judgment or decision.' Unless it supports that case, it cannot properly be said to 'corroborate.' A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case. The direct testimony of a second witness is unnecessary; the corroboration may be afforded by circumstances. *McDonald* v. *McDonald* [(1903)], 33 S.C.R. 145."

MARTIN, J.A.

Applying these principles I have no hesitation in saying that the case at bar is amply supported by corroborating evidence.

GALLIHER, J.A.: On the first point raised by the appellant, *Sir Charles* directed our attention to the remarks of the learned trial judge in his judgment, wherein he expresses a doubt as to the truth of Mrs. Inglis's evidence and suggests that he might not have believed it had it not been for the evidence of other witnesses given as corroborative. The point urged is that if the main witness is not believed the confirmatory part of the evidence falls to the ground and cites Cockburn, C.J., in *Bessela* v. *Stern* (1877), 2 C.P.D. 265 at p. 271. The words are:

"If the jury do not believe the plaintiff's evidence that there was a contract, the confirmatory part of the evidence falls to the ground."

GALLIHER, J.A.

Here, however, the learned trial judge states in effect that the confirmatory evidence convinces him that the defendants' evidence is true. See also the case of *Radford* v. *Macdonald* (1891), 18 A.R. 167. This, I think, disposes of the objection.

On the second point as to whether the Statute of Frauds intervenes to bar respondents' rights. Where as here, there was no written contract and part performance is relied upon to take it out of the statute, what constitutes such part performance is very fully dealt with in *Maddison* v. *Alderson* (1883), 52 L.J., Q.B. 737; 8 App. Cas. 467. In dealing with the matter the Earl of Selborne, L.C., says at p. 744:

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

And Lord O'Hagan at p. 747:

"'The principle of the cases is,' says Sir William Grant in *Frame* v. *Dawson* [(1807)], 14 Ves. 386, 'that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement, and then parol evidence is admitted to shew what the agreement is.' Then but not till then."

In the case before us the respondents are in possession and have been for some years, and have made improvements. When a stranger is in possession the assumption is that he is there by virtue of some agreement. There can, I think, be no question that here evidence is admissible to shew what that agreement was.

On Christmas Eve, 1910, while she and her family were living in a house on Semlin Drive, out of which they would have to move about the beginning of March, 1911, the defendant Clara Inglis, says her brother W. R. Arnold came there and in conversation said:

"'Clara,' he says, 'this house is too small for you and your family,' he says, 'why not take that house in South Vancouver, you go in and fix it up, and it is yours.'"

In cross-examination she puts it in answer to the question:

"Give me word for word, what he did say? Well, he just said to me, he says, 'Well, Clara, I don't think this house is big enough for you and the children,' and then he says, 'Why not take that house at South Vancouver,' and I said I would think over it."

And again in relating a conversation with W. R. Arnold in March, 1911, in his office, she swears the following took place:

"Well, when I went into the office he says to me, 'Well, Clara,' he says, 'What are you going to do about the house?' 'Well,' I says, 'I don't know,' I said, 'I have not really decided just yet what I am going to do.' 'Well,' he says, 'I think you had better,' he says, 'Just make up your mind,' he says, 'and take that house up there.' He says, 'you go into it,' he says, 'and I will give it to you.' He says, 'you go into it and fix it up,' he says, 'and I will give it to you.' He says, 'don't bother.'"

She further gives evidence as to going into the house in March, 1911, making improvements on same to the amount of five or six hundred dollars, and also at different times between that date and Arnold's decease, asking him to fix up the title to the property and his replying that he would fix it up as soon as he got the title straightened out.

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The going into occupation and the making of improvements would be consistent with two things, either a gift of the property as she claims on condition that she improved the premises and made the house habitable, or a purchase of the property. It seems a little difficult to understand why, if W. R. Arnold intended the property as a gift to his sister, he should make a condition that she finish the house which it was apparent had to be done. I am inclined to the view that if it can be held to be a gift it was a gift without any conditions and the mention of fixing it up was mere incidental conversation as to what was necessary to make it habitable, and that he expected her to do herself. There is this further comment that may be made upon her evidence, and that is, that it is also difficult to understand why she did not at once accept the gift of a property worth $1,400 as it stood, but took some months to make up her mind to do so. I mention these facts not because there may not be an answer to them, but for the bearing they may have when we come to consider what agreement the respondents were actually in possession under, in the light of the evidence and acts of her husband who, according to her evidence, was really managing the matter for her.

GALLIHER, J.A.

With regard to the evidence of James Inglis, the husband, as to what transpired between W. R. Arnold and his wife, I think it is admissible. Arnold at that time was exercising acts of ownership over the property, such as would under the authorities, as I read them, permit its reception under the head of a declaration against interest. The substance of his evidence as to declaration is that he was present at the conversation in March, 1911, between Arnold and his wife, and on that occasion Arnold said if they would go into the house and fix it up the house would become her property. But there is much more to Inglis's evidence and to his statements and acts, which latter are found proved by the learned trial judge, which, as I view them, militate strongly against the attitude the respondents are now taking and which require very careful consideration at the hands of the Court when dealing with the property of a deceased person, and with verbal agreements alleged to have been entered into by him.

James Inglis in his evidence states that about two years before March, 1911, he had been negotiating with W. R. Arnold for the purchase of this same property for $1,400, and that at that time Arnold was acting for the Dominion Trust Company, the then owners. It would appear from the records that the Dominion Trust Company were the owners on June 25th, 1909, as on that date they conveyed to Edna De Mar, who on the same day conveyed to one Rorison. Rorison sold to W. R. Arnold and prepared and signed an agreement dated 15th January, 1911, but which agreement was never signed by Arnold. However, later, on February 2nd, 1912, the deal was completed and a conveyance executed in favour of W. R. Arnold and registered 19th May, 1913.

It is to be noted that the title to this property was on the last above-mentioned date registered in W. R. Arnold's name, and on the 15th of January, 1914, the said Arnold executed a will devising all his property to the plaintiff in trust for the purposes mentioned therein, and this property formed a part of the property so devised. In short, from the time when the property was in Arnold's name and a certificate of title issued to him, until his death on the 12th of October, 1914, and during which period there could be no question of fixing up title, no steps were taken to vest the title in the respondents. The trustees then found this property at Arnold's death registered in his name, and upon requesting delivery of possession they are met with the statement (and this evidence has been accepted by the trial judge) that they had bought and paid for it all but the mortgage of $300 against it. On request to produce some evidence of this purchase and payment, they ignore it, claiming they did not receive the letters. They are telephoned and Inglis is asked to go down but does not do so, claiming that he knew it would have to go to Court to be settled.

GALLIHER, J.A.

When the plaintiff brings action it is met not with this claim that was put up by Inglis, but by an entirely different one, *viz.*, that it was a gift.

Bearing that in mind and assuming that the evidence of Rorison (which shews only a declaration of intention) and of the other witnesses to be admissible, I am, upon consideration

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of the facts I have above set out, and the whole evidence and the acts and attitude of the respondents before action brought, and with deference to contrary views, of the opinion that this appeal should be allowed.

The language of Street, J. in *Cross* v. *Clearly* (1898), 29 Ont. 542, with some slight changes to fit the circumstances of this case, pretty well express my views.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the judgment of MARTIN, J.A.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

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

Solicitor for appellant: *George A. Grant.*
Solicitors for respondents: *MacInnes & Arnold.*

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MAGNUSON v. GRANT.

Assault and battery—Damages—Force used to remove person from premises—Criminal charge dismissed—Criminal Code, Secs. 732, 734 and 783.

MAGNUSON v. GRANT

If the owner of a house asks a person to leave the premises and the person refuses to go, such force as is necessary may be used to remove such person.

APPEAL by defendant from the decision of MURPHY, J. of the 22nd of June, 1920, in an action for damages for assault and battery. The facts are that the plaintiff's boy was in the employ of the defendant cutting shingle-bolts and the plaintiff went to the defendant's house and asked him for $25 of the money due her son. Defendant refused to give the money without the son's order and the plaintiff thereupon became abusive and threatened violence. The defendant then, opening his front door, asked her to leave the house. She refused to go and he took her by the arm and shoved her out, closing the door. The

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plaintiff proceeded to kick the door for two or three minutes and then went away. The plaintiff then swore to an information charging assault and battery against the defendant, which was dismissed by the magistrate. On the trial of this action the plaintiff swore she was struck by the defendant and dragged out of the house. The defendant denied that he struck her but used only such force as was necessary to put her out. In this he was corroborated by his wife. Two doctors who examined the plaintiff swore that her breast and wrist were injured. The learned trial judge found that the defendant did not strike the plaintiff but concluded that more force than was necessary was used and gave damages in $800, and costs. The defendant appealed.

Statement

The appeal was argued at Vancouver on the 2nd of November, 1920, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

McPhillips, K.C., for appellant: The woman came into the plaintiff's house on an unreasonable mission. She refused to go out when requested to do so and my submission is no more force was used in putting her out than was necessary. She pounded on the door before leaving, which shewed her injuries were slight. The charge prior to this case came under section 733 of the Criminal Code. On the question of whether there is now a civil remedy there are two cases: *Hardigan* v. *Graham* (1897), 1 Can. Cr. Cas. 437, which is in my favour, and *Nevills* v. *Ballard, ib.* 434; 28 Ont. 588, which is against me.

Martin, K.C., for respondent: When charged with common assault under section 732 and a certificate issues under section 734, that relieves one from any further civil or criminal action, but section 783 applies to a case of this kind and when a certificate is given it only relieves from further criminal prosecution but not from civil action: see *Clarke* v. *Rutherford* (1901), 2 O.L.R. 206. As to the evidence the learned judge accepts our evidence. Two doctors say the injuries are from ill-treatment.

Argument

McPhillips, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: The only question of importance involved in this appeal is, did defendant use greater force than, in the circumstances, he was justified in using to put the plaintiff out of his (defendant's) house? That he had the right to put her out is not disputed. That she was acting towards him in a most unreasonable, if not violent, manner at the time is quite apparent. Her evidence was not entirely believed by the learned judge. She said defendant had struck her a blow and on this point the learned judge says:

"I am not at all sure that that blow was struck, it may have been; she was grasped by the arm and thrust out, that is what I think happened."

I entirely agree with this finding of fact. There is, I think, no evidence to shew that excessive force was used. The plaintiff refused to go after repeated demands that she should do so. That she resisted, and perhaps violently resisted, is indicated by her own statement in the following words. She said: "He had quite a time to drag me out." The only evidence upon which an inference can be drawn that much force was used is that relating to her injuries. These injuries appear to have been painful but were not of such a nature as to justify the conclusion that more force was used than was necessary to effect her expulsion. The defendant took her by the arm and thrust her out. She might easily suffer in her resistance, a wrench, for which her own resistance was responsible and not defendant's fault. The defendant was engaged in a lawful purpose and the plaintiff was unlawfully resisting him. Now, while he must, as the learned trial judge has said, take some risks in taking the law into his own hands, plaintiff on the other hand must take some risk in resisting. In my opinion she has not made out her case. I would allow the appeal and dismiss the action.

MACDONALD, C.J.A.

GALLIHER, J.A.: With every respect for the views of the learned trial judge, I cannot conclude upon the evidence which I have carefully read throughout that the defendant used unnecessary force in putting the plaintiff out after she had repeatedly refused to go.

GALLIHER, J.A.

I do not wish to comment on the evidence further than to

say that if the injuries the plaintiff complains of were caused by anything that took place that evening, the inference I draw would be that it was by reason of the excited state she allowed herself to get into and that what took place was not sufficient to warrant any such condition.

I would allow the appeal.

MCPHILLIPS, J.A.: The learned trial judge arrived at the conclusion upon the facts that the appellant used more force than was necessary in turning out the respondent, *i.e.*, that the force used was excessive—*Ball* v. *Axten* (1866), 4 F. & F. 1019. The evidence cannot be said to be very satisfactory, yet, I am unable to say that the learned trial judge had no evidence upon which he could reasonably so find and such being the case, I am not of the opinion that the Court of Appeal should reverse this finding (see *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95, Lord Buckmaster, at p. 96).

As to the damages, however, I take a different view, with great respect, to that arrived at by the learned trial judge. I cannot satisfy myself that the serious illness she later suffered from, the effects of which are to some extent still present, can be attributed to her ejection from the house of the appellant. The medical doctor the respondent first consulted was not called to give evidence as to his examination of the respondent, and the later medical opinion, some considerable time after the alleged injuries were suffered, in my opinion, cannot be said to establish any reasonable foundation for the belief that the then state of health of the respondent was at all consequent upon the injuries received at the time of her ejection from the premises of the appellant. A reasonable assessment of damages, as I would view it, would be the fixing of same at $100, and I would so reduce the damages.

MCPHILLIPS, J.A.

EBERTS, J.A. would allow the appeal.

EBERTS, J.A.

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

Solicitors for appellant: *McPhillips & Smith.*
Solicitors for respondent: *Martin, Deacon & Latta.*

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SHAW v. McDONALD.

Trial—Jury—Selected from Grand Jury list instead of Petit Jury list—Mistake by sheriff—Discovery of, after trial—Application for new trial—B.C. Stats. 1913, Cap. 34.

SHAW v. McDONALD

Upon the selecting of jurors by ballot for a trial with a Petit Jury, of which due notice was given to the parties but they did not appear, the sheriff by inadvertence selected the jurors from the Grand Jury list instead of from the Petit Jury list. After the trial (a verdict having been entered for the plaintiff) defendant discovered the sheriff's mistake and moved for a new trial which was refused.

Held, on appeal, that the duties of the sheriff were directory only, that the appellant had not been prejudiced and section 59 of the Jury Act was operative to prevent impeachment of the verdict.

Montreal Street Railway Company v. *Normandin* (1917), A.C. 170 followed.

Per MARTIN, GALLIHER and MCPHILLIPS, JJ.A.: Inquiry not having been made by appellant before the trial, his objections were now too late.

APPEAL by defendant from the decision of MURPHY, J., of the 11th of June, 1920, and the verdict of a jury in an action for damages for slander. The plaintiff who was a physician and surgeon, claimed that the defendant had maliciously defamed him by making the following statement: "Dr. Shaw cut an artery, in the operating-room, and had to send a nurse over to Dr. Carruther's house to have him come to the operating-room, take charge of the case and stop the severe hemorrhage." The notice of trial required that the action be tried by a jury. Notice of the balloting was given but neither party attended. The trial was had and the jury found for the plaintiff, judgment being entered for $1 and costs. It was subsequently found that the sheriff had by mistake chosen the jury from the Grand Jury list instead of the Petit Jury list. A motion by the defendant before the trial judge to set aside the verdict and for directions for a new trial was dismissed.

Statement

The appeal was argued at Vancouver on the 13th and 14th of October, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Brandon, for appellant: I only had 24 hours' notice to attend

the balloting. Discovery of the error was made after the trial. I submit there was no jury: see *Rex* v. *Churton* (1919), 27 B.C. 26; 31 Can. Cr. Cas. 188; *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425; *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170; 86 L.J., P.C. 113; *Trower* v. *Law Life Assurance Society* (1885), 54 L.J., Q.B. 407. As to whether the statute is imperative or directory see Maxwell on Statutes, 6th Ed., 647; *Fairweather* v. *Foster* (1918), 42 D.L.R. 723 at p. 727; *Hoar* v. *Mill* (1816), 4 M. & S. 470; *Empey* v. *Carscallen* (1894), 24 Ont. 658; *Tanaka* v. *Russell* (1902), 9 B.C. 336. The statute is imperative that the jury shall be taken from the Petit Jury list. The fact of our going through the trial makes no difference and having a special jury was a disadvantage: see *Haldane* v. *Beauclerk* (1849), 3 Ex. 658. As to waiver see Halsbury's Laws of England, Vol. 18, p. 252, par. 619. This is a breach of a mandatory rule.

Argument

Killam, for respondent: Once the trial is had and verdict is entered it cannot be set aside: see section 59 of the Jury Act, B.C. Stats. 1913, Cap. 34; *Ross* v. *B.C. Electric Ry. Co., Ltd.* (1900), 7 B.C. 394 at p. 396; *Harris* v. *Dunsmuir* (1902), 9 B.C. 303 at pp. 308-10; *Williams* v. *The Great Western Railway Company* (1858), 28 L.J., Ex. 2; *Brown* v. *Sheppard* (1856), 13 U.C.Q.B. 178. When he has power to object and does not do so he is precluded and the verdict will not be disturbed unless an injustice has been done: see *Lionel Barber & Co.* v. *Deutsche Bank (Berlin) London Agency* (1919), A.C. 304; *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170; 86 L.J., P.C. 113, in which case the list was not drawn according to law but the verdict was sustained. Those who served were all eligible as jurymen and in the *Normandin* case they were not qualified men.

Brandon, in reply: On the distinction between irregularity and nullity see Archbold's Q.B. Practice, 14th Ed., Vol. 1, p. 445.

Cur. adv. vult.

4th January, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The Jury Act, B.C. Stats. 1913, Cap.

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34, Sec. 48, imposes upon the sheriff of the county the duty in respect of a trial by Petit Jury of summoning 18 jurymen, to be selected by ballot in the presence of the parties or of their solicitors from the Petit Jury list, from which the panel of eight jurors shall be drawn to try the action.

The sheriff, by inadvertence, neither party being in attendance at the appointed time, selected the jurors by ballot from the Grand Jury list instead of from the Petit Jury list, and the jury who tried this action were empanelled from said list of grand jurors. The appellant was ignorant of this fact until after the trial and now claims to have the judgment set aside and to have a new trial ordered.

Mr. *Brandon,* appellant's counsel, referred to a number of authorities in support of his motion, but I think it is not necessary to consider the decided cases since, in my opinion, the appeal must be dismissed, in view of section 59 of said Act, which reads as follows:

MACDONALD, C.J.A.

> "No omission to observe the directions in this Act contained, or any of them, as respects the qualification, selection, balloting, and distribution of jurors, the selecting of jury lists, the entry of such list in the proper books, the drafting panels from the jury lists, or the striking of special juries, shall be a ground of impeaching the verdict or judgment rendered in any civil case."

I think that section is broad enough to cover the omission to observe the directions in the Act in respect of the selection or balloting of jurors in question here. That being so, the section is operative to prevent the impeachment of the verdict.

MARTIN, J.A.

MARTIN, J.A.: It is sought to set aside the verdict of the common jury and judgment thereon in favour of the plaintiff as being a nullity because the panel of jurors, 18 in number, was by mistake not "drawn by ballot by the sheriff . . . . . from the Petit Jury list," under section 48 of the Jury Act, Cap. 34 of 1913, which says that "they shall be drawn" in that way, but from the Grand Jury list. The defendant's solicitor was duly notified of the "drawing" by the sheriff but did not avail himself of the opportunity to exercise his right to be present thereat, so unless the mistake of the sheriff amounts to a nullity, and not merely an irregularity, it has been cured by the judgment, because no objection was taken at the trial, owing

we were informed, to the fact that the solicitor did not discover the error till afterwards (though it is admitted he had the full panel of 18 jurors as drafted with names, addresses and descriptions, in his possession at least six days before the trial), which of course is no excuse (if the mistake does not amount to a nullity) because those who seek for or rely upon irregularities must be diligent and vigilant and inquire into them before, and not after, it is too late to remedy them; here the defendant had the opportunity for such inquiry before the trial but neglected to take advantage of it, so cannot now be heard *qua* irregularity—*Cf. Harris* v. *Dunsmuir* (1902), 9 B.C. 303; (1903), 34 S.C.R. 228 at p. 238.

As to nullity, the question turns upon the application of the recent decision of the Privy Council in *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170; and in 86 L.J., P.C. 113, wherein the facts are better stated, and it depends upon whether or no the direction to the sheriff in section 48 is mandatory or directory.

In the *Montreal* case, *supra,* the "very elaborate and minute enactments," as their Lordships describe them, of the statutes of Quebec requiring the annual revision of the jury lists and the subsequent notification thereof by the sheriff to the prothonotary and the revision by the latter of the list deposited in his office, had been ignored for several years, yet from the revised list (of Grand Jurors only) the list for the trial of civil cases drawn from an unrevised and illegal old list which had been in the prothonotary's office for years. It would be difficult to imagine a more complete disregard of fundamental statutory requirements, and it was "contended for the appellants that the consequence is that the trial was *coram non judice* and must be treated as a nullity."

MARTIN, J.A.

After observing that "the statutes contain no enactment as to what is to be the consequence of non-observance of these provisions," their Lordships proceed as follows (pp. 174-5):

"The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected

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in Maxwell on Statutes, 5th Ed., p. 596, and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

Though it cannot be said that the case at bar comes within the first of the above alternative postulations, because no "serious general inconvenience" would result from the "neglect of duty" in question, yet it comes within the second as being an "injustice to persons who have no control over those entrusted with the duty," because the only right the "persons" had here (though a valuable one) was to be present at the drafting by the sheriff and, inferentially, object to any irregularity, "and at the same time [it] would not promote the main object of the Legislature" (to quote their Lordships) to hold null and void the act of the sheriff because the main objects were those three mentioned by their Lordships, all of which were attained in this case. At the most what can be said here is that instead of the parties obtaining a common jury from the Petit Jury list they got one from the Grand Jury list from which special juries are drafted under section 50. Now a special jury, being drafted from the Grand Jury, is of course the superior tribunal, because the Grand Jury "in the eye of the law . . . . occupies a very high position, and, as the grand inquest of the country, is supposed to and should comprise the 'wisest and best' of its residents (*Rex* v. *Spintlum* (1913), 18 B.C. 606 at p. 616; 5 W.W.R. 977; 26 W.L.R. 849; 22 Can. Cr. Cas. 483), and being the superior must be paid for at a higher rate, *viz.*, $32 per day instead of $24, so the result is, in practice, that the parties obtained the benefit of the higher tribunal at the lower rate, in other words, an advantage instead of a detriment." This element is important because their Lordships go on to say (p. 117):

MARTIN, J.A.

"The view taken by Mr. Justice Monet, that he ought not to interfere where the appellant had shewn no prejudice appears very reasonable, and their Lordships are of opinion that it is also in accordance with the authorities."

And further on their Lordships in approving of the case of *Doe d. Ashburnham* v. *Michael* (1851), 16 Q.B. 620; 20 L.J., Q.B. 276, say that it

"shews that while in England the fact of a juryman being open to challenge, discovered after verdict, may be ground for a new trial, yet it is discretionary with the Court to grant it, and it will not do so when it is of opinion that no prejudice has been done. Their Lordships, therefore, are of opinion that the decision of Mr. Justice Monet on the objection to the verdict founded on the omission duly to revise the lists was right."

It is obvious that a litigant is benefited, not prejudiced, by having his case heard by a special and superior tribunal, therefore this case is stronger than the *Montreal* case, *supra,* in this respect. And it is stronger in another important respect, that of the earliest opportunity to object to irregularity and assert rights, because in the *Montreal* case, *supra,* the board of revision, of which the sheriff was president, sat in private, whereas here the parties had the right to be present at the drafting by the sheriff, and in this connection the observation of their Lordships [at p. 117] is most apt, that

"it does far less harm to allow cases tried by a jury formed as this one was, with the opportunities which there would be of objecting to any unqualified man called into the box, to stand good, than to hold the proceedings null and void."

Here not only was there the same opportunity to object to unqualified persons at the trial but also at the initial drafting. Moreover, it must not be overlooked that by section 3 of the Jury Act,

"Unless exempt under or disqualified . . . . every person who is lawfully registered as an elector . . . . shall be qualified and liable to serve as a juror, both on Grand and Petit Juries, and all Courts of civil or criminal jurisdiction holding sittings within the county in which such person resides."

MARTIN, J.A.

And by section 8:

"In each county there shall be Selectors of Jurors whose duty it shall be to select from the last revised registers of voters for electoral districts or portions of electoral districts embraced in the county the requisite number of persons resident in said county to serve as Grand and Petit Jurors for the next succeeding year."

As I said before, the only mistake that was made was the putting of the higher qualified jurors upon the lower panel. So if in the *Montreal* case, *supra,* their Lordships, in spite of the fact that the statute peremptorily required that "the list of jurors must be revised every year," etc. (86 L.J., P.C. at p. 114), and that there had been "serious irregularities in the preliminary proceedings for constituting the jury panel," never-

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theless declined to declare the proceedings null and void, much more should we, I think, decline to do so where there are elements present which were absent in the *Montreal* case, *supra,* bearing in mind that always, as their Lordships point out, "so to hold would not of course, prevent the Courts granting new trials in cases where there was reason to think that a fair trial had not been had."

No suggestion of this kind has been made here, and so it follows that I think the appeal should be dismissed upon the application of the *Montreal* case, *supra.*

But there is a further statutory ground upon which the objection fails, in my opinion, and one which was absent in the *Montreal* case, wherein as has been seen there was "no enactment as to what is to be the consequences of non-observance of these provisions"; I refer to section 59 of the Jury Act, which declares that:

MARTIN, J.A.

"No omission to observe the directions in this Act contained, or any of them, as respects the qualification, selection, balloting, and distribution of jurors, the selecting of jury lists, the entry of such list in the proper books, the drafting panels from the jury lists, or the striking of special juries, shall be a ground of impeaching the verdict or judgment rendered in any civil case."

Now by section 48 the sheriff is required to draft a panel of 18 jurors, and from this panel there are "empanelled" under section 45 the eight jurors who try the case, styled "the trial jurors," in section 48, and who "form a panel for that case," as their Lordships say in the *Montreal* case, p. 116 (86 L.J., P.C.). Thus the very "omission to observe directions in drafting panels," which is complained of, is in terms declared not to be "a ground of impeaching the verdict rendered or judgment" herein, therefore we cannot consider it and the appeal must fail on this ground also.

GALLIHER, J.A.

GALLIHER, J.A.: In *Ross* v. *B.C. Electric Ry. Co., Ltd.* (1900), 7 B.C. 394 at p. 396, it was held by IRVING, J. that the provisions of the Jury Act with reference to the procedure to be followed by the sheriff in summoning a jury are not imperative but directory only. Section 48 of our Jury Act, 1913, provides the manner in which common jurors for the trial of

civil cases shall be summoned, and states they shall be drawn by ballot from the Petit Jury list.

In the case at bar no one being present on behalf of either plaintiff or defendant, the sheriff through inadvertence struck the jury from the Grand Jury list and the case proceeded to trial without this fact being discovered by either party, or at all events by the defendant who is now complaining. A verdict for one dollar was rendered in favour of plaintiff and judgment entered accordingly. The defendant applied to have the judgment set aside on the ground that the jury who tried the action and found the verdict was irregularly and defectively constituted and without jurisdiction. This was refused by MURPHY, J., against which refusal the defendant is appealing to this Court. It is admitted that it was not intended and none of the preliminaries necessary to the having of a special jury were taken. I was inclined to think during the argument that what had been done went to the whole root of the matter and might not be cured by section 59 of our Jury Act, but on a closer analysis of the authorities cited and of section 59, I have come to a different conclusion.

GALLIHER, J.A.

Moreover, it has been laid down in the old Full Court, HUNTER, C.J., DRAKE and MARTIN, JJ., in *Harris* v. *Dunsmuir* (1902), 9 B.C. 303 at p. 308, that it is the duty of the solicitor to ascertain who the jurymen are and to ascertain objections that may exist. And Bramwell, B., in *Williams* v. *The Great Western Railway Company* (1858), 28 L.J., Ex. 2, says, in reply to counsel:

"It was for you to discover it in due time. Those who have the right of challenge must make inquiries with the view to its exercise."

I would dismiss the appeal.

MCPHILLIPS, J.A.: I remain of the same opinion that I formed upon the argument of this appeal. It is not the case of want of jurisdiction. The trial was had with a jury. The learned judge had jurisdiction to hear and determine the case, and either of the parties could demand a jury, and the respondent served the appellant with a copy of the district registrar's appointment, advising that the issues of fact would be tried by a judge with a jury. The appellant claims that he had not

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sufficient notice to enable attendance at the time the sheriff selected the jury.

Upon all the facts, in my opinion, the appellant has, by delay and neglect to attend at the selection of the jurors, precluded any exception being taken to the jury selected and later by no objection taken at the time the jury was empanelled, the jury were rightly entitled to have committed to them by the learned trial judge the questions of fact requiring determination in the case.

It would be destructive of all certainty of procedure to have such belated objections taken and given effect to, the party objecting throughout having failed to take the ordinary steps in the way of scrutiny of the possible jury panel from which the final selection would be made, and after trial and judgment following thereon now insists that all is abortive.

The furthest point that the appellant can press his objection is, that the jury was, in effect, a special jury not a common jury, *i.e.*, drawn from the Grand Jury list. It is difficult to see what prejudice took place, as a matter of fact, it was a matter of advantage as I look at it, in any case no prejudice has been made out by the appellant. The jury merely gave nominal damages, when upon the facts very substantial damages might have been awarded. I cannot persuade myself that anything has occurred in this case which could be said to offend against natural justice requiring this Court, in the interests of justice, to set aside all the proceedings had and direct a new trial, and that not being the situation, the appeal cannot be given effect to. If authority is necessary to support the view that the case is not one calling for a reversal of the judgment and that a new trial be directed, I would refer to *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170; the head-note reads:

MCPHILLIPS, J.A.

"The verdict of a jury in an action will not be set aside on account of irregularities in the due revision of the jury list unless the litigant applying proves that he has been prejudiced thereby.

"The circumstances under which a statutory provision for the performance of a public duty should be treated as being merely directory, considered."

Upon the facts of the present case the duties of the sheriff were directory and the failure to proceed regularly should not be held to affect the judgment recovered by the respondent. I

would in particular call attention to what Sir Arthur Channell said at pp. 176-7 and 178. At p. 176 he said:

"Having regard to the nature of the sheriff's duties and their object, it seems quite unnecessary and wrong to hold that the neglect of them makes the list null and void; and although the prothonotary's neglect, if it had been in the matter of the order of taking the names, might have resulted in a packed jury, the neglect, if there had been any in other matters, would be of the same kind as the sheriff's. It does far less harm to allow cases tried by a jury formed as this one was, with the opportunities there would be to object to any unqualified man called into the box, to stand good, than to hold the proceedings null and void. So to hold would not, of course, prevent the Courts granting new trials in cases where there was reason to think that a fair trial had not been had. The view taken by Monet, J. that he ought not to interfere where the appellant had shewn no prejudice appears very reasonable, and their Lordships are of opinion that it is also in accordance with the authorities."

And at pp. 177 and 178:

"Another case referred to in the argument was *Williams* v. *Great Western Ry. Co.* [(1858)], 3 H. & N. 869 which shews that the omission to challenge, although the facts were not known until after the time for challenge, is not without effect on the rights of the parties, and a comparison of that case with *Doe* v. *Michael* (1851), 16 Q.B. 620 shews that while in England the fact of a juryman being open to challenge, discovered after verdict, may be ground for a new trial, yet it is discretionary with the Court to grant it, and it will not do so when it is of opinion that no prejudice has been done. Their Lordships therefore are of opinion that the decision of Monet, J. on the objection to the verdict founded on the omission duly to revise the lists was right. Counsel for the appellants pressed the Board not to weaken any of the safeguards provided by the Legislature for securing fair and impartial juries, but their Lordships fail to see that the decision of Monet, J. has that effect."

MCPHILLIPS, J.A.

It follows that, in my opinion, the appeal should be dismissed and the judgment entered upon the verdict of the jury should be affirmed.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitor for appellant: *J. S. Brandon.*
Solicitor for respondent: *Cecil Killam.*

MORRISON, J. (At Chambers)

1921

Jan. 5.

PHILIP BOND & CO., LTD. v. CONKEY

PHILIP BOND & COMPANY, LIMITED v. CONKEY.

Summons returnable in less than one day—Order LIV., r. 4—Irregularity only—Order LXX., r. 1—Abridgment of time—Order LXIV., r. 7.

A summons served less than one clear day before the return thereof is not a nullity, but is merely affected with an irregularity which is waived by an appearance on the application at the time fixed by the defective summons.

Statement

ON an application to amend the statement of defence, the summons was served on the 4th of January, 1921, returnable on the 5th of January, 1921. The application came on to be heard on the 5th of January, 1921.

Cosgrove, for plaintiff, took the preliminary objection that one clear day's notice had not been given, as required by Order LIV., r. 4.

Argument

Mayers, for defendant: A summons or notice of motion served less than the requisite number of days before the return is not a nullity, but a mere irregularity, and can, and will be cured by an appearance on the part of the party served. Where a party is served with a summons or notice of motion returnable in less than the requisite number of days, that party has two courses open, either to abstain from attendance, in which case no order can be made, and if made will be at once set aside, or the party served can attend, in which case the summons or notice of motion has fulfilled its object in procuring the presence of the parties before the Court, so that the application will then proceed in the usual way, unless the party served requires an adjournment, which, of course, he could obtain on reasonable grounds at the expense of the party serving him. The same point was decided by the Court of Appeal in England: see *In re McRae* (1883), 25 Ch. D. 16 at p. 19.

Judgment

MORRISON, J.: I am of the opinion that, having attended on the return of the summons, the party served, here the plaintiff, has waived the irregularity of the summons and that I cannot now attend to the objection.

Objection overruled.

BLIGH v. GALLAGHER *ET AL.*

MURPHY, J.

1920

June 24.

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BLIGH v. GALLAGHER

Contract—Promise to devise by will—Death of promisor—Evidence—Corroboration—R.S.B.C. 1911, Cap. 78, Sec. 11—Pleadings—Amendment.

An aged woman was taken into the plaintiff's home and cared for until her death in consideration of a small payment per month and a promise to make a will leaving all her property to the plaintiff with certain small exceptions. The will was made in accordance with the promise, but was later revoked and another will made in favour of her sons. An action for specific performance of the contract was dismissed.

Held, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the promise of deceased to make the will was an enforceable contract, the actual making of the first will, and certain statements by deceased to others as to her promise or intention and the circumstances of the case were sufficiently corroborative of the promise testified to by the plaintiff.

It appearing from the evidence that the executors under the second will realized some $2,077, and disbursed the same with the exception of $800, the plaintiff was allowed to amend her pleadings and claim damages for breach of contract instead of specific performance.

APPEAL by plaintiff from the decision of MURPHY, J., in an action on a contract, tried by him at Vancouver on the 16th of June, 1920, whereby the plaintiff agreed to provide Mrs. Mary Ann Wilson with a room at $5 per month and take care of her in case of illness as long as she lived in consideration for which Mrs. Wilson agreed to make a will of all her property (less funeral and testamentary expenses) in the plaintiff's favour. Mrs. Wilson commenced living with the plaintiff under this arrangement in June, 1917, and continued to do so until her death in March, 1919. Shortly after going to the plaintiff's house she made a will in her favour in accordance with the agreement, but subsequently she made a will in favour of her two sons. The estate amounted to a little over $2,000. Statement

Killam, and *N. R. Fisher*, for plaintiff.

Martin, K.C., for defendant H. W. Wilson.

Beck, K.C., for defendants Gallagher and F. J. Wilson.

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MURPHY, J.: Though the ultimate decision in *Maddison* v. *Alderson* (1883), 52 L.J., Q.B. 737 turned on the doctrine of part performance it is clear, in my opinion, from a perusal of the progress of that case through the Courts, that a contract binding and enforceable by both parties during the lifetime of the testator must be proven if plaintiff is to succeed herein. To utilize and adopt, if I may, the language of Lord O'Hagan in the case cited, if at any time consistently with the proved agreement during the lifetime of the testator she might at her will have terminated the arrangement and if the plaintiff might reciprocally have declined to serve her further and so have prevented the fulfilment of the alleged condition of her promise, which could only have had effect on the continuance of plaintiff's service until the testator died, and if there is no evidence to shew that plaintiff agreed to let deceased have the use of the rooms rent free, I do not clearly see that a bargain so obscure in its terms, so uncertain in its effect, and so doubtful in intention could have been properly enforced. I have had a transcript of the evidence made and carefully perused it, and in my opinion its purport is accurately described in the foregoing language. The record, to my mind, is at least as consistent with the proposition that plaintiff was acting on the expectation that deceased would fulfil her promise, as that there was a

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binding agreement for service for the lifetime of the deceased on plaintiff's part and for making a will in plaintiff's favour on the part of the deceased. Indeed, I would go further and say, in my opinion, plaintiff would have been greatly surprised if for any reason she had terminated the arrangement during the lifetime of the testator, had the testator taken action against plaintiff for breach of contract. If this view is correct, her action must, I think, fail. Nor can she succeed on a *quantum meruit,* which necessarily implies the existence of a binding contract, the only term of which not definitely fixed is remuneration, which on such contract being proved, but only then, can be assessed by a jury or judge acting as such. As stated the record here goes no further, in my opinion, than to shew plaintiff acted on the expectation that deceased would fulfil her

promise to make plaintiff the beneficiary under her will, and this the case cited shews is not a contract. The plaintiff does say the last year's room rent was not paid and it may be she can recover this, but it is not sued for herein and cannot be adjudicated upon on this record, as the question was not raised on the pleadings nor dealt with by counsel on the trial. The action is dismissed with costs to defendant.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 11th of November, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

N. R. Fisher, for appellant: There is a binding contract here. Mrs. Wilson made a will in accordance with the agreement and later made another. The Court can enforce specific performance of the contract: see *Hammersley* v. *Baron de Biel* (1845), 12 Cl. & F. 45 at p. 61; *Raser* v. *McQuade* (1904), 11 B.C. 161; *Synge* v. *Synge* (1894), 1 Q.B. 466 at p. 471; *Dashwood* v. *Jermyn* (1879), 12 Ch. D. 776 at p. 781; *Fitzgerald* v. *Fitzgerald* (1873), 20 Gr. 410; *Kinsey* v. *National Trust* (1904), 15 Man. L.R. 32; *Dillwyn* v. *Llewelyn* (1862), 4 De G.F. & J. 517. There is sufficient corroboration: see *In re Hodgson. Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177; *McDonald* v. *McDonald* (1903), 33 S.C.R. 145. On the question of *quantum meruit* the authorities are collected in Smith's Leading Cases, 12th Ed., Vol. 2, p. 46. If it is held there is no contract, we are entitled to payment for services rendered.

Argument

Martin, K.C., for respondent: As to corroboration I say, first, that the will is not corroboration. The evidence must satisfy the Court that there was a contract under which a will was made. It is not material evidence as the will may be made for other reasons. In the case of *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, it was found there was no contract as here. The Court must find there was a contract and proof of a contract must be corroborated under section 11 of the Evidence Act.

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Fisher, in reply, referred to *Voyer* v. *Lepage* (1914), 8 Alta. L.R. 139 on the question of corroboration.

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MACDONALD, C.J.A.: The contract upon which the plaintiff's claim rests has, I think, been proved, and the plaintiff's evidence has been sufficiently corroborated by other material evidence. Great care must of course be exercised by our Courts to guard the estates of deceased persons against fraudulent claims put forward by persons whose evidence cannot be met by that of the other alleged contracting party. What was a rule of prudence with the Chancery Judges in England has been made a statutory one here. One must therefore scan with a watchful eye what the plaintiff has sworn to and what other witnesses called to corroborate her evidence have sworn to. The effect of the plaintiff's evidence, shortly stated, is as follows:

She was asked under what circumstances the arrangement between her and the deceased was made and said:

"Well, she [the deceased] said she was afraid to be alone and her son had put her out and she wanted to find a place to make a home for the balance of her years."

Plaintiff was not then able to take her and the deceased came back shortly afterwards and again requested to be taken into plaintiff's house. The plaintiff's evidence then proceeds:

"I decided to take her, and she said she had very little ready money, but she would pay me five or six dollars a month or more if she could, and would make her will to me for the balance, for her care, and that was what was agreed upon."

The deceased was provided with a home and care during the balance of her life, about 2 years. She actually made a will in conformity with the promise set out above but before her death and unknown to the plaintiff she revoked the will and bequeathed her property to her two sons. The evidence with regard to the making of the will is important, because it connects the will with the contract and corroborates the plaintiff's story. It is the evidence of George Warton. He said:

"Before the will was made, she [the deceased] often asked me if I would go down with her to make her will, that she had agreed to make a will to

Mrs. Bligh for her keep and home. She wanted to know if I would go with her and act as an executor."

There is other evidence corroborating the evidence of the plaintiff but I do not think it is necessary to refer to it. There is no suggestion in this case of undue influence or want of capacity or of intelligence on the part of the deceased. The learned trial judge appears to have relied very strongly upon language used by Lord O'Hagan in *Maddison* v. *Alderson* (1883), 52 L.J., Q.B. 737. The only question decided in that case was as to whether there had been part performance so as to take the contract out of the Statute of Frauds, a question which does not arise in this case at all, as it was stated by counsel that the statute was not relied upon. Whether that statute could have any application to this case or not I am not called upon to enquire into. True, in the case just mentioned, their Lordships made some observations in regard to the sufficiency of the contract, but these observations are entirely *obiter*; they are entitled nevertheless to very great respect, but the facts of that case were not nearly so favourable to the plaintiff as they are in this case. In this case the plaintiff relies upon a distinct promise to make a will in consideration of the plaintiff taking the deceased into her home, providing her with rooms on payment of very small sums, caring for her for the balance of her years, upon the promise aforesaid to make a will.

What took place cannot, in my opinion, be read as a mere revocable intention to make a gift. It is sufficient in support of her right of action to refer to *Hammersley* v. *Baron de Biel* (1845), 12 Cl. & F. 45. The authority of that case has never been questioned and it has been relied upon in many subsequent cases.

The plaintiff in her statement of claim asked for specific performance of the contract, not for damages for breach of it. No merely technical questions were raised during the argument, the only question argued was as to whether the contract had been made out or not and sufficiently corroborated. I gather from the evidence that the executors under the second will got in the estate which realized some $2,077, and there is an intimation

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in the evidence that this money has been disbursed in some way with the exception of $800. It is therefore evident that specific performance cannot be ordered, even if the property involved were such as to make that the proper remedy. The plaintiff of course is entitled as against the executors to damages to the full value of the property which had been promised her under the first will.

While in terms the statement of claim does not ask for damages for breach of contract, yet all the facts are before the Court, and no objection at all has been taken by counsel in respect of the form in which relief is sought. I would therefore amend the statement of claim and give the plaintiff damages as aforesaid and direct a reference to the district registrar of the Supreme Court at Vancouver to ascertain what deduction should be made from the said sum of $2,077, for debts, funeral and testamentary expenses of deceased over and above the legacies, other than the legacy to the plaintiff mentioned in the first will, and which amount to the sum of $70 and the head-stone $100, which I think I must infer plaintiff assented to having deducted from the property to be devised to her.

MACDONALD, C.J.A.

The plaintiff should have costs here and below and the costs of the reference.

MARTIN, J.A.: In my opinion, with all due respect for the contrary view of the learned trial judge, there is sufficient undisputed evidence to support the contract set up and ample corroboration thereof "by some other material evidence" than that of the plaintiff (as required by section 11 of the Evidence Act, R.S.B.C. 1911, Cap. 78), within the following language of Chief Justice Taschereau in *McDonald* v. *McDonald* (1903), 33 S.C.R. 145 at p. 152, on a section practically identical in terms:

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> "The statute does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the fact sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence."

This decision was followed by the same Court in *Thompson*

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v. *Coulter* (1903), 34 S.C.R. 261, and is referred to in my judgment in the case of *Dominion Trust Co.* v. *Inglis, ante,* at p. 222, in which judgment is being given today.

The appeal therefore should be allowed, and I agree with the Chief Justice in the amendment to the prayer and in the form of the judgment to be pronounced, and also that in the circumstances the executors should not get their costs out of the estate, though no order should be made against them.

GALLIHER, J.A.: In this case I am unhesitatingly of the opinion that the appeal should be allowed.

I refrain from passing any strictures upon the fact that we find an old woman, 68 years of age, and subject to epileptic fits, practically on the street without a home, though one of her sons with whom she had lived resided in Vancouver, not knowing what may have led to such a condition. However, be that as it may, while in that condition the deceased came to the home of the plaintiff and, as the plaintiff alleges, entered into an agreement with her by which the deceased was to have two rooms at $6 per month, to have a home with her during her life and when her misfortune overtook her, was to be properly cared for, in consideration of which the deceased would make a will in favour of the plaintiff, which, with the exception of the reservations in the will, was to leave the plaintiff the entire estate of the deceased at her death.

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Such will was duly made and attested in or about the month of November or December, 1917. This is sworn to by the plaintiff herself and corroborated by the evidence of defendant Gallagher, who took the instructions and drew the will and saw to its execution in proper and legal form, and who was named one of the executors, as well as by the witness Warton, who was also named an executor. It is suggested that this will was not drawn in pursuance of any agreement, but I do not think it requires any stretch of imagination in this case, to conclude that it was so drawn, rather than that it was a mere whim to bequeath her property to a stranger who was kind to her. But fortunately, we are not without evidence in that regard. There is first the condition of the deceased without a home and sub-

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ject to the infirmity mentioned; there is the evidence of the plaintiff herself, and there is in corroboration the evidence of Warton, in these words:

"Well, before the will was made, she [meaning the deceased] often asked me if I would go down with her to make her will, that she had agreed to make a will to Mrs. Bligh for her keep and home."

And Mrs. Burns said:

"She said any one that looked after her in her last days, they were to have all that was left after her funeral expenses were paid."

And again:

"She said, she spoke of Mrs. Bligh and said that she had arranged everything, that if anything happened to her at any time Mrs. Bligh would have everything."

This evidence of Mrs. Burns is not as direct as that of the witness Warton, but fits in with the evidence of the plaintiff to some extent. Moreover, there is the proved fact that a will was actually executed in the terms of the alleged agreement, although not stating that it was in pursuance of any agreement, and this is in itself a circumstance to be taken into consideration.

After all, it is for the Court to decide, after making all due and proper allowance and observing all safeguards thrown around claims against the property of a deceased person, to determine what evidence is sufficient to warrant them in maintaining any such claim, and in my opinion that onus has been discharged by the plaintiff.

GALLIHER, J.A.

Some months after making the will referred to, the deceased, while still an inmate of plaintiff's home, make another will revoking the will in favour of the plaintiff, but continued to live with and be cared for by the plaintiff up to the time of her death. This will was also prepared by the defendant Gallagher who with one of the sons of the deceased, was named executor and such last-mentioned will was duly probated. The plaintiff knew nothing about this subsequent will until told by the sons a day or two after the funeral, who informed the plaintiff that she could do nothing but that she had better send in a bill for expenses, which she did, believing she had no other remedy. This was not even paid although, to use the words of the sons as stated in the evidence: "Why," they said, "it certainly is an awful state of affairs, but never mind sister, we will see you paid."

The will in favour of the plaintiff could not be produced. Gallagher had delivered it to the deceased, but had at the time taken a copy which was either destroyed or mislaid and could not be found, and the original itself, if it still existed, was borne away by the sons in the trunk of the deceased after the funeral. That such a will was executed, however, is not in dispute. Now, if the will was executed in pursuance of that agreement (and I so find), there is an enforceable contract which cannot be set aside or rendered nugatory by a subsequent will. The learned trial judge relied upon the authority of *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; 52 L.J., Q.B. 737. On the facts of that case their Lordships were inclined to the view that no contract had been established, but assuming that there was such a contract there was no part performance unequivocally referrable to a contract so as to exclude the operation of the Statute of Frauds.

In the case at bar, I have already stated that the evidence is sufficient to establish a contract. The Statute of Frauds, although pleaded, was not argued or insisted on before us.

The estate of the deceased consisted of two mortgages on real estate which have since been paid off, the defendant Gallagher as one of the executors having received the moneys, amounting in all to $2,077.11.

As specific performance cannot be decreed under the circumstances, and as the evidence discloses that breach of contract is the proper remedy, we should, I think, amend the pleadings to conform to the evidence.

There should be judgment against the executors for the value of the estate which came into their hands, less all proper deductions, and a reference to the registrar to take the accounts.

The appeal should be allowed.

MCPHILLIPS, J.A.: I am of the opinion that Mr. Justice MURPHY arrived at the right conclusion and the appeal should be dismissed. The onus was upon the appellant to establish an enforceable contract, and that onus was not discharged. In *In re Fickus* (1899), 69 L.J., Ch. 161 at p. 163, Cozens-Hardy, J. (afterwards M.R.) said:

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"A mere representation that the writer intends to do something in the future is not, though the person to whom it is made relies upon it, sufficient to entitle that person to obtain specific performance or damages. There must be a contract in order to entitle the party to obtain any relief. This seems to me to result from the judgments of the House of Lords in *Hammersley* v. *De Biel* [(1845)], 12 Cl. & F. 45; *Jorden* v. *Money* [(1852)], 21 L.J., Ch. 531, 893; 15 Beav. 372; 2 De G.M. & G. 318; 5 H.L.C. 185; and *Maddison* v. *Alderson* [(1883)], 52 L.J., Q.B. 737; [(1854)], 23 L.J., Ch. 865; 8 App. Cas. 467."

In *Ungley* v. *Ungley* (1877), 46 L.J., Ch. 854, Jessel, M.R. said:

"Now, as to the facts; and before dealing with them I make this preliminary observation, that the decision of the judge, who has had the advantage of seeing the witnesses and hearing the evidence, ought not to be lightly overruled, and the case should be an exceptional one to induce the Court of Appeal to interfere with the view he has taken of the evidence. I do not say that the Court of Appeal should never do so, but a strong case must be shewn to justify such interference."

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Fisher & Johannson.*

Solicitors for respondents Gallagher and F. J. Wilson: *A. E. Beck.*

Solicitor for respondent H. W. Wilson: *Joseph Martin.*

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Trusts and trustees—Banks and banking—Debtor and creditor—Output of manufacturer hypothecated to bank—Outside loans secured by portion of proceeds on bank's approval—Trusteeship of bank—Liability.

The R. Company, manufacturers of pulp, had hypothecated all its output to the defendant Bank to secure its overdraft. The H. M. Company made a loan of $50,000 to the R. Company upon receiving a letter from them that "In consideration of your advancing to us $50,000 we will give you our note . . . . and by way of security we undertake to pay you $10 per ton from the proceeds of each ton of pulp manufactured and sold by us . . . . until the amount advanced, with interest, is fully repaid. In any event the full amount of said advance to be repaid within one year from date. It is understood that our bankers . . . . to whom all our output is hypothecated . . . . has full knowledge of this arrangement and approves of it and will waive security to that extent," which letter was marked "approved by the bank." Later the H. M. Company assigned the loan to the plaintiff. The overdraft in the Bank was credited with the sum borrowed and the proceeds from the sale of pulp continued to be deposited in the Bank. After monthly payments had been made for five months under the agreement the Bank refused to further honour the company's cheques in favour of the plaintiff who brought action. It was *held* by the trial judge that the approval by the Bank was a specific undertaking to see that the payment of the $10 per ton was carried out and that the Bank with that object in view consented to honour the company's cheques as issued, and was trustee for such sums as might be found due in an accounting in that respect.

Held, on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that the defendant Bank being the holder of the fund created by the whole proceeds is liable to account to the plaintiff therefor to the extent of $10 per ton.

APPEAL by defendant from the decision of MORRISON, J. in an action tried by him at Vancouver on the 25th of February, and 3rd of August, 1920, for moneys had and received by the defendant for the use of the plaintiff under an agreement of the 13th of May, 1918, made between the Rainy River Pulp & Paper Company and the Holley-Mason Hardware Co., and approved by the defendant, of which agreement the plaintiff was assignee under an assignment of the 10th of March, 1919, from the Holley-Mason Hardware Co. of which the defendant

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Bank was duly notified; also for an accounting of all moneys received by the Bank for the use of the plaintiff. The facts relevant to the issue are sufficiently set out in the judgment of the learned trial judge.

Lennie, and *J. A. Clark,* for plaintiff.
E. A. Lucas, for defendant.

5th August, 1920.

MORRISON, J.: The Rainy River Pulp & Paper Company at the times material to the issues herein manufactured kraft pulp and had as its bankers the Standard Bank of Canada, Vancouver, the defendant herein, to which it was indebted in large sums and to which it had hypothecated the whole product and output of its commodity. The Rainy River Company sought and obtained a loan of $50,000 from the Holley-Mason Hardware Company of Spokane upon receiving the following letter:

"In consideration of your advancing us $50,000, we will give you our note, payable on demand, for the amount, with interest at the rate of seven (7%) per cent., and by way of security, we undertake to pay you $10 per ton from the proceeds of each ton of pulp manufactured and sold by us from the first of June, 1918, until the amount advanced, with interest, is fully repaid. In any event, the full amount of said advance to be repaid within one (1) year from date.

"It is understood that our Bankers, the Standard Bank of Canada, to which all our output is hypothecated for advances from time to time, has full knowledge of this arrangement and approves of it, and will waive its security to that extent.

"Approved:
"Standard Bank of Canada,
"Vancouver, B.C., J. C. Perkins, Manager."

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Pursuant to the terms of this agreement certain sums were paid by the Rainy River Company by cheques on the defendant Bank. On the 10th of March, 1919, the company assigned to the plaintiff this agreement, and in due course upon refusal of the defendant Bank to further honour the company's cheques in favour of the assignee pursuant to his interpretation of the said agreement, this suit was brought seeking the payment of $8,440 and to declare the defendant a trustee for the plaintiff in respect of the said sum, and an accounting. The point of the case urged upon me at the trial is as to the true intent and

meaning of this agreement and of its approval by the Bank. The Rainy River Company was engaged solely in the manufacture of kraft pulp and the defendant Bank had hypothecated to it the whole of its products and output, the only asset, I take it, upon which it could give security. At the date of the agreement the company owed the Bank some $100,000. The $50,000 received from the plaintiff's assignor was deposited in the defendant Bank and subjected to the usual exigencies of business between the Bank and its client. The only way in which security for the $50,000 loan could be provided by the company was with the approval of the Bank, which now contends in paragraph 3 of the statement of defence, supported by Mr. *Lucas's* very closely worded argument, that in approving of the agent in question it did not approve of the loan of $50,000 by the Holley-Mason Company to the Rainy River Company, but only of the rate at which the Rainy River Company proposed to repay the said loan. Assuming the defendant had the power under the Bank Act to associate itself in this way with a liability of its client, which point is not raised in the pleadings, then, having regard to the relationship existing between the Rainy River Company and the Bank, I interpret the approval by the Bank as a specific undertaking to see at least that the payment of the $10 per ton was carried out, and, with that object in view, consented to honour the company's cheques as issued. Mr. Perkins, the manager, seemingly did so during his incumbence, and it was not until Mr. Sutherland, the new manager, as a measure, it may be, of abundant caution, refused to continue doing so, that the Bank's view of the transaction was disclosed. It was entirely a matter for the Bank's consideration as to whether the state of the company's account with them and the range and prospect of its business justified an approval of this kind. The step was not obligatory. The Holley-Mason Company, as a business concern, were looking for adequate security, and the only security available was held by the Bank. As regards at any rate the payment of the $10 a ton, the Bank stepped into the shoes of the Rainy River Company and in my opinion are trustees for such sums as may be found due in an accounting in that respect.

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From this decision the defendant appealed. The appeal was argued at Vancouver on the 27th of October, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

E. A. Lucas, for appellant: For five months the cheques in favour of the Holley-Mason Company were paid from the Rainy River Company's account, but the Rainy River Company drew against the account for other payments to an amount that exceeded the receipts from the sale of pulp-wood, and the burden of paying the instalments to Finucane fell solely on the Bank. It was the duty of the Rainy River Company to see that sufficient was left from each month's assets in the account to make these monthly payments, but this was entirely neglected and the Bank was justified in refusing the cheques for December, 1918, and the following January. All we did was to waive our security on the output, we are not directly liable, but the learned judge held that we were. There is no debt or trust by the Bank. In order to establish the Bank as trustee the Bank must have the estate of the company. The account, which was a current account, was always overdrawn.

Argument

Davis, K.C. (*J. A. Clark,* with him), for respondent: At the time of the loan from the Holley-Mason Company the Rainy River Company was indebted to the Bank for $120,000 and by reason of the loan this was reduced to $71,000. The Bank received the company's moneys when paid for pulp-wood sold, there being an equitable assignment of said moneys to the Bank, and if these moneys were paid away they are responsible. On the 28th of January, 1919, the Rainy River Company assigned to John Elliot for the benefit of its creditors. There was a good equitable assignment to the Bank: see *In re Irving. Ex parte Brett* (1877), 7 Ch. D. 419; *Greet* v. *Citizens' Ins. Company* (1879), 27 Gr. 121. They are liable because they are the holders of the fund: *Burn* v. *Carvalho* (1834), 1 A. & E. 883; (1835), 4 N. & M. 889. It is entirely hypothecated to the Bank: see *Trunkfield* v. *Proctor* (1901), 2 O.L.R. 326 at p. 334. As to assignment of a chose in action arising in the future see *Rodick* v. *Gandell* (1849), 12 Beav. 325; *Wil-*

liam Brandt's Sons & Co. v. *Dunlop Rubber Company* (1905), A.C. 454; Kehoe's Choses in Action, pp. 58-9; *Adams* v. *Craig* (1911), 24 O.L.R. 490 at p. 502. The word "approved" in the letter to the Holley-Mason Company must be read as meaning "ratifying and co-operating with the carrying out of the agreement."

Lucas, in reply, referred to Warren on Choses in Action, pp. 27 and 81-2.

Cur. adv. vult.

4th January, 1921.

MACDONALD, C.J.A.: I entertain no doubt whatever of the soundness of the judgment and would therefore dismiss the appeal.

MARTIN, J.A.: In my opinion the result of the written agreement in question is that $10 of the proceeds of each ton of pulp were set apart for and became the property of the Holley-Mason Hardware Company, and the defendant Bank being the holder of the fund created by the whole proceeds is liable to account to the plaintiff therefor to that extent, just as it would be liable to account to the full extent if the whole proceeds had been similarly set apart, and so the judgment below should be affirmed.

GALLIHER, J.A.: I entertained no doubt at the close of the argument of the correctness of the learned trial judge's findings. As the case was reserved I have taken the trouble to read the evidence and look into the authorities cited, which confirm me in my original view.

The appeal should be dismissed.

MCPHILLIPS, J.A.: This appeal involves the determination as to whether there is any contractual or other obligation enforceable in law as against the appellant the Bank at the suit of the respondent the assignee of the Holley-Mason Hardware Co. of Spokane, Washington, U.S.A.

The facts shew that the Rainy River Pulp & Paper Company was a customer of the Bank at the City of Vancouver, and in

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the course of the company's business hypothecated to the Bank its entire product and output of kraft pulp as security for advances made. It would appear that the company was in need of more money than its line of credit with the Bank admitted of and borrowed $50,000 from the Holley-Mason Hardware Company. The Bank, though, was in no way a party to this borrowing, save that the Bank was made aware of it and the then manager of the Bank at Vancouver signified his knowledge and approval of the fact of the borrowing. The advance of the $50,000 was acknowledged by the Rainy River Pulp & Paper Company by a writing reading as follows, and the approval of the manager of the Bank, it will be seen, was written at the foot thereof: [already set out in the judgment of the learned trial judge.]

It would appear that in ordinary course the $50,000 received by this borrowing was deposited by the Rainy River Pulp & Paper Company to its credit in its current account with the Bank, but with no arrangement made with the Bank whatever as to its disposition, that is, it was like any ordinary deposit carried to the company's credit by the Bank and drawn against without any interposition of the Bank, that is, the Bank never at any time undertook to scrutinize or control, nor was it at liberty to do so by any agreement with its customer, its free right to carry on its business as it saw fit.

The benefit of the agreement above set forth as entered into by the Rainy River Pulp & Paper Co. with the Holley-Mason Hardware Co., was assigned to the respondent on the 10th of March, 1919, and express notice of the assignment was given to the Bank on the 26th of June, 1919. It would further appear that during the months of July, August, September and October, 1918, before the assignment to the respondent, the Holley-Mason Hardware Co. was paid in the ordinary course of business in compliance with the agreement above set forth without any interposition upon the part of the Bank at all, amounts which represented the sum of $10 per ton for each ton of pulp manufactured during that time, but no further payments would appear to have been made.

The learned trial judge gave judgment against the Bank for

the sum of $7,240. The reasons for judgment of the learned trial judge read as follows: [see *ante*, pp. 252-3.]

The contention of the respondent upon this appeal is that the learned trial judge was right in his conclusion that liability rests upon the Bank to pay the amount due in respect of the agreement so assigned to him. Upon the argument it was submitted that what took place amounted to (as set forth in the learned trial judge's reasons for judgment) "a specific undertaking to see at least that the payment of the $10 per ton was carried out and the Bank, with that object in view, consented to honour the company's cheques as issued," and further on as we have seen in the reasons for judgment, "as regards the payment of the $10 a ton, the Bank stepped into the shoes of the Rainy River Company, and in my opinion are trustees for such sums as may be found due in an accounting in that respect." With great respect to the learned trial judge and to all contrary opinion, I cannot come to any such conclusion as that arrived at by the learned judge. I see no writing, facts or circumstances that can at all warrant the imposition of liability upon the Bank by reason merely of its signification of its approval of the borrowing without more. How can it be said that the Bank is under any contractual obligation to pay the money or as trustee for the respondent to recover the money and pay it to the respondent? In effect, a surety or guarantor that the money would be paid out of the proceeds of each ton of pulp manufactured and sold by the Rainy River Pulp & Paper Company. This contention, and not to be wondered at, is strenuously combatted by the Bank.

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It is well at this point to note that the evidence shews that the payments that were made in respect of the agreement by the Rainy River Pulp & Paper Company with the Holley-Mason Hardware Co., assigned to the respondent, were made without any interference on the part of the Bank, the Bank in no way enforcing or exercising its security. The fallacy pressed and persisted in in the argument, in the learned trial judge's judgment, is this, the finding of liability upon the Bank to the respondent without even a scintilla of foundation therefor. Where is the contract and where can be found any con-

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sideration for a contract that the Bank would be insurers of payment to the respondent of the moneys that would become due and payable? The Bank, it is true, had security upon the pulp but because the Bank had security was it obligated to enforce it? The answer must be in the negative. The Bank in all that it did merely waived 10 per cent. of its security, thereby relieving its customer to that extent, *i.e.*, instead of paying or being called upon to account to the Bank for the 100 per cent. of the proceeds from the pulp, the Rainy River Pulp & Paper Company could only be required to pay or account for 90 per cent. thereof. This situation, though, never could be held to be one of requirement upon the part of the Bank to enforce its security upon each and every occasion upon which there was a sale of the pulp and collect the 100 per cent., or any portion of the moneys, that would be a matter of business discretion resting with the Bank. Further, the Bank's security stood reduced to 90 per cent., and it could not have enforced the security to the extent of 100 per cent. It cannot but be idle contention to advance any such argument, that once the Bank had approved of the agreement it was thereafter incumbent upon the Bank to enforce its security and collect the 90 per cent. or the 10 per cent., which the Rainy River Pulp & Paper Company had obligated itself to pay. If necessity requires any elucidation of this point (plain to demonstration already), it can be well illustrated by shewing what was agreed to, what was done, and the course of conduct of the parties to the agreement, which is always a good way of determining what contract was entered into.

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It will be noticed that in the agreement (the letter of the Rainy River Company to the Holley-Mason Company of May 13th, 1918), the contractual obligation is that of the Rainy River Company to do what "we [the Rainy River Company] undertake to pay you [Holley-Mason Co.] $10 per ton from the proceeds of each ton of pulp manufactured and sold by us from the first of June, 1918, until the amount advanced, with interest, is fully repaid. In any event, the full amount of said advance to be repaid within one (1) year from date." Then further on: "Our bankers, the Sandard Bank of Canada,

to which all our output is hypothecated for advances from time to time, has full knowledge of this arrangement and approves of it, and will waive its security to that extent," *i.e.*, to the extent of $10 per ton. Then because the Bank by its manager, signifies its approval of this, forsooth there arises the formidable nemesis of the law, and the Bank by accommodating its customer and its customer's creditor by waiving its security in part, has become the principal debtor, the surety or the trustee for the respondent, the assignee under the agreement, and is contractually liable to discharge the debt, although the Bank has no fund out of which to pay the moneys. Apart from all other considerations, even if it could be looked at as an equitable assignment, which it is not (see *Galt et al.* v. *Smith* (1888), 1 Terr. L.R. 129, where it was held, "that the order in conjunction with the other documents, could not operate as an equitable assignment, because the evidence did not shew that the company either were debtors to B. or held a specific fund to which he was entitled"), so far as the Bank is concerned there was no fund out of which the moneys were to be paid. (Also see *Percival* v. *Dunn* (1885), 29 Ch. D. 128; 54 L.J., Ch. 570). In the present case the Bank was not the debtor of the Rainy River Company or the Holley-Mason Co., nor did the Bank hold a specific fund then existent or to be later acquired to which the Rainy River Company or the Holley-Mason Co. were or would be entitled. In *Galt et al.* v. *Smith, supra,* Wetmore, J. (afterwards C.J.), at pp. 134-5 said, and it is peculiarly applicable to the present case:

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"Now, does this case under consideration come within either of the rules laid down by Lord Truro? [*Nodrick* v. *Gandell* (1852), 1 De G.M. & G. 763]. In the first place does it come within the definition of 'an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor?' I think it does not. The Hudson's Bay Co. owed no money to Bull [here the Bank owed no money to the Rainy River Co.], and held no fund belonging to him or out of which he was to be paid."

The Rainy River Company paid the moneys that were paid in respect of the agreement in the ordinary course of business, the Bank not enforcing its security.

The following was the letter advising the Holley-Mason Company of what the Rainy River Company had done by resolution

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with respect to the borrowing of the $50,000, and note at the end thereof, "to give us security therefor and to repay the same at the rate of $10 per ton on all the pulp manufactured and sold commencing June 1st, 1918":

"This is to advise you that at a meeting duly called and held by the board of directors of the Rainy River Pulp & Paper Co., held at the office of the Company, 222 Standard Bank Building, Vancouver, B.C., on Wednesday, April the 24th, 1918, at 11.00 a.m., a resolution was properly moved and seconded, and unanimously carried, authorizing the Rainy River Pulp & Paper Co., to negotiate and secure a loan from your Company in the amount of Fifty Thousand ($50,000) Dollars, and to give as security therefor, and to repay same at the rate of $10 per ton on all of the pulp manufactured and sold commencing June 1st, 1918."

The effect of the above was to give to the Holley-Mason Co. a direct security to the extent of $10 per ton, and the Bank made this possible and allowed it to be done. The query might well be, why was not the security enforced? The attempt now is to make the Bank liable for the respondent's neglect to enforce a security which the Bank by waiving its security to that extent rendered possible.

The Bank never received the moneys, the proceeds from the pulp under its security. The circumstance that all such moneys were paid in in the ordinary course of business by deposit by the Rainy River Company to its credit in its current account with the Bank, cannot be said to be the receipt of the moneys by the Bank under its security. The deposits were not earmarked in any way, the Bank was not a party to the payments in or the withdrawals, the moneys went in as all other moneys and were drawn out as all other moneys were, and when the customer's account was not in funds the Bank refused payment of cheques of the Rainy River Company. That amongst the cheques dishonoured there were cheques given by the Rainy River Company in payment of moneys due in respect of the agreement and borrowing of the $50,000 is not a matter of moment to the Bank. Such happenings can in no way impose any liability upon the Bank. It had not agreed to pay these or any other cheques of its customer; it was obligated only to pay cheques when there were funds out of which they could be paid, and it was not the duty of the Bank to scrutinize the business of the customer and apprise itself as to whether the

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customer was making payments in pursuance of the agreement —it had undertaken no such responsibility. Further, it is to be noted that as contemplated by the agreement a promissory note was given for the $50,000 borrowed and the indorsements thereon shew the various payments made in ordinary course by the Rainy River Company without the interposition of the Bank. Clearly the Rainy River Company dealt with the Holley-Mason Co. quite apart from the Bank and this punctuates the position of things, that the Bank had in no way assumed or undertaken any liability in the matter of this borrowing of $50,000—the promissory note and indorsements thereon read as follows: [after setting them out his Lordship proceeded.]

Then we have the correspondence throughout between the Rainy River Company and the Holley-Mason Co. relative to payments and delays in payments, and throughout all the time the Bank is not called in or made a party to any of the payments, in fact throughout, the Bank, save as to its "approval" given was not consulted or dealt with in respect of this indebtedness between the Rainy River Company and the Holley-Mason Co., and this is not to be wondered at, as it had nothing to do with the repayment of the moneys and no liability in respect thereof in law or in equity.

The following letters well indicate the course of procedure between the companies and that the Bank was not dealt with or looked into in respect of the loan of $50,000, the Bank's position merely being that it had waived its security to the extent of $10 per ton:

"December 13th, 1918.

"Rainy River Pulp & Paper Co.,
"Standard Bank Building,
Vancouver, B.C.

"Gentlemen:

"Kindly send us check upon receipt of this letter as per agreement of $10 per ton on pulp manufactured and sold during the month of November. We also note in your agreement that the Standard Bank of Canada waive their security to that extent. We therefore would be pleased to receive at your earliest convenience, a report on tonnage manufactured and sold since we made you the advance of $50,000; and oblige.

"Yours respectfully,
"HOLLEY-MASON HARDWARE COMPANY,
"E. D. Thompson,
"Sec'y & Treas."

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"Dec. 16th, 1918.

"Holley-Mason Hardware Co.,
"Spokane, Wash.

"Dear Sirs:

"We are in receipt of your letter of December 13th and in reply thereto we enclose you our statement of production for November, together with our cheque for $2,635.28.

"Our previous monthly reports have given you the amount of our production, and the amount of our payment on loan per month, but for your convenience we append herewith a summary of past statements:

"Month	Production	Repayment of loan.
"June	204 tons	$2,040.00
"July	205 "	2,050.00
"August	282 "	2,820.00
"September	236 "	2,360.00
"October	246 "	2,460.00
"November	236 "	2,360.00
Total	1,409 "	$14,090.00

"This shews to you that we have repaid the sum of $14,090, and trust this is the information you require.

"Yours very truly."

The Rainy River Company in the end got into financial difficulties and became insolvent and on the 28th of January, 1919, made an assignment pursuant to the Creditors' Trust Deeds Act, 1901, and it appears that the Bank is a creditor for a large amount and throughout all the time in the carrying on of its business, and loans made independent even of the loan of the $50,000 from the Holley-Mason Co., the Rainy River Company's liability to the Bank increased. The Bank did not receive in payment of indebtedness due to it by the Rainy River Company, any of the moneys so borrowed—the customer carried on business in ordinary course and all the moneys were deposited in current account and were checked against in ordinary course.

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The insolvency having ensued then and for the first time the position is taken up that the Bank is directly liable to the respondent, it being put forward, as will be seen by the following letter written by the solicitors for the respondent to the Bank, that the Bank "undertook to pay to the said Holley-Mason Hardware Company, $10 per ton from the proceeds of each ton of pulp manufactured and sold." The letter reads as follows:

"We beg to advise you that by indenture dated the 10th day of March, A.D. 1919, the Holley-Mason Hardware Company of Spokane, Washington,

assigned to Francis J. Finucane of the same place all moneys due or to become due from you to it under the agreement dated the 13th day of May, A.D. 1918, between the Rainy River Pulp & Paper Company and the said Holley-Mason Hardware Company, approved by you, whereby you undertook to pay to the said Holley-Mason Hardware Company $10 per ton from the proceeds of each ton of pulp manufactured and sold by the Rainy River Pulp & Paper Company from the 1st day of June, A.D. 1918, until the sum of $50,000, bearing interest at the rate of 7% per annum loaned by the Holley-Mason Hardware Company to the Rainy River Pulp & Paper Company had been fully repaid.

"We are instructed that you have received from the proceeds of pulp manufactured by this company a tonnage which, at the rate above mentioned, would entitle our client to receive the sum of $8,440 from you, and we have to request that you will make payment of this amount, or such amount as you have received for the use of our client forthwith."

The evidence does not establish the receipt by the Bank of one dollar in respect of the agreement referred to in the above letter. As before pointed out the circumstance that the moneys derived from the sales of the pulp were deposited in ordinary course to the credit of the Rainy River Company in its current account with the Bank means nothing. It was not the receipt of moneys by the Bank in respect of the agreement, these moneys were wholly at the command of the customer, the depositor, and the Bank in ordinary course paid out these moneys upon the customer's cheques, and the Bank was under obligation to do this. The moneys were not ear-marked in any way in being paid in or in being paid out, and the Bank was under no contractual obligation to the Holley-Mason Co. or the respondent to enforce its security. The Bank's security in any case stood reduced to 90 per cent. and the Holley-Mason Company's security existed as to 10 per cent. (the security the respondent is now the assignee of). What prevented the enforcement of that security? I am quite unable to follow the submission made by the learned counsel for the respondent, that the liability rests upon the Bank and that the judgment can be supported. In my opinion the judgment is wrong and should be set aside. In support of the judgment the learned counsel for the respondent relied upon the following, amongst other cases: *In re Irving. Ex parte Brett* (1877), 7 Ch. D. 419. That was a case, though, of an express agreement. There could be no doubt in such a case and, with deference, I cannot

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see its application to the present case. In justice to the learned counsel for the respondent, he frankly admitted that the liability contended for could have been better expressed. My difficulty is to see where it is expressed at all. *Burn* v. *Carvalho* (1839), 4 Myl. & Cr. 690. That was a case of the passing of title in goods and it was held that there was a good title in equity to the goods, but here there is no such transaction or element. In my opinion the case of *Malcolm* v. *Scott* (1850), 3 Mac. & G. 29; 87 R.R. 1 is one that is helpful in determining the question we have to decide, and it is favourable to the appellant. The present case has not the elements of an equitable assignment and the only question is whether the Bank entered into a legal contract with the Holley-Mason Co. I have already said that I fail to see where any legal contract is shewn.

There was no fund in the present case out of which the moneys could have been paid and if the Bank had even enforced its security it would have only been able to enforce it to the extent of 90 per cent. of the security, and to that extent the moneys would have been the moneys of the Bank, not the moneys of the respondent.

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I cannot see the applicability of *Rodick* v. *Gandell* (1849), 12 Beav. 325; (1852), 1 De G. M. & G. 763. If helpful at all in the present case, it is favourable to the appellant. Here there is no distinct promise or agreement to apply a fund in any particular manner, nor any fund existent or required to be subsequently acquired or got in. Then as to *Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1905), A.C. 454, I cannot see its application. The principle governing equitable assignment is, of course, in this case, well and ably defined, but where in the present case was there any right in the Bank to receive this $10 per ton from the Rainy River Company for the Holley-Mason Co., or any contractual obligation that it would enforce its security and get in a fund out of which the payment would be made?

Further, this is disregarding what I have before pointed out, that the Holley-Mason Co. had been given its security by agreement and resolution of the Rainy River Company absolutely

independently of the Bank, the Bank waiving its security to the extent of 10 per cent. to admit of the Rainy River Company doing this, then it rested with the Holley-Mason Co. to implement that security, if it thought fit. I cannot see that there is any analogy between the present case and *Adams* v. *Craig* (1911), 24 O.L.R. 490 at p. 502. This is not the case of the Bank taking and dealing with the pulp with the knowledge of the interest of the Holley-Mason Co. and being liable to account to the extent of the respondent's interest therein—the security was not enforced and no moneys were received by the Bank. The proceeds of the sale of the pulp were received by the Rainy River Company and it was the plain meaning of the whole transaction that the Bank should stand aside and waive its security to the extent of the 10 per cent., but there was no other contractual obligation either in law or in equity.

The following language of Lord Truro, L.C. in *Malcolm* v. *Scott, supra,* at pp. 50-1 is peculiarly applicable to the facts of the present case:

"This case, therefore, now comes on for further direction, and it seems to me to be clear from Lord Cottenham's judgment, that he expressly determined that the correspondence raised no case of equitable assignment, and that the only equity of the plaintiff was to have an account taken, if the defendants had entered into a legal contract with the plaintiff . . . . The result of the action decided that, in point of law, no contract was proved by the correspondence against the defendants, and I think that decision leaves no equity in the plaintiff to be administered, and, therefore, that the bill should be dismissed."

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No contract, in my opinion, has been established in the present case against the Bank, therefore it follows, if I am right in this, that there is no equity left in the respondent as in the *Malcolm* case. Here, as in the *Malcolm* case, as stated by the Lord Chancellor, it was argued that

"independently of the question of contract, the correspondence operated as an equitable assignment, but I repeat that, after full consideration, I am satisfied that Lord Cottenham intended to, and, in fact did, decide that the plaintiff had no cause of equitable assignment . . . . . but I think it right to add, as I have heard the question of equitable assignment fully argued and have considered it, that if I were called upon to decide the question, I entirely concur in the opinion expressed by Lord Cottenham."

The position was simply one, well known in law, of debtor and creditor as between the Bank and the Rainy River Company and there was no relationship between the Bank and its

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customer or the Holley-Mason Co. of trustee and *cestui que trust* (*Robarts* v. *Tucker* (1851), 16 Q.B. 560 at p. 575; 83 R.R. 601, *per* Alderson, B.; *Foley* v. *Hill* (1848), 2 H.L. Cas. 28; *National Bank* v. *Insurance Co.* (1881), 104 U.S. 54; *Marten* v. *Rocke, Eyton, and Co.* (1885), 53 L.T. 946; *McMahon* v. *Fetherstonhaugh* (1895), 1 I.R. 83; *Mutton* v. *Peat* (1899), 2 Ch. 556; *London and Canadian Loan and Agency Company* v. *Duggan* (1893), A.C. 506), and I cannot accede to the contention that there existed any trusteeship in the Bank, coupled with an obligation to get in the moneys payable to the Holley-Mason Company from the proceeds of the sale of the pulp; there was no contract upon the part of the Bank to do this, nor was there the legal right to do this in the Bank; the Bank could only have enforced its security to the extent of the 90 per cent. and failing action by way of enforcement of the Bank's security and that of the Holley-Mason Company, it followed that the Rainy River Company was at liberty to collect in the moneys derived from the sales made of the pulp and disburse the moneys as thought fit, and that is what did occur.

In the present case it is clear that the Holley-Mason Co. was desirous that the Bank should release its security to the extent of 10 per cent. and thereby enable it to obtain that security, and relied for payment upon this security which it took from the Rainy River Company along with the demand note, but failure ensuing, now the attempt is to saddle the liability upon the Bank, a most unconscionable proceeding when the facts shew that the Bank did not enforce its security or receive any of the moneys being the proceeds from the sales of pulp, its customer dealing with the moneys, as it was entitled to do in the ordinary course of business. It is the duty of the Bank to cash its customer's cheques if the customer has sufficient moneys and the Bank is liable for breach of contract if it fails in this: *Foster* v. *The Bank of London* (1862), 3 F. & F. 214; *Carew* v. *Duckworth* (1869), 38 L.J., Ex. 149; *Margetti* v. *Williams* (1830), 1 B. & Ad. 415; 35 R.R. 329; *Rolin* v. *Steward* (1854), 14 C.B. 595; 98 R.R. 774.

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Further, it is to be noted that the Holley-Mason Co. did not advance the contention it now makes, *i.e.*, the liability of the

Bank until after the insolvency of the Rainy River Company. (See *Thomson* v. *Clydesdale Bank, Limited* (1893), A.C. 282 at p. 287; *London Joint Stock Bank* v. *Simmons* (1892), A.C. 201; *Earl of Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333; *Union Bank of Australia* v. *Murray-Aynsley* (1898), A.C. 693; *Bank of New South Wales* v. *Goulburn Valley Butter Company Proprietary* (1902), A.C. 543; *Coleman* v. *Bucks and Oxon Union Bank* (1897), 2 Ch. 243).

I fail to see upon the whole case that any equitable assignment or any contractual obligation has been established imposing liability on the Bank in favour of the Holley-Mason Co. or the respondent, or that the Bank was a trustee for the Holley-Mason Co. or the respondent, or owed any duty to the Holley-Mason Co. or the respondent, therefore it follows, in my opinion, that the judgment is wrong and should be set aside and the action dismissed, that is, the appeal should be allowed.

EBERTS, J.A.: I formed my opinion at the hearing of the appeal, as to the correctness of the judgment of the learned trial judge in this case, and would therefore dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Lucas, Lucas & Richmond.*
Solicitors for respondent: *Lennie, Clark & Hooper.*

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA, WATT AND WATT v. THE CORPORATION OF THE DISTRICT OF SAANICH.

Highways—Trees on right of way—Cut by municipality—Rights of adjoining landowner—B.C. Stats. 1914, Cap. 52, Secs. 332-3.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* CORPORATION OF SAANICH

The plaintiff was the owner of land adjoining a highway the soil and freehold of which were under section 332-3 of the Municipal Act in the Crown and the possession thereof in the defendant municipality.

Held, that an action is not maintainable by the landowner for damages for the cutting by the municipality of trees on the highway.

Held, further, MARTIN, J.A. dissenting, that a claim for damages for trees cut which stood wholly or partially on the plaintiff's land should be dismissed as it appeared from the evidence that they were cut with the plaintiff's consent.

APPEAL by plaintiffs from the decision of MORRISON, J., of the 19th of July, 1920, in an action for a declaration that the defendant unlawfully entered upon certain lands and that they had no right to cut or remove the timber thereon, for an injunction, and for damages. In 1891, the plaintiff Watt purchased 100 acres of land, being sections 79 and 80, Lake District, Vancouver Island, and the deed was put in his wife's name. In 1917, Mrs. Watt conveyed 31.95 acres of this land to her husband. The original grant from the Crown contained a proviso reserving the right of the Crown to resume any part of the lands (not exceeding one-twentieth of the whole) for roads, etc., and in 1898 the Government reserved sufficient land to run the road in question through section 80. The land reserved slightly exceeded the one-twentieth portion allowed under the original grant from the Crown, for which Watt was then paid by the Government. The road allowance was 66 feet wide and a narrow portion in the middle was cleared for road purposes, the timber remaining on each side of the road allowance. The land in question being within the defendant Municipality, the Municipal Council passed a resolution in 1919 (no by-law being passed) that the timber along the road allowance be cut for the purpose of clearing it and that it should be cut

Statement

into cord-wood and used as fire-wood for the municipal schools. From the evidence it appeared that one tree on the plaintiffs' land and one standing on the boundary of the road allowance were cut and a certain amount of the timber fell on the plaintiffs' land, the fence being broken in places. The learned trial judge dismissed the action.

The appeal was argued at Vancouver on the 7th and 8th of October, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Mayers, for appellants: No by-law was passed, but the reeve, wanting fire-wood for the schools, cut the timber on the road allowance on each side of the cleared portion; only a resolution was passed by the Council. First, assuming the Council could cut when properly authorized, without such authorization they were in no better position to cut the timber than any other individual; secondly, there was an expenditure for cutting not authorized to which we have a right to complain; thirdly, at least one of the plaintiffs' trees was cut and many trees fell on our property and damaged the fences, the cutting up of the logs on our property being a trespass. They must pass a by-law: see *Bailey* v. *City of Victoria* (1920), 60 S.C.R. 38 at pp. 56 and 61; *King's Asbestos Mines* v. *Municipality of Thetford* (1909), 41 S.C.R. 585 at p. 592; *John Mackay and Company* v. *Toronto City Corporation* (1920), A.C. 208 at p. 214; *Croft* v. *The Town Council of Peterborough* (1856), 5 U.C.C.P. 141 at pp. 149 and 154. An adjoining proprietor has a qualified interest; he has the right to have the *status quo* maintained until removed by proper authority: see *L'Hussier* v. *Brosseau* (1901), 20 Que. S.C. 170; *City of Victoria* v. *MacKay* (1918), 56 S.C.R. 524. Municipal funds have been spent in a manner not authorized: see *Dundee Harbour Trustees* v. *D. & J. Nicol* (1915), A.C. 550. Next, there was a direct trespass on our property. At least one tree was cut on our property, the wood was cut up on it, and the fences were broken: see *Holder* v. *Coates* (1827), M. & M. 112.

Argument

Harold B. Robertson, for respondent: When you have a high-

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way already in existence they can proceed without a by-law. Watt must shew he has a material interest, in fact he has no more interest than he would have in the case of a private individual adjoining: *Hodgins* v. *City of Toronto* (1892), 19 A.R. 537. As to bringing an action against a corporation see *Elworthy* v. *Victoria* (1896), 5 B.C. 123 at p. 126. The Attorney-General only can bring an action: see Odgers's Common Law of England, 2nd Ed., 240-1; *Corporation of Oak Bay* v. *Gardner* (1914), 19 B.C. 391. We did not authorize the men doing the work to go off the road allowance: see *Bolingbroke* v. *Swindon Local Board* (1874), L.R. 9 C.P. 575. *Holder* v. *Coates* (1827), M. & M. 112 is in our favour as we say the tree started to grow on the road allowance and in any case was hanging over the highway, a right of action as to this being trivial. We have a right to pass a by-law and the Court will not make a futile order: see *Turner* v. *Ringwood Highway Board* (1870), L.R. 9 Eq. 418.

Argument

Mayers, in reply: We have a right of action irrespective of the Attorney-General: see *Boyce* v. *Paddington Borough Council* (1903), 1 Ch. 109 at p. 113; *Campbell* v. *Paddington Borough Council* (1911), 27 T.L.R. 232.

Cur. adv. vult.

4th January, 1921.

MACDONALD, C.J.A.

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

MARTIN, J.A.

MARTIN, J.A.: This is an action for damages for the cutting of certain trees and for trespass. There are two branches of the claim, the first being that certain timber, trees of natural growth, which stood upon the side of the highway (the West Saanich road) between the travelled portion thereof and the boundary of the plaintiffs Watts's adjoining land were unlawfully cut down by the defendant Corporation, and it is claimed that the said Watts have such a special interest therein that they can maintain an action for the damage done to their property by the destruction of said trees. It appears from the evidence that the trees were of a very large and fine kind and formed a beautiful natural avenue, and I have no doubt that the allegation is justified that their destruction did directly

injure the plaintiffs' property to an appreciable extent and at least to the amount claimed, $500. But it is objected that as under sections 332-3 of the Municipal Act, B.C. Stats. 1914, Cap. 52, the title of the "soil and freehold" of this public highway (which includes the trees—*Hodgins* v. *City of Toronto* (1892), 19 A.R. 537 at p. 548) is vested in the Crown and its "possession" (saving certain exceptions) for the public use is vested in the defendant, therefore the plaintiffs, other than the Attorney-General, have no *status* to maintain the action. So far as the Attorney-General is concerned the position is as peculiar as it is undesirable that it should recur, which arises from the fact that the order adding him as a party directs that "he is hereby added as a party plaintiff in this action subject to the terms and in accordance with [his] letter of the 23rd of March, 1920," which letter is as follows:

"The consent of the Attorney-General to be added as a party plaintiff to this action was granted to enable your client to bring the matter in dispute before the Courts. With regard to your client's claim for a declaration that the highway in question is not a highway within the meaning of the Highway Act, I understand from you that you abandon this contention.

"With regard to any claim your client may make for an injunction to restrain the Corporation from removing trees or timber on the highway, and for any claim your client makes for an accounting for timber already removed (if any) you of course understand that the Attorney-General as a plaintiff does not seek such an injunction, nor does the Crown through the Attorney-General make any claim for an accounting or compensation for removal of trees or timber."

MARTIN, J.A.

This sort of a conditional order should not, in my opinion, have been made because every party should be wholly upon the record or not at all, and the result of it is as embarrassing as it is unprecedented. But since there has been no appeal from it and the plaintiff has accepted and gone down to trial upon it, there is no way now of curing the matter, and it must be dealt with as it stands. Its effect is, I take it, that as to any claim for trees cut upon the highway the Watts must stand upon their own rights unassisted by the Crown, and viewing the matter in that light I have, after a careful consideration of the cases cited and others, reached the conclusion that they have no such special property in the trees upon the highway as will enable them to maintain that branch of this action.

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The case of *Douglas* v. *Fox* (1880), 31 U.C.C.P. 140, is an instructive one upon the point, wherein the plaintiff succeeded because of certain special provisions in the Ontario Act, which, as Mr. Justice Osler put it, "conferred upon him a special property, and interest in the trees beyond that which the general public enjoy therein," but there are no corresponding sections in our Act. The plaintiffs' counsel relied upon the somewhat similar Quebec case of *L'Hussier* v. *Brosseau* (1901), 20 Que. S.C. 170, which is founded upon *Beauchamp* v. *Cite de Montreal* (1891), M.L.R. 7 S.C. 382, a consideration of which shews that it is based upon the planting of a shade tree "in accordance with the by-laws and regulations of said defendant then in force," whereby the tree "became and was an accessory to said lot, and that plaintiff was entitled to the use and enjoyment thereof, so long as it was not required for purposes of public utility by said defendant corporation."

This view of the acquisition of a special interest, because of planting and care with the consent of the municipality has been adopted by the Supreme Court of South Dakota in *Lovejoy* v. *Campbell* (1902), 92 N.W. 24, but that element is wholly wanting here.

Though the case of *Hodgins* v. *City of Toronto, supra,* is based like *Douglas* v. *Fox, supra,* which it considers at p. 551 (19 A.R.), upon special statutory provisions, yet at p. 550 Mr. Justice Maclennan, speaking of the adjacent proprietor, says:

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> "In the absence of a by-law making The Tree Planting Act applicable, he has no more title to or interest in the trees than any other citizen, and I do not see how he can support an action for their destruction or injury."

In the case at bar, as the property in the trees is in the Crown it also has the power of preserving and protecting them subject to the "possessive" right of the Municipality by lawful procedure and acts to remove obstructions to convenient and safe travel and traffic, and to preserve or improve the roads as may be reasonable and necessary and abate nuisances in that connection, as to which see *Gilchrist* v. *Corporation of Township of Carden* (1876), 26 U.C.C.P. 1. The fact that the title is in the Crown excludes the *ad medium filum viæ* rule, which was applied in favour of the adjacent owner in *O'Connor*

v. *The Nova Scotia Telephone Company* (1893), 22 S.C.R. 276.

This first branch of the action therefore fails, and it remains to consider the second, relating to cutting of trees upon the plaintiffs' land and to damage to fences, etc., as regards which I may say that after scrutinizing the evidence I can only reach the conclusion that in view of the arrangement which the learned trial judge must have found was made with Verdier, the man who did the cutting, the plaintiffs have only one ground of complaint left open, *viz.*, that of the cutting of the large forest tree (fir) without permission (as was admitted), which stood upon the boundary of the road and plaintiffs' land; the trunk of which was five feet in diameter. According to Watt four feet of the trunk stood upon his land and one foot upon the highway; according to the defendant's engineer only one foot was on Watt's land, but a land surveyor, Merston, called by Watt, testified that the boundary line passed through the centre of the stump and I accept his evidence, though the exact measurements are not vital because it is admitted that the trunk of the tree stands partly upon both properties and it is therefore a line or border or boundary tree, as such trees are termed. The defendant seeks to justify this cutting by the authority of *Holder* v. *Coates* (1827), M. & M. 112 (31 R.R. 724), but, in my opinion, that case has no application, because there the trunk of the tree stood wholly upon the land of one party and the question was as to the extension of the roots into the land of the other party and the priority of sowing and planting. But here as it is admitted that the trunk stands partly upon each property then the two landowners are tenants in common of the tree, and it was held in *Waterman* v. *Soper* (1698), 1 Ld. Raym. 737:

MARTIN, J.A.

> "Two tenants in common of a tree, and one cuts the whole tree; though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting; as where one tenant in common destroys the whole flight of pigeons."

The decisions on the point are conveniently collected in Gray's Cases on Property, Vol. 1, p. 543, *sub. tit.* "Border Trees," and after an examination thereof I am of opinion that the law is well stated at p. 552 in *Griffin* v. *Bixby* (1841), 12 N.H. 454 [37 Am. Dec. 225 at p. 227], wherein it is stated:

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"Without going to the extent of the ruling in Lord Raymond, we are of opinion that a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other."

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That decision was followed by the Supreme Court of New York in the instructive case of *Dubois* v. *Beaver* (1862), 82 Am. Dec. 326.

As to damage that ought to be awarded for this wrongful cutting we are left somewhat in doubt (probably because the plaintiffs' counsel was discouraged by the learned trial judge from pursuing that subject), but the plaintiff swears that the tree would have produced 14 to 15 cords of wood, which the defendant's clerk says are worth $6 a cord delivered, so the plaintiffs would be entitled to half the profit thereon, at least, and there would be also the damage suffered in being deprived of its shade and "as a matter of ornament," as it is put in *Douglas* v. *Fox, supra*; moreover, punitive damages might well be given for persisting in such a wanton trespass after repeated protests and objections by the plaintiffs and assertions of their rights, especially in regard to great trees which cannot be replaced, of the same size, under probably three centuries, at least.

MARTIN, J.A.

All these elements must be taken into consideration, and, in my opinion, the lowest sum that should be awarded is $75. The appeal therefore should be allowed with costs.

GALLIHER, J.A.

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

McPHILLIPS, J.A.: In my opinion this appeal must fail. The learned trial judge has not given any reasons indicating the grounds upon which he dismissed the action, save the following:

MCPHILLIPS, J.A.

"At the trial I formed the impression that had an engineer been requested to go over the ground in question, and report as to the exact boundaries and the extent of the work done and where, in all probability this action would never have been brought. I postponed delivering my judgment in the hope that the parties would get together. I have now been urged to hand down judgment. The action is dismissed."

It is evident, though, upon the facts as adduced at the trial, that the learned judge was satisfied that there had been mis-

understanding of the exact boundaries of the highway and that this had given rise to the litigation. However, be that as it may, the evidence shews—and the evidence is that of the Provincial Land Surveyor called by the appellant Watt (Merston)—that the alleged trespass was indeed of a trifling nature, considering all the facts and circumstances, one tree only being cut, wholly on the land of the plaintiffs, the other tree being partly on the highway and partly on the land of the appellant, John Watt, all the other trees cut being admittedly upon the highway. Then as to the tree wholly upon the land of the appellant John Watt, it was really a windfall, so that it was not in fact the cutting down of a tree but the cutting up of a tree already down. Then as to the tree partly upon the highway and partly upon the land of the appellants. The tree was in diameter about five feet, as to four feet thereof, it was upon the highway, one foot only being upon the land of the appellants, and it was leaning over the highway. Now the tree cutting was done under the authority of the respondent by one Verdier, and in the doing of the work Verdier and the appellant John Watt came together, and according to Verdier, Watt admitted that the tree partly on his land should rightly be deemed as upon the highway, which was certainly reasonable, all things considered.

MCPHILLIPS, J.A.

Then as to the tree which was a windfall, or as it is called by Verdier "the long tree stub," wholly upon the land of the appellants, Verdier said he had the permission of Watt to cut it up. It would appear that only three trees cut upon the highway fell upon the land of the appellants, and according to Verdier there was permission to do this from Watt. In consideration for this, Verdier was to cut some wood for him, which he did, namely, 20 ricks of wood. Verdier denied that in felling the trees he broke down the appellant John Watt's fence, his statement is that he took down the fence before felling the trees, and after felling the trees put the fence up again in as good a condition as it was before. When the evidence is well weighed it is reasonable to come to the conclusion that there was leave and licence, never revoked (*Wood* v. *Leadbitter* (1845), 13 M. & W. 838; 67 R.R. 831), to do all the

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appellant John Watt complains of and brings this action for. It is true that Watt denies this, but the learned trial judge had evidence before him upon which he could reasonably so find, and he had an advantage we have not, of observing the demeanour of the witnesses. There is the highest authority for not disturbing a judgment upon the facts (*Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326; *Union Bank of Canada* v. *McHugh* (1911), 44 S.C.R. 473 at p. 492; *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96; *McIlwee* v. *Foley Bros.* (1919), 1 W.W.R. 403 at p. 407). But apart from the facts, the law would not support any action against the respondent for the cutting down of the trees upon the highway; the fee in the highway is in the Crown (the cases in England and other jurisdictions, where the trees upon the highway and the soil under the highway is the property of the adjacent owners (1 Rol. Abr. 392, letter B, pp. 1, 2; *Turner* v. *Ringwood Highway Board* (1870), L.R. 9 Eq. 418; *Goodtitle ex demiff Chester* v. *Akler and Elmes* (1757), 1 Burr. 133; 97 E.R. 231, are inapplicable), and the Crown expressly disclaims any right of recovery of any damages consequent upon the cutting down of the trees, and I fail to see that any cause of action has been established in the appellant Watt for the cutting down of the trees upon the highway adjoining or abutting upon his land. The respondent is by statute entitled to the possession of the highway, it is in public use, and the respondent, the road authority, in the exercise of its corporate powers was entitled to be in control thereof and was exercising its duty in all that it did, was ensuring the stability of the highway and providing for the safety of the travelling public.

Many points of law were dealt with by the learned counsel from both sides in very elaborate arguments, which I, with deference, do not consider require detailed attention, especially in view of the way I look at the facts of the case, but in coming to my conclusion in the present case, I do not wish it to be understood that an injunction might not, in a proper case, be obtainable in a properly constituted action to restrain the inter-

ference with ornamental trees upon the highway or trees of historic or other value not obstructing the highway or endangering the public thereon, but that is not this case. It follows that my opinion is that the judgment should be affirmed and the appeal dismissed.

EBERTS, J.A. would dismiss the appeal.

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

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

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

NIMMO v. ADAMS *ET AL.*

Will—Codicil—Inconsistent with will — Construction — Surrounding circumstances—Consideration of in aid of construction—Specific legacy.

A testator bequeathed her house and furniture to her daughter G. and the residue of her estate to two executors, which included the carrying on at their discretion a certain business of which the testatrix was a two-thirds owner, and out of such residue of her estate to pay certain sums and "to divide my . . . . . interest in the said business or what remains thereof . . . . . one-third thereof to my grandson W. . . . . and the balance thereof to my daughter G." There was then a provision as to the division of certain company shares and a residuary devise in favour of G. Subsequently the testatrix conveyed by deed to G. her residence and furnishings and gave her certain sums of money. Later by codicil the testatrix revoked the bequest to W. of the portion of her interest in the business and charged her interest in the business with the sum of $1,000 in favour of a certain daughter and further provided "after such payment I give . . . . . the whole of my . . . . . interest remaining in the said business . . . . . to my son F. and my grandson W. . . . . in equal shares," in all other respects confirming her will.

Held, that by the codicil the bequest to W. of the one-third share of testatrix's interest in the business was revoked and in lieu thereof W. and

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F. were given her entire interest in the business to the exclusion of G. and subject only to the bequest of $1,000; notwithstanding the fact that this construction might result in revoking or rendering impossible of performance other dispositions in the original will not so treated in the codicil; that the Court was entitled to consider "the surrounding circumstances" at the time of the execution of the codicil in case of any ambiguity which was thereby removed; that the gift to W. and F. was a specific legacy (subject to the right of said legatee of $1,000) and therefore the beneficiaries named in the will other than W. and F. had no right to intervene or seek any redress in connection with the business.

ACTION for the winding-up of a business and for an account to be taken of the receipts and disposition of the effects of the business by certain of the defendants. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Victoria on the 27th of May, and the 18th of November, 1920.

Statement

Maclean, K.C., and *Higgins, K.C.*, for plaintiff.
Sir C. H. Tupper, K.C., and *Bass*, for defendant.

10th February, 1921.

MACDONALD, J.: Minerva Tabor Marvin, while living at Los Angeles, Calif., and being, at the time, possessed of valuable real and personal property, made her will on the 4th of June, 1912. By such will, she gave her house and furniture to her daughter Grace and, then, devised and bequeathed the balance of her estate to Frank F. Hedges of Victoria, B.C., and William J. Nimmo of Los Angeles, Calif., as executors, expressing a desire that they should act jointly, but giving power to each, if they should prefer, to act alone in their respective countries. The will provided, *inter alia*, that the executors should take and hold the rest and residue of the estate for the following purposes, uses and trusts:

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"(a) To enter into possession thereof and manage the same for all and singular the purposes in this will set out, and to that end to carry on and permit to be carried on, as they or the survivor thereof may, or shall, in their, or his, sole discretion think well, the business now carried on in the said City of Victoria under the name, style or firm of 'E. B. Marvin & Co.' (of which business I am two-thirds owner) and not to wind up the said business, or dispose of my interest therein, until and unless said executors, or said survivor thereof, think well and necessary in the interest of my estate.

"(b) And out of such rest and residue of my estate (1) to pay to my daughter, Laura Maria Stratton, wife of J. A. Stratton, of the City of Seattle, State of Washington, one of the United States of America, the sum of Five Hundred Dollars ($500); and (2) to pay to my son Frank, the sum of One Hundred Dollars ($100); and (3) to pay to my son-in-law, the said J. A. Stratton the sum of Seven Thousand Dollars ($7,000), to be by him taken and held in trust to invest same and to pay the interest and income thereof, after the same shall be received by him, to Florence Marvin, who has been brought up with my family, during the term of her natural life, free from the control or disposition in any way of any husband she may have, and upon her decease to divide such principal money, Seven Thousand Dollars ($7,000) and accrued interest amongst her then living children, if any there be, and if none, then equally between the then living children, if any, of my grandson, Walter, and if there then be none such children living, then to divide such sum and accrued interest equally between my then living children share and share alike.

"(c) To divide my two-thirds interest in the said business, or what remains thereof, and all accumulation thereof unto me belonging, one-third thereof to my grandson, Walter Edward Adams, and balance thereof to my said daughter Grace."

There was then a provision, as to the division of the shares held by Mrs. Marvin in a Sealing Company, and a residuary devise in favour of her daughter Grace. In the event, however, of her decease, during the lifetime of the testatrix, the residue was to be divided equally between the then living children of her son Frank. This will was immediately placed in the custody of Mr. Nimmo, the plaintiff, and remained in his possession until after Mrs. Marvin's death. Shortly, after the making of such will, plaintiff in his letter states, that

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"Mrs. Marvin conveyed by deed to her daughter Grace Adams, the residence with all its furnishings, known and situate as 2151 West 20th Street, Los Angeles, California, and about the same time gave to Grace certain sums of money, which comprised all of her estate in California."

I am satisfied, that this course was pursued, instead of allowing the will to operate in due time. It was largely through affection, but may have been actuated, partly, as a precaution on the part of Mrs. Marvin and to safeguard her California property against any liability that might possibly arise out of her connection with the business of E. B. Marvin & Co. This may be reasonably inferred from letters of Mr. Hedges, one of the executors, who was then, and remained for some years, the bookkeeper, and trusted employee, of such firm. Be that as

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it may, her sole remaining property, after such disposition, was situate in British Columbia. She returned to this Province for a visit in July, 1916, and on the 25th of July of that year, by a codicil, varied her will, and dealt more especially with her interest in such business, as follows:

"I HEREBY REVOKE the bequest made in my said will to my grandson, Walter Edward Adams, of a portion of my interest and share in the business and firm of E. B. Marvin & Co. of the City of Victoria, in the Province of British Columbia, Dominion of Canada. I charge my said share and interest in the said business and firm of E. B. Marvin & Company with the sum of one thousand ($1,000) dollars to be paid by the said firm to my Executors and Trustees, and I give, devise and bequeath the said sum of one thousand ($1,000) dollars so received by my Executors and Trustees, to my adopted child, Florence Marvin, for her sole and separate use absolutely. After such payment, I give devise and bequeath the whole of my share and interest remaining in the said business and firm of E. B. Marvin & Company to my son Frank Woodman Adams, and my grandson, Walter Edward Adams, both of the City of Victoria aforesaid, in equal shares. In all other respects I do confirm my said last Will and Testament."

These two documents together constituted the last will of Mrs. Marvin and expressed her intention, as to the disposition of the property of which she might be possessed at the time of her death. This occurred on the 30th of January, 1917, and probate of her will was granted in due course in both California and British Columbia; Frank H. Hedges, up to the time of his death on the 1st of July, 1919, as one of the executors, acted alone in British Columbia, with respect to the estate of the deceased. The business of E. B. Marvin & Co., in which the deceased had a two-thirds interest, continued to be carried on during this period without any objection or interference on the part of the plaintiff, as an executor of such will or otherwise. W. B. Monteith, a chartered accountant, gave evidence as to investigating the books of the business and shewed the extent of withdrawals by all parties interested from 1912 to 1919. He stated that he understood, and it was apparent from the books, that, in 1917, after the will of Mrs. Marvin had been probated, Hedges eliminated the Marvin estate from consideration, as being no longer interested in the business. In other words, that, while the firm name of "E. B. Marvin & Co." was retained, that the two-thirds interest held by Mrs.

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Marvin in such firm, was treated as having, by the terms of the will, become vested in her son and grandson and that they were the solely interested partners in such business. This was also the belief entertained by Grace Marvin, after she read the codicil, and is expressed in a letter to her brother Frank, on the 19th of March, 1917, complaining of the treatment that would thus be meted out to her adopted sister Florence, as follows:

"I know positively that mother intended to leave the amount Seven Thousand Dollars ($7,000) mentioned in her will to Florence and had she understood that there was not sufficient residue in the remainder of the estate to make up that Seven Thousand Dollars, she would never have made the codicil giving you and Walter the business."

In this letter she also refers to the desirability of the doctor's fees and funeral expenses being paid by E. B. Marvin & Co. promptly, and that such disbursements "can be refunded to them out of any residue of the estate." She was, by so writing, not destroying any right she might really possess, still it is noteworthy that she was not asserting any interest in or control over the business, but practically admitting that such payments by the firm, were entirely at the option of her brother.

In January, 1920, following the death of Frank F. Hedges, the plaintiff, as the surviving executor under the will, without any previous demand, commenced this action, seeking to have the firm of E. B. Marvin & Co. wound up and an account taken of the dealings by the then defendants with the property of such firm. Such defendants contended that the business should not be wound up nor should they be called upon to give such an account, on the ground that the whole business belonged to them under the terms of the will and that, in any event, it was being carried on in accordance with the provisions of the will, and it was not in the interests of the estate that it should be interfered with or wound up. Since the commencement of the action, the defendant Frank W. Adams has died and the defendant Walter E. Adams, as the surviving partner, claims, in addition, the right to continue the business for the purpose of realizing the partnership property. Plaintiff, while seeking such redress, did not allege any grounds necessitating immediate action on account of the partnership assets being affected.

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The defendants admitted in their statement of defence, and now, since the decease of his father, during the action, the defendant W. E. Adams, admits, that the two-thirds interest in the business was subject to the payment of $1,000 to Florence Marvin, the adopted child of Mrs. Marvin. With this exception, he contends, that all of Mrs. Marvin's interest in the business of E. B. Marvin & Co. had been devised and bequeathed to his father and himself and is now his sole property.

While the statement of claim does not raise any question as to the construction to be placed upon the original will, coupled with the codicil, still, it appeared by the defence and became fully developed during the trial, that such construction was requisite in order to ascertain the rights of the parties. Any difficulty as to beneficiaries who might be interested not being before the Court, was overcome by Grace Adams, Laura Stratton (*nee* Adams) and Florence Marvin, the adopted child, requesting through their counsel, to be represented at the trial. An order was then made adding them as parties, and their rights were thus protected. They appeared at the trial and their contentions have been outlined in argument submitted on their behalf.

Judgment

The point to be decided is, whether by the terms of the codicil, the bequest made by Mrs. Marvin to her grandson, Walter Adams, of a one-third share of her interest in the business of E. B. Marvin & Co. was revoked, and whether in lieu thereof, he, and his father, were given her entire two-thirds interest to the exclusion of the daughter Grace and subject only to the bequest of $1,000 to Florence Marvin. I think the wording of the codicil, when read with the original will, bears such a construction and that it is the proper interpretation of the intention of Mrs. Marvin with respect to her interest. I think it was her final desire to thus dispose of such property.

If I felt in doubt on this point, or that the language of the codicil was ambiguous, it would certainly be removed were I to consider "the surrounding circumstances." It is contended that I should not consider them in arriving at the intention of the testatrix. A similar position was taken in *Innes* v. *Sayer*

(1851), 3 Mac. & G. 606, and it was there dealt with in the judgment at pp. 614-5 as follows:

"It was argued, that evidence of the state of the property at the date of the will is inadmissible in this case, and Sir James Wigram's work was quoted in support of this view: but the very contrary is maintained in that work. According to the fifth proposition laid down in that book: 'For the purpose of determining the . . . . subject of disposition a Court may inquire into every material fact relating to the . . . . property which is claimed as the subject of disposition, and into the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the thing intended by the testator.' Wigram on Application of Extrinsic Evidence to Interpretation of Wills, p. 51, 3rd Ed. It is true that there have been many cases in which the Court has held that a power was not executed even where the words might have referred to the power; but in those cases, the words could be fully satisfied by referring them to the testator's own property; and there have been also various cases in which the Court has refused to take into consideration the state of the testator's property at the date of his will, or at the time of his death; but in these cases the disposition was not *prima facie* specific, as I think it is in this will."

See also Lord Chelmsford in *Hensman* v. *Fryer* (1867), 3 Chy. App. 420 at p. 424:

"Where the meaning of a will is doubtful, the Court may assist its construction by evidence of the state of the testator's property at the time when it was made; but where the words are plain, no such extrinsic aid can be resorted to, to give them a different meaning."

Then again, in *In re Grainger. Dawson* v. *Higgins* (1900), 2 Ch. 756 at p. 773, Collins, L.J., in considering the construction to be placed upon the terms of the will, considered it ambiguous and that evidence as to the state of the testator's assets at the time of the will, was admissible. He discussed the matter further as follows:

Judgment

"The maxim that in construing a written document surrounding circumstances may be looked at has been nowhere more emphatically laid down than in relation to wills. 'Every claimant under a will,' says Sir J. Wigram (p. 96), 'has a right to require that a Court of construction, in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare,' citing *Doe* v. *Martin* (1833), 1 Nev. & M. 512, 524. And though I am aware that qualifications sometimes subtle and difficult of general application have been placed on this proposition, still I think the evidence here suggested falls within the words of Baley, J. in *Smith* v. *Doe* (1821), 2 Brod. & B. 473, 553, referred to with approval by Sir Thomas Plumer, M.R. in *Colpoys* v. *Colpoys* [(1822)], Jac. 451, 465. Bayley, J. says: 'The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a

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provision which was distinct and accurately described; but because there is an ambiguity upon the face of the instrument; because an indefinite expression is used capable of being satisfied in more ways than one; and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest, or situation would assist us in judging what was her meaning by that indefinite expression.' "

So, with respect to this specific disposition by Mrs. Marvin of her interest in the business, if there be any doubt as to what she intended, I think that I am entitled, in order to reach a conclusion, to consider the circumstances as they existed at the time when the codicil was executed. She had, at that time, disposed of all her property in California. She had, for a number of years received large amounts from the business, which had been carried on by her son and grandson, without any assistance on her part. She was on friendly terms with such relatives and at the time, was paying them a visit in Victoria. She had amply provided for her daughter Grace, and was merely changing the form of her gift to her adopted daughter Florence. While she had received such moneys from the business, it was not, according to Mr. Monteith, in a very prosperous condition and perchance this condition was likely caused by the depression which ensued, shortly after the commencement of the war and continued up to the year 1916. There was apparently not any appreciable surplus in the business to dispose of, still, it was the livelihood of her son and grandson. Under these and other circumstances, even if she did not use apt wording in the codicil, I think her intention was, that they should, upon her death, receive directly the whole of her share in the business. Further, while they may not be debarred from now asserting the contrary, I do not think a different contention was ever suggested on the part of the others interested in the estate, until after the death of Mr. Hedges. In thus deciding, I have borne in mind that Sir James Hannen in *In the Estate of Ann Faith Bryan* (1907), P. 125 at p. 130, said that:

Judgment

"The Court may put itself in the same position as the deceased was in when she sat down to sign the last will—in other words, to enable the Court to ascertain what the deceased knew at that time."

It is submitted that the construction of the codicil which

I have adopted, would revoke portions of the original will which are not distinctly so treated. I think the matter of revocation was present to the mind of the testatrix to this extent, that she was seeking to dispose of the business as I have indicated, and if this resulted in revoking or rendering impossible of performance other dispositions in her original will, she was content. She did not intend that her daughter Grace, should have the portion of the business given by the original will or any interest in the business. Revocation may be implied in this respect without express terms to that effect.

I think the terms of the codicil satisfy all the conditions essential to treat the gift by Mrs. Marvin in favour of her son and grandson, as a specific bequest. It deals with a part of the property of the testatrix, as distinguished from the whole. See Jessel, M.R. in *Bothamley* v. *Sherson* (1875), L.R. 20 Eq. 304 at p. 308. It comes within the definition of a specific legacy given by Lord Selborne, L.C. in *Robertson* v. *Broadbent* (1883), 8 App. Cas. 812 at p. 815 as being something

"which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate."

As the bequest to the defendants of the business was specific and only encumbered to the extent mentioned, the other beneficiaries named in the will had no right as against either of the defendants to intervene, or seek any redress in connection with such business. Such conclusion does not affect the admitted right of Florence Marvin to enforce payment of the legacy of $1,000 in her favour.

Judgment

There is no question of debts outstanding against the estate, and as the plaintiff failed in the first instance to avail himself of his rights as an executor, he should not, especially at this late date, obtain any judgment which would interfere with the business carried on in the name of E. B. Marvin & Co. He should not be allowed to in any way prejudicially affect the gift by Mrs. Marvin to her son and grandson.

The action is dismissed with costs.

Action dismissed.

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ROYAL BANK OF CANADA v. NATIONAL INSURANCE CO.

ROYAL BANK OF CANADA v. NATIONAL INSURANCE COMPANY.

Practice—Costs—Taxation—Brief and fee for junior counsel—Discretion of registrar—Appeal.

The registrar's discretion on the taxation of a bill of costs will not be interfered with unless good reason therefor is disclosed.

Under the new tariff of costs the registrar has in his discretion the power to allow junior counsel a fee and brief on taxation.

Statement

APPEAL by plaintiff from the registrar on the taxation of a bill of costs. The registrar, in his discretion, allowed brief and fee for junior counsel on the taxation of the defendant's costs. Argued before MURPHY, J. at Chambers in Vancouver on the 10th of September, 1920.

Alfred Bull, for appellant.
S. S. Taylor, K.C., and *Hossie, contra.*

5th January, 1921.

Judgment

MURPHY, J.: Under the new tariff of costs, the registrar is given discretion to decide, *inter alia,* whether a brief and fee to junior counsel in any given case tried is to be allowed or not, subject to a right of appeal to a judge. Whilst the particular discretion vested in the registrar is new, discretion as to numerous items in the tariff of costs has long been given to him under our practice, subject to a similar right of appeal. Likewise a principle has long been acted upon on the hearing of such appeals, that the registrar's discretion will not be interfered with unless good reason therefor be shewn. In my opinion, this principle is applicable to this appeal.

As I can see no good reason for holding the registrar to be in error, the appeal is dismissed.

Appeal dismissed.

GODDARD v. BAINBRIDGE LUMBER COMPANY LIMITED. (No. 2.)

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GODDARD v. BAINBRIDGE LUMBER CO.

Practice—Costs—Action for damages—Payment into Court—Arbitration—Forest Act, B.C. Stats. 1912, Cap. 17.

The defendant commenced expropriation proceedings under the Forest Act for a right of way across the plaintiff's land, but stopped proceedings pending an attempt to settle on the purchase price. In the meantime he proceeded to construct a railway across the proposed right of way. On the plaintiff bringing an action for trespass the defendant paid into Court $350 to satisfy the plaintiff's claim. The trial judge gave $25 damages and ordered the defendant to proceed with the arbitration. On the question of costs:—

Held, that if the sum determined by the arbitration as the value of the land expropriated with the $25 above mentioned does not exceed the amount paid into Court, the plaintiff is only entitled to his costs up to the time of payment in and the costs of the issue as to liability on which he succeeded, the other costs to go to the defendant.

Davies v. *Edinburgh Life Assurance Company* (1916), 2 K.B. 852 applied.

THE question of costs arose through the judgment delivered herein by GREGORY, J., on the 29th of November, 1920 (see *ante*, p. 186). The action was for damages for trespass and for an injunction restraining the defendant from interfering with lot 129, Alberni District, the plaintiff's property. The defendant Company had commenced expropriation proceedings under the Forest Act to expropriate a right of way through the lot for a logging railway but proceedings were stopped pending negotiations to settle the purchase price. In the meantime the defendant went on with the construction of the railroad under an alleged arrangement with the plaintiff. Negotiations fell through and the plaintiff brought this action. The defendant alleged it was willing to proceed with the arbitration and paid $350 into Court to satisfy the plaintiff's claim. The learned judge awarded the plaintiff $25 damages and ordered that the defendant should proceed with due diligence to expropriate the land required under the Forest Act. Tried by GREGORY, J., at Victoria on the 24th of November, 1920.

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W. J. Taylor, K.C., and *W. A. Brethour,* for plaintiff.
Harold B. Robertson, and *Finland,* for defendant.

14th January, 1921.

GODDARD v. BAINBRIDGE LUMBER CO.

GREGORY, J.: With reference to the question which has been raised on the question of costs, I see no good reason for depriving the plaintiff of any of the costs which he appears to be entitled to, and think he was justified in launching his action in the Supreme Court.

I find considerable difficulty in applying the rule as to costs laid down in the case to which I have been referred by Mr. *Robertson.* In that case the full amount of damages recoverable was determined by the verdict of the jury. In the present case the question must be viewed from the plaintiff's standpoint at the time of issuing his writ, and while it is true that I have in one sense, only allowed him $25 damages, my judgment enables him to collect the material damage done to his land, but it cannot be greater than the value of the land to be taken under the Forest Act. That damage I have no means of ascertaining, but assuming that it will be the value of the land as determined by the arbitration, if that sum together with the $25 above mentioned does not exceed the amount paid into Court, the plaintiff is only entitled to his costs up to the time of payment in and the costs of the issue as to liability on which he has succeeded, the other costs would go to the defendant, that is, *Davies* v. *Edinburgh Life Assurance Company* (1916), 2 K.B. 852 would apply.

Judgment

In case the proceedings under the Forest Act are not proceeded with, the question of costs will have to stand until the conclusion of the reference. Leave to apply continued.

Order accordingly.

BRITISH COLUMBIA TELEPHONE COMPANY v. MORRISON, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 213, AND LOCAL UNION 310 OF SUCH BROTHERHOOD *ET AL.*

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BRITISH COLUMBIA TELEPHONE CO. v. MORRISON

Trades and trade unions—Illegal revocation of charter of local union—Contractual relation between employer of labour and local union—Interference with—Injunction—Costs.

The plaintiff Company, employer of labour, entered into an agreement with the local union of the defendant Brotherhood, providing, *inter alia*, for certain working conditions, rates of pay, and that members of the Brotherhood only should be employed. The agreement was approved by the International office of the Brotherhood. The charter of the local union was subsequently revoked.

Held, that the revocation of the charter was illegal, because it was done without right or done under a right improperly exercised, as no opportunity had been given the local union of defending itself, and as it unjustifiably interfered with the agreement with the plaintiff, they were entitled to an injunction restraining the Brotherhood and its officials from a repetition within the Province of such revocation.

A parent labour organization, in pursuing its policy of requiring obedience of its orders from its branches, must have regard to the rights of others. To revoke a branch's charter without legal justification, and thus prejudicially affect the position of an employer of labour under its agreement, ratified by the parent labour organization, with such branches, gives a right of action to the employer; malice on the part of the organization is not an essential element for such right of action; but malice may be evidenced by conduct adopted to forward one's own interests by destroying the rights of others.

Where is it apparent to an industry, especially one serving the public, that damage may result from interference with its employees, it is not required to wait until damages ensue before taking action, but may apply at once for an injunction.

Where judgment for an injunction for illegal interference was given against some defendants but not against others, the latter are given their general costs, although they had joined with the others in pleading fraud and other defences which were not established, but they are required to then pay the costs of such unsuccessful issues, to be set off against their general costs.

Statement

ACTION for an injunction restraining the defendants from interfering with an agreement entered into by the plaintiffs,

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with Local Union No. 310 of the International Brotherhood of Electrical Workers. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 25th of October, 1920.

BRITISH COLUMBIA TELEPHONE CO. v. MORRISON

McPhillips, K.C., and *H. M. Smith,* for plaintiff.
Rubinowitz, for defendants.

10th January, 1921.

MACDONALD, J.: On the 26th of May, 1920, plaintiff entered into a written agreement with Local Union No. 310 of the "International Brotherhood of Electrical Workers" (hereafter called "the Brotherhood"), providing, *inter alia,* for certain working conditions and rates of pay, for the members of such Local Union, who might be employed by it under the agreement. There was a proviso in the agreement, creating a "closed shop," as follows:

"The employer agrees to employ none but members of the I.B.E.W. who are members in good standing of Local Union No. 310."

Subsequently, on the 28th of June, 1920, the Brotherhood, through the defendant Lee, revoked the charter of Local Union 310. Plaintiff complains that such revocation prejudicially affected its rights under such agreement and was so intended. Further, that unless the revocation be removed, and its further continuance prevented, it would result in damage to the plaintiff.

Judgment

Before considering whether the revocation of the charter of Local Union 310 interfered with, or affected, the contractual relationship existing between the plaintiff and such Union, under the agreement, or whether such revocation was unauthorized, or illegal, and created a cause of action, I think it well to discuss the history of the troubles between Local Union 310, and Local Union 213 of the "Brotherhood," which had received its charter in November, 1901. I will thus be able to indicate the facts leading up to the execution of the agreement, not for the purpose of determining its validity, but to decide whether the actions of the defendants, other than Local Union 310, with respect to the revocation of the charter, were "justified." This is an important question, as the plaintiff is seeking to bring itself within the proposition of law that "it is an

actionable wrong for a third person to interfere with contractual relations recognized by law if there is no sufficient justification for the interference": see Halsbury's Laws of England, Vol. 27, p. 649, citing *Quinn* v. *Leathem* (1901), A.C. 495 at p. 510, and other cases. I am influenced towards adopting this course, though it may be somewhat lengthy, because in addition to determining whether contractual relationship existed, and whether there was an interference on the part of any of such defendants, I must consider "all the circumstances" in deciding the question of "justification." The law on this point is stated in Halsbury's Laws of England, Vol. 27, p. 660, as follows:

"What is a sufficient justification is a matter to be decided by the Court on the circumstances of each case. Any justification, to be available as a defence, must cover the whole conduct of those who set it up, the means as well as the end":

see *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 at 618 and other cases cited.

The "Brotherhood" had revoked the charter of Local Union 213 in June, 1919. Such revocation resulted in litigation which was fully outlined in my judgment: see *Morrison* v. *Ingles* (1920), 2 W.W.R. 50—the result being, that the revocation was set aside and the members of Local Union 213 re-established in their membership, both of the Local Union and of the Brotherhood. In the meantime, Ingles, representative of the Brotherhood, had assisted in constituting a new Local Union, No. 310, and was instrumental in obtaining, in November, 1919, a new agreement with the plaintiff Company, providing better terms for its employees. This agreement did not prevent members of Local Union 213 from being employed by the plaintiff Company. Before the judgment was rendered in *Morrison* v. *Ingles, supra,* negotiations were instituted by Ingles, acting in conjunction with Local Union 310, for higher wages, but terms were not definitely arranged. After such judgment was given, the Brotherhood decided, after consideration, to abide by the decision, and endeavoured to bring about an amalgamation of the two Local Unions in the City of Vancouver. Active steps, to that end, took place in May, 1920. Propositions and counter-propositions ensued between the two

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Unions, but, I believe, the spirit of distrust between the officials, to a great extent, stood in the way of success. At any rate, satisfactory terms of amalgamation could not be arranged. The agreement, to which Ingles was a party in November, 1919, still continued and was effectual between the plaintiff Company and its employees, the greater number of whom were members of 310, though some belonged to 213. It was, notwithstanding this condition of affairs, repudiated by the defendant Morrison, as business agent of Local Union 213. The employees of plaintiff Company were anxious to adjust the question of wages, but, as far as Local Union 213 was concerned, it could not assist in this direction, as the plaintiff refused to negotiate with such Union. The contention of plaintiff apparently was, that the agreement of November, 1919, was still in force, and would remain effective until varied or a new agreement entered into. While this was the attitude of the plaintiff Company, towards Local Union 213, I think its officials were quite friendly to Local Union 310, and prepared, in April or May, 1920, to discuss the matter of increased wages with such Union. With this situation, and while the amalgamation, urged by the Brotherhood, was not proceeding favourably, Local Union 213 applied for a Board of Conciliation under The Industrial Disputes Investigation Act, 1907, Can. Stats. 1907, Cap. 20. The nature of the dispute, upon which such application was based, was that "the Company [plaintiff] has refused to negotiate a new agreement, with respect to wages and conditions of employment, in which Local Union 213 is named as a party." It refers to the agreement of November, 1919, as having been entered into with a minority of the plaintiff's employees and that the Company had definitely refused to treat with Local Union 213. The application is dated 20th May, and the authority for that purpose is stated to have been given by Local Union 213 on May 3rd, 1920. It is signed by the president and secretary, and recommends defendant Morrison, as a member of the Board of Conciliation. Then, in the statutory declaration indorsed on the application, both the president and secretary of Local Union 213 declare that, in the event of failure to adjust dispute between the

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parties, or a reference thereof by the minister of labour, "a strike will be declared and that the necessary authority to declare such strike has been obtained." The plaintiff Company, through C. F. Bollschweiler, general superintendent of plant, replied to this application, and referred to the grounds upon which the charter of Local Union No. 213 had been revoked, and repeated the willingness of his Company to negotiate with Local Union 310. Efforts to amalgamate the two Local Unions had, in the opinion of Local Union 310, become fruitless, so at a meeting of this Union, held on the 25th of May, it resolved, to enter into a new agreement with the plaintiff Company for its own benefit. This resulted in the agreement, already referred to, being executed on the 26th of May, 1920. It was well understood, by both the officials of Local Union 310 and of the plaintiff Company, that this agreement, under the constitution of the Brotherhood, required the approval of the International office. This was necessary under the following indefinite wording: "All agreements between Local Unions must be ratified by the I.O. and shall not be abrogated without the sanction of the I.O." The practice had been, to obtain what was termed "approval," and there is no doubt that all parties considered such approval would be necessary. The plaintiff would, naturally, be desirous of continuing to recognize the Brotherhood at its head office, and it was incumbent upon the officials of the Local Union 310 to observe the rules of its organization and preserve their standing. The agreement thus entered into, is now attacked, and its validity and contractual effect attacked on two grounds. First, that the document was not properly executed. Secondly, that the approval was ineffective and not binding upon the International office.

Judgment

As to the execution of the document being insufficient and irregular, some support is given to this contention by a portion of the examination for discovery of the general manager of the plaintiff Company. The effect of this, however, was destroyed by a subsequent statement, shewing ratification on the part of his Company. It is under seal, and bears the signature of the officer of the Company who negotiated and brought about such new arrangement for service of the

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employees. There is no particular form, nor mode of execution, for an agreement of this kind. This one sufficiently denotes the wages and working conditions, which are to be observed, and thus answers the purpose of those interested. I intimated, during the argument, while the question of execution was being discussed, that there might be an argument presented, as to the power of the committee of Local Union 310 to bind such a Union, and create an enforceable contract, as it has no legal entity and is merely a voluntary association. This point, however, was not pursued by counsel for the defendant, and I may assume that it was not deemed beneficial to his cause, and, therefore, dismiss it from further consideration. I have come to the conclusion that the execution of the agreement was sufficient for the purpose intended. It formed a basis upon which those employees, who were or should become members of Local Union 310, might work for the plaintiff Company.

Then, as to the approval or ratification of the agreement, by the International office, being properly obtained, there is no official of the Brotherhood designated in the constitution, who is to give such approval, but the practice was for the president to do so. The importance, attaching to this question, is apparent, when one considers that, if the Brotherhood, according to its constitution, approved of the agreement and practically became a party to it; then, it might be contended, that any proceeding, which would tend towards a breach, would be actionable.

Judgment

After execution of the agreement, the next step, in order to render it effectual, was to communicate with the International office and obtain its approval. I am satisfied that such office was already aware of the pending negotiations for improvement and modification of the existing agreement and an increase of wages. This is indicated by a telegram of May 12th, which also contains recognition of Local Union 310 and that it is a unit of the organization, until amalgamation of the two unions has been concluded. The committee which had signed, on behalf of the Local Union 310, in order to obtain the necessary ratification, telegraphed the International president on the 26th of May, 1920, as follows:

"Negotiations between Local Three Ten and B.C. Telephone Company brought to a successful conclusion tonight by Local's action accepting Company's offer committee empowered to sign for local wire ratification immediately as that is all that will hold up retroactive wages wire reply to Burton also Telephone Company."

He did not approve immediately, but wired on the 27th of May, as follows:

"Lee reports Two thirteen declines to admit all members of Three Ten. Have wired Morrison for their position. Will answer your telegram relative Telephone Company tomorrow."

And on the same date, he shewed his knowledge, that amalgamation had not taken place, and thus, that the agreement already signed would not include the members of 213, by a telegram to defendant Morrison, as follows:

"Lee reports Local Two Thirteen refused to admit those who have been admitted to Three Ten as new members since Local was organized in the interests of harmony necessary all members be admitted through amalgamation without discrimination earnestly urge Local Two Thirteen take such action answer."

Knowledge of a similar nature, on the part of the International president, is further shown, by information contained in a telegram from defendant Morrison to him, under date the 28th of May. It indicates, that the plaintiff Company had stated to the department of labour that Union 310 was the only one recognized by the Brotherhood, and would confirm a conclusion, if such were required, that the plaintiff Company, in any agreement for wages, was only dealing with Local 310, and was not recognizing, or including, Local 213 or its members in any way. Defendant Morrison, in this telegram, also asked for a declaration as to the position of his Union in the Brotherhood. The International president, in his reply, without intimating that he had been requested to approve an agreement with 310, at some length, covered two important points as follows:

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"Consider position of Two Thirteen in requiring members of Three Ten taking examination unfair and unwarranted we are seeking peaceable solution of situation and respectfully solicit co-operation of all interested continuation of two charters cannot be helpful to situation regret effort to amalgamate not being met in the spirit they were offered you should not lose sight of fact that we cannot arbitrarily compel Three ten to amalgamate as Court decision defines rates of Locals in Canada their charter could not be revoked except for constitutional reasons and the Acts should not be lost sight of that new members admitted to Three Ten are accepted

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to membership and also have constitutional rights that must be respected we appeal to Two Thirteen to recede from their position otherwise we will be required to notify Three Ten to proceed with wage negotiations wire answer."

The reply of defendant Morrison, on the 28th of May, to this latter telegram, further supports the conclusion that the International president was well aware, that the agreement, for which ratification was sought, only referred to Local Union 310. A portion of such reply reads as follows: "Understand 310 signed agreement with Telephone Company. Has International approved this action?" Amalgamation, at the time, seemed hopeless from the tone of the telegrams. I think the International president came to this conclusion and determined, without further delay, to ratify the agreement, and after receiving a further lengthy telegram from Davis, secretary of Local 310, he wired Buntin, one of the committee, and the plaintiff Company, as follows:

"Settlement agreed to with British Columbia Telephone Company by Local Three Ten will be ratified by International Brotherhood. Advices received from Local Two Thirteen indicate that they will agree to equal recognition for all members in matter of amalgamation. Keep us advised. Am wiring Telephone Company relative to ratification of your Local's agreement."

"General Manager,

"British Columbia Telephone Co.,

"Vancouver, B.C.

"International Brotherhood will approve and ratify agreement reached between your Company and Local Number Three Ten of our Brotherhood.

"JAS. P. NOONAN."

Judgment

It was submitted, that the approval of the agreement was only to become operative and binding when it was forwarded for such purpose and actually signed by the president. I think it was fully understood and intended to be an immediate ratification and was so treated by the International president in subsequent correspondence. He was aware that the plaintiff Company, on the strength of such ratification, would pay wages on a retroactive basis, and thus would be entitled to treat the ratification as immediately effective. Further, I do not think that the International president was under any misapprehension at the time when he ratified, and, acting within the constitution, such ratification amounted to an act of the Brotherhood. It thereby became a party to the agreement and, in so

far as it could be bound in this Province, it was required to abide by its terms. It could only, in a legal manner, interfere with the arrangement thus arrived at between the plaintiff and a substantial number of its employees for the service covered by such agreement.

Were the actions of the Brotherhood, subsequent to such ratification, proper and legal, or did they constitute an unlawful and unjustifiable interference with such working arrangement, so as to entitle the plaintiff to invoke the assistance of the Court?

In an attempt to adjust the differences that had arisen between the two Local Unions and also with their employers, the International president instructed Thos. E. Lee, an official of the Brotherhood, to come to Vancouver, for that purpose. He strove to bring about amalgamation, and did not approve of the agreement made between the plaintiff and Local Union 310, excluding the members of Local Union 213 from its operation. He reported the condition of affairs, but failed to effect a settlement of the matter. Then Local Union 310 requested the plaintiff Company to fulfiil the closed shop terms of its agreement, and the plaintiff Company in turn posted a notice requiring that the electrical workers should produce a paid-up card of membership in Local 310; otherwise they would not be entitled to continue in such employment. This increased the friction between the two Unions and resulted in a number of the electrical workers being required either to abandon their membership in Union 213 and join 310, or cease work. They adopted the latter alternative, and officials of 213 interceded with the International office. Apparently there were sufficient employees, however, remaining in the service of the plaintiff Company to carry on its work. It was quite evident that the plaintiff Company had not receded from its original position, that it would not negotiate nor come to any agreement with Local Union 213. The members of such Union could, under these circumstances, only obtain the benefit of the agreement of the 26th of May either by such abandonment and rejoining, or by bringing about an amalgamation of the two Unions, and thus endeavouring to bring its members within the terms of

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such agreement. The plaintiff Company was satisfied with the condition of affairs, and in the event of merger of 310 with 213 would not willingly recognize the latter Union. If the members of 310 could, however, be induced to favour such an amalgamation, it would follow that the plaintiff Company would be compelled either to accept the changed situation, or face a condition, as to this skilled labour, where an open shop would prevail, or lose many of its employees, as well as the security of an agreement with a Union would disappear. Local Union 310 did not desire to amalgamate with 213, and plaintiff Company was willing to adhere to the agreement, and electrical work was proceeding smoothly. It is contended by plaintiff that the Brotherhood then joined with Local Union 213, and for its benefit, to force 310 to amalgamate, or, failing such result, to destroy the effect of the agreement by cancelling its charter. I find that objections, which were not considered of moment, at the time of ratification, were then made to the agreement. It was alleged that there were discriminatory clauses contrary to the constitution, also that two local Unions of this character, engaged in the same work, could not be authorized by the Brotherhood in the same district. The International president had already intimated in his telegram that he could not arbitrarily compel 310 to amalgamate. After correspondence, and frequent discussions between the contending parties, the final conclusion was, that Lee should revoke the charter of 310. He states that such revocation arose through a breach of the constitution by such Union or its controlling officials. I think this question of unconstitutionality, so termed, was an after-thought, and that Lee, in his revocation, was acting under instructions received from the International president by his telegram under date of June 19th, in which he stated that any agreement sanctioned by the International office should cover all members of the Brotherhood, and that if 310 persisted in refusal to amalgamate, they must revoke its charter. He had no right to thus change his ground, but I can assume that Lee acted upon such instructions in dealing with the matter. He became satisfied that Local 310 would not recede from its position, and that it claimed the exclusive

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benefit of the agreement. While he doubtless bore in mind the instructions received from his president, as to revocation, he, at the meeting when that course was pursued, referred to a portion of the constitution as not having been complied with. Whether he revoked the charter, on behalf of the Brotherhood, on the ground of refusal to amalgamate, or for some other reason, in my opinion, such action was illegal. There was no opportunity afforded to Local Union 310 of defending itself. He adopted the same course as was previously pursued by Ingles, on behalf of the Brotherhood, and which is referred to in *Ingles* v. *Morrison, supra.* He did not act "according to the higher rule of justice and fairness" requiring that sufficient notice of any charges should be given to such Union. The illegality of a revocation, so made, was fully discussed by me in that case, and suffice to quote, on this point, a portion of the judgment of Lord Denman in *Innes* v. *Wylie* (1844), 1 Car. & K. 257 at p. 263, as follows:

"The society was, in my opinion, wrong in removing him without giving him distinct and positive notice that he was to come and answer the charge that was made against him, and I hold that he should have been told what the charge was, and called on to answer it, and told that it was meant to remove him if he did not make his defence. No proceedings in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so. As no such notice was given here, I think that the removal is altogether a void act, and I am therefore of opinion that the plaintiff is still a member of the society."

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Then, as to the manner in which persons who are not judges should act, in exercising a judicial or *quasi*-judicial authority, see Jessel, M.R. in *Russell* v. *Russell* (1880), 14 Ch. D. 471 at p. 478; 49 L.J., Ch. 268, referring to the judgment in *Wood* v. *Woad* (1874), L.R. 9 Ex. 190; 43 L.J., Ex. 153, as follows:

"I must say it contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than judges who have judicial functions to perform. . . . . The passage I mean is this, referring to a committee: 'They are bound, in the exercise of their functions, by the rule expressed in the maxim, *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.'"

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I am of the opinion, that there was no right possessed by Lee to revoke the charter, or if any right existed under delegated authority received from the president, then, that the right was improperly exercised. While the revocation of such charter was illegal and void, still, as the members of Local Union 310 are not seeking redress, such conclusion is only important as bearing upon the rights of the plaintiff, under the agreement.

Before the full effect of such revocation of the charter could be determined, plaintiff obtained an injunction, containing provisions, *inter alia,* restraining the defendants from in any way interfering with the agreement of the 26th of May, 1920. Upon motion to dissolve such injunction, it was continued until the trial.

It is contended that none of the actions of the Brotherhood, or its officials, or Local Union 213 or its officials, justified the injunction being granted or now being supplemented by a further restraining order. I must then consider whether, under the circumstances, the acts of the Brotherhood, and its officials, with respect to the revocation of the charter of Union 310, affected, or were likely to affect, the contractual relationship between the plaintiff and its employees under the agreement, and warrant the plaintiff in seeking redress. In the first place, I feel satisfied, that the revocation of such charter and the effect of the agreement were closely allied in the minds of all concerned. In this connection, it is only necessary to refer to the letter of the 3rd of June from the secretary of the Brotherhood to Lee, its representative. These two matters are there discussed together, and the attitude of the Brotherhood indicated. It is noteworthy, that the International office, at that time, was of the opinion "that the Court decision that protected Local 213, in a similar manner protected Local 310, and that we could not arbitrarily revoke their charter." It was also stated that their decision was "to insist that all (both Unions) be received into the amalgamated or combined Local without discrimination." It was then intimated, that the agreement of the 26th of May would not stand in the way of such amalgamation being accomplished, and all the electrical workers of the plaintiff, who were members of the Brotherhood, being brought within the terms of another agreement with the plaintiff.

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To further this end, the stand was apparently to be taken, that the agreement of the 26th of May "would not be considered legal, inasmuch as it has not been approved by the International office, or rather, the amendments or modifications to the agreement have not been approved." This reference is not very clear, as the agreement itself was only sent from Vancouver by the secretary of Local 310 to the International president, on the same date that such letter was written. It could not very well apply to discrimination, as this situation had been fully considered by the International president, before he telegraphed his approval of the agreement to the plaintiff.

It is true that the intentions of the Brotherhood and its opinion, as to its right to revoke, were subsequently changed, when the negotiations for amalgamation failed; but the telegram of the 19th of June, from the president to Lee, further supports my conviction that the two matters were closely associated and were being dealt with together. He refers to the agreement being ratified, "with the understanding that Locals were carrying out orders to amalgamate and that any agreement sanctioned by the International must cover all members of the Brotherhood," and that if 310 persisted in refusal to amalgamate, they must revoke its charter. In other words, if all the members of the Brotherhood would not act in concert, and so amalgamate, and incidentally ignore the plaintiff's agreement for electrical service, with 310 alone, then, the right of such Local so refusing, to continue as part of the Brotherhood, should cease. Its members, for the time being, at any rate, would thus lose their Union standing. That this course was pursued, for such an object, is admitted in a portion of a telegram from the International president to the plaintiff's manager on the 29th of June, after revocation, as follows:

"We ordered Local Unions to amalgamate, refusal of either Local to do so make necessary disciplinary measures."

While it may be the policy of a parent organization, to require obedience of its orders from all of its branches, still, in pursuing such a course, it should have regard to the rights of others. The Brotherhood did not, in revoking the charter 310, bear this in mind, but sought to compel compliance with its instructions, even though it put an end to such Local Union

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as part of the Brotherhood. While I do not consider that malice, on the part of the Brotherhood, is an essential element in this action, still, if it were necessary to shew such malice, on the part of the Brotherhood, it would, under these circumstances, come within the observation of Lord Halsbury in *Trollope & Sons* v. *London Building Trades Federation* (1895), 72 L.T. 342, as referred to by North, J. in *J. Lyons & Sons* v. *Wilkins* (1896), 1 Ch. 811 at p. 818, as follows:

"'If you want to forward your own interests by destroying the rights of others, it seems to me that that is express malice.'"

Compare *Pratt* v. *British Medical Association* (1919), 1 K.B. 244 at p. 267. Then in *National Phonograph Company, Limited* v. *Edison-Bell Consolidated Phonograph Company, Limited* (1908), 1 Ch. 335 at pp. 360, 371, it was the clear view of Buckley and Kennedy, L.JJ. that the defendants were not excused in their employment of illegal means, by the fact, that they acted with the object of advancing their own trade interests, rather than for the purpose of gratifying an ill-will towards the plaintiff. I have already referred to the improper cancellation of the charter, but I do not think that in this case it is necessary for me, from such finding, to deduce malice by the Brotherhood or its officials against the plaintiff. If I am right, in the conclusion already expressed, that the Brotherhood had, after due consideration, deliberately ratified the agreement, then, it was in duty bound not to do anything which would affect its proper performance. On the contrary, it attempted to effectually destroy the right of one of the parties to still continue as an organization, amenable to the terms of the agreement. Even if the Brotherhood had not by its ratification become a party to the agreement, I think it must have been well aware, and so intended, that the revocation of the charter would seriously affect the contractual relationship between the plaintiff and the members of Local Union 310:

Judgment

"There are numerous cases shewing clearly that a wrongful interference between employer and employed, from which damage ensued, gives a cause of action even where the employment is at will only and not for a fixed period":

see North, J. in *Allen* v. *Flood* (1898), A.C. 1 at p. 43.

It is contended that, even if the revocation might be construed as an interference between the plaintiff and such

employees, that no damage resulted therefrom. I think that where it is apparent to a company operating an industry, especially one serving the public, that damage may result from interference with its employees, that it is not required to wait until damage ensues. If the charter remained revoked, then the agreement was impaired. This impairment would, as I have previously discussed, be of such a nature as to justify the plaintiff in seeking the assistance of the Court by way of injunction.

It is then submitted that, in any event, the Brotherhood, being a foreign, voluntary organization, and none of its officials being resident within the Province, an injunction should not now be granted of a permanent nature; further, that it would be ineffective. This position is tenable, to a certain extent, as an injunction only operates *in personam*. In this case, however, defendant Lee came within the jurisdiction of the Court, and under instructions of the Brotherhood, in my opinion, improperly interfered with the arrangement arrived at between the plaintiff and a portion of its employees. Further, such Brotherhood acts, and in a sense "does business" within the Province, and receives fees from local branches. In this instance, as in the past, it negotiated and became a party to an agreement for service within the jurisdiction. I think, under such circumstances, there should be a judgment declaring the revocation illegal and void, also that the agreement is binding and in full force. There is more difficulty as to the future, as the Brotherhood may act within its constitution and not contrary to the agreement, but there should be an injunction restraining the Brotherhood and its officials from a further repetition, within the Province, of such revocation in like manner or under similar circumstances.

Judgment

While there is judgment against the Brotherhood, and its officials, I do not find any evidence to support the allegation that Local Union 213 or the defendant Morrison made threats as to declaring plaintiff's works "unfair," or gave such support or assistance in the revocation of the charter as would justify their being held liable. Upon the evidence, I find, that such matter was dealt with solely by the Brotherhood and its officials,

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so I do not think there is any ground for continuing an injunction against either Local Union 213 or the defendant Morrison. They, however, in their statement of defence, joined with the other defendants, except Local Union 310, in pleading fraud in the ratification of the agreement, mistake of fact in connection with such ratification, and a collateral or conditional agreement affecting the main agreement with plaintiff, and various other pleas outlined in paragraphs 19 to 28, inclusive, of the statement of defence. They, in common with such other defendants, fail on these issues, as well as others in the pleadings, though successful on the main issue, as to non-interference directly with the contract or through the revocation of the charter. It is contended, that after having pleaded fraud, such defendants should be deprived of all costs in connection with the action, to which they would otherwise be entitled. I do not think that the authorities go so far, in dealing with a defendant who may be otherwise successful. I think that these defendants should bear the costs upon such unsuccessful issues, and these may be set off against their general costs.

Plaintiff is entitled to the judgment in terms indicated, with costs against the "Brotherhood," as well as Noonan and Lee.

Judgment for plaintiff.

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Stay of proceedings — Two actions commenced — Arising out of same subject-matter—Action with substantial claim allowed to proceed— Stay in other.

A mortgagor, anticipating foreclosure proceedings on five consolidated mortgages, commenced action for taking of accounts and redemption of four of them, and for a declaration that the assignments of three of them to the mortgagee (who held all five mortgages) was a fraudulent scheme to prevent the redemption of the property securing the other mortgages. The mortgagee three days later commenced foreclosure proceedings, and applications were then made by the defendant in each of the actions for a stay of proceedings pending a decision in the other. The applications were heard together, when it was held that all matters in dispute could be effectively disposed of in the mortgagee's action, which should first be heard.

Held, on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that the claim of the mortgagor which arises out of the substantial claim of the mortgagee for foreclosure should be stayed pending the mortgagee's action, particularly since the mortgagor's claim can be advanced by way of defence to the mortgagee's action, the onus being on the mortgagee to first prove the facts to entitle her to consolidate her several mortgages.

Miller v. *Confederation Life Association* (1885), 11 Pr. 241 applied.

APPEALS by the plaintiff Martin from the decision of MORRISON, J. on two applications heard together at Chambers in Victoria on the 19th of October, 1920, for a stay of proceedings in each action. The actions arose over certain mortgages held by Miss Finlayson against Martin. In 1899 Martin borrowed $7,000 from Sarah Finlayson, A. W. Jones, R. D. Finlayson and Sarah Susette Finlayson, for which he gave a mortgage on several properties in Victoria. In 1907 the other mortgagees assigned their share of this mortgage to R. D. Finlayson. On his death the mortgage passed by will to his widow who, in May, 1920, assigned it to the plaintiff Miss Sarah S. Finlayson. In June, 1904, the sum of $3,000 was paid on account of this mortgage. In 1912 Martin borrowed $2,000 from Miss Finlayson for which a further mortgage was given on the same lands. In 1913 Martin borrowed $6,000 from R. D. Finlayson for which a mortgage was given on the same property, and on his death this mortgage was bequeathed to his widow, who later assigned it to Miss Finlayson. In March, 1914,

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Martin borrowed $14,000 from Hanna W. Jones on the security of other property in Victoria, this mortgage being assigned to Miss Finlayson in May, 1920. In March, 1914, a further sum of $5,000 was borrowed from Miss Finlayson by Martin, a mortgage being given on property adjoining the first-mortgaged property. There was default in respect of all these mortgages amounting in all to $31,000, and interest overdue $6,700. In May, 1920, Mr. *Jackson,* solicitor, under instructions from Miss Finlayson, made demand for payment. Martin asked that foreclosure proceedings be delayed for six weeks to give time for arranging to finance the debt, and asked for further delays, stating that in case the plaintiff proceeded he would contemplate applying for stay under the Moratorium Act. In June, 1920, Martin declared there were favourable prospects of paying off the mortgages and asked that he be given two days' notice before foreclosure proceedings were commenced. Martin took the position that his financial negotiations to pay off the mortgages separately were being illegally frustrated by a fraudulent scheme to prevent redemption of the separate mortgages by taking assignments of other mortgages and consolidating them against each and every distinct property and that prior to issuing a writ he had on three occasions notified the mortgagee that he would bring action to set aside the consolidation and declare his right to redeem separately. On the 24th of August, 1920, the mortgagee's solicitor advised Martin he would commence proceedings on the 30th of August following, and on the 27th of August Martin issued a writ against Miss Finlayson asking that an account be taken of what was due on four of the mortgages (all except the H. W. Jones mortgage for $14,000) and to redeem the property therein comprised and for a declaration that the assignment of the mortgages to Miss Finlayson was not *bona fide* but a fraudulent scheme as aforesaid. Miss Finlayson then commenced her action for foreclosure on the 30th of August, 1920. On the 25th of September, the defendant in the action of *Finlayson* v. *Martin* moved for a stay until the determination of the action of *Martin* v. *Finlayson,* and on the 13th of October the defendant in the action of *Martin* v. *Finlayson* moved for a stay until the determination of the action of *Finlayson* v. *Martin.*

Jackson, K.C., for Miss Finlayson.
C. G. White, for Martin.

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MORRISON, J.: Two applications have come on to be heard before me at the same time, to stay one or other of the above actions.

Mr. *White,* solicitor for the plaintiff in *Martin* v. *Finlayson,* before I have given my decision, has asked me for reasons for any judgment which I might hand down in contemplation of an appeal. I at first was disposed to refuse giving any such undertaking, as I could not recognize in the material before me any new point of practice nor any question requiring the reannunciation of any principle of law. However, under the particular circumstances of this case, I accede to his request.

These applications, although made in cross-actions, savour in their nature of one for consolidation of the two suits. However that may be, it is necessary to be satisfied of the true character of the main substantial claim arising from the dealings between the parties. Nothing is clearer than what was brought about by the passing of the Judicature Act, 1873, namely, that the Courts are empowered fully to grant all such remedies as the parties to a suit may appear entitled to in respect of any legal or equitable claim, to the end that all matters in controversy may be completely determined without dilatoriness and without undue expense and multiplicity of proceedings concerning any such matters avoided where there are cross-actions as here. The Court, therefore, looks for a main cause of action or dispute; looks to see if the one arises incidentally out of the other or not. If so, then I would think that that one could be more conveniently and fairly disposed of along with the one in which the main dispute arises. In a foreclosure action, the result of which may lead to alienation of property, the plaintiff must prove his case conclusively, and in so doing anything in the nature of a defence can be raised in answer. To ascertain whether that is the situation here, a brief recitation of the alleged facts set out in the respective statements of claim is necessary.

The mortgagee, Miss Sarah Susette Finlayson, in her statement of claim alleges that in 1899 the Honourable Mr. Justice Martin, one of the parties herein, mortgaged to Sarah Finlay-

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son, Arthur William Jones, Roderick David Finlayson and herself jointly, certain properties in the City of Victoria, for $7,000 repayable in 1902. In 1907 there was an assignment of this mortgage to Roderick David Finlayson by the surviving mortgagees, Sarah Finlayson having died in 1906. In 1916 Roderick David Finlayson died, having by his last will devised this mortgage to his wife, Lilias Mary Finlayson, who remarried in 1919 a Mr. Brooks. In May, 1920, she in turn assigned it to Sarah Susette Finlayson aforesaid. In 1904 there was $3,000 paid by the mortgagor in reduction; since then there has been default in payments. In 1912, a further mortgage was given by the mortgagor herein to Sarah Susette Finlayson on the same property for $2,000 and there has been default in payment of principal and interest thereon. Again, in 1913, the sum of $6,000 was borrowed from Roderick David Finlayson on this same property, to be repaid in 1916. This mortgage was also bequeathed by him to his wife, Lilias Mary Finlayson; she assigned it to the said Sarah Susette Finlayson. Default has also been made in the payments thereon. In March, 1914, the sum of $14,000 was borrowed from Hannah Watts Jones on the security of other Victoria property. This sum was to be repaid in 1916. This mortgage was assigned the 27th of May, 1920, to Sarah Susette Finlayson. There is default also in respect of this mortgage. On the 25th of March,

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1914, a further sum of $5,000 was borrowed from Sarah Susette Finlayson on adjoining property, to be repaid in 1916. Default has occurred in payment of this one. Then the mortgagee in her action makes the usual formal claim for an accounting and judgment and also for consolidation of the above mortgages.

The mortgagor, on the other hand, in his action which was commenced on the 27th of August, 1920 (the mortgagee's action having been commenced on the 30th of the same month), alleges that the said Sarah Susette Finlayson, called in and demanded payment of the first mortgage on the property known as The Homestead, and threatened to foreclose. Whereupon the mortgagor began negotiations with a view to pay off this particular mortgage, leaving the others as they were. It is also further alleged that the mortgagee refuses to allow him to redeem the

said mortgage unless he redeems the other overdue ones. And then it is alleged that after the above demand was made, the said Sarah Susette Finlayson, *mala fide,* and pursuant to a fraudulent scheme, prevented the mortgagor from paying off this mortgage by means of the several assignments aforesaid from Mrs. Brooks and Mrs. Jones. It is also claimed that in consequence of this alleged wrongful refusal to allow redemption without also redeeming the other mortgages, it is impossible for the mortgagor to raise a further loan. He therefore claims to redeem the mortgage on his homestead freed from all the other mortgages aforesaid and to have the same reconveyed to him; that there is no right to consolidate and he seeks a declaration that the assignments are part of a fraudulent scheme and are null and void as against his equitable rights of redemption.

On this application the parties support their respective submissions by affidavits, Mr. *Jackson,* solicitor for Miss Finlayson, having been fully cross-examined on his.

On this material, the substance of which I have set out above, the mortgagor claims his suit should be heard first and that the suit in which the mortgagee is pursuing her remedies under the various mortgages should be postponed pending the trial and determination of the allegation of fraud thus set up and of the question of the mortgagee's right to consolidate her mortgages. Against so doing there is a strong current of authority. In my opinion there can be no question that the claim put forward by the mortgagor arises out of the substantial claim of the mortgagee for foreclosure; and particularly where there is no perplexing differences as to parties or subject-matter, it occurs to me that the question raised in the mortgagor's action can be advanced as a defence to the mortgagee's action when the time arises to file a defence, and thus all the matters in dispute between the parties herein will be disposed of effectively in the mortgagee's action. *Thomson* v. *South Eastern Railway Co.* (1882), 9 Q.B.D. 320; *Miller* v. *Confederation Life Association* (1885), 11 Pr. 241.

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The action *Martin* v. *Finlayson* therefore will be stayed pending the determination of the issues in the other action herein.

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From this decision Martin appealed. The appeal was argued at Victoria on the 2nd of February, 1921, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Maclean, K.C., for appellant: There were five mortgages on distinct properties and the mortgagor first commenced action to redeem the $2,000 mortgage and we say there was a fraudulent consolidation of the five mortgages to prevent his right to redeem the $2,000 mortgage. One action is the reverse of the other and the mortgagor having commenced his action first, he has the right of way. There is no defence except on the point he raises in his own action but the claim that the consolidation was made to fraudulently deprive him of the right to redeem on distinct properties should first be disposed of: see *Thomson* v. *South Eastern Railway Co.* (1882), 9 Q.B.D. 320.

Jackson, K.C., for respondent: The only substantial question is the right to consolidate five mortgages, aggregating in all $31,000 and interest and taxes going back for some years. The mortgagee has been pressing for payment for a number of years. The Court will not assist a party delaying. He has never tendered any money in payment of any of the mortgages: see *Tumin* v. *Levi* (1911), 28 T.L.R. 125 at p. 126. His writ though issued three days before ours was not served until after the issue and service of our writ. Mere threats are no cause of action. He brings his action as to our consolidation before we take any proceedings: see Eng. & Emp. Digest, Vol. 1, p. 35, par. 274. As to when consolidation does arise see Fisher's Law of Mortgages, 6th Ed., p. 626a. Proceedings must be taken before there is consolidation. The learned judge below has considered the rights of the parties and has exercised his discretion in deciding which action should be heard: see *Thomson* v. *South Eastern Railway Co.* (1882), 51 L.J., Q.B. 322 at pp. 325-6. The question is where the substantial burden of proof rests: see *Miller* v. *Confederation Life Association* (1885), 11 Pr. 241.

Argument

Maclean, in reply: The consolidation takes place when they say they want to be paid off in full: see *Tumin* v. *Levi* (1911), 28 T.L.R. 125 at p. 126.

Cur. adv. vult.

7th February, 1921.

MACDONALD, C.J.A.: The first of the above actions was commenced some days earlier than the second and upon application to Mr. Justice MORRISON in each, he made an order staying the first and allowing the second to be proceeded with.

At the hearing of the appeals a question arose in respect of the inclusion in the appeal books of an affidavit and cross-examination thereon, of Mr. *Jackson,* which was disposed of by his disclaimer of any intention to refer to them in the course of his argument.

Thomson v. *South Eastern Railway Co.* (1882), 9 Q.B.D. 320, is relied upon by both sides. The case is useful to this extent that it sets at rest the notion that the first to commence action is, as a matter of course, entitled to proceed; nor is the first to threaten action, nor the one who has the most substantial claim against the other. Beyond this the case merely enunciates the well-established doctrine of the Courts that each case must be decided on its own facts and that hard and fast rules ought not to be laid down when the decision must necessarily depend to a large extent on the discretion of the judge who has to determine the question.

The test proposed by Mr. Dalton, then Master in Chambers, in *Miller* v. *Confederation Life Association* (1885), 11 Pr. 241 at p. 245, is, I think, a useful one to apply to the case at bar:

"I think a good practical test in such circumstances to discover who should be plaintiff, where there are no cross demands but really only one subject of litigation, would be to ask, whose object would be defeated supposing both actions to be stayed forever. The one who in that case would be defeated should be allowed to be plaintiff, and the other might set up his case as a defence."

It is manifest that Miss Finlayson would be the only one to suffer if both actions were stayed forever. I am also of opinion that the burden of proof is in the true sense upon her. In this connection burden of proof does not mean the burden of proving a particular issue, but the onus which rests upon the party who must discharge it or fail to recover in the action. Miss Finlayson must in her action first prove the facts which entitle her to consolidate her several mortgages; if she shall fail in this the issue raised in the first action, *viz.*, fraud will

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become immaterial. If she shall prove facts which *prima facie* are sufficient to entitle her to consolidation, then the issue of fraud is a material defence.

Taken as a whole, Miss Finlayson's case is (1) to have judgment for the debt, (2) to consolidate and foreclose her several mortgages. Consolidation is resisted. If the defence succeeds the defendant will get all the relief that he could obtain in his own action, *i.e.*, he will be allowed to redeem the mortgages separately, and he need not even counterclaim for redemption since that is his right under a foreclosure decree.

I have examined *Rechnitzer* v. *Samuel* (1906), 95 L.T. 75, to which my attention has been drawn by my learned brother MCPHILLIPS, but am unable to derive assistance from it. A stay of an action brought in the Chancery Division was refused in that case because a more complete remedy could be obtained under the machinery of that Court than in the Common Law Division.

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But even if I were in doubt as to which action should have been stayed, I should not be justified, on the facts before us, in interfering with the discretion exercised by the learned judge in the Court below. The practice is well established that the large measure of discretion vested in the judge of first instance in matters of this character, is not, except for very cogent reasons, to be interfered with.

I would dismiss the appeals.

GALLIHER, J.A.

GALLIHER, J.A. would dismiss the appeals.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appeals really involve the determination as to whether one action should be stayed pending the hearing of the other. The action of *Martin* v. *Finlayson* was first begun and a summons was taken out asking for an order that the proceedings in the action of *Finlayson* v. *Martin* should be stayed pending the decision in the action of *Martin* v. *Finlayson*. The subject-matter of both actions is the same, that is, having relation to certain mortgage securities.

In the action of *Martin* v. *Finlayson* the plaintiff Martin is claiming the right to redeem the mortgage on the homestead freed from all other mortgages and to have the same reconveyed

to him, and a declaration that the defendant is not entitled to consolidate any of the mortgages, an account in respect of the mortgages and for a declaration that the three certain assignments of mortgages not given to the defendant by the plaintiff but to others have been obtained by the defendant Finlayson as part of a fraudulent scheme to prevent the redemption of the home of the plaintiff Martin. The action of the plaintiff Finlayson is to have an account taken of the same mortgages dealt with in the action of *Martin* v. *Finlayson,* and a consolidation thereof, and that the redemption must be as to all of the mortgages, which would result in preventing redemption and destroying the plaintiff Martin's equitable rights in his homestead. This may be said to be, shortly perhaps, a statement of the issues that will necessarily require consideration and disposal at the trial, and may be disposed of in the action of *Martin* v. *Finlayson,* the one first begun, and being determined obviate need of any further trial.

Now, the question becomes one of what, under the circumstances, should have been the proper and correct order in the Court below? The learned judge in Chambers dismissed the application of the plaintiff Martin, which was one for a stay of proceedings of the action in *Finlayson* v. *Martin,* pending the trial of the action in *Martin* v. *Finlayson,* and in the action of *Martin* v. *Finlayson* made an order that that action be stayed until after the trial of the action in *Finlayson* v. *Martin.*

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The practice in matters of this kind has received some considerable attention from time to time in the Courts of England, and counsel for both parties in the appeals have referred to and relied upon *Thomson* v. *South Eastern Railway Co.* (1882), 46 L.T. 513; 51 L.J., Q.B. 322. That decision was considered by Buckley, J. (now Lord Wrenbury), in *Rechnitzer* v. *Samuel* (1906), 95 L.T. 75, a case which may be said to be somewhat analogous to the case we have for consideration upon these appeals. The action was one brought upon a promissory note; the defence was that the transaction in respect of which the note was given was harsh and unconscionable and that the transaction ought to be reopened. Here it is contended in effect that there is harshness and unconscionableness in the attempt to con-

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solidate the mortgages and prevent redemption of the homestead, and what the plaintiff Martin contends specifically is that he be allowed to redeem the mortgage upon the homestead freed from all the other mortgages and to have the same reconveyed to him.

Now, when all is considered, some of the language of Buckley, J. would appear to me to be apt and very appropriate in the consideration of these appeals, and to my mind conclusive of the matter in favour of the appellant Martin, if the reasoning of Buckley, J. be agreed in, and I may say that I am in complete agreement with the reasoning of Buckley, J. and would apply it to the present appeals. At page 77 in the *Rechnitzer* case he said:

"In the common law action there is nothing whatever for the plaintiff to do except to put in the promissory note, to prove the defendant's signature if it were disputed (which it is not), and ask for judgment. That is the end of his case."

In regard to the present appeals all the mortgages are admitted, so that the position is quite similar and the onus is upon the plaintiff Martin, in the action of *Martin* v. *Finlayson,* to establish all that is contended for, that is, he (Martin), as Buckley, J. has said, "is the person upon whom the onus rests." Mr. Justice Buckley proceeds and says, in the action he had under consideration:

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"It is for him to prove that his opponents are moneylenders within the Act of Parliament; that they have so dealt with him as that under the Act of Parliament he will be entitled to such special remedies which are allowed by the Act of Parliament, and so on. He is the person upon whom the onus entirely rests, and if the two actions could be brought, as I could not bring them together, it seems to me the right order would be to consolidate the two, and make the borrower the plaintiff in the consolidated action."

Now, Buckley, J. had a difficulty that does not present itself to this Court and which was not present in the Court below, that is, in England actions may be brought in either the Queen's Bench or Chancery Division, and as it happened one action was in the Queen's Bench and the other in the Chancery Division the *ratio decidendi* of the decision of Buckley, J. clearly indicates that if the situation was as it is with us, the borrower's action would have been given priority, and to apply that same conclusion to the present appeals, the mortgagor Martin would

be allowed to proceed with his action and the *Finlayson* v. *Martin* action stayed with leave for the defendant Finlayson, if desired, to set up in the *Martin* v. *Finlayson* action by counterclaim all that is being sued for in the action of *Finlayson* v. *Martin,* that is, the principle is well settled that it is preferable to allow that action to go on in which the burden of proof rests upon the plaintiff, and that would clearly appear to be upon the plaintiff in the action of *Martin* v. *Finlayson.*

Further, a consideration not to be lost sight of and one which is entitled to consideration is the fact that the action of *Martin* v. *Finlayson* was first begun, and upon all the facts and circumstances of this case it is a consideration which is entitled to very considerable weight in view of the fact that it is alleged and not denied at this bar that the mortgagee refuses to accept redemption of the mortgage upon the homestead alone, but insists that the mortgages upon other lands than the homestead be redeemed. There is no suggestion that if the order of the Court be that the proceedings be stayed in the second action, namely, that of *Finlayson* v. *Martin,* and that the action first begun of *Martin* v. *Finlayson* should be proceeded with, that any loss or damage will in the *interim* ensue, in any case, if the mortgagee counterclaims in the mortgagor's action, the whole matter in dispute may be determined in the one action.

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Here we have the situation that makes it clear to demonstration that the action of *Martin* v. *Finlayson* should be first proceeded with and the action of *Finlayson* v. *Martin* stayed. The plaintiff Martin first sued and as we have seen the onus rests upon him, so that it is impossible, upon the authorities, to make any other order, *i.e., Martin* v. *Finlayson* must first go on. It is only necessary to read the language of Brett, L.J., and Holker, L.J. in the *Thomson* case (1882), 51 L.J., Q.B. 322 at pp. 325 and 327, to see the futility of contending otherwise. At p. 325:

> "If indeed there should be in any case nothing to guide the exercise of his discretion but the fact that one party was the first to issue the writ, then he would properly give that party the benefit and advantage of his diligence."

The situation here is, exactly that the plaintiff Martin first sues, raising the whole question and with the onus upon him,

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the mortgages being admitted. Brett, L.J. at p. 325 proceeds:

"If, for instance, the burden of proof was as much on one litigant as on the other litigant, then the party who first issued the writ would get the advantage and his action would be allowed to proceed."

It is here seen that if the plaintiff Martin had not even the impregnable position which he has, that of having the onus upon him, *i.e.,* if honours were even, which they clearly are not, he yet would be entitled to first proceed. And at p. 327 Holker, L.J., said:

"It appears to me to be more reasonable to allow the party who has substantially everything to prove to begin; he has really to establish his case, and in the action which proceeds it is just that he and not the other party should be the plaintiff. The appeal, therefore, must succeed."

(Also see *White* v. *Harrow* (1901), 50 W.R. 166). Then we have a case in the Court of Appeal in England which is absolutely on all fours with this case, demonstrating that the appeals of the plaintiff Martin should be allowed and the action of *Martin* v. *Finlayson* do first proceed and the action of *Finlayson* v. *Martin* be stayed. The case is *Tumin* v. *Levi* (1911), 28 T.L.R. 125:

"The defendant, who had a number of transactions with the plaintiff, a registered moneylender, offered the plaintiff just before the last sum he had borrowed had become due, the balance of the principal and a sum for interest which the moneylender declined. The borrower thereupon issued a writ in the Chancery Division claiming an account of all transactions between him and the moneylender, and a declaration that some of them were harsh and unconscionable, and for relief under the Moneylenders Act. The moneylender shortly thereafter issued a writ in the King's Bench Division for the full amount said to be owing by the borrower. The borrower thereupon took out a summons asking for a stay of the proceedings in the King's Bench Division on the ground that they were an abuse of the process of the Court in view of the proceedings pending in the Chancery Divsion.

"*Held* (Kennedy, L.J., dissenting), that, in the circumstances of the case, the proceedings in the King's Bench Division should be stayed."

And we find Vaughan Williams, L.J. in this case, at p. 126, approving of the rule in the *Thomson* case (51 L.J., Q.B. 322) and saying:

"That being the rule, and applying it, he thought he ought to stay the second action not simply because it was the second action, but because there was nothing in the onus of proof to make it just that the plaintiff in the Chancery action should have that action stayed, and he left to be added only as defendant in the Common Law action."

And Buckley, L.J., at p. 127, said:

"*Prima facie* therefore it was oppressive to appeal to the King's Bench Division as well, and it was wrong when an action was pending to bring another action. [And here it was wrong in the circumstances to bring the *Finlayson* v. *Martin* action.] The second ground rested on this, whether the borrower was first or not [and here the borrower the mortgagor, Martin, was first]. It was on him that the burden of proof lay, and he had to satisfy the Court as to the facts. *Prima facie* then it was right that the second action should be stayed and that the action go on in which the burden of proof was on the plaintiff."

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In view of these decisions in the Court of Appeal in England (decisions binding upon this Court) in the absence of decisions to the contrary in the Supreme Court of Canada or the Privy Council (see *Trimble* v. *Hill* (1879), 5 App. Cas. 342) this Court, with all respect to contrary opinion, cannot do otherwise than follow the well-defined rule and that palpably is, in the circumstances of the case, to stay the proceedings in the *Finlayson* v. *Martin* action.

I am therefore of the opinion that both of the appeals should be allowed and that it should have been determined in the Court below that the action of *Martin* v. *Finlayson* should be first proceeded with and that the action of *Finlayson* v. *Martin* be stayed pending the decision of the action in *Martin* v. *Finlayson,* with liberty to the mortgagee Finlayson to set up in the mortgagor's action, that is, in *Martin* v. *Finlayson,* all that she is proceeding for in her action.

MCPHILLIPS, J.A.

EBERTS, J.A. would dismiss the appeals.

EBERTS, J.A.

Appeals dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *White & Martin.*

Solicitors for respondent: *Jackson & Baugh-Allen.*

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RE PAPPAS

RE PAPPAS.

Immigration—Officer—Appointment of—Signature of acting deputy minister sufficient—Order of deportation—Amendment—R.S.C. 1906, Cap. 1, Sec. 31(l)—Can. Stats. 1910, Cap. 27, Sec. 22(2); 1918, Cap. 12, Sec. 48; 1919, Cap. 25, Sec. 8.

The appointment of an immigration officer under section 22(2) of the Immigration Act is valid when signed by the acting deputy minister of immigration and colonization by authority of section 31(*l*) of the Interpretation Act and section 48 of the Civil Service Act.

In the case of an order of deportation being insufficient in form, the officer making it may, at any time before the return is made to the writ, issue an amended order.

Statement

APPLICATION for a writ of *habeas corpus* and *certiorari* in aid. One Theodore Pappas entered Canada in the latter part of 1912, crossing the International Boundary from Sumas, Washington, to Huntingdon, B.C., and taking the night car on the B.C. Electric Railway to Vancouver. He saw no officials, either immigration or customs, had no baggage, and was accompanied only by his brother, George Pappas. He was arrested at Prince George, B.C., in April, 1920, and brought before A. E. Skinner, an immigration officer appointed under section 22, subsection (2) of the Immigration Act, to exercise the powers and discharge the duties of a Board of Inquiry at any place in Canada other than a port of entry. Prince George was not a port of entry under the Act. The proceedings were attacked, *inter alia,* on two points: (1) That the appointment of Skinner, under section 22, subsection (2), was signed by W. W. Cory, acting deputy-minister of immigration and colonization, and not by the minister personally; and (2) that the original order of deportation made by Skinner did not on its face shew jurisdiction, and that the officer had no right or authority to make an amended order shewing such jurisdiction. Heard by MORRISON, J. at Chambers in Vancouver on the 24th of February, 1921.

Stuart Henderson, for the application.
Reid, K.C., for the Crown.

Judgment

MORRISON, J.: Under the provisions of section 31, subsec-

tion (*l*) of the Interpretation Act, Cap. 1, R.S.C. 1906, and section 48 of the Civil Service Act, 1918, Can. Stats. 1918, Cap. 12, the signature of the acting deputy minister is sufficient; if an order of deportation is insufficient in form, the officer making it can, at any time before the return is made to the writ, issue an amended order shewing jurisdiction. The application is dismissed.

Application dismissed.

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IN RE DOMINION TRUST COMPANY, LIMITED; *EX PARTE* ROSS.

MURPHY, J. (At Chambers)
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IN RE DOMINION TRUST CO., LTD.

Company law—Winding-up—Discovery—Position of liquidator — Specific documents.

Where a specific document is traced into the hands of a company which has since been ordered to be wound up, the liquidator will be ordered to produce that document, or to properly account for his inability to produce it.

APPLICATION to rectify the register of a company in the course of being wound up. On the hearing, the applicant applied for an order directing the liquidator to produce or properly account for the share certificates which the applicant had delivered to officials of the company some five years before the company had been ordered to be wound up. Heard by MURPHY, J. at Chambers in Vancouver on the 22nd of February, 1921.

Statement

Mayers, for the application, cited *In re Barned's Banking Co. Ex parte The Contract Corporation* (1867), 2 Chy. App. 350, and *Gooch's Case* (1872), 7 Chy. App. 207.

Alfred Bull, for the liquidator, cited *In re Mutual Society* (1883), 22 Ch. D. 714, and *Dominion Trust Co.* v. *Royal Bank of Canada* (1919), 27 B.C. 166.

Argument

MURPHY, J.: I do not think that there is anything in the cases cited which prevents my doing what is obviously right and just in this matter. The share certificates have been traced into the hands of the manager and accountant of the Company, and in any ordinary action such a state of facts would be suffi-

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cient for the success of an application under Order XXXI., r. 19A, (3). Now, is there anything in the position of a liquidator which exempts him from the ordinary obligation of a litigant to make a full discovery of all documents which are or have been in his possession or power in any manner relevant to the issues to be decided. I find that Sir William James, L.J., in *Gooch's Case* (1872), 7 Chy. App. 207 at p. 212; 41 L.J., Ch. 338 at p. 340, expressed himself as follows:

> "Among the other duties of an official liquidator, it may fall to him to represent the company as a party litigant. The company can only sue or be sued through his agency, and where there is such a suit, or where there is in the winding up a proceeding, which is in substance, though not in form, a bill or action by or against the company, then, from the very necessity of the case, the adverse party has a right to deal with the official liquidator as the litigant, and to obtain from him the same measure of discovery in the same manner as he would from any other litigant."

I do not think this principle has been in any way affected by the subsequent case of *In re Mutual Society* (1883), 22 Ch. D. 714, and the case decided by my learned brother MACDONALD. All that was decided by the last two cases was that while the liquidator does certainly represent the company in litigation, he is not an ordinary litigant, but an officer of the Court, and will therefore be assumed by the Court to be ready and anxious to render to the opposing litigant all the assistance in his power, so that it will rarely be necessary for any Court to make an order upon the liquidator for a general affidavit of documents, for the reason that the liquidator will have anticipated and rendered unnecessary any such order by giving to any person interested, not only free access to any relevant books and papers, but also every assistance and facility in finding out which are the relevant books and papers that person requires. I take the decision in the case of *In re Mutual Society, supra,* and in the case of the *Dominion Trust Co.* v. *Royal Bank of Canada* (1919), 27 B.C. 166, to mean this and no more, namely, that since an order for discovery of documents is by no means an order of course, even in ordinary litigation, therefore it must very rarely happen that such an order can be required to be made upon an officer of the Court, who will be assumed to have already done everything that such an order would require him to do.

Judgment

Application granted.

REX *EX REL.* BRADSHAW v. WESTMINSTER BREWERY LIMITED.

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Criminal law—Prohibition—Sale of beer by brewery—Over two and one-half per cent. proof-spirit—Innocent mistake by shipper—B.C. Stats. 1916, Cap. 49, Sec. 10.

In compliance with an order from a hotel for near-beer (not over two and one-half per cent. proof-spirit) a brewery company delivered 17 dozen bottles. Three of these bottles were seized by the Provincial police, an analysis shewing the contents exceeded two and one-half per cent. proof-spirit. The evidence of the manager of the Brewery and his son (who had charge of the bottling) was that regular tests were made of the beer and that prior to the delivery in question it was discovered that certain bottles ran over the two and one-half per cent. limit and they were set aside in a pile to be later poured back into the vats and brought under the allowed percentage. The shipper being short of stock used a portion of this pile to complete the order from the hotel not having been informed that this pile was over-proof. The magistrate accepted his evidence but nevertheless found that the Brewery did deliver bottled beer more than two and one-half per cent. proof-spirit and convicted and fined the Brewery $1,000.

Held, on appeal, by way of case stated that the conviction should be quashed.

CASE stated by H. L. Edmonds, police magistrate for New Westminster. The defendant was charged with unlawfully selling liquor, found guilty, and fined $1,000. The police magistrate stated the following case:

"The defendant was charged before me for that the defendant on the 27th of December, 1919, at the City of New Westminster aforesaid, within the Province of British Columbia, did unlawfully sell liquor contrary to the form of statute in such case made and provided.

Statement

"I convicted the defendant on the 2nd of February, 1920, and imposed a fine of $1,000, which fine was duly paid under protest but the defendant claiming to be aggrieved and desiring to question my conviction or determination on the ground that it is erroneous in point of law and has applied to me for a stated case and having complied with the requirements of the Summary Convictions Act in this regard, I herein set forth the facts of the case and the grounds upon which the proceeding is questioned for the decision of the Supreme Court thereon.

"Prior to the 27th of December, 1919, the Fraser Hotel in the City of New Westminster, Province of British Columbia, through its bar-

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tender ordered 17 dozen bottles of near-beer. Thereafter on the 27th of December, 1919, the defendant delivered to the said Fraser Hotel 17 dozen bottles purporting to contain near-beer. These bottles were seized by the Provincial police when delivered at the hotel and the said Provincial police took three of the said bottles, at the same time advising the bartender that same were for analysis. After the seizure by the police being brought to the attention of Mr. Nels Nelson, the defendant's manager, the same day the said Nels Nelson telephoned to the hotel that there had been a mistake in the filling of the order and ordered the hotel to put the bottled beer aside and said that the same would be replaced. Such of the said bottles as were then in the possession of the hotel proprietor were put off the shelves and replaced on the following Monday by the Brewery who sent near-beer under two and one-half per cent. proof-spirit. The analysis shewed that the contents of the three bottles seized from out of the delivery of the 27th of December ran over two and one-half per cent. proof-spirit.

"The defendant by its manager, Mr. Nelson, and his son gave evidence that the contract with the hotel was to sell them only near-beer within the limits prescribed by the Prohibition Act, and every precaution was taken against sending out anything over two and one-half per cent. proof-spirit by periodical tests made by the brewer and reported to Mr. Nelson's son, who had charge of the bottling.

"Previous to the 27th of December, 1919, they had discovered some bottled beer running over two and one-half per cent. proof-spirit and had set it aside in a pile customary for that purpose and separate from the supply to be sent out, to be poured back into the vats later and brought down under two and one-half per cent. proof-spirit. The shipper being short of stock, used a portion of this pile to complete the Fraser Hotel order. The only evidence on the question of the shipper's knowledge was given by Mr. Nelson's son, in which he stated that he had not informed the shipper that the separate pile contained stock containing over two and one-half per cent. proof-spirit.

Statement

"I accept Mr. Nelson's evidence and the evidence of the hotel proprietor and find that what both parties had in mind when the contract was made was near-beer and the Brewery did not intend to sell beer over two and one-half per cent. proof-spirit. I find as a fact that the Brewery did deliver bottled beer over two and one-half per cent. proof-spirit, which was later replaced as heretofore stated by near-beer under two and one-half per cent. proof-spirit. The said delivery was not paid for at the time of seizure by the police, it being customary to pay every Monday.

"The questions signed and stated for the opinion of the Supreme Court are as follows:

"1. Did the delivery of beer over two and one-half per cent. proof-spirit in bottles made under the circumstances hereinbefore set forth amount to a sale under section 10 of the British Columbia Prohibition Act?

"2. Was I right in holding that the defendant sold liquor as alleged in the information on the 27th of December, 1919?"

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Argued before MORRISON, J. at Vancouver on the 30th of February, 1921.

R. L. Maitland, for appellant: The conviction should be quashed on the facts set out in the case stated. Neither of the parties ever intended a sale. This does not amount to a sale under the Sale of Goods Act.

Macgowan, for the Crown: The whole question is whether it turned on the fact that intoxicating liquor was delivered pursuant to the sale and accepted by the hotel. It is submitted the Brewery did make a sale and deliver intoxicating liquor. *Mens rea* does not apply in a case of this kind, and the conviction should be affirmed.

Argument

MORRISON, J.: The answer to both questions is in the negative. The conviction is therefore quashed.

Judgment

Conviction quashed.

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Banks and banking—Promissory note—Given bank without consideration—Object to deceive Government supervisors—Bank becomes insolvent—Action by receiver on note—Estoppel.

The defendant gave a promissory note without consideration, which he subsequently renewed, to a bank in the State of Washington, with the knowledge that it was to be used for the purpose of deceiving the bank examiner as to the bank's assets. He took from the bank manager at the same time a written acknowledgment that there was no liability on the note. The bank became insolvent and the bank commissioner acting under statutory powers of said State as receiver brought action in British Columbia on the note.

Held, that the defendant was liable and was estopped from pleading want of consideration upon the insolvency of the bank.

Held, further, that the fact that the bank examiner who had in his report accepted the note as a valid asset, made statements in his cross-examination at the trial to the effect that he would probably not have

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acted differently in his consequent action had such note not been in existence, did not affect the defendant's liability.

ACTION to recover the balance due on a promissory note. The facts are fully set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 26th of January, 1921.

A. Alexander, for plaintiff.

Craig, K.C., and *Tysoe,* for defendant.

28th February, 1921.

MACDONALD, J.: Plaintiff seeks to recover the balance due on a promissory note, dated 27th September, 1915, by which the defendant promised to pay, in 60 days, to the Northern Bank and Trust Company, $10,521, with interest, after maturity, at 7 per cent. The balance claimed, after giving credit for $3,000, purporting to have been paid, on the 23rd of October, 1915, is $10,136.09. Plaintiff is the successor in office of W. E. Hanson, bank examiner for the State of Washington, and, under its law, the said bank became insolvent. On the 29th of January, 1917, Hanson, as such bank examiner, took possession, and control, of its assets, under the provisions of the laws relating to insolvent banking corporations. He remained in possession of such assets, for the purpose of liquidation and disposition, until he was succeeded by Louis H. Moore, who, in turn, was succeeded by the present plaintiff, the official name, in the meantime, of the said bank examiner having been changed to that of bank commissioner. No question arises as to the right of the plaintiff to sue, nor that such right cannot be exercised in this Province, where the defendant now resides, though, at the time of the making of the note he was a resident of Seattle, in the State of Washington.

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The first defence raised is, that there was a total failure of consideration. It appears that the note in question is a renewal of a previous note, dated 24th December, 1914, made by the defendant, payable on demand, in favour of the Northern Bank and Trust Company. Such note bears an indorsement that interest, amounting to $130, was paid up to the 1st of March, 1915. The note was given by the defendant at the request of

W. R. Phillips, then president of such bank. Defendant, as a matter of precaution, obtained from Phillips an acknowledgment, shewing no liability as follows:

"December 24, 1914.

"Received from Dr. N. Allen a note of $10,000 held *Re* Issaquah Superior Coal Co. The Bank agrees that there is no liability of any kind pertaining to said note."

I am quite satisfied, that there was no consideration for the giving of this note of $10,000. Then, in the following year, defendant was requested to renew the note, and, on the 22nd of September, 1915, gave the note sued on for $10,521. On that occasion, he produced the acknowledgment referred to and obtained an indorsement upon such letter of indemnity, from W. L. Collier, who had become president of the bank, as follows:

"9/27/15. Renewal of this note taken this date under agreement herein above mentioned."

There was thus no consideration for the giving of the note sued on, and the defendant did not in fact owe the bank $10,521, nor any portion thereof. According to an indorsement on the note, a payment appears to have been made thereon, on the 23rd of October, 1915, "by Alvensleben," of $3,000, leaving the balance then due of $7,521. The bank could not, under these circumstances, have recovered the amount of the note from the defendant. Is the plaintiff, then, in a stronger, or better, position than the bank would have been, had it sued? It was, at the outset of the trial, strenuously contended that, in this action, all defences were open to the defendant, that he could have raised in the event of the bank suing. Two well qualified legal practitioners of the State of Washington deposed, as to the law of that State, with reference to the liability of the defendant. They differed in their view of the law, but I am inclined to think that such variance was more, in the way they applied decisions of the United States to the facts of this case, than a difference as to the settled law of that State. The attorney, called for the defence, apparently considered that the right of the plaintiff to recover was in the same position as an ordinary receiver. If no distinction can be drawn in favour of the plaintiff, on account of the nature of his position, then he would be right in his conclusion. The law, in this respect, is

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expressed in Pomeroy's Equitable Remedies, Vol. 1, p. 186, as follows:

> "It is generally held that a receiver can occupy no better position than those for whom he acts and is appointed, that he is in the place of the ones he represents, and has only such rights as they had, so that the rights and liabilities of third parties are not increased, diminished, or varied by his appointment. There passes to the receiver the property and the rights of the one from whom he takes, precisely in the same condition and subject to the same equities as before his appointment, and any defence good against the original party is good against the receiver."

This statement of the law is referred to in *Citizens' Bank* v. *Kretschmar* (1907), 44 South. 930 at p. 932, and numerous cases are there cited in its support.

As the trial developed, however, counsel, for the defendant, felt compelled to concede that the law in this connection was too broadly stated and that, if the facts so warranted, the doctrine of estoppel might be invoked by the plaintiff and render the defendant liable. This would place the plaintiff in a different position to that of the ordinary receiver, and prevent the want of consideration being set up as a defence to the note.

In *Moore* v. *Kildall* (1920), 191 Pac. 394, a somewhat similar action was brought in the State of Washington by Louis H. Moore, the predecessor in office to the present plaintiff, against one Kildall. It was there held, by the Court, that, in the absence of fraud or mistake, it was incompetent for a party signing a promissory note to set up an independent collateral agreement limiting or exempting him from liability. Further, that if he gave such note, as "live" paper, so as to deceive the bank examiner, he was estopped, upon the insolvency of the bank, from alleging want of consideration. In the judgment, a quotation from the case of *Golden* v. *Cervenka* (1917), 116 N.E., p. 273, is cited, with approval, as supporting this proposition of the law. A distinction was sought to be drawn from the facts of the present case, as sufficient consideration was there found to have existed, and it was an oral agreement, as distinguished from a written agreement, with reference to the matter of consideration. It is contended, there is no such distinction in applying the principle of estoppel, where a bank examiner is seeking to realize upon the assets of the bank. Dunn, J., in delivering the judgment of the majority

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of the Court, in that case, refers, at p. 281, to the question of liability under these circumstances as follows:

"Where notes or other securities have been executed to a bank for the purpose of making an appearance of assets, so as to deceive the examiner and enable the bank to continue business, although the circumstances may have been such that the bank itself could not have collected the securities, it has been held that the receiver, representing the creditors, could maintain the action, and the makers were estopped, upon the insolvency of the bank, to allege want of consideration."

A number of cases are then cited, and particular reference is made to *Lyons* v. *Benney* (1911), 79 Atl. 250. There the facts are very similar to those here presented. The note sued upon had been given by the defendant, to accommodate the bank, and upon an agreement that he was not to be personally liable. It was held, that, in substance, his defence amounted to an admission that he was a party to a scheme to create a false asset and to deceive the bank examiner. The point to be decided was, not whether the bank, if it were still carrying on business, as a solvent institution, could enforce the payment of the note, but whether the note, having passed into the hands of the receiver of such bank, and as a representative, not only of it, but of its creditors, could bring the suit. The right of a receiver, under such circumstances, was then discussed in the judgment, as follows (p. 251):

"While the general rule undoubtedly is that the receiver of an insolvent corporation has no greater rights than those possessed by the corporation itself, and a defendant in a suit brought by him may take advantage of any defence that might have been made if the suit had been brought by the corporation before its insolvency, it is equally true that when an act has been done in fraud of the rights of the creditors of the insolvent corporation the receiver may sue for their benefit, even though the defence set up might be valid as against the corporation itself. In such a case he may maintain an action which the corporation itself could not."

Judgment

Reference is then made to an underlying principle, that one who voluntarily gives his obligation to the bank, for the purpose of taking up another obligation, and of being exhibited, as one of its assets, to a supervising officer of the Government, is estopped from denying want of consideration upon the insolvency of the bank, when a receiver brings an action upon the note for the benefit of the creditors of the institution. The judgment concludes as follows:

"Neither the law nor good conscience can sanction the contention of the

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defendant that he ought to be permitted to take advantage of the fraudulent agreement between him and the bank, to which its creditors were not parties and for whom the receiver sues."

Then, as I find that the facts here warrant such conclusion, there is an apt citation in *Lyons* v. *Benney, supra,* at p. 251, from *Pauly* v. *O'Brien* (1895), 69 Fed. 460, as follows:

"'When parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice, to leave him bound who has bound himself. It will never do for the Courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. Undoubtedly, the transaction in question originated with the officers of the bank, but to it the defendant became a willing party. . . . . .'"

In the argument, it was practically conceded that the law was as thus stated, so, the question to be decided here is, whether, upon the facts, the principle of estoppel can be applied. In other words, that while a decision as to foreign law is, in a sense, a finding upon evidence, still, I require also to determine whether the facts disclosed in the case warrant the application of such law.

The defendant contends that the principle of estoppel should not be applied, on account of the manner in which he undertook the obligation. If he failed, in this respect, then he seeks to avail himself of a portion of the evidence of C. S. Moody, upon which to base a contention, that one of the essentials of equitable estoppel does not exist.

Judgment

As to the first ground, if there are no special circumstances surrounding the giving of the note, relieving the defendant, who has bound himself, he should remain bound as against a receiver seeking, under statutory powers, to realize the assets of the bank for the benefit of its creditors. With reference to the signing of the original note of $10,000, defendant did not offer any clear nor satisfactory reason for his actions. In instructing a solicitor to prepare his defence, he apparently deemed it advisable to allege, that such note was given "in order that it might be pledged by the bank to a third person." But there was no evidence offered in support of this statement, and it was not pressed at the trial. He was, at the time, aware of the risk he was running, in signing a document which was false, in so

much, that it acknowledged an indebtedness to the bank which did not exist. He sought to protect himself by obtaining the letter of indemnity, so that he might not, in case of death, be held liable by the bank. He now says, his thoughts of financial danger did not go further and he did not intend to deceive. If I understand his position aright, he claimed to have acted thoughtlessly and, in the light of after events, in an unbusiness-like way, simply to comply with the wishes of his friend Phillips, president of the bank. The accommodation was not, however, on its face, supplied to Phillips, but to the bank. The letter of indemnity shews, that it was intended, that defendant should appear to owe the bank, in connection with the Issaquah Company, the amount of the note. This document, and perchance the conversation incident to it, must have brought home to defendant the fact that not only was he not accommodating Phillips personally, but was really creating a fictitious asset in the hands of the bank. He was giving a note, which would, in all likelihood, and, as a fact, did pass muster before the bank examiners, who were unaware of the true position of the matter, and treated it as a good asset available for creditors. If I accept as truthful the letter of defendant written under date February 15th, 1917, addressed to J. H. Edwards, state bank examiner, with reference to this note, then he had certainly in mind, at the time he gave the note, that it might deceive such bank examiners, as appears by the following excerpt from such letter:

Judgment

"The only thing that I paused about was the possible fooling of the examiners and I was assured that they knew the note was for the Issaquah Coal Co."

Any excuse, or explanations offered by the defendant, for giving the first note, have, however, in my view of the matter, no weight whatever as affording a defence to the note sued on. He was not called on to give this note, and, in so doing, was only repeating, without even the influence of Phillips, his first misrepresentation. He could not reasonably suggest that he was accommodating Collier, the then president. He was aware that he was creating a false asset, and the indorsement on the original note of the payment of interest by some one other than himself, would surely indicate that the bank officials were

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either actively assisting or conniving at proceedings, for the purpose of giving the transaction a *bona fide* appearance.

There may be an occasion, where there is such gross neglect to inquire, or shutting of the eyes to what is transpiring, as to constitute notice of the existence of certain facts. I do not require to found a conclusion on this basis, as, when I consider all the circumstances, I feel satisfied that the intention was that the note in question was to represent an asset of the bank. Further, that the defendant was bound to know, and did know, that according to the laws of the State, there would be an inspection by a bank examiner in due course, and that the note would appear to such official as a valid asset. Such inspection took place and the note was so treated, and so remained until the insolvency of the bank. In the liquidation which followed, the creditors have not fully realized their claims, and this note should, to my mind, be available to assist towards that object. In other words, the defendant should, upon the principle of estoppel, make good his representation, unless there are some facts disclosed, which would distinguish this case from any of those to which I have referred, and prevent the operation of such principle.

Judgment

It is contended that, in any event, such a distinction exists and that the second ground mentioned should prevail. It is submitted, that no prejudice nor loss was suffered, through the actions of the defendant, and thus that one of the essentials of estoppel is wanting. This position was not specifically raised by the pleadings, but defendant contends that it received sufficient support, from the cross-examination of C. S. Moody, a deputy State bank examiner, who was called in rebuttal by the plaintiff. It appears that at the time of the bank examination by Moody, in September, 1916, that the capital stock of the bank purported to be $100,000, with a surplus fund of $20,000. He found this note of $10,521, with an indorsement of the payment of $3,000 by Alvonsleben, and considered it an asset of the bank, and was so exhibited in his report. While he discovered that losses had been made by the bank, which made it necessary to levy an assessment of 100 per cent., he, according to his report, in which the present plaintiff joined, did not,

in ordering such loss to be charged off, include any amounts in connection with the Issaquah Coal Company. The report thus shews that the note in question, representing a balance of $7,521, was accepted as a valid asset of the Bank, and the directors deposed to that effect before Moody, though classing such asset under the heading of "slow paper." Moody, in his cross-examination, was asked whether, if this note had not been put in this report, he would have acted differently, and his reply was,

"the chances are we would have had to close the bank because if you look in the back part here [of the report] the capital stock was practically gone and 100 per cent. assessment levied on the bank."

He then further describes the condition of the bank and as to the ordering of such assessment, and after a reference was made to the note of $10,000 having been reduced to $7,521, he was asked, if such an amount had not been put in the report, whether he would have done more than he did. His answer to this question was, that he could not say, under those circumstances, what he might have done. Following this answer, he was pressed further by counsel, as follows: "And you cannot swear that you would have done anything different?" and he replied in the negative. Counsel for the plaintiff then intervened, and, in reply to a somewhat leading question, Moody said, that what he would have done would be a matter for consideration, after he discovered the nature of such asset. The point was then again pursued by counsel for the defendant, not so much on the line of the asset being a misrepresentation, or attempt to inflate the assets of the bank, as the effect that would have been produced on the mind of Moody, had such note not have been in existence. In other words, if the assets had been $7,500 less, would he have acted differently, and his reply was that he did not think he would. In answer to further questions in this connection, he said that if the assets had been less than $7,500, "the chances are it would have made no difference." From these statements, or admissions, it is contended by the defendant that the plaintiff, whether representing the bank or its creditors, should not be entitled to set up estoppel. In other words, the submission is, that the bank would have continued to do business even if the note had not been

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given. Even if Moody could, by any such admissions made, at this late date, in course of his cross-examination, affect the plaintiff in any right of action he possessed, still, I do not think they go so far as to destroy the liability of the defendant, upon the note in question. The fact, that the bank might have continued in business, even without an additional asset appearing of $7,500, is not material, nor the deciding point.

The true import of the actions of defendant is, that having falsely, for the benefit of the bank, represented that he owed such institution, he was satisfied to allow the document, shewing the indebtedness, to remain outstanding in the hands of the bank, and forming a portion of its assets, until such time as it came into possession of the plaintiff. The result is, that the plaintiff then became entitled, in the interest of the creditors, to contend, that they would be prejudiced, in realizing these claims, unless the defendant be estopped from denying liability. Defendant, as against the plaintiff, by his continued representation, is not in any better position than if he had actively induced an innocent party to purchase this past due note from the bank, and would thus be prevented from disputing an indebtedness. In my opinion, the plaintiff has the right to recover the balance due upon the note. There should be judgment for the plaintiff for $10,200 and costs.

Judgment

Judgment for plaintiff.

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Constitutional law—Grant of land by way of subsidy—Settlers' Rights Act—Application to Governor in Council under—Proof of occupation—Notice of hearing—Right to cross-examine witnesses—Jurisdiction of Court to review—Crown grants issued to settlers—Effect of disallowance of Act—Innocent trespass—Damages—Milder rule of assessment—B.C. Stats. 1883, Cap. 14; 1884, Cap. 14; 1904, Cap. 54; 1917, Cap. 71.

By Provincial Act of 1883 a block of land (including the land in question) was granted to the Dominion Government who later transferred it to the plaintiff Company by way of subsidy. The Vancouver Island Settlers' Rights Act, 1904, as amended in 1917, provided that "upon application to the Lieutenant-Governor in Council on or before the first day of September, 1917, shewing that any settler occupied or improved land within said railway-land belt prior to said Act of 1883 with the *bona fide* intention of living on the said land accompanied by reasonable proof of such occupation or improvement and intention a Crown grant of the fee simple in such land shall be issued to him or his legal representative." Applications were made by the defendants thereunder (their predecessors in title having acquired surface rights by pre-emption) and they were heard by the Governor in Council, counsel for the plaintiff Company (who received seven days' notice of the proceedings) being present, who asked for an adjournment and the right to cross-examine witnesses on their affidavits submitted in evidence. This was refused and after the hearing Crown grants issued. In an action for a declaration that the Crown grants were null and void in so far as they purported to grant the minerals or that portion of the surface over which the plaintiff was entitled to exercise acts of ownership it was held by the trial judge that under the Settlers' Rights Act aforesaid, there must be a hearing of which the plaintiff was entitled to notice; that the notice received was inadequate and as the evidence in support of the claim as to occupation, etc., consisted only of solemn declarations of witnesses the application for an adjournment should have been granted and counsel should have been given the right to

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cross-examine the witnesses on their declarations and in the absence of such cross-examination there was not "reasonable proof" as required by the Act.

Held, on appeal, in the *Wilson* case, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that the evidence in the declarations did not amount to "reasonable proof" as required by the Act, and therefore the Executive had no power to issue the Crown grant; and in the *Dunlop* case, reversing the decision of GREGORY, J. (EBERTS, J.A. dissenting), that the evidence in the declarations did amount to "reasonable proof" and the defendant was entitled to succeed.

Held, further (EBERTS, J.A. dissenting), that the amending Act of 1917 was *intra vires* of the Provincial Legislature (as dealing with property and civil rights in the Province) notwithstanding the fact that plaintiff's railway had been declared to be a work for the general benefit of Canada and the disallowance of said amendment (which amendment extended the time for application) did not invalidate the the Crown grants issued thereunder prior to such disallowance.

Held, further, in the *Wilson* case, that damages recoverable by the plaintiff should be assessed under the milder rule, allowing the innocent trespasser the cost of severance of the coal as well as bringing it to the bank.

[On appeal to the Privy Council, the judgment of the Court of Appeal was reversed in the *Wilson* case, and affirmed in the *Dunlop* case.]

Statement

APPEALS by defendants from the decision of GREGORY, J., in an action tried by him at Victoria on the 5th, 6th, 7th and 9th of January, and the 16th to the 19th of February, 1920, for a declaration that a Crown grant issued to the defendants Wilson and McKenzie as executors of the estate of Joseph Ganner is null and void in so far as it purports to grant to the defendants the coal, coal-oil, ores, etc., in section 2 and part of section 3, range 7, Cranberry District, containing 160 acres, also that part of the surface of said lands upon which the plaintiff is entitled to exercise acts of ownership, purchase or rights of easements for an injunction restraining the defendants from entering upon and working the mine or in the alternative that the Crown grant is null and void in so far as it purports to grant lands other than those actually occupied or improved with the *bona fide* intention by the settler of residing thereon. By B.C. Stats. 1883, Cap. 14, assented to on the 19th of December, 1883, a tract of land (including the ground in question) and all the coal, coal-oil, ores, etc., were granted to the Dominion of Canada to aid in the construction of a rail-

way between Esquimalt and Nanaimo, and to be appropriated as the Dominion Government might deem advisable. By agreement between the Dominion Government and the E. & N. Railway Co. (ratified and confirmed by Act of Canada, 1884, Cap. 6) of the 20th of April, 1883, the Railway Company agreed to construct the railway and the tract of land transferred to the Dominion was transferred to the Railway Company as portion of a subsidy in aid of the construction of the railway. The surface rights of the land in question in this action were transferred by the E. & N. Railway to Joseph Ganner on the 24th of December, 1890, reserving, excepting and saving from the grant the right of the plaintiffs to enter upon and carry away timber for railway purposes and all coal, coal-oil, ores, etc. The Vancouver Island Settlers' Rights Act, 1904 (B.C. Stats. 1903-04, Cap. 54), came into force on the 10th of February, 1904, which provided that upon application within 12 months from the coming into force of the Act shewing that a settler occupied and improved land within the belt prior to the coming into force of the Act relating to the Island Railway, the Graving Dock and Railway lands of the Province (B.C. Stats. 1883, Cap. 14, assented to on the 19th of December, 1883), with the *bona fide* intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention a Crown grant shall be issued to him. By Cap. 71 of B.C. Stats. 1917 (coming into force on the 19th of May, 1917) the 1904 Act (Cap. 54) was amended by extending the time within which application could be made until the 1st of September, 1919. Between the 19th of May, 1917, and the 1st of September, 1917, the defendants Wilson and McKenzie, executors of the estate of Joseph Ganner, filed an application pursuant to the provisions of Cap. 71 of B.C. Stats. 1917, aforesaid, between said dates there being 179 other applications filed under said Act. The plaintiff received notice on the 8th of February, 1918, of hearing all applications on the 9th of February, 1918. On the day of the hearing counsel for the plaintiff applied for an adjournment on the grounds: (1) that a petition to disallow the Settlers' Rights Act Amendment Act, 1917, was pending before

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the Governor-General in Council at Ottawa and it should not proceed until said petition was disposed of; (2) that the plaintiff had not been permitted to see the defendants' application; (3) that there had been no time to prepare a defence; and (4) there were no means whereby the plaintiff could subpœna witnesses. The adjournment was refused. The evidence heard by the Governor in Council consisted of affidavits and declarations only and an application to allow cross-examinations on the affidavits was refused. On the 15th of February, 1918, the Crown grant was issued to the defendants Wilson and McKenzie for the lands in question. On the 18th of February, 1918, Wilson and McKenzie conveyed to one Treat who on the same day conveyed to the Granby Consolidated. On the 30th of May, 1918, Cap. 71, B.C. Stats. 1917, was disallowed by the Governor-General in Council. The two cases being substantially the same they were argued together, the only difference being with relation to the statutory declarations submitted as to "occupation and improvement" of the lands in question.

Davis, K.C., and *Monteith,* for plaintiff.
S. S. Taylor, K.C., for defendants.
Johnson, K.C., D.A.-G., for the Attorney-General.

12th August, 1920.

GREGORY, J.: As these cases are practically identical, and there has been but one hearing and argument, this judgment is intended to cover each of them, but for convenience I shall refer only to the record in the Wilson and McKenzie action.

In this most important case it is the greatest satisfaction to me to know that it is the intention of the parties to carry the case to the Court of last resort and that therefore my decision in no way finally disposes of the rights of the litigants. I regret exceedingly the long delay which has occurred between the hearing and judgment, but I have found it absolutely impossible to find time before vacation to give it the consideration it is entitled to.

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It is urged that the action cannot succeed by reason of the fact that the plaintiff has disposed of all its interests in the

land in dispute to the Canadian Collieries. It is said that this is shewn by the documents put in as exhibits, but those documents have not been read to me and counsel has not even made the slightest reference to any paragraph or portion of them to shew that such is the fact. In these circumstances I do not think it is incumbent upon me to critically examine the papers to ascertain if this is so or not, particularly as I drew attention of counsel during the argument to the fact that he was making an assertion without making any attempt to shew that it was true or upon what he based it. From all the facts and documents which have been drawn to my attention it seems to me to be abundantly established that the legal estate in the disputed lands is in the plaintiff Company and that it is the proper party to bring the action.

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I think the plaintiff must succeed on the third ground set up by Mr. *Davis* in his argument, *viz.*, that there was no proper hearing by the Lieutenant-Governor in Council as provided by section 3 of the Vancouver Island Settlers' Rights Act, 1904, Cap. 54, B.C. Stats. 1903-4. It is unnecessary, therefore, for me to state the conclusion I have arrived at upon his six other grounds.

Mr. *Taylor* urged very strongly that no hearing before the Lieutenant-Governor in Council of which the plaintiff was entitled to notice was necessary, that the hearing was an act of the Executive, that the proceedings before it were secret and could not be enquired into, and that in any case it is quite consistent with the evidence that the Executive had before it other material than that mentioned by Mr. *Robertson*. I cannot agree and in addition the Premier promised that the plaintiff should have notice of the hearing and formal notice of the hearing was sent by the Provincial Secretary to the plaintiff.

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That there must be a hearing and that plaintiff is entitled to notice of it is settled for me by the decision of the Full Court upon this very section of the statute in the case of *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412.

The proceedings on such a hearing can in no way that I can conceive of be considered as secret, and there can be absolutely

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no objection to a full disclosure in the Court of all that took place at such a hearing. As to the suggestion that the council may have had before it other evidence than the declarations, etc., referred to by Mr. *Robertson,* I cannot admit. Mr. *Robertson,* a gentleman of experience and high standing at this bar, testified that he attended the hearing as counsel for the plaintiff, and that he remained until the end or what he presumed to be the end and he believed it was the end, and I cannot accept any suggestion that it was not the end and that the only evidence before the council were the declarations, etc., he referred to, particularly in view of the fact that I told Mr. *Taylor* during the argument that I would draw this inference unless it was shewn that it was improper. I am entirely at a loss to understand the attitude of the Crown with reference to the suggestion made by the Deputy Attorney-General in his cross-examination of Mr. *Robertson* as well as by Mr. *Taylor,* and I am quite convinced that if other evidence was before the council they would have proved it, and in any case the plaintiff was entitled to know all the evidence which the council considered. No evidence should have been considered by the council of which Mr. *Robertson* had no notice, after allowing him to leave under the impression that the hearing was at an end.

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In the circumstances the notice of the hearing given to the plaintiff was, I think, entirely inadequate, and in view of the correspondence between Mr. *Robertson's* firm and the Honourable Mr. Brewster and other members and officers of the Government, much less than Mr. *Robertson* had a right to expect.

Notwithstanding the promise that ample time should be given the plaintiff to investigate the applications, etc., Mr. *Robertson* experienced the greatest difficulty in obtaining any definite information upon this matter. It is unnecessary to refer in detail to all the correspondence, but attention may be drawn to the letter of the 10th of September, 1917, to the Honourable the Attorney-General, which was never answered, and the subsequent letter of the 10th of November, 1917, which was answered, being a letter from the Deputy Attorney-General,

dated the 14th of November, 1917, but not received until the 20th of November. This letter enclosed a list of the applicants, 180 in number, with "as correct a description as possible of the property in respect of which they claim," but the department refused to "guarantee that the descriptions are correct," but stated that the description was "as nearly correct as it was possible to obtain from the applicants." It was well known then that Mr. *Robertson* desired to have permission to inspect and copy the declarations made in support of the applications, but this he was not permitted to do, the original permission given being withdrawn when a clerk was sent to make the copies. It was not until Saturday, the 2nd of November, 1918, that Mr. *Robertson* saw any of these documents, or rather copies of them. On that date he received notice of the hearing for the following Saturday, of the Wilson and McKenzie and Dunlop cases, and with the notice copies of the declarations in those cases only. Mr. *Robertson* received this notice about 12.30 on Saturday morning; all Government offices close at one o'clock on that day. In any case it would be impossible for him to do anything until the following Monday, the 4th. On the 5th he wrote the Honourable the Provincial Secretary pointing out it would be impossible to prepare his cases in time for the hearing on the following Saturday, and asking for an adjournment for two weeks. He received no reply to this letter but over the telephone he was told to make his application for postponement to the Executive on the day of the hearing and he had not the slightest idea that it would be refused until it was in fact refused.

In view of the fact that no witnesses were present in support of the application and so no one was going to be seriously inconvenienced it is difficult to see any reason for refusing such a reasonable request. If it had been intended to proceed with the hearing, Mr. *Robertson* might at least have been told so when he had the conversation over the telephone. In Mr. *Robertson's* letter asking for the postponement, he stated that a petition for the disallowance of the Act had been filed in Ottawa, and it was suggested and pressed by counsel that Mr. *Robertson* never made any attempt to prepare for the hearing

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and never intended to, as he was relying upon the disallowance of the Act, and that his statement that he had not sufficient time to prepare his case was mere prentence.

If I only had Mr. *Robertson's* statement to the contrary, I could not accept such suggestion. But Mr. *Robertson's* letter itself shews that there is no foundation for the suggestion. The letter is evidently written in the belief that pending the settlement of the question of disallowance the Government will not proceed with the hearing, and he only asks for the postponement "in the event of it being determined to proceed at all with the applications."

I am firmly convinced that it would be a physical impossibility for any one to make the necessary investigation to properly prepare the case in the five days intervening between Sunday and Saturday.

It required an investigation into facts and conditions, etc., prior to December, 1883; a tedious interviewing of persons in Cranberry District; a careful examination of the public records at Nanaimo and at Victoria, Nanaimo being a four hours journey by rail from Victoria. Many of the persons who it would be advisable to interview would undoubtedly be found to be dead or to have moved from the district. There were two applications to be fully inquired into. I am quite familiar with the searches and inquiries which would have to

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be undertaken, for on the 3rd of August, 1916, I was appointed a commissioner by the then Government to inquire into the claims to Crown grants made under the original Act, Cap. 54, B.C. Stats. 1903-04. The commission was duly opened and several sittings had, but for reasons which it is not necessary to state, the inquiry was not further proceeded with.

If there is to be a hearing and notice to the E. & N. Railway, surely such notice should be a reasonable one, one which would enable the Railway Company to make all necessary inquiry to prepare their defence or to examine into and test the merits of the claims filed, for any land given to the claimants was to be taken from it, their right cannot be questioned, for in the case of *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462, their Lordships of the Privy Council held at p. 466, that

the plaintiff's title to the land was "incontrovertible" apart from the Vancouver Island Settlers' Rights Act, 1904, then under consideration.

Notice of trial in action at law is, under the Rules of Court, ten days, and that after pleadings have settled the issues and there has been full discovery on both sides.

While I am convinced that the notice given to the plaintiff was entirely inadequate, I am not clear that I would be justified in acting upon that alone, but there is another and, I think, more grave defect in the hearing. The evidence in support of the claim as to occupation with the *bona fide* intention of living thereon consisted of a number of solemn declarations taken before a notary public. It may be questioned whether the declarations are in the proper form or not. There is authority for taking some extra-judicial declarations in the Canada Evidence Act, but under our own Act it would appear that under section 24 (1) it is only competent for a witness to make a declaration instead of taking an oath in certain specified cases, and there is nothing to shew that the declarants herein came within any of these cases. At the hearing Mr. *Robertson* asked that the declarants be produced before the council and sworn. Section 26 of our Evidence Act (Cap. 78, R.S.B.C. 1911) provides for the administration of an oath, and that he be permitted to cross-examine them. But this was refused. He pointed out to the council that the Act provided no means whereby he could subpœna them, but that the council could and should require their presence and give him full opportunity of cross-examination.

It is unnecessary to point out how vital it is in investigations into the truth to have full cross-examination of the witnesses. It must be admitted that the statute is confiscatory in its nature. That there is no suggestion of compensation and must, I think, be strictly interpreted. The statute says that the proof of occupation or improvement and intention to live on the land must be "reasonable proof." It does not say proof satisfactory to the Lieutenant-Governor in Council, and how can it be said that there is any proof whatever, reasonable or otherwise, when there has been no opportunity for cross-examination?

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I think that the Legislature inserted the word "reasonable" to enable the council to depart from the strict rule of evidence and to admit a certain amount of hearsay evidence, which would not be unreasonable in an inquiry into conditions so many years ago in a sparsely settled community, but surely those persons who pretend to speak of the past and of what they have been told, etc., must submit themselves to cross-examination even more than they who speak of existing present-day facts, for in such a case they can be met by others equally conversant with the conditions.

For the reasons herein set forth there must be judgment for the plaintiff. There will, of course, be no costs against the Crown, but the other defendants will have to pay costs. There will, of course, have to be an inquiry as to damages and an injunction, I suppose, but these matters and any others arising out of this judgment may be spoken to on motion to settle the terms of the judgment.

It was suggested that the Granby Company was in a different position from Wilson and McKenzie, they being innocent purchasers for value, but I cannot agree to this; they purchased with full knowledge and their title must fall with that of Wilson and McKenzie. In fact, under section 104 of the Land Registry Act, they have no title at all, apart from the question of registration of the Crown grant through which they claim, for they purchased not from the Crown grantee but from Treat.

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In coming to the conclusions which I have, I do not wish it to be understood that I in any way dissent from the proposition that the Courts cannot interfere with or attempt to control the policy or executive acts of the ministers of the Crown, but when the Legislature authorizes by statute the council to do an act which it has no other authority to perform, that act must be done strictly in the way the Legislature says it is to be performed.

From this decision the defendants appealed. The appeal was argued at Vancouver on the 2nd to the 8th of November, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

S. S. Taylor, K.C. (*Robert Smith,* with him), for appellants: The chief discussion is in respect to section 3 of the Vancouver Island Settlers' Rights Act, 1904 (B.C. Stats. 1903-04, Cap. 54), and the amending Act (B.C. Stats. 1917, Cap. 71) extending the time for application by settlers within the railway land belt, and the further extension in 1919 (B.C. Stats. 1919, Cap. 86) to the 1st of September of that year. The constitutionality of the Act of 1904 is discussed in *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462 at p. 468. The learned trial judge based his decision in favour of the plaintiff on the ground that there was no proper hearing by the Lieutenant-Governor in Council as provided by section 3 of the Act of 1904, when it was decided a Crown grant should issue to Ganner, and on the 15th of February, 1918, the Crown grant was issued. On the 18th of February following, the property was transferred to one Treat, who on the same day transferred it to the Granby Consolidated. The Company then spent large sums in preparing and equipping the ground for the production of coal. The order in council disallowing the Act (B.C. Stats. 1917, Cap. 71) was passed on the 30th of May, 1918. They raised three points below: (1) That the Act was disallowed; (2) that at the time of disallowance there was no registration of any conveyance and no title therefore exists in the Granby Company; and (3) there was no hearing by the Executive as required by the Settlers' Rights Act. As to the third point, Mr. *Robertson,* solicitor for the Railway, was served with a copy of the applications (including Ganner's) on the 20th of November, 1917, and on the 19th of December following there was a hearing, when Mr. *Robertson* applied for an extension evidently for the purpose of awaiting the disposal of the application at Ottawa for disallowance of the Act. He had received a copy of the evidence, and the notice of the 20th of November was tantamount to pleadings. He did nothing, evidently resting back in the hope of disallowance. Exhibit 28 shews the material before the Executive when it was decided to issue a Crown grant, and my submission is, it was sufficient to establish reasonable proof. The learned judge said an adjournment should have been granted but my submission is, that as long

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as they acted reasonably and honestly the Court will not interfere with their right to decide whether an adjournment was necessary: see *Local Government Board* v. *Arlidge* (1915), A.C. 120; *Weinberger* v. *Inglis* (1919), A.C. 606 at p. 619 *et seq.*; *Rex* v. *Central Tribunal* (1916), 86 L.J., K.B. 799; *Electric Development Co. of Ontario Limited* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario* (1917), 38 O.L.R. 383 at pp. 389-90. The Courts may inquire into the validity of orders in council: see *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412; *Attorney-General* v. *Bishop of Manchester* (1867), L.R. 3 Eq. 436. Ganner got his title from the Railway and it is an admission on the part of the Railway that he had complied with the provisions and had occupied and improved the land. The point of disallowance involves two questions: (1) Does it affect anything done under the Act while the Act was in force? (2) Is the Act which was disallowed the root of our title or not? I contend the Crown grant issued remains valid notwithstanding disallowance. The Act is not the root of our title: *Clapp* v. *Lawrason et al.* (1842), 6 U.C.Q.B. (o.s.) 319 at p. 320; Lefroy's Legislative Power in Canada, p. 203 (note); *Browning* v. *Ryan* (1887), 4 Man. L.R. 486. As to whether the disallowed Act was the root of our title see *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462. The statute only gives the right to apply for a Crown grant. It is in no sense the root of our title. The learned trial judge remarked that this was "barefaced confiscation," but the history of the case, including Rothwell's report, must be taken into consideration in construing the Act: see *Thomson* v. *Clanmorris (Lord)* (1900), 1 Ch. 718 at p. 725; see also *In re Granby Consolidated Mining, &c., Co. and the Registrar-General of Titles* (1919), 26 B.C. 523; *Esquimalt & Nanaimo Railway Company* v. *Wilson* (1919), 89 L.J., P.C. 27; (1920), A.C. 358; *Bing Kee* v. *McKenzie* (1919), 3 W.W.R. 221; *Quesnel Forks Gold Mining Co.* v. *Ward* (1918), 25 B.C. 476; (1918), 3 W.W.R. 230; (1919), 89 L.J., P.C. 13; (1920), A.C. 22; *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412; *North Pacific Lumber Co.* v. *Sayward*

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(1918), 25 B.C. 322; 2 W.W.R. 771; *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462; *Hoggan* v. *Esquimalt and Nanaimo Railway Co.* (1894), A.C. 429. He says you cannot pass an Act dealing with railway lands but subsection 10 of section 92 of the British North America Act does not exclude this. As to registration, the question is whether we had a right to a Crown grant and registration has nothing to do with it: see *Howard* v. *Miller* (1915), A.C. 318 at p. 325. In the case of *Bailey* v. *City of Victoria* (1919), 60 S.C.R. 38 at p. 52, Mr. Justice Duff refers to the *Howard* case; see also, *Dorrell* v. *Campbell* (1916), 23 B.C. 500. The power of the Legislature is discussed in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 586. The Granby has its title from Wilson and is in possession with a good title. It is their business entirely whether it is registered or not. The Canadian Collieries should be a party to the action, its consent to become a party was filed but was not given effect to. The Company was a necessary party: see *Canadian Collieries* v. *Dunsmuir* (1914), 20 D.L.R. 877. On the question of damages the trial judge was in error in giving the value of the coal taken at the pit's mouth: see *Wood* v. *Morewood* (1842), 3 Q.B. 440; 114 E.R. 575; *Last Chance Mining Co.* v. *American Boy Mining Co.* (1904), 2 M.M.C. 150 at p. 151.

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Davis, K.C., for respondent: The first point is the question of a hearing. There must be a hearing and it necessarily follows it must be a proper one. There must be reasonable proof of the *bona fide* intention of a hearing thereon: see *Attorney-General* v. *Bishop of Manchester* (1867), L.R. 3 Eq. 436 at pp. 458-9; *Minister of Mines* v. *Harney* (1901), A.C. 347. Whether or no the Executive action is within the ambit of their jurisdiction, first there must be a hearing which is a condition precedent even if not in the statute, and second the condition precedent in the statute must be complied with. The cases are: *Commercial Cable Company* v. *Government of Newfoundland* (1916), 2 A.C. 610; 86 L.J., P.C. 19; *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412; *Bonanza Creek Hydraulic Concession* v. *Regem* (1908), 40 S.C.R. 281; *Cooper* v. *Wandsworth Board of Works* (1863),

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14 C.B. (N.S.) 180; *Capel* v. *Child* (1832), 2 C. & J. 558; *Fisher* v. *Jackson* (1891), 2 Ch. 84 at pp. 95-9; *Burn* v. *National Amalgamated Labourers' Union* (1920), 2 Ch. 364. The right to cross-examine is essential to a proper hearing and most important in this case: see *Smith* v. *The Queen* (1878), 3 App. Cas. 614 at p. 624. The evidence shews we did not have a reasonable opportunity of being heard. Not being allowed to cross-examine goes to the root of the whole matter.

[MACDONALD, C.J.A. referred to *Fletcher* v. *Wade* (1919), 26 B.C. 477 and cases therein referred to, including *Reg.* v. *Justices of Yorkshire; Ex parte Gill* (1885), 53 L.T. 728.]

The adjournment alone may not be fatal but when you do not see the witnesses and have no opportunity of offering witnesses in evidence in addition to which statutory declarations of friends and relatives about matters that happened nearly 40 years ago are accepted in evidence. There was not a proper hearing: see *Regina* v. *Eli* (1886), 10 Ont. 727; *Rex* v. *Dominion Drug Stores, Ltd.* (1919), 31 Can. Cr. Cas. 86; Phipson on Evidence, 5th Ed., pp. 469 and 471; *Henderson* v. *Lacon* (1867), L.R. 5 Eq. 249 at pp. 254 and 258; *Nason* v. *Clamp* (1864), 12 W.R. 973. The evidence was that of friends and relatives but the fundamental basis is our right to cross-examine. We did not have full opportunity for making our defence. The next question is as to proof. We submit the statute requires that before a grant issues they must have reasonable proof of the statutory requirements. The sole evidence was the statutory declarations and even without cross-examination they do not amount to reasonable proof of the statutory requirements. The statute says "reasonable proof," that is, such as would warrant a judge to find as they did. If there is not reasonable proof before a judge he will be reversed and the same reasoning applies here. The evidence shews Ganner was not in a position to apply as a squatter under section 23 of the Act of 1883, Cap. 14, as it required occupation for one year previous to January, 1883. His original application was under section (*f*) of the agreement between the two Governments which provided for actual settlers on the

land for four years after the passing of the Act. That he did not take advantage of the right of a squatter one year prior to the Act shews he was not entitled to do so. It is an inference that he does not fall within the squatter's class and is inconsistent. As to disallowance, we say this is more than a repeal of the Act. The Act is declared null and void: see *Esquimalt and Nanaimo Railway Company* v. *Granby Consolidated Mining, Smelting and Power Company, Ltd.* (1919), 88 L.J., P.C. 199 at p. 201; *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 587; Opinion of Professor Dicey, 45 C.L.J. 459; *In re Goodhue* (1872), 19 Gr. 366 at p. 384. By disallowance the Act is wiped out and can no longer form a root of title. The next ground is that the property is in Wilson and McKenzie. No interest has passed to the Granby by reason of the Registry Act and as it did not pass prior to disallowance no interest has been transferred by virtue of that Act. As to section 104 of the Land Registry Act see *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282. *Howard* v. *Miller* (1915), A.C. 318 at p. 325, has reference merely to question of procedure. The other cases are *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51; *Bank of Hamilton* v. *Hartery* (1918), 26 B.C. 22; (1919), 58 S.C.R. 338. I say section 104 means precisely what it says. There was no registered title but even if the disallowance does not affect anything done under the Act there was no transfer prior to disallowance to anyone else: see *Levy* v. *Gleason* (1907), 13 B.C. 357; *Goddard* v. *Slingerland* (1911), 16 B.C. 329 at pp. 330-2; *Chapman* v. *Edwards, Clark and Benson, ib.* 334 at p. 340; *Cowell* v. *Stacey* (1887), 13 V.L.R. 80. The Granby Consolidated never had any interest, legal or equitable. There is nothing to say how many acres were occupied and improved. There was not reasonable proof of any settled amount of land. It should be limited to the land actually occupied and no more: *Bentley* v. *Peppard* (1903), 33 S.C.R. 444 at pp. 445-6; *Dundas* v. *Johnston and Wilson* (1865), 24 U.C.Q.B. 547 at p. 550; *Hunter* v. *Farr* (1864), 23 U.C.Q.B. 324 at p. 327; *Wood* v. *LeBlanc* (1904), 34 S.C.R. 627 at pp. 633 and 636; *Cowley* v. *Simpson* (1914), 31 O.L.R. 200 at p. 206. The word "instrument" is dealt with in *The*

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Commonwealth v. *The State of New South Wales* (1918), 25 C.L.R. 325. On the question of *ultra vires,* this is a different Act from that dealt with in *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462. This different Act is *ultra vires* as at the time the road was for the general benefit of Canada and in addition the transfer to Ganner's trustees included the right of way, whereas in the *McGregor* case it did not. If the rights of persons outside the Province are affected, the Legislature cannot deal with it. In *Royal Bank of Canada* v. *Regem* (1913), A.C. 283, the *McGregor* case is discussed. All the members of the Council were not present. When a statutory tribunal are in session they must all be present. As to assessment of damages, the right principle is laid down in *Lamb* v. *Kincaid* (1907), 38 S.C.R. 516, in which *Wood* v. *Morewood* (1842), 3 Q.B. 440 is approved: see also *Last Chance Mining Co. Ltd.* v. *American Boy Mining Co. Ltd.* (1904), 2 M.M.C. 150. As to the Canadian Collieries being a party, it depends on the construction to be placed on the agreement of the 5th of June, 1905, but I contend it is not necessary: see *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1905), A.C. 454 at p. 462; *Dell* v. *Saunders* (1914), 19 B.C. 500 at p. 506. It can be added at any time: see *Ruston* v. *Tobin* (1879), 10 Ch. D. 558; (1880), 49 L.J., Ch. 262.

Taylor, in reply: As to the hearing, in construing the words "application accompanied by reasonable proof," effect should be given to the word "accompanied." The term "squatter" is dealt with in *Hoggan* v. *Esquimalt and Nanaimo Railway Co.* (1894), A.C. 429 at p. 434. These lands had been transferred and were in no way railway lands or under the control of the Dominion. The Act gave a subsidy for aid in construction, and not for operating the railway: see *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), A.C. 437 at p. 443.

Cur. adv. vult.

4th February, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The Vancouver Island Settlers' Rights Act, 1904, B.C. Stats. 1903-04, Cap. 54, was, I think, enacted

on the assumption that the persons defined as "settlers," meaning persons who had prior to the 19th of December, 1883, occupied or improved lands within the Railway Belt, with the *bona fide* intention of living thereon, had been in equity and good conscience entitled to grants in fee simple, but had theretofore been denied their just claim thereto. Section 3 of the Act reads as follows:

"Upon application being made to the Lieutenant-Governor in Council, on or before the first day of September, 1917, shewing that any settler occupied or improved land within said railway land belt prior to the enactment of chapter 14 of 47 Victoria, with the *bona fide* intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler."

By Provincial orders in council passed in 1873, a tract of land, which embraced within its boundaries the lands in question herein, was reserved from settlement, but notwithstanding this, numerous persons squatted upon different portions of this tract, presumably in the expectation that they would be able at some future time to procure grants from the Crown in accordance with the provisions in favour of settlers or pre-emptors contained in the land law then in force. Subsequently, *viz.*, in 1883, an agreement was reached between the Dominion and Provincial Governments and ratified by Provincial Act, 47 Vict., Cap. 14, assented to on the 19th of December, 1883, under which, roughly speaking, the tract aforesaid was conveyed to the Dominion for railway purposes, subject to certain exceptions in favour of alienees but not of squatters. Many, if not all, of these squatters however, obtained by subsequent pre-emption or purchase under privileges extended to them by the said Act of 1883, grants of the surface of the lands occupied by them as aforesaid, but the squatters were not satisfied with these grants, and an agitation was commenced and persisted in, which culminated in the passage of the said Act of 1904, the object of which was to give the persons within its benefit the fee simple.

MACDONALD, C.J.A.

The appellants are the executors of the late Joseph Ganner, who they allege was a "settler" entitled to the benefit of the

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Act. Joseph Ganner was a teamster, residing with his family at the city of Nanaimo, at some distance from the land in question. The appellant's case is that Ganner settled upon these lands in 1880 or 1881. It is admitted that he pre-empted the land in 1885, taking advantage of the provisions of said statute of 1883 and the agreement thereby ratified, and that a grant of the surface was made to him in 1890. In support of his pre-emption entry he made a sworn declaration that the land was at that date (29th July, 1885) unoccupied Crown land. The fact that he procured the land other than the minerals in this way does not necessarily preclude his executors from taking advantage of the Vancouver Island Settlers' Rights Act of 1904. While he was not entitled to the benefit of the last-mentioned Act *qua* pre-emptor, yet if it were proven that he had been a "settler" prior to the 19th of December, 1883, this would bring his personal representatives, the appellants, within the benefit of that Act in respect of the minerals. Nor do I attach much importance to Ganner's declaration in 1885 that the land was unoccupied Crown land, since he may have meant no more than this, that it was not in adverse occupation.

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Coming then to the several declarations which accompanied the application, I think it is apparent, upon reading those of the appellants' themselves, that they had no personal knowledge of the matters of which they profess to speak. This conclusion is emphasized by their conflicting declarations. The declaration of Gribble is limited to a statement that Ganner "squatted" on the land in 1883. He does not say that he had ever been upon the land himself or had any personal knowledge. If he meant that Ganner had resided on it, and to be a "squatter" he must have been in actual possession and occupation, then he is mistaken, since all the evidence of those who must have known of Ganner's residence is inconsistent with this. The declaration of Lizzie Peck proves nothing. Margaret McKenzie, the daughter of Ganner, speaks from hearsay only; she professes to have had an intimate knowledge of her late father's affairs, and she says she understood that her father had built a cabin or dwelling upon the land, but she had no personal knowledge whatever in respect of it. She does not even bring her evi-

dence within the rule as to declarations by her father, which might be said to form part of the *res gestæ*, if indeed that doctrine is applicable. What her declaration omits is significant. She was living with her father in the city of Nanaimo at this time, yet she does not say that her father lived away from his home, even for a short time. The inference I draw from her declaration is that he resided with his family in Nanaimo during the period when he is alleged to have settled or squatted upon this land. This witness fixed the date of the settlement as in 1880 or 1881. The declarant Morton says that in addition to the "many talks" he had with Ganner about the land, the latter had driven him to a place in the near vicinity of the land, but he does not say that he saw it. McAdie speaks from knowledge of his (Ganner's) business and says that Ganner "took up" land in Cranberry, but he does not say that he saw the land or had any personal knowledge of Ganner's connection with it. The only declarant who professes to speak from personal knowledge of the *locus in quo* is W. H. Ganner, son of the deceased. He alleges a distinct recollection of his father "taking up" this land and of having, in company with his father's hired man and another young man named Meakin, done work "slashing and piling brush preparatory to clearing." Not a single one of the declarants venture to say that Joseph Ganner ever resided upon the land. It is therefore, to my mind, quite clear that there is no legal evidence that Ganner occupied the land within the meaning of section 3 of the Act of 1904.

MACDONALD, C.J.A.

But this lack of proof of occupancy does not necessarily defeat the appellants' case. It is sufficient for their purpose to shew that Ganner improved the land with the *bona fide* intention of living on it. The only evidence upon this point is that of the son and daughter mentioned above. That of the daughter amounts to nothing, as I have already pointed out. That of the son consists of the above-mentioned statement of the slashing and piling of brush preparatory to clearing, and which for aught we are told may have been of the most trifling character. The witness does not say whether the work lasted one hour or one day, nor does the evidence indicate that it was of any value whatsoever in the way of improvement to the land.

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One may therefore ask, how is it that this witness, who would be expected to know something of the work actually done upon the land, including the alleged building of the cabin or dwelling-house, has told nothing of the slightest value? He was either not possessed of, or has withheld the facts in respect of the alleged improvements. Not a single person has said that he or she saw the alleged cabin. Not one of the declarants have named a single item of real improvement made upon the land. There is therefore nothing from which the inference may be drawn of a *bona fide* intention on Ganner's part to live on this land.

For these reasons, I am of opinion that the conditions upon which the Legislature has declared that the Lieutenant-Governor in Council shall have power to make grants to settlers have not been performed by the appellants, and that the grant was therefore rightly annulled.

MACDONALD, C.J.A.

In this result, the several other questions argued need not be answered. There should be an assessment of damages on the footing of innocent trespass without negligence, applying the rule referred to by Parke, B. in *Wood* v. *Morewood* (1842), 3 Q.B. 440.

MARTIN, J.A.

MARTIN, J.A.: In view of the decision of the Full Court in *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412; 11 W.L.R. 509, which I think is binding on us (though one of the two judges who formed the majority based his decision upon a misconception in a vital particular of the true facts in the case of *Assets Company, Limited* v. *Mere Roihi* (1905), A.C. 176; 74 L.J., P.C. 49, as I pointed out in *North Pacific Lumber Co.* v. *Sayward* (1917), 24 B.C. 273; (1918), 2 W.W.R. 771 at p. 776), and so we must hold that the plaintiff Company was entitled to be heard on the application to the Lieutenant-Governor in Council for a Crown grant under section 3 of the Vancouver Island Settlers' Rights Act, 1904, Cap. 54 of 1903-04.

The learned judge below was of opinion that there had not been a legal hearing in the true sense because the Executive Council refused to adjourn it, at the plaintiff's request, or to

direct that those persons who had given their evidence by affidavit should be produced for cross-examination before the Council. As to the first ground, that clearly was one for the exercise of the discretion of the tribunal, and where such a discretion has been exercised it will not be interfered with even in a capital case, as we decided in *Rex* v. *Mulvihill* (1914), 19 B.C. 197; 22 Can. Cr. Cas. 354; 26 W.L.R. 955; 5 W.W.R. 1229; affirmed by the Supreme Court, 49 S.C.R. 587; 23 Can. Cr. Cas. 194; 6 W.W.R. 462. The learned judge below thought that the seven days' notice of the hearing given herein was insufficient and hence the adjournment should have been granted, saying:

"Notice of trial in action at law is under the Rules of Court, 10 days, and that after pleadings have settled the issue and there has been full discovery on both sides."

But even by Rule of the Supreme Court, No. 438, a party may be "ordered to take short notice of trial," which is a "four-days' notice, unless otherwise ordered" by the Court or a judge. In the Admiralty Court of this Province there is no fixed time appointed for notice of trial, the practice being for the judge to fix the time, which varies from a few days to a month, to meet the circumstances of each case. Furthermore, in the present case, I am prepared to hold, if necessary, that the plaintiff did not shew due diligence in preparing for the hearing, and so was not entitled to an adjournment.

MARTIN, J.A.

As to the production of deponents for cross-examination, I am of the opinion that the mode in which the evidence should be taken before the Executive Council is a question for it to determine in accordance with its practice in that behalf in the hearings innumerable that have for time legally immemorial been held by that tribunal which, being composed of His Majesty's constitutional representatives in Council, is one of the highest and most august description. There is nothing whatever before us to shew that what was done upon the occasion in question differed in any way from what must (in the absence of any evidence to the contrary) be presumed to be its ordinary and established practice, and we should not be, in my opinion, at all justified in interfering with that practice. Various tribunals in the history of our jurisprudence (the

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Common Law Courts, the Chancery Court, the Ecclesiastical, the Probate, the Admiralty, the Prize and the Criminal Courts) have had, and still have, various ways of taking evidence, some by *viva voce,* some by depositions, and some by both methods, and tribunals which are not Courts in the ordinary sense must necessarily have a greater latitude of discretion in the conduct of a hearing before them. I am quite unable to say that there was anything contrary to natural justice in the course adopted by the Council on this hearing, and we must be prepared to go that far before we are entitled to interfere with their conduct of their regular proceedings, if we can, indeed, interfere at all. In the present case that tribunal might well have taken the view that it would not call upon the deponents to appear personally till the plaintiff had adduced some evidence at least to answer that put forward by the applicants. It was for them to say what course they would adopt as the hearing developed, and there are no Rules of Court to limit their discretion as to the proper conduct of the hearing. I am fortified in this view of the matter by one of the principal cases cited against it. I refer to *Capel* v. *Child* (1832), 2 C. & J. 558; 2 Tyrw. 689 (149 E.R. 235), wherein the Bishop of London took proceedings "of his own knowledge" against a Vicar involving "consequences . . . . highly penal . . . . for they affect the temporal and spiritual condition of this person" (*per* Vaughan, B.) under a statute which empowered him so to do in specified cases, "either of his own knowledge, or upon proof by affidavit laid before him." It was held that as the requisition issued by the Bishop under said statute, which involved said consequences, had been issued without giving the Vicar an opportunity of being heard in his defence, it (and the subsequent proceedings in the Consistory Court founded thereupon) was void, being "in the character of a judicial proceeding," because it was "totally foreign to every notion of the administration of justice" (584). But even in that case, in which the requisition was held by Baron Bolland to be "in the nature of a conviction," it was not suggested that if the requisition had been founded on an affidavit that the Bishop should have done more than to cite the Vicar to appear before

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him, shew him the affidavit charging the delinquencies, and give him the opportunity to meet the charge by a personal explanation or by filing affidavits in reply: see Lord Lyndhurst, C.B., at p. 573; Baron Bayley at pp. 578, 581, and Baron Bolland at p. 588. Baron Bayley, after referring to meeting the charge by "counter affidavits, explaining and doing away with the effect of every act which had been mentioned and specified in that affidavit," goes on to say, at p. 579:

"It is not at all essential, in order to give effect to such proceedings, that there should be that delay which a suit in the Ecclesiastical Court would naturally produce. It would be quite sufficient if the bishop were to call the party before him, and to state to him the grounds on which he thought the duties were inadequately performed, by reason of his negligence; and he should have asked whether he had or had not any grounds on which he could answer that charge; but, is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate should have an opportunity of being heard?"

This shews that the essential thing is that the party affected should have "the opportunity of being heard" in defence of his property and the imposition of penalties, but the manner and conduct of that hearing must be in accordance with the practice of the tribunal which has the power to hear, so long as that practice is not totally foreign to the administration of justice. It follows that, in my opinion, the hearing now complained of was a proper one, and the plaintiff Company should (if it thought it necessary) have met the case set up in the affidavits by counter-affidavits or witnesses in person, which it is not suggested the Council would have refused to hear.

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But it is further objected that the application for the Crown grant is not "accompanied by reasonable proof of such occupation or improvement and intention," etc., as required by said section 3. I agree that the existence of "reasonable proof" is a condition precedent to the jurisdiction of the Executive to issue the Crown grant, and that the question of that existence is one of fact and not of law, and is something quite apart from the practice or procedure adopted by any tribunal in its discretion.

It is not easy to define what is intended by that expression, but it could not be contended that more proof should be required

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from the tribunal in question than a Court of common law, and in such a Court the jury is the constitutional tribunal to determine questions of fact, and so , if there were even enough evidence here that could reasonably have been submitted to a jury, that would be clearly sufficient. In that light, therefore, I have carefully examined the depositions and have come to the conclusion that they do not contain that reasonable proof which could satisfy a jury and is essential, and so the Crown grant is null and void because of lack of jurisdiction to support it.

If follows from this that the action should be dismissed, but in case my opinion on this point is erroneous, and having regard to the fact that the same questions arise in the similar action of *Esquimalt and Nanaimo Railway Company* v. *Dunlop et al.*, it seems proper that I should here consider briefly some of the other questions which have arisen on this appeal and which require special notice.

(1) As to disallowance of the statute in question under sections 56 and 90 of the B.N.A. Act, which provides for the manner of disallowance, and goes on to say that "such disallowance . . . . shall annul the Act from and after the day of such signification." I agree with the opinion expressed by the Chief Justice of this Court in *In re Granby Consolidated Mining, &c., Co. and the Registrar-General of Titles,* 26 B.C. 523; (1919), 2 W.W.R. 321 at p. 324, wherein he dealt with the effect of disallowance upon a Crown grant issued under the enactments now in question that disallowance has not a retroactive effect and what has been done under an Act before disallowance is valid, and upon this view their Lordships of the Privy Council expressed no opinion when the case was before them: (1919), 88 L.J., P.C. 147; 3 W.W.R. 331 at p. 335; (1920), A.C. 172. This view follows in principle the judgment of the Upper Canada Court of Queen's Bench in *Clapp* v. *Lawrason* (1842), 6 U.C.Q.B. (o.s.) 319, and followed by Chief Justice Wallbridge in *Browning* v. *Ryan* (1887), 4 Man. L.R. 486. I cannot accept the submission that the statute in question should be regarded merely as a root of title which is cut off, so to speak, upon disallowance and the diverted land restored to its original owners. Disallowance is

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a question of public policy (exercised upon principles which have varied and are still unsettled and uncertain, not to say, sometimes obscure), and it may well be that, *e.g.*, the Governor-General would suspend his decision and wait to observe the practical effect of a statute, and if that effect were small and circumscribed he might decide to allow it to take its course, whereas if it developed into something large and far-reaching he might put an end to it. For example, if the applications for Crown grants under the Act in question were few and to a small area and the rights and equities of the conflicting parties doubtful, it might be the better policy not to interfere at the outset, though His Excellency's opinion might change if the claims were expanded in number and area. It does not seem just that there should be no greater regard displayed for the property of the lieges than their persons, and if a man can be lawfully deprived of his liberty or his personal property by fines and penalties (as decided in the *Clapp* case, *supra*) by a disallowed statute, why not of his real property? Why should the principle vary with the property?

(2) As to the effect of section 104 of the Land Registry Act, R.S.B.C. 1911, Cap. 127. In my opinion, it does not apply to the facts of this case, and I adhere to the view I expressed in *Dorrell* v. *Campbell* (1916), 23 B.C. 500; (1917), 1 W.W.R. 500, the principle of which, I think, covers it.

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(3) As to the Act of 1917 being *ultra vires*: In the limited time now at my disposal I am unable to go more fully into this matter, but must content myself with saying that, in my opinion, the objection to the validity of the Act is not sustainable.

Then as to the principle upon which the damages for the wrongful abstraction of coal should be awarded: Here, as there has been unquestionable good faith in that respect, being an assertion of right under a *bona-fide* belief in title, the milder rule as laid down in *Last Chance Mining Co.* v. *American Boy Mining Co.* (1904), 2 M.M.C. 150 (followed in *Joseph Chew Lumber and Shingle Manufacturing Co.* v. *Howe Sound Timber Co.* (1913), 18 B.C. 312; 25 W.L.R. 105; 4 W.W.R. 1308; and *Adams Powell River Co.* v. *Canadian Puget Sound*

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Co. (1914), 19 B.C. 573; 28 W.L.R. 13), wherein the authorities are cited, should be applied and the matter dealt with on the basis that the innocent trespasser should be allowed the cost of severance of the coal from the realty as well as of bringing it to bank. The appellant is right, I think, in the submission that the learned judge should have ascertained upon the facts and declared this principle instead of referring it to the registrar, as he did, by the direction in the judgment that the registrar (who has no jurisdiction to decide it) should inquire into the question "as to whether the cost of severing such coal should be one of such allowances" of the cost of mining, and so the appellant is entitled to have the judgment varied upon this point.

In conclusion I feel I ought to say that, with the greatest respect, I am unable to accept the statement of the learned trial judge, in his reasons, that "it must be admitted that the statute is confiscatory in its nature," and similar but stronger observations in the course of the trial. Opinions may well differ greatly on that subject, and it cannot be overlooked that the special recitals in the Act itself shew that the intention of the Legislature was to remedy what it in effect declared to be an injustice that had been suffered by a certain class of settlers, and so I refrain from making any observations upon the nature of the enactment.

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GALLIHER, J.A.: A number of points, both on the law and the evidence, were argued before us on this appeal, but owing to the clear conclusion I have reached on one point, which, if I am right, disposes of the appeal, I have deemed it unnecessary to deal with the others.

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The statute does not leave it at large, but says a Crown grant shall issue upon "reasonable proof." The statute has fixed the condition, and the Courts have power to consider and determine what is "reasonable proof." In a case of this sort, where there were rival claimants to the lands, of which the Governor in Council had due notice, one would have looked for fairly conclusive proof, but even eliminating the factor of rival claimants, I would still conclude that no reasonable proof of occupa-

tion or improvements was had, and by reasonable proof I mean proof which, in my opinion, reasonable men could reasonably act upon in complying with the words of the statute. Whether the Council were bound to grant a hearing or not I do not decide, but they purported to grant a hearing, and upon that hearing, the proof set out in the appeal book was before them. Mr. *Taylor* suggests that that material might not have been all that was before them upon which they decided, but if it were otherwise, it could easily have been shewn. He had the conduct of the appeal and could have had it included, if such existed.

I am deciding the case on what appears before us. I have carefully examined the declarations filed, and so far from being reasonable proof of residence, occupation or improvement, they are, in the general terms in which the statements are made and in their very indefiniteness, as pointed out by the Chief Justice (and which I will not repeat), and without any apparent attempt to check them up, in my opinion, almost no evidence at all, or at all events, far from such evidence as should be accepted by any one as reasonable proof.

I would dismiss the appeal.

I agree with the Chief Justice as to the measure of damages.

McPHILLIPS, J.A.: In my opinion this appeal should succeed. It is a matter of history in this Province that the Vancouver Island Settlers' Rights Act, 1904, was a remedial statute. It has been said, and I think rightly, that in the Crown resides "infallible justice" (see Boyd, C. in *Niagara Falls Park* v. *Howard* (1892), 23 Ont. 1 at p. 27: "It would seem contrary to the infallible justice of the Crown . . . ."): *Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem; Rex non potest peccare; Salus populi suprema lex; Ubi jus ibi remedium.* It is only necessary to read the preamble to the Act which has to be construed in this appeal to see that the Legislature enacted it in the furtherance of justice, the carrying out of the true attributes of the Crown, and fundamental legal principles. The Legislature being sovereign as to "Property . . . . in the Province" (British North

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America Act, 30 & 31 Vict., c. 3, 1867, Sec. 92, Subsec. 13) may make such disposition thereof as it in its wisdom may determine. The Act as stated is: "An Act to secure to certain Pioneer Settlers within the Esquimalt and Nanaimo Railway Land Belt their surface and under-surface rights."

The real contest in this appeal has relation to the under-surface rights, *i.e.*, the coal in, upon, or under the lands. The learned trial judge proceeded upon one point only in his judgment, and that was that there was no proper notice of hearing, or hearing had under the provisions of the Vancouver Island Settlers' Rights Act, 1904 (B.C. Stats. 1903-04, Cap. 54, Sec. 3, as amended by Cap. 71, B.C. Stats. 1917), and it was by the judgment declared that the Crown grant was null and void. From this judgment comes this appeal. The learned trial judge considered that he was bound by the decision of the then Full Court in *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412, and that, upon the facts as adduced at the trial, the *Fiddick* case was determinative of the point and that no proper hearing was had admitting of the issuance of the Crown grant. With great respect, I am not of the opinion that the *Fiddick* case is binding upon the Court of Appeal. Further, I am not in agreement with what is there decided: (see Lord Dunedin in *Charles R. Davidson & Co.* v. *M'Robb or Officer* (1918), 34 T.L.R. 213 at p. 217). Undoubtedly the judgments of the Full Court are entitled to the greatest respect, but it is to be observed that the judgment is the judgment of but two of the judges of the Supreme Court, the Court then consisting of five judges, and the judgment was one of reversal of the judgment of HUNTER, C.J.B.C., and MORRISON, J. dissented, my brother MARTIN (then a judge of the Supreme Court) not sitting. It is true, though, that the statutory quorum existed and the judgment is one of the then highest Court of the Province. This action is not brought by the Attorney-General of the Province, nor is it an action by way of Petition of Right. The Attorney-General has been added as a defendant in the action, but the Attorney-General supports the Crown grant, as he is by statutory mandate required to do (see section 4 of the Vancouver Island Settlers' Rights Act, 1904) and denies

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the jurisdiction of the Court to reverse the decision of the Lieutenant-Governor in Council. It is without hesitation that I come to the conclusion that no jurisdiction exists in the Court to pass upon, enquire into or set aside the Crown grant challenged in this action, and which has been declared by the trial judge to be null and void. The Crown grant did not issue following compliance, or attempted compliance, with rules and regulations ending with the decision only of some departmental or ministerial officer—this is the fallacy that runs throughout the whole proceedings upon the part of the respondent. The insuperable obstacle the respondent meets with on this appeal is this, that that which is challenged is a Crown grant which has been issued at the mandate of Parliament by the Lieutenant-Governor in Council, and having issued has statutory effect. The statute does not provide for any review or appeal from the decision of the Lieutenant-Governor in Council, and without that there can be no review or appeal. In *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), 76 L.J., P.C. 85, Sir Henri Elzear Taschereau, delivering the judgment of their Lordships of the Privy Council, dealing with the same Act we here have to construe, said at p. 86:

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

And further on we find this language:

"In their Lordships opinion this enactment in a remedial Act, read with the other parts of it, means clearly that a grant in fee-simple, without any reservations as to mines and minerals, of any of the land therein mentioned (including the lot in question), if applied for within twelve months (as was done by the appellant), should be issued to the settlers therein mentioned (including the appellant as to the particular lot in dispute), though previously such a grant could not legally have been issued, because the said land had already been granted, with its mines and minerals, to the Dominion Government by the Provincial Act of 1883, and subsequently by the Dominion Government to the respondents. If the Act of 1904 did not apply to this lot, amongst others, because the title to it was then vested in the respondents, it would have no possible application at all. Such a construction would defeat the clear intention of the Legislature."

Now it is important to note the statutory interpretation given

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to the Lieutenant-Governor in Council by section 26 (4) of the Interpretation Act (R.S.B.C. 1911, Cap. 1). It is enacted:

"26 (4.) In every Act of the Legislature, unless the context otherwise requires,—'Lieutenant-Governor in Council' means the Lieutenant-Governor of British Columbia, or person administering the Government of British Columbia for the time being, acting by and with the advice of the Executive Council of British Columbia."

It is therefore at once seen that the issuance of the Crown grant is a duty imposed by statute upon the Lieutenant-Governor, who is to act on the advice of the Executive Council, in other words, the duty is to be performed by the Government of British Columbia; it is not a duty cast upon a ministerial officer in the ordinary discharge of his office. Nor is it the case of the validity of an order in council, which lately has been the subject of judicial decision, notably by their Lordships of the Privy Council in *The Zamora* (1916), 2 A.C. 77; 85 L.J., P. 89. What we have here is a legislative enactment giving certain rights, with a legislative mandate directed to the Lieutenant-Governor in Council to proceed and issue Crown grants in pursuance of the provisions of the Act, *i.e.,* Parliament has defined, directed and ordered what the Lieutenant-Governor in Council must do, and as we have seen, the Lieutenant-Governor acts upon the advice of the Executive Council. Therefore, it comes to this, that if there is the power of review, it means that that review is the review of the advice given by the Executive Council, a power of review certainly not given by the Act, and I may say, a power of review unknown to the law. Here we have a Crown grant issued, as it must be assumed (as it in fact was) by the Lieutenant-Governor in Council, acting upon the advice of the Executive Council. It cannot be said that there was any want of jurisdiction, and there being jurisdiction, and no right of review or appeal given to the Courts, how can it be successfully contended that there is any power of review in the Supreme Court? In effect, what is contended for is that the Lieutenant-Governor in Council has been constituted a Court of Judicature, and notwithstanding that the statute is silent as to appeal, nevertheless, an appeal lies. This is the advancing of a proposition that is against fundamental law, and, with great respect to all contrary

opinion, seems to me to be in antagonism to that which may be said to be elementary in jurisprudence. Apart from the restraint that there is upon the Court in trespassing upon the domain of Executive Government, which, to my mind, is also fundamental, there would only be in other cases possibly the right of review or the right of appeal where something was done which was clearly repugnant to natural justice. (See *Christian* v. *Corren* (1716), 1 P. Wms. 329-330; Bacon's Abridgement, tit. Prerogative (D) 1, p. 428; *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409; *Reg.* v. *Alloo Paroo* (1847), 5 Moore, P.C. 296.)

Should I be wrong in this view, then my further answer is, that the Executive Council had evidence before it which constituted "reasonable proof" (Cap. 54, Sec. 3, Vancouver Island Settlers' Rights Act, 1904), which admitted the Lieutenant-Governor in Council to direct that the Crown grant should issue, and the Crown grant having issued, the result is as stated by HUNTER, C.J. in the *Fiddick* case, 14 B.C. at p. 415:

"As I read the decision of the Judicial Committee in the *McGregor* case, the statute in effect enacts that upon the issue of the defendant's grant, the plaintiff's rights shall cease and determine. *Ex hypothesi*, then, the defendant's title destroys the plaintiffs' and there is nothing left to take the case out of the ordinary rule to which I have referred."

The rule that the Chief Justice had previously in his judgment stated was expressed in these words, at pp. 414-5:

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"There is no principle better established in our law than that in an ordinary suit between subjects, a patent from the Crown which is *ex facie* valid cannot be attacked in the absence of statutory authority on the ground of any irregularity, mistake, misrepresentation or fraud, which is alleged to have occurred in the proceedings leading up to its issue, but such matters may be canvassed only in a suit properly framed for that purpose by or with the assent of the Crown, such as an action by the Attorney-General or by petition of right. If it were not so, no man's title would be safe, and the foundations on which the right to real property at present rest would be swept away."

Further, if it be that there is jurisdiction in the Court to review the action of the Lieutenant-Governor in Council, which I, of course, do not admit but deny, a hearing was had, in my opinion, in complete compliance with the provisions of the statute, and there was absolute discretion in the Lieutenant-Governor in Council to refuse any adjournment of the hearing,

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and nothing took place which could be said to be repugnant to natural justice (see *Mulvihill* v. *Regem* (1914), 49 S.C.R. 587).

Then it is said that as the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1920, was disallowed, although after the issuance of the Crown grant (see sections 56 and 90 of the British North America Act), it has the effect of rendering the Crown grant invalid and void. It would seem to me that it is unnecessary to do other than call attention to the language of the statute, the effect being to only "annul the Act from and after the day of such signification" (see section 56, British North America Act). This must and can only mean that until such "signification" the Act has the force of law, otherwise all government and law in Canada would be arrested during the time of the respective periods, namely, during two years in the case of enactments of the Parliament of Canada and one year in the case of enactments of the Parliaments of the Provinces. It is unthinkable that this should be the law. If it were, all would be chaos and there would be an end to autonomy, and it would be idle to say that Canada has had conferred upon her complete autonomy and the full *status* of a nation within the Empire. It must follow, upon the application of the true canons of construction of statute law, that that which has been done upon the faith of the statute law—having in the *interim* the full force of law—has been rightly and validly done.

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The only remaining question which in my opinion needs be adverted to is the point as to whether the respondent is in a better position than it was in the *McGregor* case (76 L.J., P.C. 85) by reason of its undertaking having been declared to be a work for the general advantage of Canada. The jurisdiction of the Dominion Parliament over the undertaking is unquestionably unfettered and cannot be affected by legislation of the Parliament of the Province, and in so far as there may be conflict all Provincial enactments are displaced, but this cannot be operative to affect that which is *dehors* the undertaking, *i.e.*, apart from the railway undertaking, and that which is in question here is "property and civil rights" independent of the rail-

way undertaking. In this connection I would refer again to the *McGregor* case, and to the apt language of Sir Henri Elzear Taschereau at pp. 86-7:

"On the constitutionality of the Act of 1904, and the power of the British Columbia Legislature to enact it, their Lordships see no reason for doubt. The Legislature had the exclusive right to so amend or repeal in whole or in part its own said statute of December, 1883 (47 Vict. c. 14). And the Act relates, not to public property of the Dominion, as contended for by the respondents, but to property and civil rights in the Province, and affects a work and undertaking purely local (section 92, subsection 10 of the British North America Act). This railway is the property of the respondents, and the said land had ceased to be the property of the Dominion in 1887 by the grant thereof to the respondents. By an Act passed in 1905 by the Dominion Parliament and the legislative power over the company has since been transferred to the Federal authority; but that Act, of course, has no application to this case."

Finally, I would say, and with great respect to the learned trial judge, that the Act under consideration cannot be said to be "confiscatory in its nature"; it is only necessary to read the preamble to the Act to advise oneself to the contrary, and it is admitted that the Crown has made compensation and granted lieu lands in respect to Crown grants already issued under the Vancouver Island Settlers' Rights Act, 1904 (see the Vancouver Island Settlers' Rights Agreement Ratification Act, B.C. Stats. 1910, Cap. 17), whereby a free grant of 20,000 acres of land was made to the respondent by the Parliament of the Province of British Columbia, with exemption of taxation from the date of the issuance of the Crown grants for ten years, with the grant of the foreshore and coal under the sea, demonstrating that right has been done in the premises, and as right has been done, it is fair to assume that right will still be done. Further, it is not within the province of the Court to animadvert upon the law-making authority. It may be fairly said that the land subsidy was acquired by the respondent with the knowledge of the adverse possession (*National Bank of Australasia* v. *Joseph* (1921), 1 W.W.R. 379), outstanding equities or inchoate rights of the pioneer settlers. It is true the earlier legislation did not preserve these equities or inchoate rights to the pioneer settlers, but if the interests of justice required that right be done (although belated), why should it not be done?

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The questions of fact and the justice of the legislation may

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be well gleaned by reading the preamble of the Vancouver Island Settlers' Rights Act, 1904. I will not quote it all, but content myself by quoting only the concluding paragraph, which well portrays the reason for the enactment, founded upon natural justice and in conformity with well-known attributes of the Crown. That paragraph reads as follows:

"And whereas all of said settlers are entitled to peaceable and absolute possession of said land occupied by them and title thereto in fee simple, in accordance with the Statutes of British Columbia at the time existing governing the disposal of public lands."

It follows that, in my opinion, the appeal should be allowed, and my reasons for judgment in this case are equally applicable to the appeal in the *Esquimalt and Nanaimo Ry. Co.* v. *Dunlop,* which appeal also should, in my opinion, be allowed.

EBERTS, J.A.: This is an appeal from the judgment of Mr. Justice GREGORY in the above cause. The facts shortly are as follows:

By section 3 of the Statutes of British Columbia, 1884, Cap. 14, a block of land in Vancouver Island was granted to the Dominion Government for the purpose of construction and to aid in the construction of a railway between Esquimalt and Nanaimo, on Vancouver Island. This railway was duly completed, under the provisions of the Act, by the Esquimalt and Nanaimo Railway Company, and the lands mentioned in said section 3 were conveyed to the said Railway Company by the Dominion Government and duly registered in the Land Registry office, Victoria. The land in dispute in this action, being section 2, range 7, 100 acres, and the easterly 60 acres of section 3, range 7, Cranberry District, B.C., lie within the boundaries of the land conveyed to the Dominion Government and by the latter conveyed to the Railway Company, by virtue of section (f) of the agreement set out in the preamble to the Act. The lands so conveyed were open for pre-emption for four years from the 19th of December, 1883, the date of the passage of the Act, "to actual settlers for agricultural purposes," and the Government of British Columbia was authorized to make and issue pre-emption records to actual settlers of said lands. By section 23 of the Act, *bona fide* "squatters" who had con-

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tinuously occupied and improved any of said lands for a period of one year prior to the 1st of January, 1883, were entitled to a grant of the freehold of the surface rights only of the squatted land to the extent of 160 acres to each squatter on payment of $1 an acre. One Joseph Ganner, a teamster, who was living with his family in the city of Nanaimo, in this Province, made an application for, and there was issued to him on the 4th of August, 1885, a pre-emption record under subsection (f) aforesaid, of the lands in question, and on the 24th of December, 1890, a conveyance of the surface of said lands was made to said Ganner by the Esquimalt and Nanaimo Railway Company. It does not appear by the record that Ganner, as a squatter, asserted any right under section 23 of Cap. 14 aforesaid, nor does it appear throughout this record that Ganner asserted any rights as a squatter under the Settlement Act, which became law the 19th of December, 1883, nor did his trustees make any application under the Settlers' Rights Act of 1904, and not till the 5th of July, 1917, did they assert any claim to the lands in question until an amendment was passed to the Settlers' Rights Act of 1904 in 1917, evidently giving a renewed opportunity to these settlers who had acquired rights under the Settlement Act to apply for grants, which, as I have said, became law on the 19th of December, 1883. It may be noted that Ganner acquired the surface rights to the lands in question from the Esquimalt and Nanaimo Railway Company on the 24th of January, 1890, and the appellants, as Ganner's trustees, for valuable consideration, gave a conveyance in fee of the lands to one Bing Kee on the 13th of March, 1905. Ganner died in December, 1903, devising all his estate to the defendants Wilson and McKenzie, in trust. Chapter 54 of the Statutes of British Columbia, 1904, entitled "An Act to secure to certain Pioneer Settlers within the Esquimalt and Nanaimo Railway Land Belt their surface and under-surface rights," was passed by the Legislative Assembly of British Columbia, and by section 3 it was enacted that:

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"Upon application being made to the Lieutenant-Governor in Council on or before the first day of September, 1917, shewing that any settler occupied or improved land within said railway land belt prior to the enactment of chapter 14 of 47 Victoria, with the *bona fide* intention of

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living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler."

Under that section the defendants Wilson and McKenzie, as trustees and executors of the will of Joseph Ganner, deceased, made an application to the Lieutenant-Governor in Council for a Crown grant of the lands above mentioned, and in support of the application filed declarations purporting to be reasonable proof of the requirements called for under section 3, that Ganner occupied and improved the land in question prior to the enactment of Cap. 14, B.C. Stats. 1884, with the *bona fide* intention of living on same. The respondent's solicitors (who for some time previously had been in communication with the Government with reference to appellants' application to the Lieutenant-Governor in Council) were, on the 2nd of February, 1918, served with a notice by the Provincial Secretary that the claims of Wilson and McKenzie (the appellants) under the Vancouver Island Settlers' Rights Act, 1904, and Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, would be passed on by the Lieutenant-Governor in Council on the 9th of February, 1918, at 11 a.m., and enclosing copies of the various documents filed by the claimants in support of their application. It may be here noted that the "various documents" filed by the claimants with the Government had been in the possession of the Executive for some months prior to their notice of the 2nd of February, 1918, and that the respondent's solicitors were refused copies or inspection of same until the 2nd of February, 1918. The respondent's solicitor and counsel appeared on the 9th of February, 1918, and applied for an adjournment of the hearing for the purpose of properly preparing the respondent's answer to the declarations filed by the claimants in their case. This application was not acceded to, and the application asking that the declarants be produced for cross-examination was also refused, as the record shews. It might be said by the Executive that they had no power to compel the claimants to attend for cross-examination. If the claimants and their witnesses refused to

attend, the Lieutenant-Governor in Council could in turn withhold the grants until they had submitted themselves for cross-examination. It was strenuously argued by Mr. *Taylor* (for appellants) before this Court, that respondent was not entitled to notice of the hearing or be heard before the Executive Council. It was decided by the Full Court of British Columbia in the case of *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 421, that the respondent was entitled to appear and be heard in an application of a similar kind under the Settlers' Rights Act, and which decision I feel bound to follow.

It is a well-known principle in British jurisprudence that all statutes dealing with the liberty of the subject and which are in terms "confiscatory," all parties interested are entitled to notice and to be heard. In *Reg.* v. *Saddlers' Co.* (1863), 32 L.J., Q.B. 337 at p. 344 it is said:

"It is of the very essence of justice that every person should be heard before judgment is given against him,"

and the principle of natural justice should be carried out, and the hearing being a *quasi*-judicial one, the Lieutenant-Governor in Council, on the principle of natural justice, should have given the respondent herein a full and complete opportunity of being heard by presenting its case and by cross-examination of the declarants. The cross-examination would have been a most important feature on the hearing, especially in view of the "flimsy" evidence filed in support of the application: see *Burn* v. *National Amalgamated Labourers' Union* (1920), 2 Ch. 364 at pp. 374 and 377; Paley on Summary Convictions, 8th Ed., 134; *Rex* v. *Simpson* (1717), 1 Str. 44.

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In *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462 at p. 466, it was held by their Lordships of the Privy Council that

"but for the British Columbia Act of 1904 [Vancouver Island Settlers' Rights Act], and the grant to him [the appellant McGregor] under its provisions, the respondents' title to the mines and minerals in question would be incontrovertible."

That was the respondent's position up to the hearing before the Executive. At that time the Government of British Columbia had no interest in the lands in question, having granted them under the 1884 Act to the Dominion of Canada,

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and it thereafter conveyed them to the respondent herein for railway purposes, such conveyance being duly registered in the name of the Esquimalt and Nanaimo Railway Company. The Province of British Columbia having no title to the lands, the Lieutenant-Governor in Council could not, in my opinion, as a matter of policy, grant to the appellants the lands, and could not exercise any discretion as to the disposition of same otherwise than under chapter 54 aforesaid. They were a judicial body appointed by the Legislative Assembly under Cap. 54 of 1903-04, to issue a Crown grant to a "settler," who is defined in the Act as follows:

"2. (*b.*) "'Settler' shall mean a person who, prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt, with the *bona fide* intention of living thereon."

Therefore, in my view, the learned trial judge's conclusion was correct, that the respondent herein was entitled to appear and be heard before the Lieutenant-Governor in Council, and should have been given a reasonable time in which to prepare its case, and above all, that the application to cross-examine the persons who made declarations on behalf of the appellants should have been acceded to, and the respondents should be entitled to the declaration asked for, and damages for trespass.

I am also of opinion the respondents should succeed on the ground that the evidence produced to the Lieutenant-Governor in Council in no way complied with that which is called for under Cap. 54, Sec. 1, B.C. Stats. 1903-04. The declarations in the record are almost valueless to shew that Ganner had complied with section 3 of the statute to entitle his legal representatives to a Crown grant of the lands.

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It must be borne in mind that at the time of the hearing the lands in question stood registered in the Esquimalt and Nanaimo Railway, and to dispossess them of such valuable lands the clearest evidence was necessary, and the strictest proof in conformity with the statute should have been required.

The evidence filed in support of the contentions of the trustees consisted of a number of short declarations made by the following persons: John Gribble, Chas. Wilson and A. D. McKenzie (Ganner's trustees), Lizzie Peck, Margaret McKenzie, W. H. Morton, W. H. Ganner, and Henry McAddie. I find on

analyzing the declarations that not one of them shewed "reasonable" proof that Ganner was a "settler" as defined in the Settlers' Rights Act, that he "occupied or improved lands within the Railway land belt," being lands described by section 3 of Cap. 14 of 47 Vict., being "An Act relating to the Island Railway, the Graving Dock and the Railway Lands of the Province," with the *bona fide* intention of living on the land, accompanied by "reasonable" proof of such occupation or improvement and intention. There is nothing to shew in any of the declarations that the dwelling-house referred to in the declaration of Margaret Harvey as having been built by Ganner had been built by him, or that any declarant had ever seen a dwelling-house on the land prior to the 1st of January, 1883, nor did they shew any real improvement, or was there anything to shew Ganner's *bona-fide* intention of living on the lands in question. Appellants Wilson and McKenzie, in a declaration filed with the Lieutenant-Governor in Council, made on the 5th of July, 1917, said:

"2. The said land was first occupied or improved by Joseph Ganner on or about the day of May, 1883.

"3. That his claim to receive such grant is based upon the following facts:

"He settled upon the said lands, sections 2 and 3, in range 7, Cranberry District, with the intention of making his home therein in the spring of 1883. Plans and affidavits are all filed in the Government office with the application. This surface land was sold to Bing Kee (Chinese) in February, 1904."

On the 29th of August, 1917, the said trustees made a further declaration, of which the following is part, *viz.*:

"2. The said land [meaning the land in question] was first occupied or improved by Joseph Ganner on or about the year 1880 or 1881.

"3. That our claim to receive such grant is based upon the following facts:

"The said Joseph Ganner took up the land at the date above referred to with the intention of making a home thereon; built a cabin and had some clearing done, and finally sold to one Bing Kee (Chinese) in February, 1904."

The above declarations of the trustees are so conflicting that I place no reliance on them whatever.

For the above reasons I would dismiss the appeal, with costs against the defendants, other than the Crown. In my opinion, the Granby Company had full knowledge at all times of the

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respondent's contention that the coal belonged to them, and they were not innocent purchasers for value. I agree with the principle of assessing the damages set out in the original judgment. I express no opinions on several other questions argued before the Court.

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MACDONALD, C.J.A.: The argument of this appeal followed that in *Esquimalt and Nanaimo Railway Company* v. *Wilson*, and was very short, counsel on both sides relying generally upon their submissions in that case.

The proofs submitted by the appellants in this case are vastly different, I think, from those in the other one. There is here ample evidence of occupation and improvement and of intention to reside on the land on the part of the late Archibald Dunlop, and it is therefore impossible to say that there was not reasonable proof submitted to the Lieutenant-Governor in Council.

This conclusion makes it necessary that I should consider the other issues which, in view of my opinion of the evidence in the other appeal, I was not there constrained to decide.

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The Railway Company complains that though it received notice of the hearing of the application and was represented by counsel, yet the length of notice was not reasonably sufficient, and further, that an adjournment was unreasonably refused, as was also the request that the attendance of those persons who had made statutory declarations in support of the application should be procured for purposes of cross-examination. No practice or procedure is required by statute to be observed by the Lieutenant-Governor in Council, and assuming that the statute contemplates a hearing, though the inference I would draw from its language is against that assumption, I do not think we are at liberty to call in question the mode of procedure adopted or the discretion exercised. It does not appear to me that we are much concerned with what took place before or at the time of the hearing. This action is brought to set aside

the grant, substantially on the ground that the same was not authorized by the statute. We have to decide the question of law, namely, was there the "reasonable proof" which the statute requires?

Respondent's counsel further contended that the disallowance of the amending Act of 1917 destroyed the grant. I adhere to the contrary opinion, which I expressed in *In re Granby Consolidated Mining, &c., Co. and the Registrar-General of Titles* (1919), 26 B.C. 523 at p. 534. They also argued that because of non-registration of the instruments of title no interest in the land passed to appellants the Granby Company. I cannot see the relevancy of this. The deed from the Crown is not nullified by non-registration, and what is left of the submission is no concern of the respondent. They further argued that because one member of the Council was absent from the hearing of appellants' application for the grant that it was therefore null and void. In addition to what I have already said on the question of a hearing, I would add that we were not referred to any authority, statutory or otherwise, in support of this contention, and in the absence of authority to the contrary, I shall infer that the usual procedure followed by the Council was observed and that a quorum was present. Again, they argued that the amendment of 1917 was *ultra vires*. The original Act was held by the Judicial Committee to be *intra vires*, but they argued that because since then the respondent's railway has been declared to be a work for the general benefit of Canada, and therefore has been brought under Dominion jurisdiction, it was not, in 1917, competent to the Provincial Legislature in this way to deplete respondent's assets. This contention, in my opinion, though ingenious, is untenable. The most that can be urged is that when circumstances require it, the jurisdiction of the Province in respect of property and civil rights must give way to Dominion powers. In this case, no such necessity has been shewn to exist.

The final submission on behalf of respondent calls for very careful consideration. It is that the grant could be made of such lands only as had been in the actual possession of or had been improved by the settler, that is to say, that occupation or

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improvement of part of the parcel or parcels granted cannot be said to be occupation or improvement of the whole. When land is not enclosed that is usually so. In this case, the answer to the submission is to be found in the Act itself, if not in direct terms, at least by fair inference from its terms and its object. Under the land laws then and now in force, persons were enabled to acquire unoccupied and unreserved Crown lands. The lands in question here were not then unreserved, but the Legislature has chosen to treat the matter in favour of the "settler" as if there had been no reserve. That is plain from the language, and particularly so from the object of the Act.

The three parcels in question appear to have been surveyed Crown lands. Archibald Dunlop applied to the Land Commissioner of the Province in 1885 for a pre-emption record and was granted it, and in 1892 the Railway Company (respondents) conveyed the surface of these three parcels to him, no doubt in pursuance of the agreement ratified by said Act of 1883. Now, while these subsequent acts of the respondent may not be relied upon as a recognition by it of Dunlop's occupancy of these parcels prior to the 19th of December, 1883, they are circumstances which may be taken into consideration, when construing the Act of 1904. The grievance of the settlers was notorious. It was not that they had been unable to obtain title to the surface of their holdings, but that title to the minerals, particularly the coal, had been withheld. The object of the Act was to remedy this grievance, and if it is to be construed as giving them nothing more than the coal under such portions of their surface holdings as can now be shewn to have been enclosed, or if they are to get relief limited to the patch or field actually cultivated or otherwise improved, the manifest object of the Act will have been substantially defeated.

MACDONALD, C.J.A.

I would allow the appeal and dismiss the action, with costs here and below.

MARTIN, J.A.

MARTIN, J.A.: In this case the questions raised are the same as in *Esquimalt and Nanaimo Ry. Co.* v. *Wilson* and the same ruling on the law therefore applies, but on the facts, I have no doubt that the "reasonable proof of such occupation or improve-

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ment and intention," etc., which was wanting in that case, is here present, and therefore the appeal should be allowed.

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

[MCPHILLIPS, J.A. allowed the appeal for the same reasons he gave in *Esquimalt and Nanaimo Ry. Co.* v. *Wilson, ante,* p. 359.]

EBERTS, J.A.: This is an appeal from the judgment of Mr. Justice GREGORY in the above cause, arising from the application for and grant to the appellant Dunlop (who is the sole devisee under the will of her husband, Archibald Dunlop) of the fee of the south-east portion of section 4, range 7, the west part of section 3, range 8, and the west part of section 4, range 8, on the official plan or survey of Cranberry District, in the Province of British Columbia, under and by virtue of Cap. 54, B.C. Stats. 1903-04.

In my opinion given in the case of *Esquimalt and Nanaimo Ry. Co.* v. *Wilson,* I set out my reasons why the appeal should be dismissed. This case and the *Wilson* case came up for hearing before the Lieutenant-Governor in Council on February 9th, 1918, and the same application was made in this case as was made in the *Wilson* case by counsel who acted for both parties, asking for an adjournment for the purpose of preparing the respondent's case in answer to the applicant's case, and also for the purpose of cross-examination of the declarations that had been filed. Following the case of *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 421; 11 W.L.R. 509, it was held that the respondents were entitled to appear and be heard in an application of a similar kind and under the same Act, and which opinion I feel bound to follow in this case, and to the well-known principles set out in *Reg.* v. *Saddlers' Co.* (1863), 32 L.J., Q.B. 337 at p. 342; 10 H.L. Cas. 404; *Burn* v. *National Amalgamated Labourers' Union* (1920), 2 Ch. 364 at pp. 374 and 377; 89 L.J., Ch. 370; Paley on Summary Convictions, 8th Ed., 134; *Rex* v. *Simpson* (1717), 1 Str. 44.

EBERTS, J.A.

For the above reasons I would dismiss the appeal, with costs against the defendant, other than the Crown, as expressed by

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me in *Esquimalt and Nanaimo Ry. Co.* v. *Wilson*. The Granby Company had full knowledge at all times of the respondent's contention that the coal belonged to them.

I agree with the principles of assessed damages set out in the original judgment. I express no opinion on the sufficiency of the declaration filed by Elizabeth Dunlop in her application, nor on several other questions argued before the Court.

Wilson appeal dismissed, McPhillips, J.A. dissenting, Dunlop appeal allowed, Eberts, J.A. dissenting.

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

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

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THORNDYKE-TRENHOLME CO. INC. v. THE WILLIAM LYALL SHIPBUILDING COMPANY LIMITED.

Commission—Sale of ships—Finding a purchaser—Contract entered into—Agent efficient cause—Purchaser fails to complete—Right to recover.

The defendant, while in the course of construction of six auxiliary schooners, entered into negotiations with the plaintiff's brokers in Seattle as to the sale of the ships. The plaintiff later getting in touch with one Van Hemelryck through its London agents sent a telegram to the defendant stating, "authorized to offer $450,000 each for your six vessels less five per cent. commission, delivery first September one each interval three weeks thereafter. Payments half cash balance on each vessel as delivered." The defendant replied, "first boat now launched can deliver all six February 15th, 1919. Acceptance contingent on immediate deposit half cash our credit Mechanics and Metals National Bank, New York." There was a further stipulation that 10 per cent. should be paid immediately as evidence of good faith. Van Hemelryck agreed to the terms but no payments were ever made by him. The defendant in the meantime continued their construction of the ships and on completion were held for a time for Van Hemelryck but were never delivered, acceptance being refused. The defendant then

brought action against Van Hemelryck, interlocutory judgment was signed, damages assessed for breach, and final judgment entered, but nothing was realized on the judgment. The plaintiff then brought action for commission, and it was held by the trial judge that there was a special contract, the plaintiff had failed to perform the services as stipulated and the action should be dismissed.

Held, on appeal, affirming the decision of MACDONALD, J., *per* MACDONALD, C.J.A., and EBERTS, J.A. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the plaintiff was not entitled to the commission claimed on the ground that on the evidence there was no completed contract for the sale of the ships.

Per GALLIHER, J.A.: That the effect of the offer submitted by the plaintiff to the defendant leading to the negotiations for sale was that the commission was only payable out of the purchase price and that the completion of the contract and payment of the money was a *sine qua non* of the payment of commission.

[Affirmed by Supreme Court of Canada.]

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APPEAL by plaintiff from the decision of MACDONALD, J. in an action for $135,000, being a five per cent. commission on the sale of six schooners by the defendant to one Raymond Van Hemelryck. The facts are set out fully in the judgment of the learned trial judge. Tried at Vancouver on the 1st and 2nd of September, 1920.

Statement

Davis, K.C., and *Ghent Davis*, for plaintiff.
Sir C. H. Tupper, K.C., and *Alfred Bull*, for defendant.

MACDONALD, J.: The plaintiff Company seeks to recover $135,000 as commission payable by the defendant, in connection with the alleged sale of six auxiliary schooners to one Raymond Van Hemelryck.

It appears that the defendant Company was constructing some schooners at its shipyard in North Vancouver, B.C. The plaintiff Company communicated with the defendant Company with a view of affecting a sale of these schooners. The correspondence in connection with the sale is voluminous, and it suffices for me to say that as a result of efforts by the plaintiff Company, it has been held that Van Hemelryck agreed to purchase these schooners. He failed, however, perchance due to the Armistice and the cessation of the war, to carry through the agreement of purchase. If he had completed the purchase he would have paid the defendant $2,700,000, and there is no

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doubt that in such event the plaintiff Company would be entitled to the commission claimed. The defendant Company did not receive any portion of this purchase price. A deposit of ten per cent. was paid into a bank in England but was never transferred to the defendant Company; the balance of the purchase price was paid to the Equitable Trust Company of New York, but never reached the defendant Company. The result was, that while the defendant Company for a considerable period held these schooners, or at least those that were finished from time to time, at the disposal of Van Hemelryck, they were never delivered, acceptance was refused, and in the outcome, in order to save itself from loss, the defendant Company operated such schooners. It transpired, however, that this attempt to thus recoup itself was detrimental to the extent of a considerable amount.

The defendant Company, failing to obtain any portion of the purchase price, deemed it advisable to take proceedings against Van Hemelryck. It was contended that the correspondence, aside from the contract, placed in escrow, and which was thus inoperative, constituted a contract sufficient to hold him liable in damages for a breach thereof. This contention was disputed but was sustained by the Court of Appeal, and the result was that the action commenced against Van Hemelryck was pursued to interlocutory judgment and then an assessment of damages for the breach took place and final judgment entered, which is now of record. It is stated that this judgment, or rather, the proceedings that led up to the judgment, are still being attacked, so that Van Hemelryck is not apparently satisfied to abide by the judgment or pay anything in connection with such purchase. The defendant Company has thus not received any sum in connection with the expected sale of these schooners, and so far only incurred costs. Under these circumstances, shortly outlined, the plaintiff Company contends that it is entitled to receive commission to the amount mentioned.

MACDONALD, J.

The statement of claim, as framed, alleges a special contract, but leave has been asked and is granted to amend and claim in the alternative, on a *quantum meruit*.

Dealing, then, first with the claim upon the special contract

of 5 per cent. upon the purchase price, I think this involves consideration, not only of the connection established between the parties, but the way in which the negotiations were continued and the final outcome. The plaintiff Company, at the time when they first got in touch with the defendant Company, does not appear to have had a purchaser available. After some time such Company, through correspondence and cablegrams with Wulfsberg, obtained what appeared to be a likely purchaser for these schooners, namely, Van Hemelryck.

The plaintiff Company felt justified, on the 11th of September, 1918, to telegraph the defendant Company at Montreal, that it had authority to offer $450,000 each, less 5 per cent. commission, on the first three schooners, and desired an option of 30 days for the three additional schooners, and mentioned other conditions in the telegram. This telegram was followed by one on September 26th, 1918, repeating the offer to some extent, but supplementing the provision for payment by providing that they should be half cash and balance as each vessel was delivered. This would be aside from a ten per cent. deposit. On the 27th of September, the defendant Company replied to the last telegram, stating that the first boat had been launched and that they could deliver all the six boats by February 15th, 1919, and then added that the acceptance of the offer was "contingent upon immediate deposit half cash, our credit, Mechanic & Metals National Bank, New York." There was a further stipulation in the correspondence as to the 10 per cent., as an evidence of good faith, being paid immediately as a deposit. Now the amount of commission to be received, if this offer had been carried out, namely, five per cent., was based upon and in connection with, not only the payment of all the purchase price eventually, upon the complete delivery of all the schooners, but in the meantime upon the deposit of ten per cent. and upon half the purchase price to be paid upon the execution of a contract. Such commission would be deducted from time to time and be payable to the plaintiff. There was thus to my mind a special contract. I think that the defendant Company employed the plaintiff Company as brokers to obtain a purchaser, and that such purchaser was required to be ready

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and willing to carry out a sale upon the terms stipulated. Generally speaking, if a broker procures a person, with whom a binding bargain is made upon any terms, he is entitled to his commission, unless there is something special in the contract of employment or if the circumstances of the case preclude him. This statement of the law was referred to by Mr. Justice Killam in *Wolf* v. *Tait* (1887), 4 Man. L.R. 59. So, if there be a special contract of service and it is not performed, the plaintiff, under such a contract, would not be entitled to recover. The Supreme Court of the United States laid down the principle in *McGavock* v. *Woodlief* (1857), 20 How. 221 (being a case cited by Mr. Justice Killam in the case of *McKenzie* v. *Champion* (1887), 4 Man. L.R. 158) that:

"'A broker must complete a sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on before he is entitled to his commissions. Then he will be entitled to them, though the vendor refuse to go on and perfect the sale.'"

I think that the purchaser thus produced by the broker should not only have the ability to purchase but he should shew a readiness and willingness to do so, not simply by words, but by actions. I do not see how, upon the facts, it could be reasonably contended that plaintiff fulfilled its duties as a broker under such special contract by producing Van Hemelryck as a purchaser. Whatever his ability may have been, he did not display the readiness and willingness that was required in order to carry out the sale upon the terms proposed by plaintiff and accepted by defendant. In my opinion, plaintiff failed to perform the services as stipulated.

MACDONALD, J.

Then as to whether the plaintiff Company should be entitled to a commission on a *quantum meruit*. This can only arise upon a failure to prove a special contract. Assuming that a special contract did not exist, then this claim requires consideration of the position of the parties, as arising out of the judgment for damages to which I have referred. Numerous cases have been cited. I have no doubt that if the terms originally imposed by the defendant Company had afterwards been altered by arrangement between the parties that this would not deprive the plaintiff Company of its commission. In other words, the vendor and purchaser could not, behind the back of

the agent, adjust the terms and thus deprive the agent of his commission. The question is, whether that is the situation here. The defendant Company, I take it, only as a last resort, and because it could not obtain any other redress, sought in this Province, when Van Hemelryck has apparently no assets, to recover damages for breach of the alleged contract of purchase. This, to my mind, differs from the parties coming together and rearranging the terms, and then the party liable for the commission seeking to evade payment. The position might have been stronger, from the plaintiff's standpoint, if the deposit even had been paid to the defendant Company. It is forcibly argued that although a new contract, in terms, was not made between the vendor and purchaser, though by a formal document, still, as it has been held that the correspondence constituted a binding contract, the plaintiff Company should be entitled to commission. I think one has to look at the intention of the parties. I do not for a moment suppose that in the month of October, which counsel for the plaintiff says was the date of the completion of the sale, that the plaintiff Company considered it was entitled to recover any commission. It was well aware at the time that no money had been paid. The special contract of employment had not been performed. As time wore on, the situation changed; the plaintiff Company was advised that Van Hemelryck had repudiated the transaction and refused to make any payment. Even then the view taken by the plaintiff Company was not one in which it asserted itself entitled under all circumstances to the payment of the commission now claimed. It is true that later on its attitude was changed and it took such a position, but in the earlier stages, if I read the correspondence aright, that was not the position assumed. It is true that if there was a right to recover commission unless specifically abandoned, for a consideration, such correspondence would not destroy the claim, but it is of some assistance in determining what the intention of the parties was as to the employment in connection with this sale. Further, the basis of recovery upon a *quantum meruit* is the value of the services rendered. So far, such services of the plaintiff Company have been of no benefit to the defendant Company, but rather the contrary.

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So I am of the opinion that upon a *quantum meruit,* the plaintiff Company is not entitled to any commission. The result is that, upon both contentions, I find for the defendant Company, and the action is dismissed, with costs.

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From this decision the plaintiff appealed. The appeal was argued at Victoria on the 19th of January, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

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Argument

Davis, K.C., for appellant: The sale was brought about by the plaintiff through Wulfsberg & Co., London, England, with whom the commission was to be divided. There is no dispute that a contract was entered into between the defendant and Van Hemelryck at the instance of the plaintiff. Once the contract is made, the doctrine of "ready, able and willing to complete" does not apply. Van Hemelryck did not carry out the contract and the defendant obtained interlocutory judgment against him, the damages being later assessed at $1,350,000, but as yet there is no realization on the judgment, there being no assets of the judgment debtor within the jurisdiction. On the question of when there is liability for commission see *Wycott* v. *Campbell* (1871), 31 U.C.Q.B. 584 at p. 590; *Fisher* v. *Drewett* (1878), 39 L.T. 253; *Hornby* v. *Eberle* (1884), 1 T.L.R. 104. As to the doctrine of "ready, willing and able" not applying when the contract is entered into, see *Mackenzie* v. *Champion* (1885), 12 S.C.R. 649 at p. 657; *McKenzie* v. *Champion* (1887), 4 Man. L.R. 158; *Horford* v. *Wilson* (1807), 1 Taunt. 12; *Grogan* v. *Smith* (1890), 7 T.L.R. 132; *Whiteside* v. *Wallace Shipyards, Limited* (1919), 27 B.C. 40. The American cases on the question are: *Kalley* v. *Baker* (1892), 29 N.E. 1091; *Gilder* v. *Davis* (1893), 33 N.E. 599; see also *Toulmin* v. *Millar* (1887), 58 L.T. 96; *Bagshawe* v. *Rowland* (1907), 13 B.C. 262; *Calloway* v. *Stobart Sons & Co.* (1904), 35 S.C.R. 301. On the question of the intention of the parties see *Inglis* v. *Buttery* (1878), 3 App. Cas. 552 at p. 576. We are entitled in any case on a *quantum meruit*: see *Wolf* v. *Tait* (1887), 4 Man. L.R. 59; *Passingham* v. *King* (1898), 14 T.L.R. 392; *Glines* v. *Cross* (1899), 12 Man.

L.R. 442; *Aikins* v. *Allan* (1904), 14 Man. L.R. 549 at p. 560; *Haffner* v. *Cordingly* (1908), 18 Man. L.R. 1; *Prentice* v. *Merrick* (1917), 24 B.C. 432; *Doner* v. *Loose* (1920), 30 Man. L.R. 350; *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614.

Alfred Bull, for respondent: There is no contract of agency and there never was. The plaintiff was the agent of the purchaser, and there was an arrangement between the vendor and purchaser that purchaser's agent should receive the commission if the sale went through. The contract implies clearly that the commission was to be paid out of the purchase price. If we collect on our judgment against Van Hemelryck we must then pay the commission: see *Chapman* v. *Winson* (1904), 20 T.L.R. 663. On the difference between general employment and a special contract see *Colonial Real Estate Co.* v. *La Communaute Des Soeurs De La Charite De L'Hopital General De Montreal* (1918), 57 S.C.R. 585; 45 D.L.R. 193 at p. 201.

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MACDONALD, C.J.A.: On the evidence before us in this appeal, I have come to the conclusion that there was no completed contract for the sale of the ships in question. Counsel on both sides appeared reluctant to discuss this all-important phase of the case, no doubt because a decision upon it might embarrass them in another pending action in which their respective contentions may be out of harmony with those which they would advance in this appeal on that point, but the facts are before me, and irrespective of the course pursued by counsel, I must decide this appeal on its own merits.

MACDONALD, C.J.A.

It was suggested by Mr. *Davis,* that the Court had, in an interlocutory appeal in the action aforesaid, decided that a sale had been proven, but this is not my understanding of our decision in that case. The Court merely decided that there was an issue on that point to be tried, but did not profess to pass upon the true merits of that issue.

In this appeal, however, the issue is squarely before us after trial of the action in the Court below. I found my opinion

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that there was no completed contract on the evidence, which shews that negotiations for sale finally culminated in the execution of a formal agreement, which the parties placed in escrow, to be delivered and to come into effect upon performance of a condition, which, admittedly, has not been performed. If I am right in this view of the evidence, there is nothing more to be said, and the appeal should be dismissed.

MARTIN, J.A.: In my opinion, this appeal should be allowed. I see no reason to regard the contract as other than the ordinary one of a sale by a broker upon commission. I am unable to regard it as a special contract whereby the broker cannot recover his remuneration till after his principal has received his purchase-money.

GALLIHER, J.A.: Assuming that there was a contract of agency, which is open to doubt, I still think the plaintiff cannot succeed in this action.

The plaintiff, as general brokers, kept in touch with builders of vessels and prospective purchasers, with a view to bringing about sales by reason of which they would earn commissions. In such capacity, knowing that the defendant was building vessels, it got in touch with one Van Hemelryck, a Belgian purchaser of ships, and submitted the following offer:

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"We are authorized to offer your firm four hundred and fifty thousand dollars each for your six vessels less five per cent. commission, delivery first September one each interval three weeks thereafter subject Belgian Flag. Payments half cash balance on each vessel as delivered. If deliveries too early accept offers subject your terms of delivery. Buyers to our knowledge are largest purchasers of vessels for Allies we having sold them five to our complete satisfaction. Confirm quickly."

If we arrive at the right viewpoint as to the effect of this document, much that followed in correspondence and interviews is, upon careful consideration, reconcilable with that document, and do not serve to alter or make a new and different contract. The view I think any person receiving this document is entitled to take, and in my opinion, the effect of it, is: We are authorized (by a prospective purchaser) to offer you $450,000 each for six of your vessels, out of which you will have to pay a commission of 5 per cent., or you will be paid that amount less 5 per cent. deducted for commission. In either event, the

completion of the contract and the payment of the money was a *sine qua non* of the payment of commission, and if this is the true effect of the document, nothing has as yet taken place to entitle plaintiff to its commission.

I do not propose to proceed to an analysis of this correspondence. I have read and weighed it all, and after doing so, have arrived at the conclusion that the appeal should be dismissed.

McPhillips, J.A.: In my opinion, this appeal should succeed. It cannot be gainsaid, as I read the evidence (I do not propose to canvass it in detail), that the appellant, after arduous work and services faithfully carried out, produced a purchaser to the respondent with whom the respondent entered into a firm contract for sale. This acceptance of the purchaser by the respondent must conclude the question in favour of the appellant, that a purchaser was produced ready, able and willing to complete and, in passing, upon this point, this is further accentuated in that the respondent sued the purchaser (Raymond Van Hemelryck) upon the contract of purchase of the vessels and obtained judgment by default against the purchaser for $1,343,015.57. It is idle now to contend that no sale was effected, or that the appellant was not the effective cause of the sale made. The appellant, upon the facts, was acting, under the authority of a general employment, to find a purchaser for six vessels, one already launched and five more on the ways in process of construction. I think the contention, in view of the facts, that no contract of sale was made or employment and acceptance of the services of the appellant, must be dismissed from consideration. Then, what is to be met is the further contention that the employment was, in its nature, a special employment, and that a term thereof was that no commission would be required to be paid by the respondent to the appellant unless the purchaser completed the purchase by payment. In fact, it can be reasonably said that it is admitted that if there had been completion by payment, the commission would be earned and be payable by the respondent to the appellant, but failing payment the contention is that no liability exists therefor. I cannot, upon the facts, find that there

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was any such specific or special agreement. It was the case of an open general employment of a broker to produce a purchaser and that would admittedly carry with it the obligation that the purchaser was one able, ready and willing to complete, but these essentials, as to ability, readiness and willingness are satisfied when the vendor accepts the purchaser and contracts with him. The broker has then assuredly done all that he can be called upon to do, and he has then earned his commission (*Wycott* v. *Campbell* (1871), 31 U.C.Q.B. 584 at p. 590). It is true in *Fisher* v. *Drewett* (1878), 39 L.T. 253, Bramwell, L.J. at p. 254 said:

"Supposing, however, that it would protect the defendant if he could shew that it was through the fault of the lender [there it was the procurement of a loan] that he did not receive the money [but there the commission was by the contract agreed to be paid "on any money received"—here we have nothing of the kind] I do not think there is any evidence to shew it."

In the present case, why should the appellant be deprived of the commission when the purchaser produced was accepted? It would seem to me that it is no answer to say that as yet payment has not been made. The appellant has done all that it was called upon to do. Even in the case last referred to, Bramwell, L.J. said at p. 254:

"In my opinion, 'on any money received' means on any sum of money in respect of which you shall have procured me a good contract to receive,"

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and in the present case the respondent has asserted that it has a good contract, and in fact, at the moment, has a judgment against the purchaser based upon the breach of the contract to accept and pay the purchase price of the vessels—the purchaser admittedly produced by the appellant to the respondent and accepted by it (see *Wolf* v. *Tait* (1887), 4 Man. L.R. 59). In that the respondent contracted for the sale of the vessels to the purchaser procured by the appellant, and has enforced the contract to judgment and given no evidence of the purchaser's inability to discharge it, it would be inequitable (*Doner* v. *Loose* (1920), 2 W.W.R. 388 at p. 392) to now hold that the appellant is not entitled to recover for services rendered, the benefit of which the respondent has accepted (*Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614 at p. 624). In *Hornby* v. *Eberle* (1884), 1 T.L.R. 104 at p. 105, Lopes, J. said:

"Has the plaintiff procured a lender willing and able to lend the money, against whom the defendant might, with some chance of success, bring an action for specific performance, if necessary?"

In the present case that action has been brought, and it is fair to assume, "with some chance of success." In *McKenzie* v. *Champion* (1887), 4 Man. L.R. 158, we find this stated in the head-note:

"Nor can the owner refuse to pay merely because the purchaser afterwards makes default and unreasonably refuses to carry out the contract."

(See Lord Justice Kay in *Grogan* v. *Smith* (1890), 7 T.L.R. 132 at p. 133, "the plaintiff, the agent had not shewn that he had introduced a party who had bound himself to purchase the house": here that requirement was satisfied). In *Calloway* v. *Stobart* (1904), 35 S.C.R. 301 at p. 307, Davies, J. (now Chief Justice) said:

"I agree that if the owners had, under the circumstances, accepted a purchaser produced to them by the plaintiff and thus profited by the plaintiff's volunteered services, the case would be different and the plaintiff might recover."

(Also see Lord Justice A. L. Smith in *Passingham* v. *King* (1898), 14 T.L.R. 392:

"In these circumstances (and I venture to think the circumstances of the present case are equally forceful) he was of the opinion that the defendant had taken up the negotiations himself and taken them out of the hands of the plaintiff and had accepted Vine as the purchaser and that therefore commission was payable.")

Finally, the main defence, and the one most strongly pressed at this bar by the learned counsel for the respondent, was that the contract was in its nature a special contract, and the commission was not to be paid until the completion of the contract by payment in full. This contention is quite untenable, in my opinion, and I would refer to what Killam, J. (afterwards Chief Justice of Manitoba and later again one of the Justices of Appeal in the Supreme Court of Canada) said in *McKenzie* v. *Champion, supra,* at pp. 164-5:

"Although some expressions in some of the opinions which I have just cited would seem to involve the idea that the commission is not earned if the purchase-money be not paid and the conveyance made, unless such a completion as this is prevented by the default of the vendor, yet I do not think that such is their meaning.

"If the purchase were to be a purely cash purchase, not to depend upon an intermediate contract of sale, this would probably be the case; but if the purchase is not to be wholly for cash and there is to be at first an

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agreement of purchase and sale, it would seem that, upon production of a party ready and willing to complete the purchase by entering *bona fide* into such an agreement, the duty of the agent would be completed and his commission payable forthwith.

"In most cases only a portion of the purchase-money would be payable at once, and very often the balance would be payable in instalments extending over a long period of time. Sometimes the balance not payable at once would be secured by mortgage, the property being first conveyed to the purchaser, and the circumstances might point in many cases to the making of the mortgage as being the completion of the purchase; but in many other cases it would not be the intention that there should be such a conveyance until the whole or, at least, several deferred instalments of the purchase-money should be paid, the parties being left to depend in the meantime for their mutual security upon an executory agreement between them. Now in case of such an agreement on which instalments would be long deferred, it would never be contended, in the absence of a special agreement to that effect, that the agent's commission should only be payable on payment of the last instalment or proportionately on payment of each instalment; that the agent should, for the whole period over which the payments were deferred, be responsible for the acts or default of the purchaser found by him. If the agent is not to be thus bound by the acts or default of the purchaser, in case of an executory agreement having been entered into, it would appear unimportant as a matter of legal liability whether the agreement be for a long or a short period of credit. It appears to me that the agent has fulfilled his duty and has earned his commission, when he has procured and brought to his principal a party ready and willing to contract with him for the purchase of the lands upon the terms stipulated for, or if the terms be not fully prescribed when the agent is employed, then upon the proposed purchaser and the principal entering *bona fide* into an agreement of purchase and sale."

MCPHILLIPS, J.A.

The above language is peculiarly applicable to the facts of the present case, and effectively meets, I consider, the contention advanced and so strenuously pressed by the learned counsel for the respondent, that there is no right to the commission until there is completion of the purchase by payment.

The learned counsel for the respondent further submitted that the judgment of the Supreme Court of Canada in *Colonial Real Estate Co.* v. *Sisters of Charity of the General Hospital of Montreal* (1918), 45 D.L.R. 193, was an authority that effectively negatived the right of the appellant to recover commission in the present case. With deference, I cannot so read the case. The situation here is that of a general employment of the broker and the absence of any special contract. *Toulmin* v. *Millar* (1887), 58 L.T. 96, and the review of the cases and the analysis thereof by Mr. Justice Anglin at pp. 197-201,

applied to the facts of the present case, in my opinion, etsablish the right in the appellant to succeed. The case may well be distinguished by adverting to what Mr. Justice Anglin said at p. 199:

"Having made a contract under which it would become entitled to a commission only upon the happening of a stated event within a definite period 'and not otherwise,' the plaintiff in effect agreed to forego all claim to commission unless that event should happen within the time stipulated. In order that an action in such a contract should succeed the plaintiff must shew fulfilment of the condition according to its terms. *Alder* v. *Boyle* [(1847)], 4 C.B. 635; *Peacock* v. *Freeman* [(1888)], 4 T.L.R. 541. The authority of the case last cited, so far as relevant to that at bar, is not affected by a distinction in regard to it made by the Court of Appeal in *Skinner* v. *Andrews* [(1910)], 26 T.L.R. 340."

It follows from the foregoing reasons that my opinion is that the appeal should be allowed.

EBERTS, J.A.: Upon the facts, I am of the opinion that, although the plaintiff, as broker, introduced to the defendant one Raymond Van Hemelryck, who appeared to be willing and to be able to purchase the six ships from the defendant for $2,700,000, yet, in the result, no concluded contract of purchase and sale was arrived at. The plaintiff consequently did not succeed in procuring for the defendant a purchaser of the ships, therefore are not entitled to the commission they sue for in this action.

EBERTS, J.A.

I would dismiss the appeal.

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

Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *Tupper & Bull.*

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WESTERN IMPERIAL COMPANY LIMITED v. NICOLA LAND COMPANY LIMITED *ET AL.*

Mortgage—Foreclosure—Interest—Redemption—Period fixed by order nisi —Application by mortgagor to reduce time—Refused—Discretion.

WESTERN IMPERIAL CO. v. NICOLA LAND CO.

On an application for an order *nisi* for foreclosure of a mortgage, the period for redemption was, at the instance of the mortgagors, extended to one year from the date of the registrar's certificate. Shortly after the registrar's certificate was issued the mortgagors sold the property, and being in a position to pay the mortgage, an application to reduce the period of redemption to six months was refused.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that where an order *nisi* fixing the period of redemption has been drawn up and entered, such period cannot be shortened either in Chambers or in Court, and this particularly applies when the period has been fixed at the request of the mortgagors.

Per MARTIN and MCPHILLIPS, JJ.A.: That the unusually long period of one year having been granted for redemption, and the mortgagors, owing to the sale, being thereby suddenly in a position to pay, and being ready and willing to pay the well settled six months' interest which the mortgagor is entitled to, it was open to the judge below to exercise his discretion in the special circumstances and reduce the period as applied for.

The Court being equally divided, the appeal was dismissed.

Statement

APPEAL by defendants Morgan and Fitzgerald from the order of MORRISON, J. of the 9th of December, 1920, dismissing an application to vary the registrar's certificate in an action for foreclosure. By the order *nisi* for foreclosure, the registrar was directed to take the accounts and ascertain the amount owing by the mortgagors at the end of 12 months from the date of his certificate, the usual time of six months being extended to 12 months at the instance of the mortgagors. The mortgagors sold the property shortly after the registrar's report was made, and being thereby able to redeem at once, applied to vary the order by reducing the period for redemption from 12 months to six months.

The appeal was argued at Victoria on the 11th of February, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Alfred Bull, for appellants: We are in a position to pay now. Owing to our waiting a year instead of six months, we have to pay $3,500 additional interest on the mortgage. The condition that we can pay at any time we are able is assumed to be included in the order: see *Parker* v. *Housefield* (1834), 2 Myl. & K. 419 at p. 422; *Hill* v. *Rowlands* (1897), 2 Ch. 361. Drastic provisions of a decree will be relieved against where conditions change and special circumstances have arisen: see 22 E.R. 508, par. 37; *Campbell* v. *Holyland* (1877), 7 Ch. D. 166; *In re Gregory Love & Co.* (1916), 1 Ch. 203.

Craig, K.C., for respondent: The Court will not vary the certificate in a way that the registrar cannot make it. He could not fix a date in between: see *Hill* v. *Rowlands* (1897), 2 Ch. 361. The order was made the way they wanted it, and they cannot now change: see Annual Practice, 1921, p. 1044; *In re Alcock. Prescott* v. *Phipps* (1883), 23 Ch. D. 372. The learned judge has used his discretion in refusing to grant the order. The certificate is in accordance with the judgment, and should not be waived.

Argument

Bull, in reply, referred to Daniell's Chancery Practice, 8th Ed., Vol. 2, p. 1213.

Cur. adv. vult.

1st March, 1921.

MACDONALD, C.J.A.: By the order *nisi* for foreclosure, the learned trial judge fixed the period of redemption at one year, that is to say, the registrar was directed to take the accounts and ascertain the amount which would be owing by the mortgagors at the end of 12 months from the date of his certificate. This lengthy period was fixed for the advantage of the mortgagors, as appears from the observations of the Court and counsel at the time. The learned judge said:

MACDONALD, C.J.A.

"Under the circumstances I would be inclined to give more [than six months].

"Mr. *Bull,* counsel for appellants: 'I was going to ask that.'"

Whereupon the period of one year was named in the order as aforesaid.

The mortgagors sold the property shortly after the registrar's report was made, thereby obtaining the moneys for redemption. They then applied to a judge in Chambers to vary the regis-

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trar's report by reducing the period of redemption, and from the refusal of that application this appeal is taken.

The cases to which we were referred, with the exception of *Hill* v. *Rowlands* (1897), 2 Ch. 361, are not in point, and the case just mentioned is an authority against the appellants. What is sought by the appellants is to have the order of the Supreme Court, which was duly drawn up and entered, varied in Chambers. That cannot be done either in Chambers or in Court, unless the power to do so is conferred by rule 833, and, in my opinion, it is not conferred by that rule. I am satisfied that that rule does not apply to a case like the present one, where it is a term of the order *nisi*, and not of the registrar's certificate, which is sought to be varied. Moreover, the application is made on behalf of parties at whose request the period of one year was fixed by the Court itself. In these circumstances, apart from any other, I think the refusal complained of was right, and that this appeal should therefore be dismissed.

MACDONALD, C.J.A.

MARTIN, J.A.: By the order *nisi* for foreclosure, the redemption period was fixed by the registrar's certificate at 12 months (*i.e.*, July 13th, 1921), for the benefit of the mortgagors, who later applied to vary the certificate so as to enable them to redeem at any earlier date, six months (*i.e.*, January 13th, 1921), and so save a large amount of interest at an oppressive rate, 20 per cent. per annum. The mortgagors are ready and willing to pay the usual six months' interest, and the money to redeem is lying in the bank at three per cent. only, so by the delay they are losing 17 per cent.

MARTIN, J.A.

It is submitted in answer, that by the settled practice of the Court, while the mortgagor may pay what is due before the ordinary appointed time of six months, yet if he does so pay, it must be the full amount that has been certified to be due at the end of that time, and the certificate cannot be varied while the order *nisi* stands unaltered.

I have carefully considered the authorities cited, chiefly *Hill* v. *Rowlands* (1897), 2 Ch. 361; 66 L.J., Ch. 689, which is a decision of the Court of Appeal, but to be understood, it must be borne in mind that it is based entirely upon the time (six

months) appointed "in accordance with the long-established and invariable practice of the Court and in the absence of any exceptional or oppressive circumstances. The reason for this practice of no redemption before the end of six months is given by Lord Justice Chitty, who says (p. 366):

"The reason is plain. The mortgagor has six months allowed him to find the money, and the mortgagee has six months to find out how to place it. It is a fixed rule of the Court, and not a matter of bargain, and there is no precedent for allowing the mortgagor to redeem within the six months on payment of a less sum. The practice is so well settled that it is not surprising no authority is to be found on the subject."

But why should this ordinary and reasonable rule for a certain six months be extended to the case of an extraordinary and unreasonable period of 12? I am unable to take the view that the Court is powerless and must close its eyes to new conditions created by extraordinary times and circumstances. Here the mortgagors are ready to pay that "well settled" six months' interest which the mortgagee is entitled to expect and arrange for, but it does not follow that because the mortgagor has obtained an extraordinary benefit of a longer period he thereby has incurred an extraordinary additional burden of interest. The mortgagee is not left in any uncertainty about arranging "for reinvesting his money if it comes in at an uncertain time" (as Lord Justice Lindley so states the real ground for his opinion), because the date, if varied, is still fixed at six months, and I am unable to see why, as a matter of equity, the Court has not control over foreclosure and redemption proceedings when special circumstances arise which shock the conscience of the Court. Be it remembered also, that in the *Hill* case, *supra,* the motion was simply one to redeem at large, while this application to vary, as contemplated by Lord Justice Chitty, is for a time certain and ordinary. I am therefore of opinion that it was open for the learned judge appealed from to exercise his discretion in the special circumstances (*Cf. In re Gregory Love & Co.* (1916), 1 Ch. 203 at p. 206; 85 L.J., Ch. 281), and as he has not done so, it is proper for us to perform that duty on the admitted facts before us, and, in my opinion, the application should have been granted, and therefore the appeal should be allowed.

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

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

The Court being equally divided, the appeal was dismissed.

Solicitors for appellants: *Tupper & Bull.*
Solicitors for respondent: *Griffin, Montgomery & Smith.*

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GUREVITCH v. MELCHOIR

GUREVITCH v. MELCHOIR.

Lien—Hire-purchase agreement—Car sent to repairer—Lien for cost of repairs—Car seized while out of repairer's possession—Priority—R.S.B.C. 1911, Cap. 154.

GUREVITCH v. MELCHOIR

The defendant sold an auto-truck, taking a lien agreement to secure the balance of the purchase price, which was duly registered. The owner having an accident, brought the auto-truck to the plaintiff, who made extensive repairs, and held the auto-truck for the cost of the repairs. On the truck being taken out for trial by an ostensible buyer, after the owner was in default under the lien agreement, it was seized by the defendant's bailiff under the lien agreement. In an action to recover the truck, it was held that the plaintiff was entitled to hold the car subject to his lien.

Held, on appeal, affirming the decision of GRANT, Co. J., that where the vendor has not taken possession and where there has been no default up to the time of repair, the purchaser has the right and duty to have the property repaired so as to give rise to a common law lien in favour of the person who did the work.

Statement

APPEAL by defendant from the decision of GRANT, Co. J., of the 13th of January, 1921, in an action for the return of a Ford auto-truck wrongfully seized by the defendant. The defendant sold the truck to one George Cohen, for $550. The purchaser paid $150 in cash and the defendant took a lien agreement for the balance of the purchase price, which was duly registered. Some time later the truck was extensively repaired by the plaintiff at Cohen's request, for which there was

a charge of $250, and the plaintiff held the car pending the payment of the bill. While being so held, a supposed purchaser was allowed to take the truck out on trial, and while it was out the defendant's bailiff seized the truck, there being still due on the lien agreement about $350. It was held by the trial judge that the plaintiff had a prior lien on the truck for the cost of the repairs.

The appeal was argued at Vancouver on the 18th of March, 1921, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Statement

E. A. Lucas, for appellant: My contention is that the moment the garage man lost possession of the car he lost his possessory lien, and in any case, the registered lien has priority: see *Smith* v. *Campbell* (1911), 16 B.C. 505; *Keene* v. *Thomas* (1905), 1 K.B. 136; *Green* v. *All Motors, Limited* (1917), 1 K.B. 625.

Vaughan, for respondent: The plaintiff has a lien under the Mechanic's Lien Act, which differentiates *Smith* v. *Campbell* (1911), 16 B.C. 505. There is nothing in the lien note as to keeping the car in repair. An accident accounts for the extensive repairs required. They must be paid first: see *Singer Manufacturing Co.* v. *London and South Western Railway Co.* (1894), 1 Q.B. 833. We have a lien under the Mechanic's Lien Act.

Argument

Lucas, in reply, referred to *Williams* v. *Allsup* (1861), 10 C.B. (N.S.) 417.

MACDONALD, C.J.A.: I think the appeal should be dismissed. The cases to which we were referred clearly shew that in a case of this kind, the holding of property under a hire agreement, where the vendor has not taken possession and there has been no default up to the time of the repair, the purchaser has the right and duty to have the property repaired, though it may give rise to a common law lien in favour of the person who did the work. Now all the evidence, all the features that are mentioned in these cases, were present in this case. True, in some of the cases there was a provision in the contract itself that the purchaser should keep the article in repair. In this case that was

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absent, but these cases shew not only that where there is such an agreement the vendee may have the car repaired and the repairer may have a lien, but that apart from such an agreement, there is a duty and there is a right to have the repair done, although it may create a lien in favour of the workmen.

At the time the repairs were done the vendee was not in default. The repairs appear to have been necessary. If they had not been made, the article would have been valueless to both vendee and vendor. The vendor received the benefit of the repairs, and applying these cases to the facts here, I see no escape from the conclusion arrived at by the learned judge below.

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I just want to add that in so far as the case of *Smith* v. *Campbell* (1911), 16 B.C. 505, is concerned, I think this case is clearly distinguishable.

MARTIN, J.A.: I am of the same opinion. The only real distinction suggested was the car was badly broken up and practically rebuilt. That may be so. Of course, accidents vary, and one cannot say what is the ordinary amount of damage that can be done to the car, because there is no such thing as an ordinary accident.

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But expenses are extraordinary, in that no one can tell what amount of repairs have been rendered necessary. There is nothing to give us the slightest suspicion here that these repairs were not ordered to be done, and carried out in a perfectly *bona fide* manner.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

Appeal dismissed.

Solicitors for appellant: *Lucas, Lucas & Richmond.*
Solicitors for respondent: *McKay, Orr & Vaughan.*

CANADA PERMANENT MORTGAGE CORPORATION v. NATHA SINGH.

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1921

March 1.

CANADA PERMANENT MORTGAGE CORPORATION v. NATHA SINGH

Practice—Foreclosure action—False affidavit of service of writ—Final order—Sale to third party—All proceedings set aside after issue of writ—Ex debito justitiæ—R.S.B.C. 1911, Cap. 127, Sec. 22—B.C. Stats. 1917, Cap. 33, Sec. 2 (1), (5).

On a false affidavit of service of writ of summons the plaintiff obtained final order for foreclosure, a certificate of indefeasible title was issued and the property was sold. On the application of the defendant on the ground that he was not served with the writ and that he knew nothing of the foreclosure proceedings until after the property was sold, all proceedings after the issue of the writ were set aside.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C., that the judgment was without foundation and all proceedings following the issue of the writ should *ex debito justitiæ* be set aside.

APPEAL from the order of HUNTER, C.J.B.C., of the 21st of October, 1918, whereby he ordered that the final order for foreclosure in this action of the 5th of June, 1918, and all prior proceedings in the action subsequent to the date of issue of the writ of summons on the 31st of May, 1917, be set aside and declared void. The application to set aside all proceedings in the action was made on the ground that the defendant had not been served with the writ of summons, he having been out of the jurisdiction at the time of the alleged service, and that he had no knowledge of foreclosure proceedings until after the final order had been obtained and the property was sold to another person. It was admitted that the defendant was not served, and that the proceedings were founded on a false affidavit of service. From the order of HUNTER, C.J.B.C., setting aside all proceedings subsequent to the issue of the writ, the plaintiff appealed.

Statement

The appeal was argued at Victoria on the 11th and 15th of February, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Housser, for appellant: We obtained certificate of indefeasible title and the property was sold. It appears from the examina-

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tion of the defendant that he was not served with the writ, and the order was made on the ground that he was not served. The question is whether third parties' rights have intervened without notice. Under section 22 of the Land Registry Act and section 2 (1), (5) of the 1917 amendment, the Legislature has intervened and destroyed the relation between mortgagor and mortgagee. The parties cannot be restored to the position in which they were at the time of the issue of the writ. His remedy is a separate action. The next point is that there is a purchaser for value without notice: see *Fink* v. *Robertson* (1907), 4 C.L.R. 864; *Williams* v. *Box* (1910), 44 S.C.R. 1 at pp. 9 and 14.

Argument

Cassidy, K.C., for respondent: This is a case of natural justice. The defendant was not served; he is therefore entitled to the order *ex debito justitiæ*. This was a judgment in default of defence: see *Nixon* v. *Loundes* (1909), 2 I.R. 1; *Mehaffey* v. *Mehaffey* (1905), 2 I.R. 292. We could not bring any one else in.

Housser, in reply, referred to *Credit Foncier Franco Canadien* v. *Redekop* (1919), 1 W.W.R. 494 at p. 495, and (1919), 2 W.W.R. 158 at p. 161.

Cur. adv. vult.

1st March, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: It is admitted that the writ was not served upon the defendant, nevertheless, final judgment for foreclosure of defendant's equity was obtained under it. What purported to be proof of service of the writ is now admitted to have been furnished under a mistake.

The defendant, upon learning of the proceedings, applied to have the same set aside. The final order of foreclosure was registered in the Land Registry office and a certificate of indefeasible title was obtained by the mortgagee, pursuant to section 14A of the Land Registry Act, as amended in 1917 by Cap. 33, section 2, subsection 5. Under the same amending Act, it is enacted that such a certificate shall extinguish the mortgagee's rights in respect of the personal covenants in the mortgage, and by section 22 of the original Act, the certificate is declared to be conclusive evidence in all Courts that the

holder of it is seized of an estate in fee-simple, subject only to reservations mentioned in the subsections to that section, none of which appear to me to cover mistake.

Now, clearly the judgment was without foundation, and therefore it, and all the proceedings between it and the testing of the writ, should *ex debito justitiæ* be set aside. The appeal against the order setting it aside is founded solely upon arguments based upon the said sections, the submission of the appellant's counsel being, that in view of the said sections, it would be idle for the Court to interfere. That this is so is not apparent to me, since one cannot foresee the result upon the fortunes of the defendant of allowing the said judgment to stand. I am not willing to speculate about it, and moreover, one thing is quite clear, and that is, that the judgment was obtained contrary to law, and defendant comes to the Court with, I think, a clear right to have it set aside.

MACDONALD, C.J.A.

I would, therefore, dismiss the appeal.

MARTIN, J.A.: This is an appeal from an order of Chief Justice HUNTER, setting aside the final order of foreclosure and all proceedings subsequent to the writ, on the ground that the writ was never served on the defendant. After the invalid foreclosure the mortgagee obtained a certificate of indefeasible title and later sold the property, before notice of any irregularity, and it is now submitted that the order setting aside the foreclosure proceedings ought not to have been made and is futile, and that the proper procedure was to bring an action against the mortgagee and the purchaser and get rid of the registered title, because while that stands, complete justice cannot be done, and we are referred to the Land Registry Act Amendment Act, 1917, Cap. 33, section 2, by operation of which the personal covenant of the mortgagor has been extinguished and other consequences provided for. I am unable, however, to see the application of that section to the present case, which is simply that the defendant is entitled *ex debito justitiæ* to have the judgment against him set aside as having been obtained on a false affidavit, and this relief he is entitled to at the outset, whatever other rights or remedies he may have.

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It is, moreover, the only safe course for him to take so as to get rid of the judgment and clear the way for proceedings to obtain whatever other remedies or rights he may have. It is unreasonable and oppressive to require that he should be compelled to resort to the expense and delay of an action to ask the Court to set aside the judgment and obtain other relief when he can speedily and inexpensively free himself therefrom by motion in Chambers. Nor is the setting aside of that judgment futile because, apart from the foreclosure, it contains a personal judgment against him for $164.45 for costs, which would be quite unaffected by any action based on the registration under the Land Registry Act.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in the reasons for judgment of the Chief Justice.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would dismiss the appeal.

Appeal dismissed.

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

Solicitors for respondent: *Bird, Macdonald & Company.*

REX v. GAUTHIER.

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1921

March 4.

REX v. GAUTHIER

Criminal law—Evidence—Confession of accused—Admissibility of—Trial within a trial—Refusal of Crown to call witness—Subsequently called by defence—Effect of.

On a criminal trial for theft a written confession by the accused was submitted in evidence. On the question of its admissibility being raised, counsel for the Crown, although requested by accused's counsel to do so, refused to call as a witness a third party who was present when the alleged confession was made, and the judge refused to compel the Crown to call him or any other witnesses with regard to the alleged confession before admitting it in evidence. The trial then proceeded, and in submitting the defence, counsel for accused called said third party as a witness and examined him as to the alleged confession. On motion for leave to appeal from the refusal to reserve a case as to the admission of the confession:—

Held, that before receiving the confession in evidence, all evidence should be taken thereon to see that it was made with that degree of freedom which would allow its reception, the question of its admission being "a trial within a trial," that it was the duty of the Crown to call the third party present at the alleged confession, and if accused's counsel had maintained his position that "the trial within the trial" should first have been completed and the Crown should have called the suppressed witness, he would have been entitled to a case stated; but having subsequently called the third party as a witness himself, thereby becoming a party to reopening the trial of the question, he could not then recede from its consequences, and the Court could give him no remedy.

Rex v. *De Mesquito* (1915), 21 B.C. 524 applied.

MOTION to the Court of Appeal, under section 1015 of the Criminal Code, for leave to appeal from the refusal of the trial judge (MACDONALD, J.) to reserve the question of the proper admission of an alleged confession of the accused, who was convicted of breaking into and entering a shop of the Canadian Western Lumber Company, Limited, and stealing merchandise, for which he was sentenced to two years' imprisonment. The accused had been brought by one Goodfellow, a bookkeeper in the store, before one Stewart, the secretary of the company, when the accused made the alleged confession which led up to taking the accused to the solicitor's office, where the alleged confession was drawn up and signed.

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Stewart was called by the Crown and cross-examined as to whether in the board-room he had said anything that would have the effect of inducing the accused to confess. Stewart denied that he had. Counsel for the accused then asked that counsel for the Crown call Goodfellow as a witness, he having heard what was said in the board-room. Counsel for the Crown refused to call Goodfellow, not giving any reason for refusing to do so, and he was upheld by the trial judge. Goodfellow was later called by the defence. The question was whether there should not be a new trial by reason of the refusal of the Crown to call Goodfellow, who should have been subject to cross-examination by counsel for the accused.

The motion was heard at Vancouver on the 4th of March, 1921, by MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Argument

A. S. Johnston, for accused: The Crown refused to call a witness who heard the conversation between Stewart and the accused. The law is that all the evidence as to the admissibility of the written confession should be taken at one and the same time. It is a trial within a trial that must be disposed of before the main trial can proceed. The accused is fairly entitled to the benefit of cross-examination of Goodfellow. There should be a new trial: see *Rex* v. *De Mesquito* (1915), 21 B.C. 524; *Rex v. Kay* (1904), 11 B.C. 157; *Reg.* v. *Male and Cooper* (1893), 17 Cox, C.C. 689.

Macgowan, for the Crown: Stewart swore he did not threaten or attempt to induce accused to make a confession. Goodfellow was later called by the defence, but his evidence did not shew that the accused was induced to confess. Unless he can shew that Goodfellow's evidence will displace the Crown's evidence he cannot succeed. No substantial injustice has been done.

Johnston, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): I would dismiss the application.

MARTIN, J.A.

MARTIN, J.A.: This is a motion, under section 1015 of the Criminal Code, for leave to appeal from the refusal of the learned judge, Mr. Justice MACDONALD, presiding at the last

Assizes in New Westminster, to reserve the question of the proper admission of an alleged confession of the accused, who was convicted, on November 8th last, of breaking into and entering the shop of the Canadian Western Lumber Company, Limited, and stealing merchandise therefrom, and was sentenced to two years' imprisonment in the penitentiary.

The obligation upon the Crown, in respect to a confession, is thus set out in my judgment in this Court in *Rex* v. *De Mesquito* (1915), 21 B.C. 524 at pp. 526-7; 24 Can. Cr. Cas. 407; 32 W.L.R. 368; 9 W.W.R. 113:

"In determining the question of the propriety of the admission of the confession, the onus is upon the Crown to 'prove affirmatively to the satisfaction of the trial judge that it was made freely and voluntarily, and not in response to any threat or to any suggestion of advantage to be inferred either directly or indirectly, from language used by a person in a position of authority in connection with the prosecution of the person by whom the confession was made': *per* Osler, J.A. in *Rex* v. *Ryan* (1905), 9 O.L.R. 137, who 'among the legion of varying voices on the subject,' adopts that very clear language from *Reg.* v. *Thompson* (1893), 2 Q.B. 12; 17 Cox, C.C. 641."

In the case at bar, the Crown proceeded to discharge this onus by first calling as a witness one G. G. Stewart, who was the assistant-secretary of the said lumber company, and was in charge of the store in question. The accused had been brought before Stewart in the board-room of the company by John Goodfellow, who is a bookkeeper in the store. A certain conversation occurred between Stewart and the accused in the presence of Goodfellow, which led up to Stewart taking the accused to the office of the company's solicitor, where the alleged confession was drawn up and signed by the accused and witnessed by Stewart. Stewart was cross-examined by counsel for the accused to shew that when in the board-room Stewart had told the accused that he (Stewart) had heard "very serious things" about him and used expressions which would have the effect of inducing the accused to confess the charge, particularly because Gauthier was a clerk in the said store and under the control of Stewart. Stewart denied that he had used any such expressions, whereupon counsel for the accused called upon the counsel for the Crown to produce Goodfellow, who was the third party in the room and admittedly had heard the conversation,

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for the purpose of informing the Court fully and fairly as to what had taken place upon that all important occasion, but the Crown counsel, for no good reason that he advanced, or that I can imagine, refused to do so, and the learned judge upheld him in this attitude. Counsel for the accused also took the position that as the admission of this evidence constituted "a trial within a trial" (as has long been beld, in accordance with the decisions cited in my judgment in *Rex* v. *De Mesquito, supra*), the Crown should call all its witnesses on its motion to admit, and have it decided before proceeding with the main trial, but the learned judge refused to adopt that course, saying, "I have never heard of it being done yet." Nevertheless, that practice was rightly affirmed nearly 23 years ago by the Court of Queen's Bench in Quebec in *Reg.* v. *Viau* (1898), 7 Que. Q.B. 362 at pp. 364 and 368; 29 S.C.R. 90, an appeal respecting a confession, wherein it was said by Mr. Justice Wurtele, p. 364:

"The trial judge must determine, as a preliminary question, whether the confession or admission was made with that degree of freedom which should allow its reception in evidence, and this question should be determined before allowing the confession or admission to go to the jury; and he should determine the question of admissibility after hearing not only the preliminary examination of the witnesses for the Crown on this point, but also such evidence as may be offered by the prisoner to shew that the confession or admission was procured by promises, threats or inducements."

And again at p. 368:

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"All the evidence as to whether the confession or admission was made voluntarily, or whether it was made under the influence of inducements should have been heard and considered before the question as to the admissibility of the evidence respecting such confession or admission was decided."

I may say that this decision, in *Reg.* v. *Viau,* was cited to and given effect to by me in a criminal trial in Victoria not long after it was decided.

Counsel for the accused continued to press the point that the Crown should call Goodfellow, as "it is only fair, because Crown counsel should bring before your Lordship all the evidence surrounding this statement," but the learned judge persisted in his refusal to do so, and gave judgment admitting the confession in evidence without hearing the evidence of Goodfellow, though the counsel for accused had stated it was his

intention to call him if the Crown would not. The main trial then proceeded, and the counsel for the accused, in the course of his defence, renewed his efforts to exclude the confession, and to that end called the said Goodfellow, who directly contradicted Stewart on material points, and the accused's counsel, at the conclusion of his defence, renewed his application that the confession should be excluded, and also renewed his objection to the course adopted of hearing piecemeal the application to admit the confession and deciding to do so without hearing the prisoner's evidence *contra,* but the learned judge decided that he could "see no reason to change the ruling I have already given in this matter." With all possible respect for the learned trial judge's opinion, I have only to say that the practice on this important point has been settled, as above set out, for many years, and I repeatedly gave effect to it when I was a judge of the Supreme Court before the constitution of this Court of Appeal in 1909. Indeed, six years ago, in my said judgment in the *De Mesquito* case, I then referred to it as being the "established practice," and I can only express my regret that it was not followed. The obvious reason, of course, for deciding once for all "a trial within a trial" upon the admission or rejection of a confession is (apart from the obvious unseemliness and inconvenience of repeated rulings and reviewals of the same at intervals during the course of the trial as new witnesses on the point are heard) that if it is improperly admitted and goes before the jury, it must result in a new trial, as pointed out in the *De Mesquito* case, *supra.*

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In my opinion, also, it was the clear duty of the Crown, as contended by the prisoner's counsel, to fully and fairly present the case for the admission of the confession, and this duty was not discharged by suppressing the evidence of one of the men who heard it given. To force the accused to put that suppressed witness in the box was to place him at a disadvantage, because he thereby made him his own witness and lost the invaluable right of cross-examination, the unfortunate consequences of which are only too clearly to be perceived by reading the examination of Goodfellow in this case. If the Crown entertained the belief that Goodfellow was not a credible witness, the

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very least it should have done, in order to maintain those principles which have made Canadian justice what it is, was to have him put in the box for cross-examination, thereby not placing the accused at a disadvantage, which it is obviously unjust from any point of view for the Crown to do. If counsel for the accused had maintained his correct position in these two respects, *viz.*, "the trial within the trial" should be begun and completed once for all, and that the Crown should have produced the suppressed witness, his position would, in my opinion, have been unanswerable and he would be entitled to a case stated because of the undoubted prejudice that had been done to that fair trial which he is entitled to. But I agree with my brother GALLIHER in thinking that he has, strictly speaking, weakened his position by calling the said witness and thereby becoming a party to reopening the trial of the question, and so, while he may well be excused for having adopted that course (being suddenly placed in an embarrassing and unexpected position by the ruling of the learned judge, whereby he was almost forced to incur the risk of calling Goodfellow, in the expectation of being successful in rejecting the confession if his instructions as to that witness's evidence were realized), yet nevertheless, in legal strictness, he cannot, once having taken that course, recede from its consequences. Therefore, I can only come with reluctance to the conclusion that this

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Court can give him no remedy, though I entertain no doubt whatever that he has not had a fair trial and that there has been in reality a miscarriage of justice caused by the deplorable action of the Crown, though it is not of that technical legal description which is contemplated by section 1019 of the Criminal Code. Fortunately, however, there is in that Code a provision in which the accused is entitled to resort, if he feels so disposed. I refer to section 1022, which gives the Minister of Justice power "to direct a new trial at such time and before such Court as he may think proper," and so that the position of the matter before this Court, as I view it, may be clearly understood in every quarter, I deem it my duty to set out my views fully, in addition to the brief expression I gave to them orally when judgment was delivered.

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GALLIHER, J.A.

GALLIHER, J.A. (oral): I think the application must be dismissed. The course, I think the better course, at all events, would have been that the Court should have followed the practice of the Court, before the decision was given, as to the admission of evidence. Your position might have been much stronger if you had taken the position then of not calling the evidence. However, Goodfellow was called and his evidence was put in, and then, being in, and there being to a certain extent a conflict of evidence, that is a matter that is within the decision of the trial judge. I see no way of saying that we would be justified in ordering a new trial.

Motion dismissed.

THE CANADIAN BANK OF COMMERCE v. THE ROYAL BANK OF CANADA.

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THE CANADIAN BANK OF COMMERCE v. THE ROYAL BANK OF CANADA

Sale of land—Agreement for—Instalments of purchase price—Assignment of—Not registered—Subsequent registered judgment—Priority—R.S.B.C. 1911, Caps. 79, Sec. 27 (1); 127, Secs. 73 and 104.

An owner of land sold under agreement for sale and in order to secure an indebtedness assigned to a bank all subsequent payments under the agreement for sale of which the purchaser was duly notified but the assignment was not registered. Subsequently another bank obtained judgment and registered the same against the owner. It was held by the trial judge that the registered judgment took priority over the prior unregistered assignment.

Held, on appeal, reversing the decision of MACDONALD, J. (MARTIN, J.A. dissenting), that the assignment of the moneys due under the agreement for sale was not an interest in land within the meaning of the Land Registry Act or Execution Act that registration thereof was not required and it took priority over the subsequent registered judgment.

Statement

APPEAL by plaintiff from the decision of MACDONALD, J. of the 23rd of September, 1920, on a special case for the opinion of the Court. In December, 1910, one Walker, who owned a

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half section of land in New Westminster district, entered into an agreement for sale of the land to the People's Trust Company Limited, there being two deferred payments of $15,000 each to be made in December, 1912, and 1913, respectively. In April, 1912, Walker assigned all his interest in the agreement for sale to the plaintiff Bank and on the same day directed the People's Trust Company, by letter, to make the deferred payments under said agreement for sale to the plaintiff Bank, which letter was acknowledged by the People's Trust Company. Neither the assignment nor letter was registered in the Land Registry office. With the assent of Walker, the property was subdivided by the People's Trust Company, and in February, 1911, a lot from the subdivision was sold to one Potts for $1,000, under agreement for sale, of which there remains due and payable $300. In December, 1913, the Northern Crown Bank obtained judgment against Walker for about $20,000 and registered the judgment in the Land Registry office in January, 1917, and by renewal still remains registered. In March, 1917, the Northern Crown Bank obtained a judgment against the said Walker and The People's Trust Company, on which there was found due by the registrar, in January, 1918, $58,748.61, confirmed by an order of the Court in February, 1918, which was registered in the Land Registry office in the same month and re-registered in February, 1920. The Northern Crown Bank was taken over and absorbed by the defendant Bank. The question to be answered was whether the $300 due from Potts should be paid to the Bank of Commerce or to the Royal Bank. It was held by the trial judge that it should be paid to the Royal Bank.

The appeal was argued at Vancouver on the 9th of November, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Davis, K.C., for appellant: The learned judge applied the case of *Bank of Hamilton* v. *Hartery* (1918), 26 B.C. 22; (1919), 58 S.C.R. 338, saying that under section 73 of the Land Registry Act the defendant's registered judgment is entitled to priority, but that has nothing to do with this case.

The point here is that I get an assignment and give notice. It is merely an assignment of moneys due under a sale. The judgment registered against Walker cannot affect this: see *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499 at pp. 506, 508-09. They rely on section 27(1) of the Execution Act, but an equitable assignment is not governed by the Act as to registration. We cannot register an assignment of moneys: see *Harrison* v. *Armour* (1865), 11 Gr. 303; Story's Equity Jurisprudence, 13th Ed., Vol. 2, p. 378, par. 1055. An unregistered equitable mortgage is entitled to priority if prior in date: see *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282 at p. 291; *Grace* v. *Kuebler and Brunner* (1917), 56 S.C.R. 1 at pp. 2 and 11. Payment of purchase-money is not dealing with land within the Act: see *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215 at p. 226.

Alfred Bull, for respondent: Section 27 of the Execution Act decides this matter. Under this section we obtain our rights, and by virtue of our registered judgment Walker had an interest in the land: see *Rose* v. *Watson* (1864), 10 H.L. Cas. 672 at p. 678; *Rayne* v. *Baker* (1859), 1 Giff. 241 at p. 247. As to the effect of the assignment of the moneys on our rights see *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338. A charge includes a judgment. The assignment to the Bank is nothing to us, and if it is an assignment of land it comes under the *Hartery* case. We say our judgment has intervened: see *Murray* v. *Stentiford* (1914), 20 B.C. 162; *Dell* v. *Saunders* (1914), 19 B.C. 500; *Jones* v. *Gibbons* (1804), 9 Ves. 407. Argument

Davis, in reply: The point is, we have no interest in land: see *Malcolm* v. *Charlesworth* (1836), 1 Keen 63; *Gresham Life Assurance Society* v. *Crowther* (1915), 84 L.J., Ch. 312.

Cur. adv. vult.

1st March, 1921.

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

MARTIN, J.A.: On December 3rd, 1910, one W. J. Walker, being the owner in fee of a certain parcel of land, entered into MARTIN, J.A.

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an agreement to sell the same by instalments to the People's Trust Company, Limited, and on April 30th, 1912, the said Walker, to secure a certain indebtedness, assigned, in writing, to the plaintiff Bank the balance of the purchase-money due ($30,000 and interest) by the Trust Company to him as vendor and gave due notice thereof. This assignment was not registered, and no assignment of the agreement itself was given by Walker.

On February 28th, 1911, the Trust Company entered into an agreement to sell part of the said land to one Potts. On January 8th, 1917, the defendant Bank duly registered a judgment against Walker for $20,000, which is still in force, and on February 26th, 1918, duly registered a judgment against Walker and said Trust Company for $58,748, which is still in force. Potts owes $300 under his agreement with the Trust Company and is ready and willing to pay the same to the proper party, and Walker and the Trust Company are ready to execute a conveyance to Potts, and it has been agreed, in the special case submitted, that Potts's proffered payment is to be treated as money ready to be paid by the Trust Company to Walker for a conveyance of Potts's parcel. The defendant Bank refuses to release the land from its judgments and claims payment of the balance of the purchase-money as being subject to its registered charges, but the plaintiff Bank claims the said

MARTIN, J.A.

balance under its assignment, and submits that as it has an assignment of all the moneys due under the agreement, Walker is a bare trustee of said moneys, and that no question arises of "any estate or interest either at law or in equity in such land" under section 104 of the Land Registry Act, R.S.B.C. 1911, Cap. 127, as this equitable assignment simply relates to the money due under the agreement: in other words, that this was not a dealing with land, but money.

Section 27 (1) of the Execution Act, Cap. 79, R.S.B.C. 1911, declares that:

"Immediately upon any judgment being entered or recovered in this Province, such judgment may be registered in any or all of the Land Registry offices in the Province, and from the time of registering the same the said judgment shall form a lien and charge on all the lands of the judgment debtor in the several land registry districts in which such judg-

ment is registered, in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of such judgment the judgment creditor may, if he wish to do so, forthwith proceed upon the lien and charge thereby created."

Applying this section, we have to consider the matter as though Walker had, under his hand and seal, signed and registered some such document as this: "I hereby give the Royal Bank of Canada a lien and charge upon all my lands for the sum of $30,000." Of course, if Walker has parted with all his interest in said lands the lien or charge is inoperative, but has he done so under the assignment of the purchase-money in question?

There is nothing in the special case to tell us who is in possession of the land, nor were we otherwise informed on that point, nor of the covenants in the agreement for sale, which may have an important bearing in certain aspects of the matter, and which should have been before us in order to fully consider the same, for without them I, at least, cannot do so wholly satisfactorily.

It is obvious that, at best, unless Walker, the vendor, is a bare trustee, the appellant's contention cannot entirely prevail, for its case is that as the vendor had assigned all moneys due under the contract, he had no further interest in it than to convey to the proper person, upon payment of the balance of the purchase-money. The learned judge below was of the opinion that he was not such a trustee, chiefly on the principle set out in *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499; 45 L.J., Ch. 554, and *Rose* v. *Watson* (1864), 10 H.L. Cas. 672; 33 L.J., Ch. 385, and, in my opinion, he took the correct view of the matter, because it is impossible to dissever the moneys due under the contract from the interest (lien) which the vendor has in the land pending the completion of the contract. What his rights are in the meantime depends upon what may occur by default in the meantime, and here he has done nothing to divest himself of the right to specific performance, or foreclosure or sale, etc., which belonged to him as vendor, and are set out in the case of *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321; 42 L.J., Ch. 49, particularly by Lord Cairns at p. 338 (L.R. 5 H.L.) and by Lord O'Hagan at p. 349 (L.R. 5 H.L.), the former making these observations:

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"Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

And Lord O'Hagan at p. 349 says:

"By the contract of sale the vendor in the view of a Court of Equity disposes of his right over the estate, and on the execution of the contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase-money; or, as Lord Westbury has put it in *Rose* v. *Watson* [(1864)], 10 H.L. Cas. 678: 'When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is in Equity transferred by that contract.' This I take to be rudimental doctrine, although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee. Thus, as it is stated by the Master of the Rolls in *Wall* v. *Bright* [(1820)], 1 J. & W. 503: 'The vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate.'"

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And he goes on to say, very appropriately to the case at bar:

"Another qualification subsequently taken by Lord Cranworth in the case to which I have already referred, *Rose* v. *Watson*: 'When, instead of paying the whole of the purchase-money, he (the vendee) pays a part of it, it would seem to follow as a corollary that, to the extent to which he has paid the purchase-money, to that extent the vendor is a trustee for him.' And it is farther very clear that the interest so vested in the purchaser may be the subject of charge or assignment, and that the sub-assignee or incumbrancer may enforce his rights against the vendor, at all events if he assumes the position of the vendee, and fulfils the duties and sustains the liabilities created by the contract."

Lord Chancellor Hatherley on p. 355 explains his similar view of the matter, and Lord Chelmsford at p. 333 says that:

"According to the well-known rule in Equity, when the contract for sale was signed by the parties, Sir William Foster [the vendor] became a trustee of the estate for Pooley [the purchaser], and Pooley a trustee of the purchase-money for Sir William Foster; and it was competent to Pooley to assign the benefit of his contract or to charge his equitable

interest in the property in favour of another person, and upon notice given to Sir William Foster of such assignment or charge, he would have been bound to protect and give effect to it."

And he goes on to say that the purchaser (Pooley) to the extent of the payment he had made

"acquired a lien 'exactly in the same way as if upon payment of the money Sir William Foster [the vendor] had executed a mortgage to him to this extent.' "

Now it must follow that if the purchaser's lien for money paid upon the property is to be regarded "exactly" as a mortgage, the vendor's lien for money unpaid thereupon must be of the same nature. And so the position comes down to this, on such incompleted contracts as are before us, that there are two reciprocal trustees, each with a mortgage upon the property to secure and protect his equitable interest therein, the purchaser being favourably regarded in the eye of equity as the "real beneficial owner," but subject to the right of the vendor, as "a trustee having a personal and substantial interest in the property" and the right to protect and assert that interest (Lord Cairns, p. 338 [L.R. 5 H.L.], *supra*).

The decision of the old Full Court of this Province (which we ought to follow) in *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215 at pp. 219-21; 1 W.L.R. 302, that the vendor's lien is "unquestionably an interest in land and therefore subject to *lis pendens*," is an instructive application of the principles enunciated in the cases cited. Why, then, is the "substantial interest" that the vendor retains in the land not to be subject to the statutory lien and charge created by the Execution Act? Because, it is submitted, the vendor has assigned his interest in the balance of the purchase-money to a third party, and hence it is claimed that he (the vendor) is a bare trustee, not merely for the purchaser, but also for his own assignee; in other words, he is a bare trustee for two different persons, *i.e.*, his vendee of the land and his assignee of the purchase-money. No authority has been cited in support of such a severance of what I regard as inseparable interests from their very nature, and I am of the opinion that the vendor cannot legally dissever the rights and obligations of the contract as between himself and the purchaser by splitting them up between the purchaser and one or more strangers to the contract. As Lord Chelms-

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ford said (*supra*) in *Shaw* v. *Foster,* it was competent for the purchaser "to assign the benefit of his contract or to charge his interest . . . . in favour of another person," and it was said in *Grace* v. *Kuebler and Brunner* (1917), 3 W.W.R. 983; 56 S.C.R. 1, *per* Mr. Justice Duff, at pp. 11-12, that

"It is clear, however, that the vendor may assign the benefit of his contractual rights under the contract and the assignee may enforce those rights, assuming the provisions of the law with regard to assignments to be fulfilled, and the assignee to be in a position to require the vendor to carry out his obligations under the contract."

But that "benefit" means his interest as a whole, and does not imply that it is legally possible in its nature for the vendor, on his part, to divide his interest between conflicting assignees or otherwise. This objection is not got over by saying that the assignee claims no interest in the land, but only in the money for its purchase, because the point is that the vendor's interest is composed of both the land and the money due upon it, and to take one from the other dissolves the interest as a whole, yet it is essential for the carrying out of the contract that it should be preserved in its original state in order to meet (as hereinbefore cited by Lord O'Hagan) those

"many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate."

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Viewing the vendor's interest as I do, as being in the nature of a mortgage, the case of *Jones* v. *Gibbons* (1804), 9 Ves. 407 (7 R.R. 247), is of assistance, because it was at pp. 410-1 there held that

"A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt. With regard to the mere bond or covenant, which perhaps may accompany the mortgage, it is said, that all the ceremonies, declared to be necessary as to debts in general, ought to be observed. But it is difficult to say, the mortgage passes, and is well assigned to one person, and yet the debt remains in another. It is impossible, that it can be so divided. Therefore by the assignment of the mortgage the debt necessarily passes, as incident to it," etc.

I see nothing in the case of *Malcolm* v. *Charlesworth* (1836), 1 Keen 63, when restricted to the facts as it ought to be, to conflict with this view, the decision there being that an assignment of a legacy charged upon land is an assignment of the money only so charged, and therefore need not be registered as a deed affecting land. The assignee of the legacy simply steps wholly into the legatee's shoes as regards his interest in the proceeds of the sale, which is not the case here, the shoes of the vendor being still largely occupied by himself with his "substantial interest," which has never been assigned. And the reason for the distinction is shewn in *Gresham Life Assurance Society* v. *Crowther* (1914), 84 L.J., Ch. 312; (1915), 1 Ch. 214, wherein *Malcolm's* case, *supra,* and *Arden* v. *Arden* (1885), 29 Ch. D. 702; 54 L.J., Ch. 655, which follows it, are considered, the question there being merely, as Lord Justice Swinfen Eady says, p. 318 (84 L.J., Ch.), "whether the assurance of a share of the proceeds of sale of the land is within the [Yorkshire Registries] Act," and he goes on to say (p. 319):

"Where persons are entitled to an interest in the proceeds of sale of land the land is vested in trustees for sale, and the trustees for sale hold the proceeds after the sale in trust for the *cestuis que trust,* and if any *cestui que trust* chooses to assign, incumber, or mortgage his interest there is a well-known method—that is, by giving notice to the trustee—by which priority is secured. The mortgagee's position is thus secured, and if due enquiry is made of the trustees before a sale or mortgage, the position is ascertained, and information can be gained as to whether the vendor or incumbrancer has previously sold or dealt with the interest which the trustees held in trust. To guard against the mischief of fraudulent dealings where money is held by trustees, there always may be enquiry of the trustees. Where simple interests in land are being dealt with the same observations do not apply."

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And Lord Cozens-Hardy, M.R. said, p. 317:

"We have held that under the deed in question there was an absolute trust for sale and that the property was converted notionally into money. The beneficiaries were the widow, who was tenant for life, and the daughter, who was absolutely entitled on her death. During the lifetime of the widow a mortgage was executed by the daughter in favour of the plaintiffs. What had the lady to mortgage? All she had to mortgage was her interest in the proceeds of sale. What is the method approved by the law of the land for protecting the interests of a mortgagee with such a person? To give notice to the trustees. That was done by the plaintiffs here, and a good title was undoubtedly acquired by the plaintiffs unless it be true that a mortgage of that character requires to be put upon the register."

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And he proceeds to hold that it was not required, and goes on to say:

"I think it would be contrary to the policy of the Act to say that trustees who have an absolute trust for sale have anything to do with dealings with the beneficial interest of persons under the trust for sale. It is not, as it seems to me, within the mischief of the Act, and apart from authority I should have come to the same conclusion, but I really cannot approach the matter in that view."

And he goes on to adopt the view taken in *Malcolm's* case, *supra,* though it was "a bold decision," because it had stood so long, 80 years, and had been followed in *Arden's* case, *supra,* upon a similar statute, "the facts of which are identical with the present one, namely, an interest in a share of the proceeds of sale of property directed to be sold," and concludes (p. 318):

"Therefore in substance we are asked to overrule a decision of Lord Langdale which is eighty years old, and a decision of Mr. Justice Kay which is thirty years old—decisions which, though some slight doubt was expressed by very cautious conveyancers, have never been impugned by any judge. I think we ought to hesitate long before we give a decision which might have the effect of destroying titles and securities which have been accepted and dealt with on the registration of deeds of this kind, unless it was absolutely necessary to do so."

I have examined the case of *Rayne* v. *Baker* (1859), 1 Giff. 241; 6 Jur. (N.S.) 366, but it does not touch this point, and is only of interest as being one where the vendor charged his equitable interest by an equitable mortgage.

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The conclusion I have come to is, then, that this assignment, purporting to sever the vendor's interest in the land and divide it into two elements of realty and personalty, for one of which he is to be deemed a bare trustee for the purchaser and for the other a like trustee for the assignee, is ineffectual to accomplish that object, and hence, as the interest cannot be severed, it is subject to the registered judgments under the Execution Act as aforesaid, on the principle established in *Bank of Hamilton* v. *Hartery* (1918), 26 B.C. 22; 3 W.W.R. 551; (1919), 58 S.C.R. 338; 1 W.W.R. 868. I have only to add that, even if I am not correct in this view, yet in any event, that interest in the land which it is admitted the vendor, Walker, did have and still has, for it has never been assigned, would be subject to the registered judgments and would have to be

realized by the statutory reference under section 30 of the Execution Act aforesaid.

It follows that the appeal should be dismissed.

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GALLIHER, J.A.: The first question that presents itself for our consideration is: Is the assignment of the moneys payable under the agreement for sale one that can be dealt with as an interest in land, and in this case, subject to the provisions of the Execution Act, R.S.B.C. 1911, Cap. 79, Sec. 27, and the Land Registry Act, R.S.B.C. 1911, Cap. 127, Sec. 73? If I could agree with Mr. *Bull's* contention, very ably put by him in argument, that this was a transaction affecting lands or an interest in lands, so as to bring it within the purview of the Land Registry Act and the Execution Act, the judgment he has obtained would seem to be within the authorities. The learned judge evidently thought it was, but I am, with respect, unable to accede to this view.

Under the decision of a majority of the Court in *Bank of Hamilton* v. *Hartery* (1909), 58 S.C.R. 338, affirming a majority decision of this Court, it was held that a subsequent registered judgment has priority over a prior unregistered mortgage.

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Mr. *Bull* then urged that the Canadian Bank of Commerce cannot be in a better position than they would have been had they taken the higher form of security, *viz.*, a mortgage against the lands which remained unregistered. That depends. In the first place, the Courts would not have countenanced the giving of a mortgage security by the vendor to the Bank after having disposed of the property by agreement for sale, but apart from that, what are the respective rights of the parties to this action? It seems to me the confusion (if confusion there is) arises by treating this matter as if the original parties were in the same position as if no assignment had been made of the moneys. Had no assignment been made, *Bank of Hamilton* v. *Hartery, supra,* would apply.

Now, what has been assigned to the plaintiffs? As I view it, merely the moneys due, or as they become due, from the People's Trust Company under an agreement for sale—no

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interest in the land—no security enforceable against the land.

It may be, and I think it is, the most that can be said, that the vendor retains the right to withhold a conveyance of the land until the purchase price is paid to his nominee, but this right he does not retain as a trustee for the assignee, but for his own protection, in order that the moneys which he has assigned may be collected and applied in payment of his indebtedness to the Bank of Commerce.

If my analysis of the matter is correct, then the Land Registry Act and the Execution Act, and the decision under those Acts have no application.

I would allow the appeal.

MCPHILLIPS, J.A.: This is an appeal from the judgment of Mr. Justice MACDONALD upon a special case, and has relation to the question of whether or not the appellant should be entitled to the moneys payable in respect of an agreement for the purchase of land, the appellant being the assignee from the vendor, or whether the respondent should be held to be entitled to the moneys by reason of having, or being entitled to enforce a judgment which was obtained by the Northern Crown Bank and duly registered in the Land Registry office, the respondent being entitled to this judgment in consequence of having acquired the Northern Crown Bank's assets. The vendor, one Walker, being the owner in fee of certain lands in the New Westminster District, entered into an agreement for sale of the lands to The People's Trust Company, Limited, and the moneys payable under this agreement for sale are the moneys in question. The appellant claims under an assignment from Walker, in the words and figures following:

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"The undersigned hereby assign and transfer to the Canadian Bank of Commerce, as security for all existing or future indebtedness and liability of the undersigned to the Bank, all the debts, accounts and moneys due or accruing due, or that may at any time hereafter be due, to the undersigned by The People's Trust Co. Ltd. and also all contracts, securities, bills, notes and other documents now held or which may be hereafter taken or held by the undersigned, or anyone on behalf of the undersigned, in respect of the said debts, accounts, money or any part thereof.

"Dated at New Westminster, B.C., the 30th day of April, 1912."

This writing was not registered in the Land Registry office

and it is questionable if it could be registered, in fact, I am of the opinion that it is a writing that would not have been registerable. On the same date, namely, 30th April, 1912, Walker executed and delivered to the appellant a further writing, in the words and figures following:

"Messrs. The People's Trust Company, Limited,
"City.

"Dear Sirs:—

"Referring to an agreement of sale covering the east half of the south half of section 18, block 5 north, range 1 west, New Westminster District, please make the payments of $15,000 each and interest due and payable on the third days of December, 1912 and 1913, to the Canadian Bank of Commerce, New Westminster."

And likewise this was not registered.

On the same date, *viz.*, 30th April, 1912, notice of this last-mentioned writing was given to the People's Trust Company, Limited, and an acknowledgment thereof was given by the People's Trust Company, Limited, under seal, which acknowledgment is written on the writing itself. It would appear that the People's Trust Company, Limited, with the assent of Walker, subdivided the lands, and a subdivision plan was duly registered. Anterior to the writing above set forth, the People's Trust Company, Limited, namely, on the 28th of February, 1911, entered into an agreement for sale with one Potts of a portion of the land above described, for $1,000, upon which there is now due approximately the sum of $300. The judgment recovered by the Northern Crown Bank, which the respondent is now entitled to the benefit of, was for the sum of $20,000, and was registered in the Land Registry office at New Westminster on the 8th of January, 1917, and was later renewed, and on the 12th of March, 1917, the Northern Crown Bank obtained a judgment against Walker and The People's Trust Company, Limited, for the amount which should be found to be due to the said Northern Crown Bank by the People's Trust Company, Limited, upon a reference to the district registrar of the Supreme Court of British Columbia, and there was found to be due on the 11th of January, 1918, the sum of $58,748.61, the certificate of the registrar being confirmed by an order of the 1st of February, 1918. This judgment was also registered in the Land Registry office at New

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Westminster on the 26th of February, 1918, and re-registered on the 11th of February, 1920.

It would seem that Potts is ready and willing to pay the balance of his purchase-money, and Walker and The People's Trust Company, Limited, are ready and willing to execute a conveyance of the land to Potts, and the parties to the case stated agreed that the moneys which Potts is ready and willing to pay are to be treated as moneys being paid by the People's Trust Company, Limited, to the said Walker for a conveyance of the land.

It is further apparent that the People's Trust Company, Limited, have not paid to the appellant the deferred payments to which it is entitled under the assignment from Walker, nor has it paid the moneys to Walker, and the respondent has declined to release the lands from the judgments unless the balance of the purchase-moneys is paid to it as being the registered owner of a charge or charges against the lands by virtue of the judgments, and the appellant is claiming the money under the assignment to it.

The question that was put to the Court for answer was in the following terms:

"Is the sum of three hundred ($300) dollars so about to be paid payable to the Canadian Bank of Commerce under and by virtue of the documents referred to in paragraphs 2 and 3 hereof, or should the said money be paid to the Royal Bank of Canada pursuant to its registered judgments against the said Walker?"

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Mr. Justice MACDONALD answered this question by holding that the $300 should be paid by Potts to the respondent to apply on its registered judgment against the defendant Walker, holding that the judgment was of the same effect as a mortgage for that amount. It is from this decision that this appeal is taken, and the respondent relies upon the *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338. In my opinion, however, that case can well be distinguished, and cannot be deemed to apply to or be determinative of this appeal. There the sole question was the construing of the statute and the effect of section 73 of the Land Registry Act, and it was a question of priorities, the mortgage there being registered, and although prior in time, registered later than the judgment. The judgment of this

Court of Appeal was sustained on appeal to the Supreme Court of Canada, but as I have said, went wholly upon the construction to be put upon section 73 of the Land Registry Act, which has relation to priorities as between registered charges. Here the appellant has no registered charge, but is unquestionably the assignee of the money in question, and no question arises of priorities under the Land Registry Act. Therefore, it must follow that *Bank of Hamilton* v. *Hartery* has no application to this appeal.

Further, if I may be enabled to say so, with respect, I do not think that the Courts ought to be called upon to further extend (unless there be intractable statute law in the way) the subversal of an equitable principle long known to the law, that a judgment creditor can have no better position than his judgment debtor. I would refer to what Vice-Chancellor Spragge said in *Harrison* v. *Armour* (1865), 11 Gr. 303 at p. 307. That was the case of a mortgage created by the depositing of title deeds, and we find the learned Vice-Chancellor saying:

"With regard to the state of the law in respect of instruments incapable of registration, but which create equities to which the Court is bound to give effect, it is a question for the Legislature. In this case, as it happens, there is no real hardship, as the party seeking priority is a judgment creditor, who has no equity whatever to be preferred to the plaintiff."

So that, according to parity of reasoning, the respondent has no equity whatever to be preferred to the appellant.

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Grace v. *Kuebler and Brunner* (1917), 56 S.C.R. 1, was a case under the provisions of the Land Titles Act of Alberta, where it was held that the payment by a purchaser to his vendor of purchase-moneys without notice of an assignment to the vendor to a third person was a valid payment. Here we have no question of want of notice of assignment that was complained of in that case. We have the Chief Justice (Sir Charles Fitzpatrick) saying in the *Grace* case, at p. 2:

"Mr. Justice Stuart prefaces his judgment in the Appellate Division with the observation that 'the practice which seems to have obtained to some extent in this Province whereby an owner of land, who has entered into a solemn agreement to convey the land to another upon payment of certain money, deliberately puts it out of his power to fulfil his contract by himself transferring the land to a third party . . . . is a reprehensible one.'

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"The qualification does not seem too severe, and it may be added that it is also invalid, unless it be in the case of an innocent purchaser without notice, of which there can be no question here, as the deed of assignment to the appellant sets out the sale already made to the respondents. An owner of the land, who had agreed to sell it, has parted with his ownership and has nothing left but the bare legal title. The transfer of the title here was never effected as the transfer was not registered. The appellant, in my opinion, had only an assignment of the debt, and registration does not enter into the case at all."

Likewise in this case, registration does not enter into the case at all, and we have Mr. Justice Duff, at pp. 11-12 saying:

"It is clear, however, that the vendor may assign the benefit of his contractual rights under the contract and the assignee may enforce those rights, assuming the provisions of the law with regard to assignments to be fulfilled, and the assignee to be in a position to require the vendor to carry out his obligations under the contract. It is elementary, however, that as against the assignee claiming under an assignment of the vendor's contractual rights, the vendee is entitled to deal with the vendor until he has received notice of the assignment. See the observations of Lord Cairns in *Shaw* v. *Foster* [(1872)], L.R. 5 H.L. 321 at p. 333."

In *Shaw* v. *Foster, supra,* at p. 333, we have Lord Chelmsford saying:

"According to the well-known rule in Equity, when the contract for sale was signed by the parties Sir William Foster became a trustee of the estate for Pooley, and Pooley a trustee of the purchase-money for Sir William Foster; and it was competent to Pooley to assign the benefit of his contract, or to charge his equitable interest in the property in favour of another person, and upon notice given to Sir William Foster of such assignment or charge, he would have been bound to protect and give effect to it."

And see pp. 338-9, *per* Lord Cairns. (Also see *per* Plumer, M.R. in *Wall* v. *Bright* (1820), 1 J. & W. 494 at pp. 500, 503; *per* Lord Westbury in *Knox* v. *Gye* (1872), L.R. 5 H.L. 656 at p. 675; *per* Jessel, M.R. in *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499 at pp. 506-10; *per* James, L.J. in *Raymer* v. *Preston* (1881), 18 Ch. D. 1, 12; and see Lord Parker in *Howard* v. *Miller* (1915), A.C. 318 at p. 326, and in *Central Trust and Safe Deposit Company* v. *Snider* (1916), 1 A.C. 266 at pp. 271-2).

In the present case the appellant is in the position of having assigned to it all the moneys due and payable by the People's Trust Company, Limited, to Walker. (Also see Lord O'Hagan, at pp. 349-350).

Torkington v. *Magee* (1902), 2 K.B. 427, is a case which is

much in point in the present case, and although this case was reversed on appeal, it was reversed upon the facts only: (1903), 1 K.B. 644. Mr. Justice Channell, in (1902), 2 K.B. discusses the law at some length, and makes it plain what the true principle of equity is. In that case we find the head-note reads as follows:

"The defendant contracted to sell his reversionary interest in property to R., who by deed assigned his interest under the contract to the plaintiff, and notice in writing of the assignment was duly given to the defendant. The defendant after the assignment to the plaintiff refused to perform his contract:—*Held*, that the assignment was an assignment of a 'legal chose in action' within s. 25, sub-s. 6, of the Judicature Act, 1873, and that the plaintiff was entitled to sue the defendant for damages for the breach of contract."

It is clear from perusal of this case that the position of the appellant is that of being entitled to all the rights that Walker, its assignor, had, and here there was notice, in fact, notice admitted of the assignment, and there is no question whatever of it being possible to make a conveyance. I may say at this Bar I asked that question, and it was stated that no question of inability to make title was called in question. It is pertinent to mention this point, as the Court, in *Torkington* v. *Magee* (1903), 1 K.B. 644 at p. 645 (Vaughan Williams, Stirling, and Mathew, L.JJ.) held that

"there was no cause of action against the defendant, inasmuch as neither the plaintiff's assignor, Rayner, nor the plaintiff himself, was ready and willing to carry out the contract in accordance with its terms." MCPHILLIPS, J.A.

Here, as I have said, no question of that kind arises whatever; the contract will be duly carried out if the moneys be paid to the appellant.

Finally, in my opinion, this appeal must succeed. I see no difficulty whatever in it being determined that the appellant is entitled to the moneys in question. Certainly the appellant is the assignee of the moneys, and the case of *Bank of Hamilton* v. *Hartery, supra,* is no obstacle in the way of the appellant being entitled to succeed. It is not a case of priorities under the Land Registry Act, and the Land Registry Act has no application to the present case, and without application, the well-known equitable principles must prevail, all of which the appellant is entitled to, that is, entitled to all the rights and

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moneys that its assignee Walker had at the time of the assignment to it of the moneys in question. No question at all arises as to the records in the Land Registry office, that is as to the judgments being a charge against the lands. All proper rectification can and ought to be made in that regard in the carrying out of the judgment of this Court; that was clearly pointed out in *Howard* v. *Miller* (1915), A.C. 318.

I would, therefore, allow the appeal.

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

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Davis & Co.*
Solicitors for respondent: *Tupper & Bull.*

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MAUNSELL AND MAUNSELL v. CAMPBELL SECURITY FIREPROOF STORAGE & MOVING COMPANY, LIMITED.

Bailment—Storage—Contract—Condition limiting liability for loss—Goods shipped by mistake to another customer—Lost in transit—Application of limitation of liability.

The plaintiffs stored goods with a warehouse company in Vancouver. The warehouse contract recited, *inter alia*, "that the responsibility of the company for the contents of any piece or package is limited to the sum of $50, unless the value thereof is make known at the time of storage and receipted for in the schedule; an additional charge will be made for higher valuation." Nine packages were stored without a declaration of value and without an additional charge being made. Owing to the mistake of a warehouseman, a servant of the defendant, four of the plaintiffs' packages were included in a shipment of goods to another customer in England. Two of the packages were lost in transit and two returned in a damaged condition. In an action for damages the defendant Company was held liable for the full amount of the loss and damage.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MARTIN, J.A. dissenting), that the goods having been negligently but not wilfully

parted with through the mistake of the defendant's servant the amount recoverable is subject to the limitation of the warehouse contract.

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APPEAL by defendant from the decision of HUNTER, C.J.B.C., of the 7th of October, 1920, giving the plaintiffs $1,630 damages for breach of contract and negligence in the custody of goods warehoused with the defendant. The defendant being a storage company, the plaintiffs, in June, 1919, left with the defendant for storage five cases of goods, a Victrola, and three trunks full of goods. Shortly after the said goods were so stored, one Colonel MacDonnell, who lived in England, and who had previously stored certain goods in the same warehouse, sent an order for his goods to be shipped to England. The warehouseman, a servant of the defendant Company, by mistake sent the plaintiffs' three trunks and the Victrola to Colonel MacDonnell. They were received in England and Colonel MacDonnell sent them back, but in transit two of the trunks were lost, and the other, with the Victrola, were returned in a damaged condition. At the time of storing the goods, the plaintiffs entered into a warehouse contract with the defendant which provided, *inter alia,* that

Statement

"the responsibility of the above Company for the contents of any piece or package is limited to the sum of $50, unless the value thereof is made known at the time of storage and receipted for in the schedule; an additional charge will be made for higher valuation."

There was no declaration of value of the pieces at the time of storage. The defendant paid into Court $230, being $50 for each package and $30 for costs.

The appeal was argued at Victoria on the 14th of January, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Buell, for appellant: We rely on the contract limiting the loss to $50 per package. Whether liability for loss can be taken outside the contract appears to depend, according to the cases, on whether it was due to the wilful act of the warehouse or whether it was accidental: see *Van Toll* v. *South Eastern Railway Co.* (1862), 12 C.B. (N.S.) 75; *Pepper* v. *The South-Eastern Railway Company* (1868), 17 L.T. 469; *Skipwith* v. *The Great Western Railway Company* (1888), 59 L.T. 520

Argument

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at p. 522. The cases as to damage are *Pratt* v. *South Eastern Railway Co.* (1897), 1 Q.B. 718 at p. 720; *Mayer* v. *Grand Trunk R.W. Co.* (1880), 31 U.C.C.P. 248. Cases under the Carriers Act are *Hinton* v. *Dibbin* (1842), 2 Q.B. 646 at p. 661; *Morritt* v. *North Eastern Railway Co.* (1876), 1 Q.B.D. 302. As to conditions of the contract see *Hood* v. *Anchor Line (Henderson Brothers)* (1918), A.C. 837 at pp. 848-9; *Grand Trunk Railway Company of Canada* v. *Robinson* (1915), A.C. 740 at pp. 748-9.

Argument

Davis, K.C., for respondents: On the admitted facts, the loss took place while the goods were being returned from England to Vancouver, in which case the condition does not come into force at all. If there is a deviation from the contract, they cannot take advantage of any condition. The cloak-room cases, on the facts, are not binding here. There was a breach by the defendant: see *Leduc* v. *Ward* (1888), 20 Q.B.D. 475; *Lumsden* v. *Pacific Steamship Co.* (1920), 28 B.C. 473; *James Morrison & Co., Limited* v. *Shaw, Saville, and Albion Company, Limited* (1916), 2 K.B. 783 at pp. 794 and 800; *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 510 at p. 511; *Harris* v. *Great Western Railway Co.* (1876), 1 Q.B.D. 515.

Buell, in reply.

Cur. adv. vult.

1st March, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The question involved in this appeal is one which has received the careful attention of the Courts in the several cases to which we were referred by appellant's counsel. The crucial point is, Does the contract, rightly construed, absolve the Storage Company (appellant) from liability beyond $50 per package arising from the negligence of its servants, and resulting in loss to the owner of the goods. Realizing, no doubt, the difficulties in his way of distinguishing in principle this case from such cases as *Van Toll* v. *South Eastern Railway Company* (1862), 12 C.B. (N.S.) 75; *Pepper* v. *The South-Eastern Railway Company* (1868), 17 L.T. 469; *Skipwith* v. *The Great Western Railway Company* (1888), 59 L.T. 520; *Pratt* v. *South Eastern Railway Co.* (1897), 1 Q.B. 718; *Hinton* v. *Dibbin* (1842), 2 Q.B. 646, and the analagous

cases under the Carriers Act, as for example, *Morritt* v. *North Eastern Railway Co.* (1876), 1 Q.B.D. 302, Mr. *Davis* sought to do so by submitting that the sending away of the articles in question to another customer in England was a breach by defendant of the contract of storage and therefore not within the protection of the clause of the contract which reads:

"The responsibility of the above Company for the contents of any piece or package is limited to the sum of $50, unless the value thereof is made known at the time of storage and receipted for in the schedule; an additional charge will be made for higher valuation."

I am unable to see any distinction in principle between what was done here and the handing out of a bag to a person at a parcel office; if done wilfully in either case it would amount to conversion; if done negligently by the warehouser's servants, the warehouser would be liable to damages for loss of the article, if not protected by a contract such as above set out. In the case at bar, the goods were negligently, not wilfully, parted with, the defendant's servants, by mistake, having put them with goods of another of defendant's customers and sent them away to him in England. Some were lost and some were returned in a damaged condition, hence this action.

MACDONALD, C.J.A.

If they had disappeared without discovery of what had become of them, the plaintiffs, on the authorities above referred to, would have no claim beyond the $50 for each article. Then, to quote Mr. Justice Grantham, in *Skipwith* v. *The Great Western Railway Company, supra*: "What difference could it make that in the present case they have been able to discover exactly how it came about?"

The cases to which Mr. *Davis* referred us, being cases of deviation of ships from their agreed courses, are, in my opinion, inapplicable to a case like the present one, since such deviations are wilful, not negligent. Now, it is conceded that if the defendant had wilfully sent away the goods to their other customer they could not claim the protection which they are now insisting on.

I would allow the appeal.

MARTIN, J.A.: This is an action upon a "warehouse contract," as it is self-described, to store the plaintiffs' goods, a

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Victrola and three trunks, at Vancouver, but instead of so doing, they were, after due delivery to the storage warehouseman, shipped by mistake on a long voyage to England, in the course of which two of the trunks were lost; one of the trunks and the Victrola were finally recovered and returned to the plaintiffs in a damaged condition. The clauses of the contract specially in question are as follows:

"It is agreed that the said goods shall be stored at owner's risk of damage by fire, moth, vermin, heat, rust, leakage, the elements, the act of Providence, or the King's enemies, the restraint of government, mobs, riots, insurrections, or by reason of the hazard of damage incident to a state of war, theft at or after a fire, etc."

"The responsibility of the above Company for the contents of any piece or package is limited to the sum of $50, unless the value thereof is made known at the time of storage and receipted for in the schedule; an additional charge will be made for higher valuation.

"The responsibility of the above Company for moving, storage and handling is limited to ordinary diligence."

The defendant claims that under these clauses its liability is limited to $50 for each package—in all, $200. The plaintiffs submit that it was a breach of this contract to store goods in Vancouver to send them off on a voyage to England, thereby subjecting them to additional risks of travel and transportation not contemplated by the parties or covered by the contract for a fixed place of storage. A number of cases were cited, and I have carefully examined them and others, and those most relevant are: *Streeter* v. *Horlock* (1822), 7 Moore 283; 1 Bing. 34; *Davis* v. *Garrett* (1830), 6 Bing. 716; 4 M. & P. 540; *Pepper* v. *The South-Eastern Railway Company* (1868), 17 L.T. 469; *Harris* v. *Great Western Railway Co.* (1876), 1 Q.B.D. 515; 45 L.J., Q.B. 729; 34 L.T. 647; *Morritt* v. *North Eastern Railway* (1876), 1 Q.B.D. 302; 45 L.J., Q.B. 289; 34 L.T. 940; *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 510; 51 L.J., Q.B. 310; *Skipwith* v. *The Great Western Railway Company* (1888), 59 L.T. 520; *Pratt* v. *South Eastern Railway Co.* (1897), 1 Q.B. 718; 66 L.J., Q.B. 418; and *James Morrison & Co., Limited* v. *Shaw, Saville, and Albion Company, Limited* (1916), 2 K.B. 783; 115 L.T. 508. The three most in point are *Streeter* v. *Horlock*, *Lilley* v. *Doubleday* (affirmed in *James Morrison & Co., Limited* v. *Shaw, Saville, and Albion Company, Limited*, at pp. 796, 800),

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and *Harris* v. *Great Western Railway Co.*, and, in my opinion, those three cases support the judgment below. In the first of them it was said, p. 36 (1 Bing.):

"Whenever, as in this case, an order is given previously to the delivery of goods to a carrier or other bailee, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly, a duty arises on his part, upon the receipt by him of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty."

In the second case a warehouseman was held liable because he had stored the goods in a repository other than that contracted for and they were destroyed by fire, without negligence on the part of the warehouseman, Grove, J. saying at p. 511 (7 Q.B.D.):

"The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another, and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other. If a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself. That proposition is fully supported by the case of *Davis* v. *Garrett* [(1830)], 6 Bing. 716, which contains very little that is not applicable to this case. . . . . I base my judgment on the fact that the defendant broke his contract, by dealing with the subject-matter in a manner different from that in which he contracted to deal with it."

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Lindley, J. said at p. 512:

"I am of the same opinion. The plaintiff gave his goods to the defendant to be warehoused at a particular place, the defendant warehoused them elsewhere, where, without any particular negligence on his part, they were destroyed. The consequence is that the plaintiff has a cause of action and is entitled to damages."

In the third case a railway company was held not to be liable for luggage entrusted to it by a passenger at the end of his journey, which it received as a warehouseman through its cloakroom facilities, and which had been stolen, as it was not placed by the company in the cloak room, but in a vestibule, without any protection except cloak room labels put on it. The question, as Blackburn, J. said, p. 651 (34 L.T.), turned "entirely on the true construction of the conditions" upon the ticket given to the passenger, and the Court held, Lush, J. dis-

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senting, that the meaning of the contract was not that the company was

"to place the luggage in some separate warehouse to which none but the defendants or their servants had access, so that the placing them in the vestibule was a breach of contract."

Mellor, J. put it, p. 653:

"It was, however, contended that in the fourth condition the company will not be responsible for the loss of or injury to articles 'except left in the cloak room,' and that those articles not being left in the 'cloak room,' the conditions do not apply to the case. I cannot, however, but think that the true effect of that condition with the others really means to notify that unless the articles have gone through the process of being ascertained, counted, and the fees duly paid at the luggage and cloak office, the company will not be responsible at all. I have come, therefore, to the conclusion that the limit of the company's undertaking was simply to warehouse the articles deposited on the conditions specified, and that they did not lose the benefit and protection of the conditions of the ticket, because the articles in question were not actually warehoused in the cloak room, but were stolen from the vestibule."

Blackburn, J. at p. 652 said:

"But in the present case I read the contract as being to keep safely, *i.e.*, with reasonable and proper care, in any way which to the defendants seems best, and to deliver up the goods on the production of the ticket, if brought at the proper office hours to the cloak room. I do not think that depositing the luggage in the vestibule would have been any breach of contract if the defendants had taken reasonable precautions to protect the luggage while placed in the vestibule from danger, as, for instance, by leaving a competent person to stand sentry over them till it was convenient to remove them to a more secure place."

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This last extract shews the *ratio decidendi* clearly, because the vestibule, with proper precautions from danger, was held to be a place within the contract, and the absence of the precautions constituted the lack of reasonable care to keep safely. But in the case at bar, the goods were not stored at all, in the proper sense of the word, in any place, but shipped abroad by a mistake of the company's servants, for which it is just as much liable as if done by direction of its managing director. The conditions, therefore, which are invoked to escape liability have not, in such circumstances, any application, because a contract to store goods in Vancouver cannot be performed by shipping them overseas to Shanghai or elsewhere, which is transforming the essential contractual element of "storing" into "forwarding" or "carriage"; such an act, moreover, involves

an additional risk to the goods not contemplated by the parties, and the condition exempting from all liability for loss can only be invoked when loss is occasioned whilst carrying out, not violating, the contract.

In my opinion, therefore, the appeal should be dismissed.

GALLIHER, J.A.: This case calls for a decision on a nice point as to the liability of a warehouseman.

Certain goods were stored for hire by the plaintiffs in the defendant's warehouse at Vancouver. The defendant relies on clause 3 of the contract for storage as protecting them to the extent of limiting their liability to $50 on each article stored and which cannot be restored, or restored only in a damaged condition. Clause 3 reads as follows: [already set out in statement.]

It is admitted that the goods were stored in the ordinary way, without the value being made known or any higher valuation charged for. What occurred here is, that the defendant, having also stored in its warehouse certain other goods belonging to a customer in England, had, on request, shipped his goods to him, and by the mistake of some one in the defendant's employ, certain of the plaintiffs' goods were included and shipped with these, and certain of plaintiffs' goods have been lost and certain others returned in a damaged condition.

The learned trial judge held that defendant, under the circumstances, was not entitled to the protection of clause 3 of the agreement, on the ground that there had been wilful misconduct in connection with the subject of the bailment during the term of the bailment, and on the further ground that the bailment had been put an end to by the wrongful act of the defendant, or even if during the existence of the bailment, what had happened was wilful or amounted to misconduct. And the learned trial judge goes on to say that if it were otherwise, all the warehouseman would have to do, if he wanted the Victrola, one of the packages, would be to ship it away and tell the customer, "your Victrola has gone astray, I owe you $50 and the Victrola is now mine."

The illustration seems to me hardly apt. The bailee could

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not, by his wrongful act, confer any title upon himself. The $50 is paid because the article cannot be returned, or can only be returned in a damaged condition. But aside from that, there is still open for decision a very nice question. During the argument I put this question to Mr. *Davis*:

"Supposing instead of the goods being shipped away they had, through the negligence of some one in the defendant's employ, been handed to a wrong party at the door of the warehouse and lost, what would the liability under such circumstances be?"

It seems to me this is an apt position to start from. Under such circumstances the bailment would have been put an end to by the wrongful act of the defendant in the sense that the delivery was made to the wrong person. I do not think we would be justified in importing the words "wilful misconduct" into this transaction. The goods were sent out of the warehouse by mistake, and that mistake was negligent. On the above supposition I would think defendant would be entitled to the protection of clause 3. Now, do the circumstances in this case differentiate it? Mr. *Davis's* submission is, that assuming the case I postulated, if my view was correct (which he did not admit), this was a very different case, that the defendant had started these goods on a voyage around the world as it were, with all the risks that might be attendant thereon, and such could never have been in the contemplation of the parties. I think it may be assumed that such a condition as pertains here was not present to the minds of either party when the goods were stored, neither would it be present to the mind of either party that the goods would be delivered to a wrong party. Then, can it be said that the mistake in the case I postulated can be said to be one that could reasonably be held to be in the contemplation of the parties? and if so, are the circumstances in the case before us so different that a different rule should apply? To the first I would answer, yes. The second requires, perhaps, more careful consideration. At all events, I find it more difficult to determine.

GALLIHER, J.A.

The business carried on is that of general warehousing, including not only the storing of goods for delivery in Vancouver, but of goods which later may have to be shipped elsewhere. We have the particular instance of goods which had

to be shipped to the customer in England. Other instances might be of persons breaking up their home in Vancouver and going to, say, Victoria, Calgary or Winnipeg, or elsewhere, in which case the goods would have to be forwarded later. This might or might not be disclosed to the bailee at the time of storage, but in most cases probably would. I cite these instances as evidencing the fact that the business carried on by the defendant included the two classes of cases, and a mistake resulting in loss or damage to the goods, might occur in either, with perhaps an additional risk in case of shipment.

Now, if, as I think, the possibility that a mistake might occur by delivery to a wrong person at the warehouse could be said to be something that could reasonably be taken to be in the contemplation of the parties, is the fact that the delivery to the wrong person by rail or boat, with its added risk, sufficient to warrant us in excluding the protection afforded by clause 3?

Of the cases cited, I will only refer to *Van Toll* v. *South Eastern Railway Co.* (1862), 12 C.B. (N.S.) 77; *Skipwith* v. *The Great Western Railway Company* (1888), 59 L.T. 520; and *Hinton* v. *Dibbin* (1842), 2 Q.B. 646. From a perusal of these cases and the authorities therein referred to and other cases cited to us by Mr. *Buell* at the hearing, I think defendant cannot be held liable beyond the amount provided for unless we can say that its negligence amounted to wilful misconduct or misfeasance, and I am not prepared to go that far. Moreover, as put by Grantham, J., in one of the authorities cited, can the fact that the means by which the goods were lost had been discovered bring about any different result than where the goods were lost and the means of loss cannot be traced? I think not. The deviation cases cited to us by Mr. *Davis* do not seem to me to be in point, and I say so with deference to Mr. *Davis's* able argument. The deviation must always (except in cases of stress of weather or other like circumstance) be a deliberate wilful act, and not negligence or inadvertence. I would allow the appeal.

GALLIHER, J.A.

McPHILLIPS, J.A.: This appeal calls for the consideration of the extent of the liability in the case of bailment for reward.

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The articles were left for storage with no value declared. According to the terms of the warehouse contract, the responsibility of the appellant is limited to $50 for any piece or package. The learned counsel for the respondents very ably supported the judgment of HUNTER, C.J.B.C., and strenuously contended that the contract and the limited responsibility, as set forth therein, afforded no answer when the facts disclosed that the damages allowed in the Court below were in consequence of no loss occurring in the place of storage, but by reason of the misplacing of some of the articles with the goods of another and later negligently shipping them to England. When being returned, two of the packages were wholly lost, the contents of the third rendered useless, and the Victrola also rendered useless. The question now is, does the contract control and determine the *quantum* of liability, or is the matter at large, and do the facts disclose such negligence as renders the appellant responsible for the loss and damage? The learned counsel for the appellant, in a very careful argument, dealt with the case upon the analogy of the liability of common carriers, and demonstrated, in my opinion, successfully, that the contract we have here to consider and construe brings the appellant into the same category as "common carriers" are under the law governing them, *i.e.*, the contract embodies the same general terms as govern common carriers, and the submission was that if common carriers, upon the like facts, would not be liable above the limited amount set forth in the contract, likewise the appellant would not, and that the judgment of the Court below, allowing damages in excess of $50 for each package, was erroneous. I, with great respect, am of the view that there is error in the judgment and that it cannot be affirmed. It is to be observed that the learned Chief Justice, in his reasons for judgment, stated that "it is a very close point." At the outset it may be conceded that the contract would not excuse the appellant's liability for acts of wilful misconduct on the part of itself or its employees. It is to be observed that the pleadings do not cover wilful misconduct—the allegation is only that of breach of contract and conversion. Now what did occur, whilst it may be somewhat unusual, is understandable,

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and it may be said to be just that kind of a happening that the contract could be said to reasonably cover. It was, in fact, the case of misdelivery, a risk that the appellant would be desirous of covering and ensuring against, and it was simple enough for the respondents, when having valuable articles in storage, to have declared the value and the responsibility, if accepted, would then extend beyond the $50 for each piece, *i.e.*, the declared and accepted value, and as in the contract is set forth, "an additional charge will be made for higher valuation." Here the charge was only $1.50 per month and the judgment is for $1,630. *Ronan* v. *Midland Railway Co.* (1884), 14 L.R. Ir. 157, is an instructive case, and I would refer to what Morris, C.J. (afterwards Lord Morris) said at pp. 173-4. Also see *Roche* v. *Cork and Passage Railway Co.* (1889), 24 L.R. Ir. 250 at p. 257.

Now the present case is not analogous to the case above cited, nor has it been brought for wilful misconduct—in any case, the facts do not disclose wilful misconduct. Then, apart from wilful misconduct, is there responsibility beyond the amount set forth in the contract? I consider that the analogy is complete when the pleadings are looked at, admitting of the language of Mr. Justice Gwynne in *The Lake Erie and Detroit River Railway Company* v. *Sales* (1896), 26 S.C.R. 633 at p. 677 being applied to the present case, as here the action was one for breach of contract and negligence. Mr. Justice Gwynne said:

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"If then the statement of claim can be construed as the statement of a cause of action arising *ex delicto* apart from any contract the plaintiffs must fail as to those goods, for the evidence shews that the defendants received them for carriage under the terms and provisions of a special contract; if the statement of claim is to be construed as a statement of cause of action founded upon contract, the contract so alleged being an absolute contract unqualified by any conditions, then as to the above goods the plaintiffs still must fail for the contract proved is a special contract creating only a limited liability, in which case there was no occasion for the defendants to plead specially the terms which shewed the contract to be of a limited character and not the absolute unconditional one stated in the statement of claim. The authorities upon this point are numerous."

Lyons & Co. v. *Caledonian Railway Co.* (1909), S.C. 1185, was a case of leaving a hamper of goods of the value of £84 at the defendant's luggage office and a ticket was received, which

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had a condition thereon that the company would not be responsible for the loss of any article exceeding £5 unless at the time of delivery the true value was declared and a special rate paid. The hamper was left on the platform and was lost. The Court held that the article being over £5 that the company was not liable for any loss whatever. In the present case the appellant has admitted liability to the extent of $50 per package and payment into Court was made of $200, being for three packages at $50 each and $50 for the Victrola, together with $30 for costs. I would refer in particular to what Lord Kinnear said at pp. 1194, 1195-6.

In considering the principle of law which comes up for consideration in the present case, it is most instructive to read what Viscount Haldane, L.C. said in *Grand Trunk Railway Company of Canada* v. *Robinson* (1915), A.C. 740, which was the case of a person travelling with a horse upon a train under a contract relieving the railway company from liability for death or injury when caused by negligence, a half fare only being paid. The conditions of the contract were not read. At p. 748 we find the Lord Chancellor saying:

"Moreover, if the person acting on his behalf has himself not taken the trouble to read the terms of the contract proposed by the company in the ticket or pass offered, and yet knew that there was something written or printed on it which might contain conditions, it is not the company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by his company, be bound, and his principal will be bound through him. To hold otherwise, would be to depart from the general principles of necessity recognized in other business transactions, and to render it impracticable for railway companies to make arrangements for travellers and consignors without delay and inconvenience to those who deal with them.

MCPHILLIPS, J.A.

"In a case to which these principles apply, it cannot be accurate to speak, as did the learned judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined."

Here the situation in principle is exactly the same, and,

adopting the language of the Lord Chancellor, "for the only footing on which (the goods were warehoused) is simply that which the contract has defined."

The language of the Lord Chancellor (Viscount Haldane) in *Grand Trunk Railway Company of Canada* v. *Robinson, supra,* that I have above quoted was also quoted by Lord Parmoor in *Hood* v. *Anchor Line (Henderson Brothers)* (1918), A.C. 837 at pp. 849-50. That was an action for personal injuries alleged to have been sustained through the negligence of the company's servants in the course of a voyage from New York to Glasgow. [The learned judge here quoted from the judgment of Viscount Haldane at pp. 843-46, and continued]:

In the present case, we have the contract signed by the respondent, Katherine R. Maunsell, and no question arises about the non-disclosure of the terms of the contract or that the terms were not fully understood. I cannot see, in the face of the contract we have here (clearly limiting responsibility) any principle upon which any further responsibility may be imposed. It is regrettable that the damages would appear to be greatly in excess of that provided for in the contract, but who is to blame for this result? The contract is plain in its terms and there was a way to have covered the true value, but that value was not declared, and, if declared, there would have been an additional charge. The Court does not make the contract between the parties; it remains only for the Court to construe the contract and impose liability in accordance with its terms. In the result, in the present case, the terms of the contract clearly limits responsibility, as the words read,

MCPHILLIPS, J.A.

"limited to the sum of $50, unless the value thereof is made known at the time of storage and receipted for in the schedule; an additional charge will be made for higher valuation."

This not being the case of any wilful misconduct, or wilful negligence, what happened can be said to be an eventuality that in the ordinary course of business might happen, and it is reasonable to conclude that it was an eventuality that, according to sound business methods, should be provided against, otherwise, for a very small pecuniary remuneration, here $1.50 per month only, very heavy damages might be imposed, notably, the judgment under appeal fixes the damages at $1,630.

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1921

March 1.

MAUNSELL v. CAMPBELL SECURITY FIREPROOF STORAGE, &C., CO.

In my opinion, the judgment should be reversed and the appeal allowed.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Senkler, Buell & Van Horne.*
Solicitors for respondents: *Davis & Co.*

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1921

Jan. 4.

IN RE PROHIBITION ACT AND TOSEY

IN RE PROHIBITION ACT AND TOSEY.

Criminal law—Intoxicating liquors—Charge of illegal possession—Forfeiture of automobile without notice to owner—Evidence—B.C. Stats. 1916, Cap. 49, Secs. 11 and 52; 1920, Cap. 72, Sec. 27.

Under section 52 of the British Columbia Prohibition Act "if it is proved before any police or stipendiary magistrate or two justices of the peace that any automobile . . . . is employed in carrying any liquor for the purpose of selling or disposal of the same illegally, such automobile . . . . so employed may be seized and declared forfeited." One Smith was convicted for unlawfully having liquor in his possession and the automobile in which Smith was carrying the liquor was declared forfeited under said section 52. The evidence was that the automobile belonged to one Tosey, but Smith who was driving the automobile was hired by others to assist in taking the liquor from Vancouver across the boundary into the United States. Before reaching the boundary they turned back and on the way back the automobile was searched and seized by peace officers. By an order of HUNTER, C.J.B.C. the declaration of forfeiture was quashed on the ground that the owner of the car received no notice to appear on said proceedings nor was he heard.

Held, on appeal, MARTIN and GALLIHER, JJ.A. dissenting, that the gist of the offence is the purpose to dispose of the liquor illegally. There is no evidence of such purpose and the onus being on the prosecution the order appealed from should be affirmed.

Per MCPHILLIPS, J.A.: The reasonable construction of section 52 is that the illegal purpose must be connected with the owner of the automobile and a declaration of forfeiture without the owner having an opportunity of being heard is contrary to natural justice and a statute should not be given such effect unless its wording is intractable.

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1921

Jan. 4.

IN RE PROHIBITION ACT AND TOSEY

APPEAL from an order of HUNTER, C.J.B.C., of the 5th of October, 1920, quashing and setting aside a declaration by the magistrate at New Westminster of forfeiture and sale of a motor-car for "being employed in carrying liquor for the purpose of selling or disposal of same illegally." The facts are that one Ray Smith was charged with unlawfully having liquor in his possession in a place other than a dwelling-house. It appeared from the evidence that certain persons had hired the accused, with the car in question, for taking liquor across the border, but before getting to the border they turned back and on the way back the car was stopped and searched, 51 bottles of liquor being found in the car. The accused pleaded guilty, was fined, and the car confiscated and ordered to be sold. There was no other evidence of any intention to sell the liquor. One J. A. Tosey, who was owner of the car, brought *certiorari* proceedings, claiming he had no notice of the hearing at which the automobile was declared forfeited, that no charge was laid against him, and that neither he nor his servants or agents with his knowledge or consent, used the automobile to carry liquor for the purpose of disposal of same illegally. The learned Chief Justice set aside the declaration of forfeiture. The police magistrate and the City of New Westminster appealed.

Statement

The appeal was argued at Vancouver on the 18th of November, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

G. E. Martin, for appellants: The Chief Justice set aside the magistrate's order on the ground that no notice to appear was served on the owner, but my submission is that it is not a proceeding in which the owner is entitled to notice. A man was found unlawfully in possession of liquor and he pleaded guilty. The car is subject to confiscation in the same way as fishing boats in case of smuggling.

Henderson, K.C., for respondent Tosey: We shew by affidavit that we knew nothing about the liquor being sold. The language of the Act carries with it the assumption that there must be a warning. We must have an opportunity to be heard: see *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909),

Argument

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14 B.C. 412. The magistrate did not find that the automobile was used for the purpose of sale of liquor. In the Act are the words "if it is proved." Sections 49 and 51 of the Act should also be read.

Martin, in reply, referred to *O'Neil* v. *The Attorney-General of Canada* (1896), 26 S.C.R. 122.

Cur. adv. vult.

4th January, 1921.

MACDONALD, C.J.A.: I would dismiss the appeal and uphold the order appealed from, on the ground that there was no evidence whatever that the liquor was being carried for the purpose of selling or disposing thereof illegally. It is the purpose to dispose of the liquor illegally which is the gist of the offence. The only purpose was to take it into the United States. To dispose of it in the foreign country, assuming that that was the purpose, and there is no evidence of it, is not an offence under the Prohibition Act. The Province cannot create these penal offences or *quasi*-crimes except for breach of its own statute. Moreover, the intention to take the liquor across the line was abandoned before seizure of the car, and at that time the purpose was to take it back to Vancouver, but there is not a fact in evidence from which an inference can be drawn that it was the purpose of those in charge to dispose of it, or part with it in any way when they got it there. The section of the statute relied on to support the forfeiture must be read in the light of the whole Act. The transporting of the liquor is not the gist of the offence, the taking of it from one place to another. The offence committed in doing this is elsewhere dealt with in the Act. The onus of proof is on the prosecution to prove the purpose. The case does not fall within those in respect of which the onus is by the Act placed on the alleged offender. On the face of the proceedings as I read them, no facts appear to give the magistrate the right to order a forfeiture of the car.

MACDONALD, C.J.A.

MARTIN, J.A.: At the conclusion of the charge against one Ray Smith, and upon his conviction thereon for unlawfully having liquor in his possession, the magistrate declared forfeited the motor-car in which Smith was carrying "the liquor

MARTIN, J.A.

for the purpose of selling or disposal of the same illegally," pursuant to section 52 of the British Columbia Prohibition Act, Cap. 49 of 1916, as amended by section 27 of Cap. 72 of 1920 as follows:

"If it is proved before any police or stipendiary magistrate or two justices of the peace that any automobile or that any vessel, boat, canoe, or conveyance of any description, upon the sea-coast or upon any river, lake, or stream, is employed in carrying any liquor for the purpose of selling or disposal of the same illegally, such automobile, vessel, boat, canoe, or conveyance so employed may be seized and declared forfeited and sold, and the proceeds thereof paid into the consolidated revenue fund or to the municipal treasurer, as the case may be."

On October 5th, 1920, by an order of Chief Justice HUNTER the said declaration of forfeiture was "quashed and set aside" because the owner of the car, Tosey, "received no notice to appear on the said proceedings nor was heard."

We were informed that this order was based upon the case of *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412; 11 W.L.R. 509, wherein it was held that a Crown grant of land to a settler upon the E. & N. Railway belt, issued under The Vancouver Island Settler's Rights Act, 1904, after application to the Lieutenant-Governor in Council, should not have been made to the applicant without giving the railway company an opportunity of being heard, and therefore was a nullity. But whatever has been or may be said about that decision, it has, in my opinion, with all due respect, no application to the many and various criminal or *quasi*-criminal proceedings of a more or less summary nature for the seizure and forfeiture of chattels used in the violation of the laws of the land, relating, *e.g.*, to the customs (R.S.C. 1906, Cap. 48, Sec. 196), excise (R.S.C. 1906, Cap. 51), weights and measures (R.S.C. 1906, Cap. 52), forgery, gaming (Criminal Code, Sec. 641), offensive weapons (Criminal Code, Secs. 611-2, 622), explosives (Criminal Code Sec. 633), counterfeiting (Criminal Code, Secs. 626, 632), trade-marks (Criminal Code, Sec. 491), fisheries, game protection, or otherwise. In the section in question, the simple condition to forfeiture is, "if it is proved," etc., and here it admittedly was proved in the course of legal proceedings before the magistrate, so I am unable to import into the section a further condition that there can be no proof

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before the owner is notified or heard in opposition. There is, it happens, in the preceding section a provision in favour of allowing a claimant to the ownership of liquor seized in transit, or kept for unlawful purposes, to lodge his claim within 30 days from seizure, and "prove his claim and his right" thereto and so prevent forfeiture, but there is nothing of the kind in the section under consideration, which deals only with chattels "employed" in the violation of the statute, so in the absence of any contrary decision really applicable to the case, I am of opinion that the declaration for forfeiture was and is valid and that the order quashing it should be set aside and the appeal allowed.

Since the argument, it has been suggested by one of my brothers that there was no evidence that the automobile was "employed in carrying any liquor for the purpose of selling or disposal of the same illegally," but with all due respect I am unable to take that view being of the opinion that it was fully open to the convicting magistrate to draw the inference of illegal purpose from the suspicious circumstances here present; the expression "sale or disposal" is as wide as it is possible to make it in attempts to get rid of liquor, and the fact that the accused's counsel did not make any submission of the kind to us during the argument, so that counsel for the Crown might have an opportunity to meet it if necessary, goes to support the opinion that the magistrate took the proper view of the peculiar facts before him.

MARTIN, J.A.

GALLIHER, J.A.: Section 52 of the British Columbia Prohibition Act, B.C. Stats. 1916, Cap. 49, gives to the magistrate trying the case the discretionary power to order a vessel and (under the amendment of 1920) an automobile employed in the carrying of liquor for the purpose of selling or disposing of the same illegally to be forfeited if it is proved before him that such vessel or automobile was so illegally employed.

GALLIHER, J.A.

The only objection raised here is that the magistrate should have given notice to the owner of the automobile, in order that he might be heard, before declaring the same forfeited. The learned Chief Justice, from whose order this appeal is taken, gave effect to this objection. With great respect, I take a

different view. It seems to me the section lays down the proof necessary to enable the magistrate to exercise his discretion, and while, in a case where the car was not the property of the man in whose custody it was found, it might seem desirable that the owner, if known, should be notified, yet the car becomes liable to confiscation so soon as proof of the illegel use to which it is put is established, in my opinion, irrespective of who the owner may be.

GALLIHER, J.A.

I think the order of the magistrate was right and that the appeal should be allowed.

McPHILLIPS, J.A.: This appeal calls in question the forfeiture of a certain automobile by the police magistrate of the City of New Westminster in the claimed exercise of powers conferred by section 52 of the British Columbia Prohibition Act, (Cap. 49, Sec. 52, 1916, and Cap. 72, Sec. 27, 1920), which reads as follows: [already set out in the judgment of MARTIN, J.A.]

Apart from the fact that the evidence does not disclose an offence which would entitle the magistrate to proceed under section 52 and declare a forfeiture of the automobile (and in that view I am in agreement with my brother the Chief Justice), there is the further insurmountable difficulty in the way of forfeiture (even if an offence was established), that the automobile was not "employed in carrying any liquor for the purpose of selling or disposal of the same illegally." This legislation, as all legislation, must be read reasonably, and unless it be that the language is intractable, it follows that the illegal purpose must be connected with the owner of the automobile, *i.e.*, the automobile is, with the knowledge of the owner thereof, employed or permitted by him to be employed in the illegal disposal of liquor. Now in the present case there is no evidence whatever of this being the situation; in fact, everything points to the contrary, and what has been done cannot be characterized as other than a denial of natural justice.

MCPHILLIPS, J.A.

It is a monstrous thing that this automobile should be declared to be forfeited, when it is apparent that the owner thereof was not even heard in the matter. It is unthinkable

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that the Legislature ever intended that the legislation should be so construed. It has been said that the Courts are the last bulwark of the people, and in my opinion it is rightly said, and unless the Courts are confronted with not only apt, but intractable words, there can be no forfeiture of property, even where there is jurisdiction to adjudicate, save upon notice and with opportunity to the owner of the property to be heard, otherwise there is the denial of natural justice.

MCPHILLIPS, J.A.

I do not consider it necessary to refer to the authorities upon this point; they are many. It follows that, in my opinion, the learned Chief Justice of British Columbia was right in quashing the forfeiture. The appeal should be dismissed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

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

Solicitors for appellant: *McQuarrie, Martin, Cassady & Macgowan.*

Solicitor for respondent: *Alexander Henderson.*

REX v. CHOW CHIN.

HUNTER, C.J.B.C.

1920

Oct. 26.

COURT OF APPEAL

1921

Jan. 6.

REX v. CHOW CHIN

Criminal law—Charge of illegal possession of drugs—Conviction—Appeal to County Court judge—Witnesses subpœnaed for defence not appearing—Refusal of Bench warrant—Conviction affirmed—Habeas corpus—Certiorari—Court of Appeal—Costs.

On a criminal appeal from a conviction by a magistrate where it is alleged by counsel that there are witnesses under subpœna who can probably give material evidence, and request that their attendance be secured, it is the duty of the Court, if possible, to secure the attendance of those witnesses, unless the Court is of the opinion that the application is not made in good faith.

THE accused was convicted by H. C. Shaw, police magistrate for the City of Vancouver, on the 16th of March, 1920, in that, without lawful or reasonable excuse, he had in his possession drugs, to wit: cocaine, morphine and heroin, for other than scientific or medicinal purposes, for which offence he was sentenced to one year in gaol and to pay a fine of $500, or in default three months' imprisonment. The accused appealed to CAYLEY, Co. J. on the 26th of May, 1920, and in his defence alleged that two other Chinamen resided in the house where the drugs were found, and that he had nothing to do with them. Counsel for the accused then applied for a Bench warrant for the arrest of these two men, who had failed to appear as witnesses after having been served with subpœnas. The learned judge refused to issue a Bench warrant for the production of the two witnesses, or to grant an adjournment for this purpose. He proceeded with the hearing of the appeal, and at its conclusion affirmed the conviction. Application was made to HUNTER, C.J.B.C. for a writ of *habeas corpus* with *certiorari* in aid, on the 26th of October, 1920.

Statement

R. L. Maitland, for the application.

W. M. McKay, contra, raised the preliminary objection that the County Court is a Court of Record, and the proceedings before the County Court judge can not be reviewed on the

Argument

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present application. *Certiorari* is taken away by section 12 of The Opium and Drug Act, Can. Stats. 1911, Cap. 17. The application is based on a matter of procedure only, and does not go to the jurisdiction: see *Rex* v. *O'Brien* (1917), 29 Can. Cr. Cas. 141; 41 D.L.R. 97; *Rex* v. *Warne Drug Co. Limited* (1917), 40 O.L.R. 469; 29 Can. Cr. Cas. 384; *Rex* v. *Cantin*; *Rex* v. *Weber* (1917), 39 O.L.R. 20; 28 Can. Cr. Cas. 341; *Rex* v. *Chappus* (1917), 28 Can. Cr. Cas. 411; *Rex* v. *McLatchy, Ex parte Antinori Fishing Club* (1916), 44 N.B. 402; 28 Can. Cr. Cas. 277; *Ex parte Doyle* (1916), 27 Can. Cr. Cas. 60, which follows *Rex* v. *Hornbrook*: *Ex parte Morison* (1909), 39 N.B. 298; 16 Can. Cr. Cas. 28; *Rex* v. *Pudwell* (1916), 26 Can. Cr. Cas. 47; *Rex* v. *Carter, ib.* 51; *Ex parte Kane* (1915), *ib.* 156 at p. 158; *Rex* v. *Howe* (1913), 24 Can. Cr. Cas. 215; *Rex* v. *Alexander*: *Ex parte Monahan* (1909), 39 N.B. 430; 17 Can. Cr. Cas. 53; *Rex* v. *Horning* (1904), 8 Can. Cr. Cas. 268; *Reg.* v. *Dunning* (1887), 14 Ont. 52; see also sections 752, 1121 and 1122 of the Code. There was plenty of evidence in this case.

Argument

Maitland: As to the right to *certiorari* to review the proceedings before the County Court see Halsbury's Laws of England, Vol. 10, p. 155, par. 310; see also p. 160, par 320, and *Rex* v. *Emery* (1916), 27 Can. Cr. Cas. 116; *The King* v. *Forbes*: *Ex parte Dean* (1904), 36 N.B. 580; *Rex* v. *Martinson* (1919), 3 W.W.R. 896; *Rex* v. *Evans. In re Fisher* (1915), 21 B.C. 322; *Rex* v. *Roy* (1907), 12 Can. Cr. Cas. 533; *Rex* v. *Allingham* (1913), 21 Can. Cr. Cas. 268; *Reg.* v. *Ellis* (1866), 25 U.C.Q.B. 324; *Reg.* v. *Peterman* (1864), 23 U.C.Q.B. 516; *Reg.* v. *McAnn* (1896), 4 B.C. 587; *Rex* v. *Lewis* (1918), 25 B.C. 442. As to the merits, there is a distinction between an ordinary adjournment and the present case, where the accused has invoked the only procedure open to procure the attendance of his witnesses. This amounts to a failure to permit the accused to make full answer and defence and goes to jurisdiction: see *Rex* v. *Farrell* (1907), 12 Can. Cr. Cas. 524; *Rex* v. *Lorenzo* (1909), 16 Can. Cr. Cas. 19; *Regina* v. *Eli* (1886), 10 Ont. 727; *Rex* v. *Nurse* (1904), 8 Can. Cr. Cas. 173.

HUNTER, C.J.B.C.: This is a pure question of principle and I do not think it is a principle that we can safely depart from. Where it is alleged by counsel that there are witnesses under subpœna who can probably give material evidence, and so request, it is the duty of the Court, if possible, to secure the attendance of those witnesses, unless the Court is of the opinion that the application is not made in good faith. I have no doubt in this particular case that there was overwhelming evidence given to convict the Chinaman, unless fully met, but I have often had occasion to say that a man may be ever so guilty, but he must be convicted according to law. That does not mean that every technicality can be successfully resorted to in criminal proceedings. But, in this particular case, I consider there was an unfortunate departure from the observance of one of the fundamental principles, which is to hear the whole case and to allow a full defence. The order will be made absolute. There will be no costs, and no action against any one concerned.

HUNTER, C.J.B.C. 1920 Oct. 26. COURT OF APPEAL 1921 Jan. 6. REX v. CHOW CHIN

HUNTER, C.J.B.C.

From this decision the Crown appealed. The appeal was argued at Vancouver on the 6th of January, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

McKay, for appellant, stated that he could not distinguish this case from *In re Tiderington* (1912), 17 B.C. 81, and asked leave to withdraw the appeal, which was granted.

Maitland, for respondent, moved for costs, and referred to *Rex* v. *Lam Joy*. *Rex* v. *Sam Bow* (1920), [28 B.C. 253]; 2 W.W.R. 1006. Argument

McKay: Costs cannot be given against the Crown in a criminal case.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: The appeal is dismissed. The respondent is entitled to the costs of the appeal. Judgment

Appeal dismissed.

MORRISON, J.

1921

Feb. 4.

BANK OF HAMILTON v. MUTUAL FRUIT CO.

THE BANK OF HAMILTON v. MUTUAL FRUIT COMPANY LIMITED.

Company law—Bills of exchange—Acceptance for company—Authority—Estoppel.

The defendant Company had power under its articles of association to accept bills of exchange and its directors had power to determine who should be appointed to sign acceptances on behalf of the Company. A bill of exchange was accepted by one of its directors, who was also its accountant and traffic manager. He had previously signed acceptances on behalf of the Company, although no formal authority had been given him for that purpose.

Held, that the Company was bound as against a holder in due course where the acceptance occurred in the ordinary course of business, on the footing that he had power to accept, and where, by the acceptance, the Company obtained goods they could not otherwise have obtained.

Held, further, that the Company was bound by estoppel, having by means of the acts of the director, and to the knowledge of the managing director, received the goods.

Statement

ACTION by a holder in due course to enforce payment of a bill of exchange, tried by MORRISON, J. at Vancouver on the 21st of January, 1921. The facts are set out fully in the reasons for judgment.

W. C. Brown, and *O'Brian,* for plaintiff.

McPhillips, K.C., and *H. C. DeBeck,* for defendant.

4th February, 1921.

Judgment

MORRISON, J.: In this action, which is an action by the plaintiff as drawee against the defendant as acceptor of a bill of exchange, the following facts were either admitted or proved at the trial: That the defendant is a trading Company having power for purposes of its business, or for the purpose of obtaining credit to make, indorse, accept and deal in bills of exchange, and promissory notes; that the defendant in the course of its business required a commodity, known to the fruit trade as "shook" for the purpose of supplying its customers and patrons with fruit boxes; that it was the custom of the defendant to

obtain this shook from the Lumber Products Limited, a customer of the plaintiff Bank; that the course of dealing between the Lumber Products Limited and the defendant was to forward cars of shook consigned to the defendant at Vernon and to pass through plaintiff Bank drafts which were discounted by the said Bank, said bills of exchange being at all times attached to and accompanied by bills of lading covering the respective cars of shook, which said cars of shook could not be obtained except upon acceptance of the draft in question by the defendant; that drafts of this nature had in fact been accepted by the defendant prior to the one in question in this action, some accepted in the name of the Company by Skinner, managing director, and by the secretary, Smithers, jointly, others by Skinner alone, and said drafts were paid in due course, with the exception of two signed by Skinner, and these were paid upon speedy judgment being rendered against the defendant Company without appeal; that the bill in question was duly drawn by the Lumber Products Limited on the defendant and discounted with the plaintiff, and that the plaintiff was at all times material holder in due course of the said bill, said bill of exchange was accepted on behalf of the defendant Company by J. H. Reader, a director of the said Company, who was as well their accountant and traffic manager; that at the time of the acceptance of this bill, N. F. Smithers, secretary-treasurer of the Company, was absent from the Province and by an informal arrangement made between Skinner, Smithers and Reader (a quorum of the directors), Reader was authorized to perform the duties of secretary-treasurer; that during the absence of Smithers bills of exchange were accepted by Reader on behalf of the Company and paid by the Company; that Reader accepted the bill of exchange in question with the knowledge of Skinner, managing director, and obtained the car of shook by reason of said acceptance, although Skinner, the managing director, denied this at the trial; that by articles of association of the Company, section 105 and section 106, subsections E and J, the directors have full power to determine who shall be appointed to sign acceptances on the Company's behalf; that the said bill of exchange was duly presented for

Judgment

MORRISON, J.

1921

Feb. 4.

BANK OF HAMILTON v. MUTUAL FRUIT CO.

payment and dishonoured by non-payment, and that the same has not been paid. It was further proved that when said drafts were returned unpaid, and when the secretary-treasurer wrote plaintiff that the lack of authority of Reader to accept was never raised, Skinner, managing director of the defendant, was called on behalf of the defendant and his evidence was very unsatisfactory and did not impress me as frank or candid, but he admitted that the defendant would not have refused to pay draft by reason of it being accepted by Reader alone if the commission account of the defendant against the Lumber Products Company Limited had been paid. It was further proven on the cross-examination of the said Skinner, during the absence of Smithers, that cheques and acceptances were signed by himself and Reader. Some had been signed by himself and Smithers. That on some cheques the names of two officers appeared, on some three, and possibly some cases only one.

It is contended, in behalf of the defendant, that the director Reader had no "actual" authority to accept the bill in question. By the articles of association the Company had power to confer the necessary authority upon Reader. There was no notice given the plaintiffs to the contrary nor was there anything in the course of the transaction to put the plaintiff on guard, even assuming that there was no such power, or that the defendant thought the power had not been delegated to Reader. Both parties proceeded on the footing that he had the power to accept the bill, and the defendant in consequence of his so accepting the bill obtained the goods which they were after and without which acceptance they could not then have secured them. There is a strong line of authority in support of the plaintiff's position, both in our own Courts and that of the Old Country, the very latest in the Courts of England being *Dey* v. *Pullinger Engineering Co.* (1920), 89 L.J., K.B. 1229, following particularly *In re Land Credit Company of Ireland (Limited)* (1869), 39 L.J., Ch. 27 at p. 32; 4 Chy. App. 460, and dissenting from *Premier Industrial Bank, Lim.* v. *J. & W. Crabtree, Lim.* (1908), 78 L.J., K.B. 103; (1909), 1 K.B. 106, and see *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382. The *ratio decidendi* of these cases is that,—

Judgment

"A holder in due course [which the plaintiff herein is] as a rule, cannot be expected to know what goes on in the company's board room; and if he has to take the risk of its turning out that the persons signing had no authority, and much more so if he has to prove that they had authority, people in business would be very shy in dealing in such bills": *Dey* v. *Pullinger Engineering Co., supra,* at p. 1230. Once establish that the Company is invested with the power to do that which is the subject-matter of the suit, then the plaintiff is not bound to see that the directors are acting lawfully in what they do. He is safe in so assuming or implying that the requisite authority had been delegated.

Judgment

Counsel for the plaintiff also raised the point, that, in any event, the defendant is now estopped from denying their liability, having by means of the acts of one of their directors and to the knowledge of the other, received the goods. To that submission, I assent. *Bernardin* v. *The Municipality of North Dufferin* (1891), 19 S.C.R. 581 at p. 593.

There will be judgment for the plaintiff as claimed.

Judgment for plaintiff.

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REX v. TELFORD

REX *EX REL.* CAMERON v. TELFORD.

Medicine—Practice of—Massage treatment—Turkish bath on premises—R.S.B.C. 1911, Cap. 155, Sec. 63.

The accused treated a patient for sciatica rheumatism in a room in which he kept a portable Turkish bath, by massage treatment and the use of acetic acid and olive oil, for which he charged a fee. He was convicted on a charge of unlawfully practising medicine under section 63 of the Medical Act. On appeal to the County Court, it was held that massage by the proprietor of a bath-house is not a breach of the Medical Act, and the conviction was quashed.

Held, on appeal, reversing the decision of CAYLEY, Co. J. (MARTIN and EBERTS, JJ.A. dissenting), that to come within the exception in the proviso to section 63 of the Medical Act the primary object of the establishment must be the bath and the treatment incidental thereto: the conditions here do not fall within the exception, and the appeal should be allowed.

APPEAL by the Crown from the decision of CAYLEY, Co. J., of the 25th of October, 1920, quashing a conviction of the accused under section 63 of the Medical Act. Telford occupied rooms in which he had installed a portable Turkish bath, and in addition to taking the baths, patients received massage treatment. The informant interviewed Telford. He asked for a treatment and was directed to disrobe. He was laid on a cot and accused applied a sponge tied to a clothes-pin to his back and hip, rubbing the skin into a glow, using at the same time acetic acid and olive oil. The same treatment was applied to the front of his body. He was charged $3. On an information of having practised medicine in contravention of the Medical Act, Telford was fined $50 and costs.

Statement

The appeal was argued at Victoria on the 4th of January, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Craig, K.C., for appellant: In this case the man had a lame hip. He did not use the portable Turkish bath. The treatment he received comes within the definition of practising medicine. He is properly convicted under section 63 of the Act. There is no evidence to shew the treatment was in the

Argument

ordinary course of the proprietor of a bath. The Act includes massage treatment and cannot be practised outside the Act.

R. L. Maitland, for respondent: He gave the informant a massage. This is not practising medicine. It does not come within the term "medical treatment."

Craig, in reply.

Cur. adv. vult.

1st March, 1921.

MACDONALD, C.J.A.: I agree in the result arrived at by my brother GALLIHER and in the reasons stated by him.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion the learned judge appealed from took the correct view in quashing the conviction herein, whereby the respondent was found guilty of an infraction of section 63 of the Medical Act, Cap. 155, R.S.B.C. 1911, though the beneficial massage treatment he was giving is something, as the evidence shews beyond question, that no medical practitioner registered under that Act would give to any one in need of it. But whatever may be said on this point, the learned judge appealed from has found that the accused comes within that exception in said section 63 which relates to a "proprietor of such bath," in that the accused had a bath in a cupboard, fitted up as a portable Turkish bath, which he used upon occasion as required in connection with his massage business, though it was not used upon the occasion in question. The section is inartistically and inconsequently drawn, and the meaning of "such bath" is obscure because the antecedent reference is not a bath as a thing, but to a "bath attendant" as a person, but in the endeavour to give a reasonable construction to the language, I am of the opinion that the ordinary use of "such bath" by its proprietor as part of his business of massage constitutes him a "proprietor" within the meaning of the Act, otherwise I must be prepared to hold that, for example, the proprietor of a large Turkish bath would infringe this Medical Act by having a servant in attendance to give his patrons that massage rubbing which is ordinarily given in such places, which, with all due respect to contrary opinions (if any) would be as preposterous as it would be detrimental to public health and welfare. And it is obvious that such proprietor would not

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forfeit his exemption if some of his patrons declined to be massaged.

GALLIHER, J.A.: In my opinion, what was done here constituted an offence under the Medical Act. What gives me some trouble is whether the accused comes within the exception in the proviso to section 63 of the Act. In looking at the proviso, where the words "proprietor of such bath" are used, what would at once suggest itself to one's mind would be that the reference was to the proprietor of a regular bath-house where a person would go for a Turkish or electric bath; and the administration of a massage in such a place was intended to be protected under the Act. Persons often go to such places to have a bath, and in addition take a massage, not necessarily to alleviate any disease or infirmity, but for the tonic (if I might use the word) such manipulation gives the system. But even if such massage is for the purpose of the treatment of some bodily infirmity or disease, the proviso protects the proprietor or attendant. I do not think any one would contend that the conditions here fall within what is set out above, but it is contended that the words "proprietor of a bath," which may or may not be used in conjunction with a massage, include not only what would be recognized as a bath-house, but also a place or room as here, where one bath was kept in a closet and at times (though not in the present instance) used in connection with giving a massage. Strictly speaking, the term proprietor of a bath, or bath-house, for that matter, would apply to a person having only one room and one bath equally with a person having several rooms and several baths, but the primary object of such an establishment would be the bath and the treatment incidental, while here the primary object is the treatment or manipulation, and the bath, generally speaking, an incident, and in the case before us not even that. We must look at the Act to gather the intention, and, in my opinion, a case such as the present is not within the proviso. I would allow the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The appeal, in my opinion, should succeed. There can be no question that there was an infraction of the Medical Act (Cap. 155, R.S.B.C. 1911) within the mean-

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ing of section 63 of the Act. The attempt, however, is to evade liability upon the ground, and as held by the Court below, that the defendant is the proprietor of a bath. With great respect to the learned judge, I cannot come to the same conclusion. The proviso added to section 63 reads as follows:

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

It is clear that there is no evidence whatever shewing that the defendant was either a bath attendant or the proprietor of a bath, nor can it be said that his ordinary calling was that of a bath attendant or the proprietor of a bath. Further, even that would not excuse if what was done constituted the practice of medicine. All that is safeguarded by the proviso in relation to the facts of the present case is the ordinary calling of a bath attendant or the proprietor of a bath. There is an entire absence of evidence that the defendant was pursuing either of such callings, *i.e.,* bath attendant or bath proprietor. The attempted evasion of the Act is too colourable. The mere fact that there was upon the premises a bath, if what was there could really be termed such, constituted a mere device profitless to accord immunity. There is not a scintilla of evidence that there was the exercise of either of the ordinary callings of bath attendant or bath proprietor, but even were it so, neither of the callings could cloak the practice of medicine, and here that has been established. It would not even appear that the defendant seriously advanced the proposition that because of the fact that there was this so-called bath on the premises that he was immune from prosecution. It would look to me that it was a very belated defence. Now, is it any defence at all? The learned editor of the Solicitors' Journal, Vol. 61, at p. 743 said:

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"The question of law thus raised is not easy to state in clear and simple language. Perhaps the best way of putting it is to say that one is entitled to adopt straightforwardly any permissible legal means of avoiding liability to a public burden, [there it was a question of taxes] but not entitled to adopt a mere colourable trick for the purpose of evading the burden. But the borderline between permissible avoidance and forbidden evasion is obviously hard to draw. The best and ablest discussion of the difficulty is to be found in the leading case of *Attorney-General* v. *Duke of Richmond & Gordon* (1909), A.C. 466."

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It is clear, upon the facts of the present case, that the "bath" affords no defence, nor does it lend any support to immunity. That which was proved in the present case constituted an infraction of section 63 of the Act, which, without the proviso above set forth, reads as follows:

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

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

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

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

I would refer to the judgment of CREASE, J. in *Regina* v. *Barnfield* (1895), 4 B.C. 305 at pp. 308-10, upon the point as to what constitutes the practising of medicine. The decision was based upon the then existent statute, not so comprehensive, or specific in nature, as the present Act. The judgment is instructive, and points out that the Medical Act was passed in the "public interest."

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It certainly would be inimical to the public interest and dangerous to life and limb that unqualified persons should be permitted to practise medicine under the guise of other lawful avocations. The Legislature has safeguarded the public, and rightly, from this great danger. It is not difficult to draw the line of demarcation, and no injustice results. That line of demarcation has been overstepped by the defendant in the present case.

It follows, therefore, for the foregoing reasons, that my opinion is that the appeal should be allowed and the conviction restored.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal allowed, Martin and Eberts, JJ.A. dissenting.

Solicitors for appellant: *Craig & Parkes.*
Solicitors for respondent: *Banton & Payne.*

BREWER v. CALORI.

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BREWER v. CALORI

Negligence—Gratuitous bailee—Innkeeper—Loss of goods—Liability—R.S.B.C. 1911, Cap. 109.

The plaintiff had been a guest for some time at a hotel, and on leaving, after paying his bill, was allowed to leave a trunk that was locked, and taken to the baggage-room in the basement, saying that it would be sent for. This room was kept locked except when opened for moving luggage in and out in the course of the hotel business. On his return two months later the plaintiff, on opening his trunk, found that the contents had been stolen, examination shewing that the hinges had been tampered with. The plaintiff recovered in an action for the value of the goods.

Held, on appeal, reversing the decision of CAYLEY, Co. J., that the relationship of hotelkeeper and guest did not exist, the hotelkeeper being merely a gratuitous bailee, and was only bound to exercise that degree of care which a reasonably prudent man would exercise with respect to his own property of a like description, that on the evidence the hotel keeper had satisfied that onus, and the appeal should be allowed, MACDONALD, C.J.A. dissenting, on the ground that the hotelkeeper had not exercised sufficient care.

APPEAL by defendant from the decision of CAYLEY, Co. J., in an action tried by him at Vancouver on the 7th of January, 1921, to recover the value of certain wearing apparel that was taken from his trunk while in the baggage-room of a hotel, the defendant being the proprietor. The facts appear in the judgment of the learned trial judge. Statement

E. A. Burnett, for plaintiff.
O'Dell, for defendant.

13th January, 1921.

CAYLEY, Co. J.: The defendant is the proprietor of a hotel at Vancouver; the plaintiff was a guest about to leave.

The plaintiff sues for the value of wearing apparel left in his trunk, which had been deposited by him for safe-keeping in the baggage-room of the hotel. The evidence given by the plaintiff was that, on leaving, he asked the hotel clerk if he might leave his trunk, with the clothing in it, until he was ready to send for it. The clerk consented and, with the elevator boy and the plaintiff, took the trunk down to the basement and put it in the CAYLEY, CO. J.

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baggage-room of the hotel. This baggage-room was kept locked, and the key was kept on a hook in the office of the hotel. It was contended by the defendant that, having paid his bill, he was no longer a guest and, therefore, could not take advantage of the Innkeepers Act. I think that a guest is a guest, after he has paid his bill as well as before, so long as he has not taken his departure. When once he has taken his departure he has ceased to be a guest, and then the position is changed from that of innkeeper and guest to that of bailee and bailor. I do not think the plaintiff was a guest after he had left the hotel, and to leave the trunk in charge of the innkeeper was mere accommodation. The innkeeper became, however, something more than a gratuitous bailee. Hotelkeepers take charge of the goods of departing guests because it is profitable for them to accommodate their patrons.

Two months later the plaintiff returned to the hotel and asked for his trunk. The trunk was brought up from the baggage-room to the plaintiff's room, and when opened the plaintiff discovered that the hinges had been forced and a fur-lined coat, fur cap, suit of clothes, rain-coat and other articles had been abstracted, and put his loss at $250, and sues for that amount.

CAYLEY, CO. J.

The case is rather near the border line, and the authorities might well leave some doubt as to whether the defendant was liable for anything more than gross negligence. However, in a case almost exactly similar, it was decided by the Full Court of Alberta some years ago, *viz.*, *Sutherland* v. *Bell & Schiesel* (1911), 3 Alta. L.R. 497; 18 W.L.R. 521, that the hotel-keeper is liable. There, according to the head-note, the plaintiff, who was a guest at the defendant's hotel, on leaving, left a valise and contents in charge of the clerk to keep for him till his return. Upon the plaintiff's return the valise could not be found, and the plaintiff sued for its value and the value of the contents. Four judges sat upon this case, which was an appeal from the judgment of the District Court, which had dismissed the plaintiff's claim. The judgment was delivered by Beck, J., allowing the plaintiff's claim and reversing the District Court. I follow that decision in the present case. I think it was the duty of the defendant to take the same care of

the trunk that a reasonably prudent and careful man might fairly be expected to take of his own property of a like description. I think it was within the authority of the hotel clerk to take charge of the baggage and that the defendant was bound by the acts of his clerk. The evidence that other baggage was stored in the baggage-room shews that it was customary to take charge of baggage, and I think the onus was upon the defendant to shew that he had taken the reasonable care which he was bound to take. I do not consider that reasonable care was exercised. The fact that a trunk in the baggage-room should be forced and contents abstracted without the hotelkeeper being aware shews a want of care, and that the plaintiff must recover.

The amount claimed for damages is larger, I think, than the plaintiff is able to shew in the evidence. He paid $75 for the coat in 1914, $8 or $10 for the cap in 1917, $15 or $20 in 1917 for the clothes, and $10 to $15 for the rain-coat. He claimed that the price of furs had increased since then, but he produced no evidence to shew it, merely making a general statement to that effect. Against that, there is wear and tear. If we cut the plaintiff's claim in two, I think we will reach the proper amount as near as possible.

CAYLEY, CO. J.

Judgment will be given for $125.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 14th of March, 1921, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

O'Dell, for appellant: After the plaintiff left, the relationship of inn-keeper and guest no longer existed, so the Act does not apply. It was simply a gratuitous bailment and he would be liable only for gross negligence. A case precisely the same is *Palin* v. *Reid* (1884), 10 A.R. 63. The facts are not the same in *Sutherland* v. *Bell and Schiesel* (1911), 3 Alta. L.R. 497; 18 W.L.R. 521.

Argument

Hossie, for respondent: The *Palin* case can be distinguished, as there was notice that a cheque must be obtained for goods left at the inn. As between innkeeper and guest see *Day* v. *Bather* (1863), 2 H. & C. 14; Halsbury's Laws of England, Vol. 1, p. 545. The consideration for keeping the trunk is

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defendant's future trade by accommodating guests, which takes the case out of the category of gratuitous bailee: see *Ultzen* v. *Nicols* (1894), 1 Q.B. 92. As to keeping articles as though his own see *Doorman* v. *Jenkins* (1834), 2 A. & E. 256. As to gratuitous bailee see *Kettle* v. *Bromsall* (1738), Willes 118; Beal on Bailments, 59.

O'Dell, in reply.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: In my opinion, the appeal should be dismissed. I think the hotelkeeper in this case was a gratuitous bailee and only responsible for that want of care; that is to say, was only bound to exercise that care which a reasonably prudent man would exercise with respect to his own property. Putting it, therefore, upon that basis, which is the most favourable to the hotelkeeper, the question arises: Had he satisfied the onus which the law puts upon him, by shewing that he took such care? The failure to produce the goods puts that onus upon the hotelkeeper. He must shew that their disappearance was not caused by want of care on his part. Has he done so in this case? That is the whole point. The plaintiff, who had been a guest of the bailee, left his trunk at the hotel to be taken care of until sent for. He was told there was a baggage-room and he was taken there when the trunk was taken down; the door was unlocked, the trunk put in, and the door again locked and the key taken back to the office. I think that he had good reason to expect that the door would be kept locked, except when a servant of the defendant had occasion to go in or out. What is the evidence upon the point of its being kept locked? The evidence of the defendant's clerk is that "It was generally kept locked." That is the whole evidence upon that point. Is that sufficient to satisfy the onus? I am inclined to think that the onus has not been discharged, and I therefore agree with the judgment of the learned trial judge, who found negligence. There is perhaps something to be said in favour of Mr. *O'Dell's* submission that the judge proceeded upon a wrong principle, but I am not able to take that view.

At all events, he tried the question of fact and came to the conclusion that there was negligence. But apart from his finding altogether, if I were trying it myself upon that evi-

dence, I think I should have been driven to the same conclusion.

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GALLIHER, J.A.: I would allow the appeal. The case is one, in my opinion, of a gratuitous bailee. Under those circumstances there is not as high a duty cast upon him as if he were a bailee for hire, and the rules with regard to that are well known, and recited by myself this morning in this case, and also set out in the case of *Sutherland* v. *Bell and Schiesel* (1911), 3 Alta. L.R. 497. I do not take quite the same view as my brother the Chief Justice as to the nature of this evidence that was given. I think the defendant has met the point and has satisfied every onus that was upon him to shew that he was not negligent in taking care of this trunk. In every hotel in the hotel business there is a baggage-room of a like description, and I think you will find in every hotel, guests, sometimes while they are guests of the hotel, leave part of their baggage in this room, that they do not want to take up to their private room. Other baggage coming and going is taken in and out of this room; and guests, in departing, sometimes leave baggage behind that they propose to call for later, or send somebody for later. That is what took place here, and the plaintiff in this case was taken down; he was shewn this room; "This is where we keep such articles as it is desired to leave with us, and we take care of them in this way." True, he saw the room was locked after they put in the trunk and left it, and he was entitled to assume that it would, in a general way, be kept locked in the same way, except when somebody was either taking baggage in or taking baggage out. I do not see that the clerk's words that it was generally locked must be taken to mean that it was open at any great length of time at any one period at all. "Generally locked" might mean just exactly what it says—that it was locked at times at which it should be locked, and it was necessary in the transaction of the business that had to go on in that room in connection with the hotel that it should not be locked at certain other times.

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Such being the case, and, in my opinion, being a gratuitous bailee would not necessitiate that at all times the landlord had to be "on the job," or some servant of his, to see that nothing

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happened there. I think the onus has been discharged in this case, and therefore that the hotel man is not liable, and that the appeal should be allowed.

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MCPHILLIPS, J.A.: In my opinion, the appeal must succeed. I am clear that the relationship of hotelkeeper and guest was not present at all from the time this trunk was left with the hotelkeeper; therefore the highest form in which the case can be looked at is that of gratuitous bailee. Now, in defining the responsibility of gratuitous bailee, the text writers have found great complexity in the decisions, and I may say I do not think all the decisions can be reconciled. But perhaps that could be said with regard to other principles of the law. After all, law is not logical, and you must give attention to the special facts of each case.

The facts of this case are as follows: The trunk was put in a room, not separated from other articles of like character, but with other articles of like character, and certain care was taken in regard to the custody of these articles, and that was made known to the plaintiff. He knew that, and following what my brother GALLIHER has said, in the running of a hotel, the same as in any other business, there must be a certain amount of coming and going, and there may have been times when in the ordinary course of things the room might be left unlocked, although generally locked.

Now, there was a suggestion made, which I deprecated at the time, which I always do when counsel sometimes, without thought, overstep their privilege. A suggestion of wrongdoing, *i.e.*, theft by the elevator boy, should not have been even hinted at without necessity, and certainly where there is not a scintilla of evidence. Why should the elevator boy be in any way connected with the matter? That would not even throw the responsibility on the hotelkeeper unless he was aware that he had a dishonest servant.

I intend to conclude my judgment by reading some extracts from *Giblin* v. *M'Mullen* (1869), 38 L.J., P.C. 25. The decisions of the Privy Council are absolutely binding upon this Court. This case is a very apt one as applied to the facts of the present case. It was a case of a customer depositing with

his bankers securities for safe-keeping. The securities were stolen by a clerk. It was held that the loss was not occasioned by their gross negligence. It was held that there was no evidence of negligence to render the bankers liable to the appellant for the loss. This appeal resolves itself into a question of law, because I do not find that the learned judge in the Court below had sufficient evidence upon which he could find negligence. That being so, it is a question of law. Lord Chelmsford said at p. 28:

"Did the plaintiff, then, give any evidence of the bank having been guilty of that degree of negligence which renders a gratuitous bailee liable for the loss of property deposited with him? From the time of Lord Holt's celebrated judgment in *Coggs* v. *Bernard* [(1703)], 1 Sm. L.C. [12th Ed., 191], in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called 'gross negligence.'"

In connection with this statement, it is rather interesting to note some of the later decisions to the effect that there is no difference in the degree of negligence. However, we find Lord Chelmsford, here in a decision of the Privy Council, laying stress upon it.

Later, he refers to Mr. Justice Crompton, who, in delivering the opinion of the Court, said (this was in another case):

"It is said that there may be difficulty in defining what gross negligence is; but I agree in the remark of the Lord Chief Baron in the Court below, when he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them,' and he added, 'For all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill and diligence, is gross negligence.'"

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Further, from Mr. Justice Willes:

"'The use of the term "gross negligence" is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailee, and it is more correct and scientific to define the degrees of care than the degrees of negligence.' The epithet 'gross' is certainly not without its significance. The negligence for which according to Lord Holt, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default."

Where was the culpable default in this case? I can see none at all. Then a little later Lord Chelmsford says (p. 29):

"It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit entrusted to

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them, and that the negligence for which alone they could be made liable, would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs."

I see no indication in the present case of that want of care. Then, finally, Lord Chelmsford says (p. 30):

"The defendant's evidence added to the plaintiff's case the important fact that in the strong room in which the plaintiff's debentures were kept, there were, besides the boxes of other customers, bills, securities and specie, the property of the bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description."

Now, would not this hotelkeeper be taking proper care if he looked after this trunk in the same way as he looked after his own trunks?

"This was in effect a question left to the jury in *Doorman* v. *Jenkins* [(1834)], 2 A. & E. 256, where Lord Denman told them that 'it did not follow from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own, and that the fact relied upon was no answer to the action if they believed that the loss occurred from gross negligence.' No one can fairly say that the means employed for the protection of the property of the bank and of the plaintiff were not such as any reasonable man might properly have considered amply sufficient. But the appellant's counsel insisted that the fact appearing for the first time in the defendant's case, that the bank, after Fletcher had abused the confidence reposed in him, had introduced additional precautions to prevent the recurrence of a similar act of dishonesty, amounting to an admission that their former safeguards were not such as prudent men ought to have been satisfied with. This argument goes the length of contending that if a gratuitous depositary does not multiply his precautions so as not to omit anything which can make the loss of property entrusted to him next to impossible, he is guilty of gross negligence."

MCPHILLIPS, J.A.

It seems to me that this language of Lord Chelmsford is very apt, and may be effectively applied to this particular case. Upon the whole, I am of the opinion that no case was made out, and in consequence the appeal should be allowed.

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

Solicitor for appellant: *Frank A. Jackson.*
Solicitors for respondent: *Daykin & Burnett.*

BENNETT v. THE KENT PIANO COMPANY LIMITED AND BOURQUE.

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1921

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BENNETT v. KENT PIANO CO.

Damages—Forcible entry—Trespass—Assault.

The plaintiff, a music teacher, purchased a piano for $610 at an auction, and brought it to her studio. Eight years previously the defendant Company sold the piano to A. on a lien note, and after being with A. for some years was taken from his house and eventually came into the hands of the auctioneer. Shortly after the plaintiff purchased, there being still due $365 on the lien note, a bailiff, under a warrant issued by the defendant Company, proceeded to the plaintiff's studio and, after being refused entry, forced his way in while a pupil was entering the open door. He then forcibly moved the plaintiff away from the piano, and with his men took the piano away. In an action for forcible entry, trespass and personal injuries, judgment was given for plaintiff for $800 damages.

Held, on appeal, affirming the decision of GRANT, Co. J. (GALLIHER, J.A. dissenting, on the ground that the damages were excessive), that there being no contractual relationship between the parties, the forcible entry was illegal, and the damages given by the trial judge were, in the circumstances, justifiable.

Hemmings and Wife v. *Stoke Poges Golf Club* (1920), 1 K.B. 720 distinguished.

APPEAL by defendants from the decision of GRANT, Co. J., of the 4th of February, 1921, in an action for damages for forcible entry and unlawful trespass. The bailiff, acting on instructions of the Kent Piano Company, went into the plaintiff's studio for the purpose of seizing the piano. The defendant Company had sold the piano to one Arnold on a lien note, and there was still due under the lien note $365. The piano had been taken from Arnold's house by a Mrs. Willbond after it had been with Mr. Arnold for some years, and eventually got in the hands of one Ross, an auctioneer. The plaintiff went to an auction sale at Ross's auction rooms and purchased the piano by auction for $610, which sum she paid, and brought the piano to her studio. After she had had it three weeks the defendant Bourque (the bailiff) one morning telephoned the plaintiff, "we intended to seize the piano under a lien note," and in the afternoon he went to the sudio with men to carry the piano away. He knocked on the door and she (plaintiff) would not let him in. Then a student (Miss Alice Willbond)

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came, and as the plaintiff opened the door to let her in, the bailiff forced his way in, and after he got in she slammed the door, not letting the other men in. Then she got on the piano, and she claimed that the bailiff, in taking her away from the piano, handled her roughly. He then let his men in and took the piano away. The trial judge allowed $800 damages.

Statement

The appeal was argued at Vancouver on the 14th and 15th of March, 1921, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Argument

S. S. Taylor, K.C. (*J. A. MacInnes,* with him), for appellants: Under the statute law of Canada this piano is the property of the Kent Piano Company. When our property is in their hands we have a right to get it and use such force as is necessary. The cases of *Beddall* v. *Maitland* (1881), 17 Ch. D. 174; *Newton* v. *Harland* (1840), 1 Man. & G. 644, were overruled by *Hemmings and Wife* v. *Stoke Poges Golf Club* (1920), 1 K.B. 720; see also *Blades* v. *Higgs* (1861), 10 C.B. (N.S.) 713; (1865), 11 H.L. Cas. 621. I can be punished for a breach of the peace but I cannot be sued for damages: see *Traders Bank* v. *G. & J. Brown Manufacturing Co.* (1889), 18 Ont. 430; *Patrick* v. *Colerick* (1838), 3 M. & W. 483; Halsbury's Laws of England, Vol. 9, p. 475, pars. 938-9. The learned judge proceeded on a wrong basis and the damages are excessive: see also *Sheard* v. *Horan* (1899), 30 Ont. 618; *Bell* v. *Cross et al.* (1917), 3 W.W.R. 242; *Hill* v. *Stait* (1913), 5 W.W.R. 225.

R. M. Macdonald, for respondent: The question is whether the action of the defendants was justified in law, and if not, the question of damages arises. There is no law allowing one to enter on the property of another for his property: see *Hemmings and Wife* v. *Stoke Poges Golf Club* (1920), 1 K.B. 720 at p. 734. The excessive force constituted an independent wrong. His duty was to take replevin proceedings: see Tremeear's Criminal Code, 2nd Ed., 43. The wrongful entry covers all the wrongful acts; in pursuance of it see *Anthony* v. *Haney* (1832), 8 Bing. 186. It was eight years before that the piano was sold to Arnold on a lien note: see also *Cameron* v. *Hunter*

et al. (1873), 34 U.C.Q.B. 121. If the entry is unlawful, damages are justified. The plaintiff is a music teacher.

MacInnes, in reply, referred to Hawkins's Pleas of the Crown, 8th Ed., Vol. 1, p. 717.

MACDONALD, C.J.A.: I would dismiss the appeal. I am quite satisfied that the trespass which was committed by the bailiff was unwarranted. It was a forcible entry into the house of the plaintiff, and the defendants have only this excuse, put forward by their counsel, that the piano belonged to the defendant Company, and therefore, the defendants had a right to make a forcible entry into the house of the plaintiff for the recovery of the possession of it. Now, there is no question of a right given by virtue of a contract between the parties, because, while the piano was sold under what is called a lien note, the plaintiff was no party to that transaction. The original buyer had parted with possession. The piano was sold to the plaintiff at an auction room. She knew nothing at all about the bill of sale or lien note, except what the law imputed to her from registration of it. So we have here a case of the defendants, without any contractual right at all, forcibly entering the room of this plaintiff.

Now, a recent case in the Court of Appeal in England, *Hemmings and Wife* v. *Stoke Poges Golf Club* (1920), 1 K.B. 720, was relied upon by Mr. *Taylor* as having overruled some previous cases, such as *Beddall* v. *Maitland* (1881), 17 Ch. D. 174, and *Newton* v. *Harland* (1840), 1 Man. & G. 644, and having established what was practically a new rule in cases of this kind. While I have had no opportunity of thoroughly examining that case, I have had sufficient to satisfy myself that all that it decides is this, that a landlord, the owner of property, may make an entry upon his property, a forcible entry if necessary, for the purpose of taking possession. Having got possession, he may expel the overholding tenant, or trespasser; he may use sufficient force to do that. The prior decisions are partially overruled by this decision. It was therefore thought that while such an entry might be made by the owner of the property, still he had no right to use force to expel the trespasser. That is the extent to which a change has been made in

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the law by *Hemmings and Wife* v. *Stoke Poges Golf Club.* Now, I am not very clear, and I do not find it quite necessary, in view of the language used by the County Court judge, to decide as to whether or not he would be entitled to allow the plaintiff damages for the assault committed by the bailiff when he attempted to take the piano against her resistance, after he had obtained entry into the room. What the learned judge said with regard to his grounds for assessing the damages at $800, I think relieves me from the necessity of considering that question. It was the indignity, the humiliation of the proceedings, which tempted the learned judge to award the punitive damages, or exemplary damages, which have been awarded in this case; and apparently the humiliation to which the plaintiff had been subjected, as it occurred to his Honour's mind, was the open and practically public forcible entry into the plaintiff's room and the injury done her in making it. An officer of the law, a deputy sheriff, acting as bailiff, came there, camped outside the door with four or five men until he got an opportunity to break in. The indignity of that was, it seems to me, the reason why the learned judge thought he ought to award very substantial damages, and I think he had a right to award such substantial damages.

MACDONALD, C.J.A.

Special damages have not been proven here, except the doctor's fee, which is a very small one, and therefore we are not very much concerned with it, but what is claimed, what is awarded, is general damages for a tort, and under the circumstances of the case, I cannot say too much was awarded. When she asked Mr. Kent for a statement so that she might look into it, apparently with the purpose of doing the right thing, it was promised her, but an hour or two afterwards, without warning to her, the bailiff was sent to take away the piano. Now, these were circumstances of aggravation which the learned judge had the right to consider when he had under consideration punitive or exemplary damages. Therefore, looking at all these circumstances, I think the Court cannot properly say that the amount awarded was excessive, so excessive as to entitle the Court to order a new trial, or to reduce the damages. Courts of Appeal are loath to interfere with the discretion of the trial tribunal,

whether it be a judge or jury, in respect of the amount of damages awarded.

GALLIHER, J.A.: I would allow the appeal and grant a new trial. I will not discuss it at any length, because the majority of the Court are of a different opinion. But I would just point out this: The trial judge has based his idea of damages entirely, or almost entirely, on the question of the humiliation occasioned by what took place. Well, that is true, I grant you. A person in their home has a right to preserve that home as against trespassers, and a high-spirited person may be led to oppose parties coming in in the way they came in here. But I cannot lose sight of the fact, on the other hand, that considerable of the humiliation which was brought about by this was occasioned by the very acts of the plaintiff. If damages are being awarded on the grounds of humiliation, then the greater the humiliation, I presume, the greater the damages; and if you aggravate that humiliation by acts of your own, you are still increasing your damages by everything you do. I do not think this is exactly the right principle to proceed upon, and while I have every sympathy with the plaintiff in this case, in the invasion of her property rights and all that, still, in thinking over the whole circumstances of the case and the facts, assuming the property to be the property of the defendant, the Kent Piano Company, the learned trial judge has awarded what is, in my opinion, I must say, under all the circumstances, excessive damages, and I think it would be proper to allow the appeal and grant a new trial.

GALLIHER, J.A.

McPHILLIPS, J.A.: The appeal, in my opinion, cannot succeed. I may say that this case is one of those which the Courts favour where well grounded, as trespass often leads to breaches of the peace, and all such acts are a menace to well ordered society.

MCPHILLIPS, J.A.

Long ago Lord Chief Justice Holt, in a slander action, said (and the analogy is complete) the Courts look upon these actions with favour. Why? Because slander is liable to cause a breach of the peace, and so are acts of trespass liable to cause breach of the peace. Lives may be lost, and one of the cardinal

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and fundamental principles of English law is that an Englishman's house is his castle. Some say that this has been affected in some way by recent decisions, but I do not agree, as in Holt's time, so in our time, the Englishman's house is his castle.

This particular case has two aspects. It is in the same category as the case I referred to during the argument—*Ferguson* v. *Roblin* (1888), 17 Ont. 167. In that case, at p. 172, Mr. Justice MacMahon says:

> "The statement of claim alleges: 1. A trespass in entering the plaintiff's house in Toronto by the defendants on the 30th of November, 1886; and 2. An assault by the defendants on the plaintiff's wife on the same day, whereby she was injured and bruised."

Now, that case is exactly the same case as the one we have before us. There was an organ in question there, and the parties liable for the trespass went upon the premises and took the organ, and in doing so, injured the plaintiff's wife. It was held that there was responsibility for what was done, and when you look at the facts of the case, all that took place was a slight scuffle between Roblin and the wife, owing to the manner in which Roblin had forced his way into the house; and in that case, which went before a jury, $250 was allowed. Here we have this lady subjected to a number of indignities, besides the actual laying of hands upon her, and done by a man of great physical strength to a delicate woman. Very often men do not appreciate the extent of the injury they do. Even grasping a lady by the arm, as it is well known in the medical profession, may cause severe physical injury. There was, further, all the indignity in connection with the disturbance of this lady in the carrying on of her musical work, and disturbance and publicity to the pupils of the conservatory. It seems to me this is all pertinent matter in assessing the damages. I will, however, refer to the damages again.

MCPHILLIPS, J.A.

With regard to the case so strongly pressed by Mr. *Taylor,* I cannot, with deference, follow the line of reasoning contained therein and advanced by the learned counsel for the appellants. Here there was trespass to land; trespass as well to person. There is no defence at all established in this case. The deputy sheriff had absolutely no right to go upon the premises, let alone make a forcible entry thereon.

Then with regard to the trespass to the person, there is no sufficient answer to that. It was greater than necessary, so that you have the two cases of trespass, the trespass to the land and the trespass to the person. And when the trespass to the person was the exercise of more force than necessary—even if there was any doubt about the entry being a trespass, and if we concede it for the moment—then it became a trespass *ab initio*, wrong from the beginning, under the well-known principle of law that if you do a wrong thing, even at the conclusion, then you have done a wrong thing at the commencement, and Courts of justice are very particular about this, and properly impose damages for such illegal acts. It is an idle appeal when you consult the cases and apply the law to the facts of the present case.

Sir Frederick Pollock, in his work on Torts, 11th Ed., deals with the question of law here to be considered, and he states at p. 393:

"He may also enter on the first taker's land for the purpose of recapture if the taker has put the goods there; for they came there by the occupier's own wrong; but he cannot enter on a third person's land unless, it is said, the original taking was felonious, or perhaps, as it has been suggested, after the goods have been claimed and the occupier of the land has refused to deliver them."

Now, Sir Frederick Pollock was not very sure of his last statement, and added a foot-note, "*Anthony* v. *Haney* (1832), 8 Bing. 186. This seems doubtful."

MCPHILLIPS, J.A.

I think the case one for exemplary damages, and I do not think that the learned judge has transgressed in any way in his assessment of these damages. There was a wanton trespass to land and a wanton trespass to the person, and the plaintiff was entitled to exemplary damages.

I may say in conclusion that the Courts, after all, have to be looked to, and should be looked to, as the protectors of the people: they are to declare the law. All that the defendant company was entitled to in this case was the right to its property, and I do not think that really is in dispute. That right of property the Courts will safeguard, and the Courts have ample machinery with which to do it, but the wrong machinery was adopted in this case. The simple action of replevin would have got this piano, and there would have been no trespass or likelihood of

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committing a breach of the peace. When people go wrong and utilize wrong methods, it is impossible for them to come to Court and press with any chance of success the submission that the damages are excessive unless they are palpably so. The damages might well have been much greater than the amount at which they were allowed by the learned judge. Overt and illegal acts cannot be indulged in with impunity.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellants: *MacInnes & Arnold.*
Solicitor for respondent: *A. I. Goodstone.*

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CANADIAN PACIFIC WINE COMPANY, LIMITED v. TULEY *ET AL.*

Constitutional law—Prohibition Act—Summary Convictions Act—Powers of local Legislature—Trespass—Seizure—B.C. Stats. 1916, Cap. 49; 1919, Cap. 69.

The defendants, police officers, under the authority of section 48 of the Prohibition Act entered the liquor export warehouse of the plaintiff Company and without the authority of a search warrant seized the liquor and carried away the money and books, subsequently, on a charge of unlawfully keeping liquor, the plaintiff Company was convicted, fined, and the stock of liquor confiscated. In an action to replevy the goods, money, and stock of liquor it was held that notwithstanding sections 19 and 57 of the Act the police officers had the right to search export warehouses under section 48 and although they could not legally seize and carry away money and books without the authority of a search warrant their having done so did not make them trespassers *ab initio* and in any case the magistrate had jurisdiction under section 60 to declare confiscation of the liquor, and it was further held that it was no defence to the recovery of the money unlawfully taken that it was given by the police authorities to the person who illegally bought the liquor from the plaintiffs with a view to their conviction.

Held, on appeal, affirming the decision of MURPHY, J., that the British Columbia Prohibition Act and the Summary Convictions Act are *intra vires* of the Provincial Legislature and that the judgment below should be sustained.

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Statement

APPEAL by plaintiff from the decision of MURPHY, J. in an action of replevin to recover a stock of liquor, valued at $230,000, wrongfully taken from the plaintiff and detained by the defendants, tried by him at Vancouver on the 24th and 30th of November and the 3rd of December, 1920. In July, 1920, the defendants entered the plaintiff Company's premises and seized the liquor in question. The defendant Tuley then laid an information against said Company for unlawfully keeping for sale intoxicating liquor in contravention of the provisions of the British Columbia Prohibition Act, and in August following, the Company was convicted by the magistrate at Vancouver, fined $1,000, and the liquors were declared forfeited to His Majesty. The plaintiff raised the question of the validity of the Prohibition Act and of the Summary Convictions Act.

Wilson, K.C., and *Arnold*, for plaintiff.

S. S. Taylor, K.C., and *R. P. Stockton*, for defendants.

10th December, 1920.

MURPHY, J.: Counsel for plaintiff desired to raise the points that certain provisions of the British Columbia Prohibition Act and the Summary Convictions Act are *ultra vires* of the Provincial Legislature. As both questions have been passed upon by the Court of Appeal adversely to his contention, I do not think them open to consideration by me. All rights of counsel to raise these matters before any higher tribunal are, of course, reserved to him, if such reservation be necessary.

MURPHY, J.

The main question involved is the validity of the confiscation of the liquor decreed by the police magistrate pursuant to section 50 of the Prohibition Act. Mr. *Wilson* argues that by reason of sections 19 and 57 of said Act, the provisions of section 48, under which steps were taken that resulted eventually in the order for confiscation, do not apply. I cannot agree. The provisions of section 48 are in the widest terms, and there is nothing in either section 19 or section 57 excluding the right of entry to search therein provided.

Then it is said, even if the entry was lawful, defendants became trespassers *ab initio* because they seized and carried

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away certain money and books without the authority of a search warrant. Admittedly they had no search warrant, and I can find no authority in the Prohibition Act for these seizures. I am of the opinion they were illegal. But I do not think this makes defendants trespassers *ab initio*. The law as to this is thus laid down by Littledale, J. in *Smith* v. *Egginton* (1837), 7 A. & E. 167 at p. 176. The general rule is in the *Six Carpenters' Case* (1610), 4 Co. Rep. 432; 1 Sm. L.C., 12th Ed., 145. When there is an authority given by law for doing an act, then an abuse may turn the act into a trespass *ab initio*. But that rule does not apply here. The rule is said to rest upon this, that "the subsequent illegality shews the party to have contemplated an illegality all along so that the whole becomes a trespass." It is obvious on the facts here, I think, that no such intention can be imputed to the defendants. But even if defendants are trespassers *ab initio* they are justifying here, not under the provisions of the Prohibition Act authorizing entry and seizure, but under a judgment of the police magistrate. No authority has been cited to me to the effect that even granted the officers were trespassers *ab initio,* that fact ousts the jurisdiction of the magistrate. The case of *Martinello and Co.* v. *McCormick and Muggah* (1919), 59 S.C.R. 394, merely decides that the provisions of the Nova Scotia Temperance Act do not apply to

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the Crown in right of the Dominion acting as a common carrier, and that if they purported to do so they would be *ultra vires*. The magistrate's judgment stands unimpeached by plaintiff, and is, in my opinion, a complete answer to this phase of the case. If I am correct, the action, I think, fails in so far as it is based on the confiscation of the liquor, since that was done regularly, under the provisions of said section 50, or if not regularly, that question is not and cannot be raised in these proceedings.

It also fails in reference to the books in question here, since they were taken under a search warrant properly issued so far as appears under the provisions of the Summary Convictions Act.

But I think plaintiff is entitled to succeed as to the $60 taken

and retained. It is argued for the defence that this plea is tainted with illegality and therefore will not be entertained by the Court, but nothing illegal appears in plaintiff's case. The money was in their safe and was admittedly taken and retained by defendants. The defendants say it was received by plaintiff as payment of an illegal sale of liquor. The question of illegality is thus first raised by defendants, not by plaintiff. It cannot, I think, be the law that anyone gaining access to such money, even if such access be legal, has a right to take it and retain it.

Then it is said that property in such money never passed to plaintiff because it was money given by the police authorities to a person for the purpose of his buying illegally liquor from plaintiff, with a view to its conviction. But the argument, I think, refutes itself. The conviction is based on a sale in which this money was a consideration, and therefore the property in it must have passed to the plaintiff.

MURPHY, J.

There will be judgment for plaintiff for $60, with costs on the County Court scale applicable to that amount. The defendants are to have their costs on the issues on which they succeeded, taxed on the Supreme Court scale.

From this decision the plaintiff Company appealed. The appeal was argued at Victoria on the 17th and 18th of January, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Wilson, K.C., for appellant: We say there was a trespass *ab initio*. The liquor should be returned, and we are entitled to damages in respect of the seizure. There was no search warrant at the time of the seizure. I rely on the fact that the original entry was unlawful: see Addison on Torts, pp. 76 and 77; *Martinello and Co.* v. *McCormick and Muggah* (1919), 59 S.C.R. 394. Our liquor, under section 19 of the Prohibition Act, was immune from seizure, as it was in possession of the Crown. It was an illegal seizure; an action of tort will lie. If the entry was lawful, then they abused their right of entry, which makes the trespass *ab initio*. We sold two cases of liquor, but we are protected by section 19 of the Act, which

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expressly allows the keeping of liquor. For the offence of which we are charged there is a penalty of $50 only. This is an isolated transaction of selling two bottles. Section 48 only gives the right to enter and search, but not to seize. Here a grave injustice has been done: see *Ormerod* v. *Todmorden Mill Co.* (1882), 8 Q.B.D. 664. On the question of evidence of opinion see *Reg.* v. *Winder* (1900), 2 Q.B. 666 at p. 673 *et seq.*; *Allcroft* v. *Lord Bishop of London* (1891), A.C. 666 at pp. 670, 674 and 678; *Re Geddes and Cochrane* (1901), 2 O.L.R. 145; *Viau* v. *The Queen* (1898), 29 S.C.R. 90. On the question of seizure and sale see *Attack* v. *Bramwell* (1863), 3 B. & S. 520; *Grunnell* v. *Welch* (1906), 2 K.B. 555; *Ash* v. *Dawnay* (1852), 8 Ex. 237; *Veuillette* v. *Regem* (1919), 58 S.C.R. 414; *Mitchell* v. *Tracey and Fielding, ib.* 640. As to the constitutionality of the Prohibition Act see *Gold Seal Ltd.* v. *Dominion Express Co.* (1920), 15 Alta. L.R. 377; 2 W.W.R. 761; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348. Instead of dealing with a local matter from a local standpoint they are dealing with a moral matter. Public wrongs and public morals are exclusively in the hands of the Dominion: see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at p. 835. This Act is founded on an attempt to improve public morals and is exclusively Dominion. On the question of trespass see *Hoover* v. *Craig and Hunter* (1885), 12 A.R. 72; *Rex* v. *Bulmer* (1920), 16 Alta. L.R. 15; 3 W.W.R. 762.

Argument

S. S. Taylor, K.C., for respondents: The books shew a large number of sales in Vancouver in addition to the two referred to. They rely on the *Six Carpenters' Case* (1610), 4 Co. Rep. 432; 1 Sm. L.C., 12th Ed., 145. If they enter legally for an illegal purpose they are trespassers *ab initio*, but that is not the case here: see *Tancred* v. *Leyland* (1851), 16 Q.B. 669. The seizure is covered by the conviction, from which they can appeal. They violated the law by selling in the Province. As to section 19 of the Prohibition Act being *ultra vires* see *Toronto Railway Company* v. *Toronto City* (1920), A.C.446. Any transaction beginning and ending within the Province is *intra vires* of the Provincial Legislature: see *Attorney-General*

for Ontario v. *Attorney-General for the Dominion* (1896), A.C. 348 at p. 368; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73 at p. 79. As to interference with trade and commerce see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at pp. 129 to 131; *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at p. 113; *Brewers and Malsters' Association of Ontario* v. *Attorney-General for Ontario* (1897), A.C. 231. The vilidity of the Summary Convictions Act was decided in *Rex* v. *Dahlin* (1919), 27 B.C. 564.

Wilson, in reply: A conviction by a magistrate is not *res judicata*: see Phipson on Evidence, 6th Ed., 683. We are a lawful company carrying on business under section 19.

Cur. adv. vult.

9th April, 1921.

MACDONALD, C.J.A.: This is an action of replevin to recover a stock of liquor belonging to the plaintiff, which in proceedings under the British Columbia Prohibition Act, before a magistrate, was declared to be forfeited to His Majesty. There were also certain books, documents, and a sum of money included in the relief claimed, but these are not in question in the appeal.

MACDONALD, C.J.A.

The validity of the forfeiture aforesaid was attacked in *certiorari* proceedings which failed before a judge of the Supreme Court because of a preliminary objection, which was sustained by him.

I agree with the reasons for judgment of Mr. Justice MURPHY, and cannot usefully add to what he has said. I would, therefore, dismiss the appeal.

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

MARTIN, J.A.

GALLIHER, J.A.: I would dismiss the appeal for the reasons given by the learned trial judge.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal is from a judgment of MURPHY, J., dismissing the action (save as to the sum of $60,

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with costs on the County Court scale, being an amount held to be the property of the appellant), which was one for the return of a stock of liquors of the value of about $230,000, and damages for claimed illegal seizure and confiscation thereof. The proceedings taken, for which the appellant is claiming the respondents are answerable for, were proceedings had and taken under and in the enforcement of the provisions of the British Columbia Prohibition Act (B.C. Stats. 1916, Cap. 49), and under the Summary Convictions Act (B.C. Stats. 1915, Cap. 59), and the appellant appeared and defended in the proceedings had and taken before the police magistrate in the City of Vancouver, and the appellant was convicted of a violation of the provisions of the British Columbia Prohibition Act and the stock of liquors was, in the conviction, declared to be forfeited to His Majesty.

Now this conviction and forfeiture still stand, no appeal being taken, either by way of appeal to the County Court or by way of a stated case to the Supreme Court. In the appeal to the County Court the hearing may be *de novo,* either party calling witnesses, and in the case stated, questions of error in law, or excess of jurisdiction. In view of this situation, the action would not appear to be maintainable; the conviction and forfeiture well support the respondents in all that they did. If an appeal had been taken, or a case stated, then there would follow an appeal to this Court in ordinary course.

MCPHILLIPS, J.A.

It is impossible to adopt the course of bringing an action and reagitating the merits in the Supreme Court and again on appeal in this Court. I cannot, with deference, at all agree with this contention, as advanced by the learned counsel for the appellant. But then it is contended that the British Columbia Prohibition Act is *ultra vires* legislation, and if that be so, that all the proceedings had and taken are illegal and void. Now as to the Act itself (British Columbia Prohibition Act), it in the main can be said to be analogous statute law to the Manitoba Liquor Act which was passed upon and upheld by their Lordships of the Privy Council in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1901), 71 L.J., P.C. 28. The particular sections of the Act that the

learned counsel for the appellant challenges, *viz.*, sections 19, 28 and 30 to 55, would seem to me to be wholly *intra vires* of the Provincial Legislature. Lord Macnaghten, in the *Manitoba* case, at p. 30 said:

"The controversy, therefore, seems to be narrowed to this one point: 'Is the subject of "the Liquor Act" a matter of a merely local nature in the Province' of Manitoba, and does the Liquor Act deal with it as such?"

That is the question here, and I cannot see that the Act in any way transgresses the limits of the jurisdiction of the Legislature of the Province of British Columbia. All proper provisions are to be found admitting of the full exercise of *bona fide* transactions in liquors between a person in the Province and a person in another Province, or in a foreign country, and it cannot be said that the Act invades the subject of "the regulation of trade and commerce," which is within the exclusive jurisdiction of the Dominion Parliament.

Then it was strenuously argued by the learned counsel for the appellant that the Act might be supported upon the ground of regulation of morals if confined to a small area, but not when applied to the whole Province, that in the case of the whole Province it would be a situation calling for legislation, and legislation only of the Parliament of Canada. Upon this point I would refer to *Quong-Wing* v. *Regem* (1914), 49 S.C.R. 440 (and it is to be noted that the Privy Council refused leave, 19th May, 1914, to appeal in that case). The Act under review was one containing a prohibition against the employment of white female labour in places of business and amusement kept or managed by Chinamen, and the Act was held to be *intra vires* of the Provincial Legislature. It is to be observed that in the British Columbia Prohibition Act this language is to be found in the preamble to the Act: "Whereas it is expedient to suppress the liquor traffic . . . . by prohibiting Provincial transactions in liquor," and unquestionably the intention of the Act was to cope with a condition that the Legislature in its wisdom deemed needed a drastic remedy, *i.e.*, a "local evil," and I would refer to what Mr. Justice Duff said in the *Quong-Wing* case, *supra*, at pp. 461-2.

MCPHILLIPS, J.A.

It would not appear to be at all doubtful, in view of all the judicial pronouncements upon analogous statute law, that the

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Act (British Columbia Prohibition Act) is *intra vires* of the Legislative Assembly of the Province of British Columbia.

In my opinion, it cannot be gainsaid that the Legislature has the power to wholly prohibit the sale of liquor within the Province, and that involves the right to control the possession of liquor within the Province, and I cannot see that the Act in any way transcends this power and jurisdiction. Even were it open to go into the facts of the case upon this appeal, the conviction and forfeiture could be supported. The Court would not be entitled, where there was evidence upon which the magistrate could proceed, to balance the evidence or to review the judgment of the magistrate upon the facts, and there was evidence admittedly of an illegal sale, and upon the facts it was a possible and reasonable inference that the stock of liquor was kept for illegal sale (being sold illegally it might well be said that it was held for illegal sale), and therefore the forfeiture was justifiable.

MCPHILLIPS, J.A.

The Summary Convictions Act was also challenged, and it was contended that it also was *ultra vires.* With deference, though, I cannot say it was very seriously argued. I find it only necessary to say that legislation of this nature has for many years stood upon the statute books of all the Provinces of Canada without challenge, and nothing was submitted that could be said to even require a second thought. The Act is plainly *intra vires,* and proper Provincial legislation.

I would dismiss the appeal.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *MacInnes & Arnold.*
Solicitors for respondents: *Taylor, Mayers & Company.*

A. R. WILLIAMS MACHINERY COMPANY v. THE BRITISH CROWN ASSURANCE CORPORATION LIMITED.

COURT OF APPEAL

1921

March 28.

A. R. WILLIAMS MACHINERY CO. v. BRITISH CROWN ASSURANCE CORPORATION

Insurance, fire — Statutory conditions — "Assigned without permission"— Interpretation—Executory contract of sale—Effect on insurance— Insurable interest—B.C. Stats. 1919, Cap. 37, Schedule, clause 12.

The plaintiff Company, on selling machinery for installation in a saw-mill for which it held a lien agreement, took out an insurance policy in the name of the owner, but payable to itself, to cover the amount due on the machinery. The owner of the saw-mill shortly after assigned for the benefit of his creditors. The creditors, on meeting, resolved to sell by tender. The highest bidder, on being advised that his tender was accepted, took out a policy in another company to cover the whole works, but two days later repudiated his tender. On the following day the mill was destroyed by fire. An action on the insurance policy was dismissed.

Held, on appeal, reversing the decision of RUGGLES, Co. J., that the acceptance of the tender created an executory contract of sale, which remained executory until after the fire; that the assignee still retained an interest in the property until after the fire and there was not an assignment within the meaning of clause 12 of the Schedule to the Fire-insurance Policy Act. The plaintiff was therefore entitled to recover on the policy.

APPEAL by plaintiff from the decision of RUGGLES, Co. J., of the 5th of January, 1921, in an action on an insurance policy. The plaintiff had sold machinery to one Beaton under a conditional sale agreement, which was installed in Beaton's saw-mill. It was arranged that either Beaton should take out a policy of insurance and assign it to the plaintiff to secure the machinery, or that the plaintiff should take one out. On the 14th of May, 1919, the plaintiff took out the policy in question in this action in the defendant Company. Beaton assigned for the benefit of his creditors on the 30th of May following to one Braden, no notice of which was given to the Insurance Company. A sale of the property by tender was decided upon at a meeting of the creditors on the 17th of June. Tenders were advertised for, and on the 10th of July, Messrs. Demask & Small were advised by the assignee that they had made the

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lowest tender and that it was accepted. Demask & Small immediately insured in another company, but on the 15th of July they repudiated their tender and refused to carry it out. On the 16th of July the property was destroyed by fire. The defendant Company pleaded that they received no notice of the sale by the assignee, that the property was insured in another company without notice, and that the building in which the machinery was installed was vacant for 30 days prior to the fire, of which they had received no notice. The action was dismissed.

The appeal was argued at Vancouver on the 24th and 29th of March, 1921, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

A. E. Bull, for appellant: In order to bring the case within clause 12 of the Schedule to the Fire-insurance Policy Act there must be a complete assignment of all interest: see *Wade* v. *Rochester German Fire Insurance Co.* (1911), 23 O.L.R. 635; *McQueen* v. *The Phœnix Mutual Fire Ins. Co.* (1880), 4 S.C.R. 660 at p. 676; *Sovereign Fire Ins. Co.* v. *Peters* (1886), 12 S.C.R. 33. The owner still has an insurable interest. We made a sale but there was not a complete assignment. There was $1,125 coming to us, and until we were paid we had an insurable interest: see *Trotter and Douglas* v. *Calgary Fire Insurance Co.* (1910), 3 Alta. L.R. 12. Beaton had not completed his sale, the sale having been repudiated: see *Keefer* v. *The Phœnix Insurance Co. of Hartford* (1901), 31 S.C.R. 144; *Gill* v. *The Canada Fire and Marine Ins. Co.* (1882), 1 Ont. 341; May on Insurance, 3rd Ed., p. 267, par. 267; Cameron's Fire Insurance, 405; *Bull* v. *North British Canadian Investment Co.* (1888), 15 A.R. 421. As to the other insurance, this was done by the contemplated purchasers and that could not affect our policy. The property was valued at more than the two policies.

S. S. Taylor, K.C., for respondent: The case is confined to the 12th clause of the Schedule to the Insurance Act. We say there was an assignment within the meaning of that condition: see *Citizens Insurance Company of Canada* v. *Parsons* (1881),

7 App. Cas. 96 at pp. 119-20; *Boutry* v. *North British & Mercantile Insurance Co.* (1918), 1 W.W.R. 704. The Williams Company stands in the shoes of Beaton, and must stand or fall as Beaton stands or falls. I say there was a bargain and sale and a change of possession: see *McQueen* v. *The Phœnix Mutual Fire Ins. Co.* (1880), 4 S.C.R. 660.

Bull, in reply: Braden had been getting lumber up to within 30 days of the fire, and after that a watchman was there.

MACDONALD, C.J.A.: I think the appeal should be allowed. The matter is not very difficult to my mind. I think Mr. *Taylor* is quite right in saying that the Williams Machinery Company have nothing to do with what took place between the assignee and the purchaser. The case must stand on the right of the assignee. The bid was made by the purchaser and accepted by the assignee, and it remained executory until after the fire. It is executory today, we have been told in the argument, so that the situation is this—being on its face a cash sale, not a sale on credit, the assignee was entitled to hold the property until the purchaser paid the purchase-money, and not until the purchase price was paid had the purchaser a right to demand possession. If the purchaser had brought an action for possession before the purchase price was paid or tendered, he could not have succeeded. The assignee did retain an interest. He held the like interest in the property that a mortgagee holds. On the other hand, the purchaser had an insurable interest. The purchaser had an executory agreement. He would be a loser if the property were lost. He would have had to pay the purchase-money just as if the property had not been destroyed. I think, on the evidence here, it is perfectly clear that the assignee had nothing to do with that insurance. He had no knowledge of it until the cheque was brought to him for indorsement; he was surprised, and declined to indorse it until it was put in such a position that the rights of the parties to the money should be protected, that is to say, be put in escrow. If I am right that the whole interest in the property did not pass under the executory agreement, the Williams Machinery Company, to whom the money was payable, have the right to succeed in this action, and there should be judgment accordingly.

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GALLIHER, J.A.: That is my view.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of opinion the appeal should be allowed. I think the policy issued by the Eagle Star Company is not very pertinent to the enquiry now before us. It is extraneous to this appeal. What we have here is really this: the purchaser assumed to place insurance upon this particular property, the loss, if any, payable to the A. R. Williams Machinery Company, and that condition existed at the time of the tender and the acceptance of the tender. It is quite apparent there was no actual delivery of the machinery or change of possession, and pending the completion of the sale a vendor's lien existed, and while that vendor's lien existed the statutory condition was not broken, as it would appear from the cases cited by Mr. *Bull*. Because of the vendor's lien there was still an insurable interest.

It seems to me the whole matter is very simple, and the argument has perhaps gone somewhat afield. I am clear upon it that the insurance moneys are the property of the A. R. Williams Machinery Company, and being entitled to the moneys, the appeal should be allowed.

EBERTS, J.A.

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

Appeal allowed.

Solicitor for appellants: *A. E. Bull.*
Solicitor for respondent: *P. J. McIntyre.*

HARRIS v. BETHUNE.

MURPHY, J.

1921

March 31.

HARRIS v. BETHUNE

Contract—Agreement for sale of land—Portion of purchase price paid—Quit claim to vendor in consideration of relief from covenant—Extension granted for repurchase if sum paid on fixed date—Failure to pay—Time of essence.

A purchaser under agreement for sale, after making substantial payments but being in default as to balance, requested acceptance of a quit-claim deed and release from her covenant in the agreement. The patries then entered into an agreement, the vendor accepting the quit-claim deed, and it was further agreed that upon payment by the 1st of May, 1920, of $33,155 and interest, taxes, etc., that the vendor would convey to her the property, or if the purchaser by the 15th of April, 1920, served notice of her intention to repurchase, to extend the date of payment to the 1st of June, 1920, or further, if the purchaser paid $10,000 by the 1st of June, 1920, to extend the time to repurchase and pay the balance to the 1st of May, 1921. The purchaser gave notice of her intention to repurchase, but failed to make payment on the 1st of June, 1920. On refusal by the vendor to accept $10,000 payment after the 1st of June, 1920, plaintiff brought action to enforce acceptance of the payment and for the right to carry out the purchase under the extension to the 1st of May, 1921.

Held, that time was of the essence of the contract, and her failure to make payment on or before the 1st of June, 1920, disentitled her to the relief sought.

ACTION to enforce acceptance of $10,000 and granting of time for payment of balance due under an agreement for sale of land, on a special agreement entered into between the parties after certain payments under the agreement for sale had been made. By agreement for sale of October, 1909, one George B. Harris agreed to purchase certain lands in the City of Vancouver for $75,000. He paid $42,000 on account up to October, 1912, and then paid interest only until September, 1914, when he assigned his interest under the agreement to the plaintiff, who continued to pay interest until the 27th of April, 1918. On the 1st of May following, the plaintiff and said Harris entered into an agreement with the defendant reciting the original agreement for sale, that there was default of $32,000 principal and $1,155 interest, the assignment from

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Harris to the plaintiff, that Harris and the plaintiff had requested defendant to accept a quit-claim deed of the property and relieve them of their covenants in the agreement for sale and had delivered quit-claim deeds of their interest in the property; in consideration of which, if the plaintiff paid $33,155 principal, interest and taxes, etc., on or before the 1st of May, 1920, the defendant would convey the property to the plaintiff free from encumbrances. It was further agreed that if the plaintiff on or before the 1st of April, 1920, served notice on the defendant of her intention to repurchase said property, the defendant would extend date of payment to the 1st of June, 1920, and there was a further agreement that in the event of the plaintiff paying $10,000 on or before the 1st of June on account of the purchase price, the defendant would extend the time of payment of balance to the 1st of May, 1921, the defendant agreeing to keep accounts of rents collected, etc., and credit net balance to purchase price. The plaintiff gave the required notice, but failed to make payment on the 1st of June, 1920, as provided. The defendant refused to accept the $10,000 payment after the 1st of June, 1920, and treated the agreement as at an end. Tried by MURPHY, J. at Vancouver on the 22nd of March, 1921.

Harris, K.C., and *T. E. Wilson*, for plaintiff.
S. S. Taylor, K.C., and *Stockton*, for defendant.

31st March, 1921.

Judgment

MURPHY, J.: In my opinion, the real intention of the parties in the transaction of May 1st, 1918, was that defendant was to become the absolute owner of the property subject to a right of redemption by plaintiff to be exercised or not at her option. The facts are very similar to those construed as shewing such an intention in *Gossip* v. *Wright* (1863), 32 L.J., Ch. 648. If anything, they point more conclusively to such a construction here, for recitals in the agreement of May 1st, 1918, state the parties of the second and third part (the plaintiff and her assignor) have requested the defendant to accept quit claims and relieve them of their covenants, and that same have been delivered and accepted by defendant. If this view is cor-

rect, *Gossip* v. *Wright, supra,* decides that the principles relating to mortgagor and mortgagee have no application. It likewise follows that plaintiff is not here seeking relief from any forfeiture, for there has been none, but is asking for specific performance. Further, the evidence shews she is seeking specific performance not of that term of the contract of May 1st, 1918, which entitled her to repurchase on or before May 1st, 1920, by paying $33,500, but of the terms which entitle her to a year's extension of her right to repurchase in the event of her paying $10,000 on or before June 1st, 1920. Construing exhibit 15 most favourably to plaintiff, its effect is to convert the agreement of May 1st, 1918, from an option for redemption into an agreement between her and defendant. If she were seeking specific performance of the first term of this agreement, there might possibly be something in the argument that the quit-claim deeds being stated to be a part of the consideration which defendant received, a Court of Equity would not regard time as of the essence of the contract so far as the money payment is concerned. But it is clear on the evidence, in my opinion, that plaintiff abandoned this term of the contract except in so far as it is incorporated in the term calling for the $10,000 payment on June 1st, 1920, which is the term she is seeking to enforce. If this is so, *Lord Ranelagh* v. *Melton* (1864), 34 L.J., Ch. 227, is decisive, I think, against the plaintiff, that time is of the essence. In fact, that case decides, I think, that the payment of the money is a condition precedent to the relation of vendor and purchaser arising under such a clause as this. If so, plaintiff's action must fail: *Steedman* v. *Drinkle* (1915), 85 L.J., P.C. 79. Further, in my opinion, Gallagher's actions in no way led plaintiff not to make the payment on the due date. The fact was she had not the money to do so. Gallagher did nothing to lull her to sleep. On the contrary, he told her he had no authority to accept any other proposition. Even if I am in error in this, I hold Gallagher's actions are not attributable to defendant. Gallagher expressly told plaintiff's agent in effect he had no power to do anything except see that the agreement of May 1st, 1918, was carried out. If any language used by defendant to plaintiff previously

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could be argued to have made plaintiff believe Gallagher's agency was wider, such impression was removed by Gallagher's explicit statement. The action is dismissed.

Action dismissed.

MURPHY, J.
1921
April 8.

PLANT
v.
URQUHART

PLANT v. URQUHART *ET AL.*

Summary conviction—Confiscation of liquor—Second form of conviction inadvertently signed—Adjudication as to liquor omitted—Latter form used on appeal—Subsequent action to recover liquor—Admissibility of first conviction in evidence—B.C. Stats. 1916, Cap. 49.

A magistrate signed a conviction declaring liquor confiscated to the Crown under the British Columbia Prohibition Act, and properly noted the adjudication on the information, but later he inadvertently signed another document purporting to be a conviction in the same case which contained no adjudication of confiscation and this document instead of the first signed conviction was by mistake forwarded to the County Court on appeal which was dismissed. In an action against the Crown officers for a return of the liquor:—

Held, that the true conviction could be adduced in evidence in this action as it has no relation to the County Court appeal.

Statement

ACTION to recover certain whisky seized by the defendant police officers from the plaintiff in the City of Vancouver and confiscated by the Crown, represented by the prohibition officers. The defendants Urquhart and Slater were officers of the Provincial Government appointed under the British Columbia Prohibition Act. Tried by MURPHY, J. at Vancouver on the 31st of March, 1921.

Wilson, K.C., and *D. Donaghy*, for plaintiff.
S. S. Taylor, K.C., and *A. Macneil*, for defendants.

8th April, 1921.

Judgment

MURPHY, J.: It is conceded that so long as the decision in *Canadian Pacific Wine Co.* v. *Tuley* [*post*, p. 472] stands

unreversed, plaintiff must rest his case on one point based on the following facts: The magistrate declared the liquor confiscated to the Crown under the provisions of the British Columbia Prohibition Act and signed a conviction to that effect. A few days later he inadvertently signed another document purporting to be a conviction in the same case, which contained no adjudication of confiscation. He did this without realizing that he was dealing with something he had already disposed of. He properly noted the real adjudication on the information. An appeal was taken to the County Court, and by mistake the second document was forwarded to the County Court instead of the true conviction. The appeal went into the County Court list and was dismissed.

It is contended by plaintiff's counsel that the true conviction cannot be adduced in evidence but that the County Court record only is admissible. If so, as the so-called conviction appearing in that record contains no adjudication of confiscation, the defence fails. It is argued that as the County Court is a Court of Record, no evidence to impeach or vary its record can be admitted, as no attempt has been made to attack the disposal by the County Court of the appeal so taken or to correct its record. In view of the nature of a Court of Record and of the principle *interest, reipublicæ ut sit finis litium,* the general correctness of this proposition may, I think, be admitted where subsequent proceedings are so related to the County Court proceedings as to make the County Court record a part thereof. But whether this is correct or not, in my view, this case has nothing to do with the County Court appeal. The defendants justify under a conviction of the magistrate, which, as the law stands at present, is unimpeachable. No authority, or statutory provision, has been cited to me to the effect that where an appeal has been taken from such a conviction, the conviction itself can only reach any other Court by way of the County Court, in proceedings which have nothing to do with the County Court appeal. The jurisdiction exercised by the County Court herein was *quasi*-criminal. The case at bar is wholly civil. It is true that the magistrate, where an appeal is taken, is directed by statute to forward the conviction to the County Court. If

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he, in error, forwards the wrong document, that, as stated, may possibly be conclusive in subsequent proceedings which are so related to such appeal as to necessarily import into them the County Court record, but only, I think, in such an instance, if at all. Were the law otherwise, the case at bar would be an apt illustration of the startling consequences. Property of great value, which as the law now stands is the property of the Crown, would be lost to it, and individuals rendered liable to heavy damages for detinue as the result of two acts by the magistrate, one in law a nullity and the second a clear mistake. The magistrate, having signed a conviction in accordance with his adjudication, was *functus*. The subsequent document signed by him is legally a nullity. The transmission of this document to the County Court was a blunder. Unless bound by clear authority, a Court of first instance should not, I think, give a decision having such results. The action is dismissed.

Judgment

Action dismissed.

MORRISON, J.

1920

Nov. 20.

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1921

April 9.

REX v. CANADIAN PACIFIC WINE CO.

REX v. THE CANADIAN PACIFIC WINE COMPANY, LIMITED.

Criminal law — Intoxicating liquors — Prohibition Act — Conviction — Certiorari—Corporation—Affidavit of merits required under section 53 of Act—Incapacity of corporation—Right to remedy—B.C. Stats. 1916, Cap. 49, Secs. 53 and 54.

Under section 53 of the British Columbia Prohibition Act no writ of *certiorari* shall issue to quash a conviction unless the party applying shall produce an affidavit "that he did not by himself or by his agent, servant or employee or by any other person, with his knowledge or consent, commit an offence." Section 54 takes away the right of appeal unless the party appealing shall make such affidavit. On an application for *certiorari* to bring up a conviction for unlawfully keeping liquor a preliminary objection by the Crown that the affidavit required by said section 53 had not been produced was sustained.

Held, on appeal, reversing the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting) that the Legislature in enacting said

sections had not in mind corporations which are incapable of making the required affidavit: as the right to apply for a writ of *certiorari* existed independently of section 53 and still exists unless taken away by it, corporations not being within its purview, are not deprived of the remedy.

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REX v. CANADIAN PACIFIC WINE CO.

APPEAL by the accused from the order of MORRISON, J., dismissing a motion heard by him at Vancouver on the 15th of November, 1920, for a rule *nisi* to shew cause why a writ of *certiorari* should not issue to remove into the Court a record of conviction by the deputy police magistrate of Vancouver of the 17th of August, 1920, on the charge of unlawfully keeping intoxicating liquor for sale and that the liquor be confiscated. The Crown had raised the preliminary objection on the motion that the accused Corporation had not produced an affidavit of merits in compliance with section 53 of the British Columbia Prohibition Act.

Statement

Wilson, K.C., and *Arnold*, for the accused.
S. S. Taylor, K.C., and *Stockton*, for the Crown.

20th November, 1920.

MORRISON, J.: This is an application for an order *nisi* to shew cause why a writ of *certiorari* should not issue to remove into this Court a certain conviction of the deputy police magistrate of Vancouver made on the 17th of August, 1920, against the Pacific Wine Company, Limited, for a violation of the British Columbia Prohibition Act on the many grounds enumerated in the notice of motion, five of which attack the constitutionality of the said Act and also of the Summary Convictions Act.

MORRISON, J.

Mr. *S. S. Taylor, K.C.*, opposing the motion, raises *in limine* the objection that section 53 of the Act has not been complied with. That section enacts as follows:

"No writ of *certiorari* shall issue for the purpose of quashing any conviction for any violation or contravention of any of the provisions of this Act unless the party applying therefor shall produce to the Judge to whom the application is made an affidavit that he did not by himself or by his agent, servant, or employee, or by any other person, with his knowledge or consent, commit the offence for which he has been convicted; and such affidavit shall negative the charge in the terms used in the conviction, and shall further negative the commission of the

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offence by the agent, servant, or employee of the accused, or by any other person, with his knowledge or consent."

No such affidavit has been filed herein in compliance with the above section.

Mr. *Charles Wilson, K.C.*, submits that this section does not apply to incorporated companies. I think it clearly does. The formation into a joint-stock company of persons upon whom the statute creates a duty should not thus enable them to evade that duty. However, the Act seems to me clear on the point: see the Interpretation Act and the context of this Act.

Mr. *Wilson* again takes his stand, in answer to Mr. *Taylor's* objection on the ground that the procedure prescribed is criminal procedure and is *ultra vires* the Provincial Legislature, and section 91, No. 27, as well as section 92, Nos. 14 and 15 of the British North America Act are relied upon. Numerous familiar authorities dealing with these sections and their applicability to cases such as this before me were referred to by both counsel. I reserved my decision on what is termed by counsel a "preliminary objection." I have now, I think, paid sufficient tribute to the exhaustive and familiar arguments of counsel by again re-reading all the constitutional classics to which they have referred me, without adding but briefly my views to the already voluminous, learned, and, I may say, in some instances, pedantic contributions as to the true meaning of the sections in question. Were it not for a fear of being considered discourteous, I am not sure but that the most effective and intelligible answer to the submission of counsel for the rule would be to request a careful and, indeed, not very critical perusal of the several Privy Council decisions cited in argument, on the particular point here involved.

A breach of the Prohibition Act, of which the defendant has been convicted, is made by the Provincial Legislature, the subject of punishment by fine, penalty or imprisonment, pursuant to the powers given it by the B.N.A. Act. The Legislature has the power in such a case to regulate and provide for the course of trial and adjudication of offences against its lawful enactments, although that procedure thus adopted be analogous to the procedure in criminal cases: *Reg.* v. *William Bittle* (1892),

21 Ont. 605; *Toronto Railway Company* v. *Toronto City* (1920), A.C. 446.

The declared object of the Legislature in passing the Prohibition Act was "to suppress the liquor traffic in British Columbia by prohibiting Provinical transactions in liquor." The Act deals with a matter "of a merely local nature" in the Province and is not itself repugnant to any Act of the Parliament of Canada and is therefore *intra vires*.

The sections attacked are local, penal provisions ancillary to the main object of the legislation and, therefore, *intra vires*.

As regards the application of the Act to corporations, it appears to me that there is not created a positive and imperative duty to the public. It only imposes a penalty as a result of non-compliance with the directions of the provisions. The Act must go so far as to say that a person committing violation of its provisions is a criminal offender. On the contrary, all it says is that the disobedience to its requirements is not a criminal offence but a breach which may be compensated by the payment of the fine.

In case of such non-compliance or disobedience the Act does not go so far as to create a misdemeanour, but merely states that in that event the corporation must submit to the penalty. So that, if I am right in finding that the Act does not intend such a breach of its provisions to be an offence, but only as a condition precedent to the recovery of a pecuniary penalty, then it is not "criminal procedure."

"The criminal branch of public law is divided into a body of substantive criminal law and a body of criminal procedure (adjective criminal law penal procedure) which is the body of rules whereby the machinery of the Courts is set in motion for punishment of offenders. It consists of two species, a simpler, summary convictions applicable to trifling transgressions, and a more solemn, for trials of serious crime. Procedure is merely the method of applying the remedies of law. One sub-division is criminal procedure. In outline, it has to do with the arrest of the accused, bail, preliminary hearing, indictment, arraignment, trial, verdict, sentence, appeal, execution":

Holland's Jurisprudence, 9th Ed., 364.

Mr. *Wilson* has submitted a number of different definitions of "crime" and, indeed, I might add, several more, *e.g.*:

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"An act which may or may not be an offence at common law may also be made an offence or crime by statute; and in such a case the act intentionally done is itself a crime":

Campbell's Principles of English Law, p. 504. Or,—

"The mode of redress determines the character of the wrongful act complained of. When an Act is made the ground of prosecution and punishment by the Sovereign on his own responsibility and in his own name, it is a crime. When made the subject of a private suit for damages it is a tort. The same act may be a crime or a tort according to the remedy pursued."

But all that is beside the question here.

Mr. *Wilson* also advances the test that the sanctions of criminal procedure are always remissible by the Crown. Assuming, for the present, that to be so, and keeping in mind that all criminal sanctions "are imposed with a punitive purpose," and not for a "coercive" purpose, then how can it be said that the procedure necessary to carry out the provisions of a section of the statute, which are not punitive but coercive in purpose to be called criminal procedure? The Crown cannot remit the fine provided by the section in question as regards corporations without some anomalous interference with the rules of law, such as would equally suffice to remit any non-criminal sanction: Kenny's Outlines of Criminal Law, 9th Ed., 15.

I agree with Mr. *Taylor* that the legislation assailed is, using his phraseology, "provincial criminal" procedure if criminal procedure at all, and is *intra vires* the Provincial Legislature. The objection is sustained.

From this decision the accused Company appealed. The appeal was argued at Victoria on the 18th of January, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Wilson, K.C., for appellant: My contention is that a company or corporation does not come within the provisions of section 53 of the Act: see *Bank of Montreal* v. *Cameron* (1877), 2 Q.B.D. 536; *Shelford* v. *Louth and East Coast Railway Co.* (1879), 4 Ex. D. 317. This is not a preliminary objection proper. The rules of Court do not apply here.

Another objection is that it is criminal and *ultra vires* of the Legislature.

S. S. Taylor, K.C., for respondent: That corporations are included in the Act see subsection (2) of section 28, which shews that "person" includes corporations. Section 53 says an affidavit shall be produced. This must be complied with.

Wilson, in reply.

Cur. adv. vult.

9th April, 1921.

MACDONALD, C.J.A.: This is a proceeding under the British Columbia Prohibition Act. The information was laid by a police officer on the 19th of July, 1920, charging the appellant with unlawfully keeping liquor for sale. The complaint was tried before a magistrate, pursuant to the provisions of the Summary Convictions Act, a Provincial enactment. The appellant was fined and a large stock of liquor found on its premises was, by the magistrate, declared to be forfeited to His Majesty. The appellant then moved before a judge of the Supreme Court for an order *nisi* directed to the respondent to shew cause why a writ of *certiorari* should not issue to bring up the conviction. Preliminary objection was taken by counsel for the respondent because of the absence of an affidavit on the part of the appellant as required by section 53 of the Prohibition Act.

The appellant's contention is, that that section is not applicable to a corporation seeking the writ. It enacts that no writ of *certiorari* shall issue to quash a conviction unless the party applying shall produce an affidavit "that he did not by himself, or his agent, servant or employee, or by any other person, with his knowledge or consent, commit the offence." Section 54 of the same Act takes away the right of appeal "unless the party appealing shall make an affidavit" to the effect above set out.

Now while, if it stood alone, a plausible and not unconvincing argument might be founded on section 53, to bring corporations within its terms, that cannot be said of section 54, its sister section, dealing as it does with a similar right or privilege in unequivocable language. The one section takes

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away, unless the condition be fulfilled, the right to the writ, the other the right of appeal. I cannot think that it was the intention, while giving individuals the right of appeal, to deprive corporations thereof because of the incapacity of a corporation to make the affidavit. Nor can I think that it was intended that corporations should be deemed to be within the purview of the one and not of the other. I think, therefore, that the Legislature had not corporations in mind when enacting the two sections.

What, then, is the result? Are corporations deprived of these remedies? In *Bank of Montreal* v. *Cameron* (1877), 2 Q.B.D. 536 the Court of Appeal denied the benefit of the rule in question there to a corporation, but in that case the benefit did not exist outside the rule, while here the right to apply for the writ, and the right of appeal, existed independently of sections 53 and 54 and still exist unless taken away by them. It, therefore, follows that if corporations are not within the purview of these sections, as I think they are not, the preliminary objection should have been overruled.

MACDONALD, C.J.A.

The application for the writ not having been heard on its merits, I think the order for the writ should be made.

I would allow the appeal.

MARTIN, J.A.: As I regard section 53 of the British Columbia Prohibition Act, it is intended to abolish a writ of *certiorari* ("No writ of *certiorari* shall issue," etc., it says) in every case, save only in those cases which come within the one specified exception, *viz.*:

"Unless the party applying therefor [*i.e.*, for a writ] shall produce to the judge to whom the application is made an affidavit that he did not by himself or by his agent, servant, or employee, or by any other person, with his knowledge or consent, commit the offence for which he has been convicted. . . . . "

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It is conceded that this affidavit must be the personal affidavit of the "party" applying, and because it cannot, admittedly, be made by a corporation, it is submitted that the statute must be construed as not relating to corporations, and hence they can without an affidavit obtain that writ of *certiorari* which is

denied to other "parties" unless they "produce to the judge" an affidavit. Now, in the first place, the expression "party" is a very wide one and here clearly means any one who has been convicted under the British Columbia Prohibition Act and who subsequently applies for relief by way of *certiorari* from such conviction, and provision is made in the Act for proceedings against, and the infliction of penalties upon, corporations which contravene it—*Cf.* sections 28(1), 46 and 47, and in all the group of sections 29 *et seq.* entitled "Enforcement and Prosecutions," corporations are properly dealt with as being included in the term "person" as defined in section 26(19) of the Interpretation Act, R.S.B.C. 1911, Cap. 1. And so the Legislature had fully in mind the position in which corporations might be placed under the Act when section 53 was inserted. It is, to my mind, a *non sequitur* to say that because a corporation cannot comply with the requirements of a statute in order to obtain an otherwise prohibited relief, therefore the statute has no application and the corporation may obtain the relief by disregarding the statute. The correct view is, I think, that if a corporation cannot bring itself within the scope of the statute and comply with its condition precedent to relief, then it must stay without the statute and go without that relief, for the matter is a *casus omissus,* just as it is in the case of any other "party" who is unable to make the affidavit at the crucial time, either because of, *e.g.,* absence beyond seas, or illness, or lunacy, or paralysis, or blindness or deafness, or both, or any other physical incapacity. The two cases, *Bank of Montreal* v. *Cameron* (1877), 2 Q.B.D. 536; 46 L.J., Q.B. 425, and *Shelford* v. *Louth and East Coast Railway Co.* (1879), 4 Ex. D. 317; 28 W.R. 407, cited by the appellant, are, in my opinion, of no assistance to it, but the reverse, when carefully examined, because in the first one it was decided that a company was not entitled to the benefit of the expeditious proceedings to obtain judgment under Order XIV., since it could not make the required affidavit to obtain a summons to call upon the defendant to shew cause; as Lord Justice Bramwell pointed out it was a *casus omissus*—"an oversight"—and he went on to say at p. 538 (2 Q.B.D.):

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"Here is a benefit given to those who can perform the condition. It is no part of the general conduct of every cause, as discovery; and I see no reason, because there is a class of plaintiffs who can take the benefit if we read the rule in its obvious meaning, why we should not abide by the words. It is very much better to abide by the plain meaning of the words, than to stretch them to meet a case which they obviously do not suit, and let the oversight, if it is one, be set right by the proper authority."

And Brett, L.J. said, at p. 539:

"It is not a right generally conferred on a plaintiff, but only on doing a certain act. In the nature of things a corporation cannot make an affidavit, nor can a corporation swear to belief; therefore the act required by this rule to be done cannot be done by a corporation, consequently a corporation cannot take advantage of the rule. In one sense, no doubt, the framers of this rule did not mean to exclude corporations; but it is equally clear that they did not intend to include them, because corporations were not present in their minds at the time. There are good reasons why this rule should not be stretched to include corporations. It is to be observed that the framers of the rules when they intended to deal with corporations knew how to do it. Thus, when it is intended to confer a benefit or impose a liability on a corporation they knew how to do it, as in the case of service of writs, or the administering of interrogatories. When, therefore, in a particular case, those who know how to provide for corporations do not do it, it must be taken to be a *casus omissus*. As there is no reason why corporations in this particular case should not be put on the same footing as other plaintiffs, no doubt the rule will shortly be amended for the purpose."

The suggested amendment was made and given effect to in the *Shelford* case, *supra*, James, L.J., saying at p. 318 (4 Ex. D.):

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"In my opinion the Court which decided on the meaning of rule 1 as it originally stood, was right in saying that with regret it was obliged to come to the conclusion that the words were such, as to deprive a plaintiff corporation of a right enjoyed by other plaintiffs. By the alteration it was made clear that a corporation as plaintiff was to be on the same footing as other plaintiffs."

These extracts directly confirm my opinion that just as a corporation could "not take advantage of the rule" in *Cameron's* case, so they cannot take advantage of the proviso in this case which enables another "party" to escape the consequences of the general prohibition against the issuance of writs of *certiorari ad hoc, viz.*: "No writ of *certiorari* shall issue . . . . unless the party applying," etc., as above recited.

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

GALLIHER, J.A.: I take the same view as the Chief Justice, whose reasons I have had the advantage of reading, in which I concur.

MCPHILLIPS, J.A.: I agree with the judgment of MARTIN, J.A. and would dismiss the appeal.

EBERTS, J.A. would allow the appeal.

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

Solicitors for appellant: *MacInnes & Arnold.*
Solicitors for respondent: *Taylor, Mayers & Company.*

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Constitutional law—Intoxicating liquors—Inter-provincial trade—Taking orders for liquor delivered from another Province—B.C. Stats. 1916, Cap. 49, Secs. 52A and 52B; 1919, Cap. 69—B.N.A. Act.

Sections 52A and 52B of the British Columbia Prohibition Act, as enacted by Cap. 69, B.C. Stats. 1919, is *intra vires* of the Provincial Legislature and prohibits taking orders within the Province for the purchase of liquor outside the Province and displaying within the Province circulars giving the name and address of persons dealing in liquor outside the Province. The legislation relates to matters "of a merely local or private nature in the Province" within section 92, No. 16, of the British North America Act and is not an interference with "trade and commerce" such as to deprive the Legislature of jurisdiction (MACDONALD, C.J.A. and EBERTS, J.A. dissenting).

The taking of an order within the Province for liquor to be delivered within the Province is a transaction which is complete within the Province and is not made incomplete because the liquor comes from a source outside the Province: the word "transaction" should not be construed as applying only to the whole contract between the purchaser and the vendor with all its intermediate steps.

APPEAL by the Crown from the decision of GREGORY, J., of the 25th of October, 1920, on a case stated quashing two

Statement

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convictions by a magistrate under the British Columbia Prohibition Act. Two informations were laid on the same day (1) That the Western Canada Liquor Company at Vancouver did unlawfully take orders for the purchase of liquor contrary to section 52A of said Act and (2) did unlawfully display a circular giving the name and address of a person dealing in liquor contrary to section 52B of said Act. It appears from the evidence that one McKay entered the office of the defendant Company in Vancouver and took from the counter one of a number of price lists for liquor of the Gold Seal Limited, of Calgary, these price lists being on the counter for distribution. He then gave an order for two bottles of rye whisky paying $6.10, being told the 10 cents was for a money order. Some days later he received a box containing two bottles of rye whisky with invoice from the Gold Seal Limited, Calgary. The questions submitted were:

Statement

"(a) Whether the said sections 52A and 52B can respectively be so construed as to constitute the actions of the defendant Western Canada Liquor Company, Limited, as disclosed in the above stated facts to be a contravention of such sections respectively? (b) Whether said sections 52A and 52B are respectively *ultra vires* of the Province of British Columbia?"

Orr, for plaintiff.

Davis, K.C., for defendant.

Tobin, for Attorney-General.

15th June, 1920.

GREGORY, J.: Case stated by police magistrate Shaw. There are two convictions, one under section 52A of the British Columbia Prohibition Act, Cap. 49, B.C. Stats. 1916, as enacted by Cap. 69, B.C. Stats. 1919, for taking an order for the purchase of liquor, and the other, under section 52B of the same Act and also as enacted by the statutes of 1919, for displaying a circular.

GREGORY, J.

It is admitted that the convictions must stand or fall together —this judgment will therefore cover both cases.

The question involved is purely one of interpretation of these two statutes. These statutes being in restriction of the common liberty of the subject should, I think, speaking in general terms, be strictly construed. While the sections under which the convictions were made appear in the statutes of 1919, they are

expressly made as amendments to the main Act of 1916—they must therefore be read as part of that Act and interpreted with the light thrown on them by all the sections of that Act. The Act begins with the following recital:

"Whereas it is expedient to suppress the liquor traffic in British Columbia by prohibiting Provincial transactions in liquor."

And section 57(1) declares that it

"is intended to prohibit transactions in liquor which take place wholly within the Province . . . . . it shall not affect and is not intended to affect *bona fide* transactions in liquor between a person in the Province of British Columbia and a person in another Province . . . . . and the provisions of this Act shall be construed accordingly.

"(2) Nothing in this Act shall be construed to interefere—

"(*a.*) with the right of any person to import from without the Province liquor for *bona fide* use in his private dwelling-house."

The liquor in the case was imported from without the Province on an order of one Lyons, sent direct to his residence and upon his order and paid for by him. The connection of the Western Canada Liquor Company with the transaction was that in the first case it received the order, took the money, including the cost of obtaining a money order for the amount, and forwarded the same, *i.e.*, the money order to the Gold Seal Company, a Dominion company, in Calgary, Alberta, which shipped the liquor direct to Lyons. The Western Canada Liquor Company took no other responsibility in the matter. So far as it was concerned the Gold Seal Company might have refused to fill the order and there was no sale or acceptance of the order until the liquor was actually shipped. In the second case, the Western Canada Liquor Company's sole connection with the affair was that it had a pile of the Gold Seal Company's circulars or price lists lying on its counter, which it permitted Lyons to take away on his own suggestion. It is true that the personnel of both Companies is much the same and they occupied a common office, but I do not think this makes any difference legally in the present case.

The Act contemplates two different transactions in liquor. One a sale within the Province, which it declares illegal; and one the importation from without the Province, which it does not interfere with. In its original form the Act of 1916 deals only with actual sales and does not pretend to affect the can-

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vassing or taking of orders for liquor to be sold within the Province, nor the distribution or displaying of circulars or advertisements for the sale of liquor within the Province. The language of sections 52A and 52B standing alone would seem to cover both classes of cases, and make it illegal for a man to ask his friend to write to a Scotch distiller for a case of whisky or for a newsdealer in British Columbia to distribute to regular subscribers any of the great London newspapers which always contain liquor advertisements. Whether the British Columbia Legislature can make such acts illegal may be open to doubt, but I do not think it can be urged in this case that it has done so, for sections 52A and 52B must be read with the recital and section 57, already referred to, and they say they are only to prohibit provincial transactions and shall not be construed to interfere with the right of any person to import from without the Province, and with that in mind they can be given full effect, for they enable the authorities to reach persons canvassing for orders for liquor to be sold within the Province or distributing or displaying circulars or advertisements for sales of the same nature, neither of which were offences under the Act until amended by the statutes of 1919.

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On the argument, it was urged that in view of the decisions of the Judicial Committee of the Privy Council in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, sections 52A and 52B must be taken to be within the power of the British Columbia Legislature. It is only necessary to point out, in answer to such a contention, that the Manitoba Act, Cap. 22, statutes of 1900, there under consideration, contained no such provisions as sections 52A and 52B, its scope was much like our original Act before being amended, and that in that case the Privy Council declined to consider the different sections of the Act and simply declared the Act to be within the competence of the Manitoba Legislature by reason of its recital and provision confining its operation to provincial transactions, Lord Macnaghten saying, at p. 80:

> "That provision is as much part of the Act as any other section contained in it. It must have its full effect in exempting from the operation of the Act all *bona fide* transactions in liquor which come within its terms."

The case of *Rex* v. *Shaw* (1917), 29 Can. Cr. Cas. 130 was strongly urged by Crown counsel as governing the present case. While I am not, strictly speaking, bound by a decision of that Court (the Manitoba Court of Appeal), I have, if I may be permitted to say so, the highest respect for its decisions, have frequently followed them and would unhesitatingly do so in the present case if I felt that it was clearly dealing with a similar situation, etc. With reference to that case, it is to be pointed out that the Court was not unanimous; that the Chief Jusice gave no reason for his decision, and it is impossible to tell whether he agreed with Mr. Justice Perdue or the other judges who sustained the conviction; that the reasons given by Mr. Justice Perdue shew clearly that he would have adopted the other view, had it appeared that the liquor to be supplied was necessarily to come from without the Province, as in this case; that the Act there under consideration, Cap. 50, Man. Stats. 1917, contained no such provisions, or recital, as our Act, and Mr. Justice Fullerton distinctly held that the question turned upon the construction of sections 91 and 92 of the B.N.A. Act, a question which, under the circumstances of the case, I do not think it necessary to consider. Mr. Justice Haggart took the same view as I do, holding that while the Act then under consideration was complete in itself, it was not to be considered as repealing section 119, Cap. 112, R.S.M., which, in its effect, is very similar to our section 57 already referred to.

GREGORY, J.

For the above reasons, I would answer question (a) in the negative, and it is therefore unnecessary and inexpedient to answer question (b).

From this decision the Crown appealed. The appeal was argued at Victoria on the 4th of January, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Tobin (*W. M. McKay,* with him), for appellant: The Company took the order for the liquor in Vancouver and the money in payment therefor. The order was ostensibly sent to Calgary. As to the jurisdiction to pass the Act see *Rex* v. *Shaw*

Argument

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(1917), 28 Man. L.R. 325; 29 Can. Cr. Cas. 130. The question is whether the section covers a case where a person acts as agent or solicits purchasers of liquor: see *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73. An individual here cannot deal through an agent to get liquor from Calgary: see *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), 1 A.C. 588; *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at p. 112. The section as it stands prevents an agent taking an order: *Regina* v. *Boscowitz* (1895), 4 B.C. 132.

Argument

Davis, K.C., for respondent: All provisions in the Act must be confined to the Province. The cases of *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73 at pp. 78 and 80 and *Colonial Sugar Refining Company, Limited* v. *Irving* (1906), A.C. 360, only go as far as to say that the Province can deal with liquor transactions within the Province. The whole transaction must begin and end in the Province. The giving of the order does not constitute a transaction within the Act: *Gold Seal Limited* v. *Dominion Express Co.* (1917), 37 D.L.R. 769; *Hudson's Bay Co.* v. *Heffernan* (1917), 10 Sask. L.R. 322; 39 D.L.R. 124. This transaction is interprovincial and is completed on the delivery from Calgary: see *Household Fire Insurance Company* v. *Grant* (1879), 4 Ex. D. 216 at p. 224. It is interfering with trade and commerce: see *Hudson's Bay Co.* v. *Heffernan, supra; Graham & Strang* v. *Dominion Express Co.* (1920), 48 O.L.R. 83. What is charged here is only a step in a "transaction." This was a transaction that before completion was dealt with in two Provinces: see *Rex* v. *Shaw* (1917), 29 Can. Cr. Cas. 130 at p. 135; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73 at p. 79.

Tobin, in reply.

Cur. adv. vult.

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

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MARTIN, J.A.: This appeal arises out of two convictions of the respondent Company in that (1) it did in the City of Vancouver "unlawfully take orders for the purchase of liquor," and (2) that it did "unlawfully display a circular giving the name and address of a person dealing in liquor" contrary to sections 52A and 52B added to the British Columbia Prohibition Act, 1916, Cap. 49, by the amending Act of 1919, Cap. 69, Sec. 6, as follows:

"52A. No person shall canvass for, receive, take, or solicit orders for the purchase or sale of any liquor, or act as agent for the purchase or sale of liquor.

"52B. No person shall distribute, publish, or display any advertisement, sign, circular, letter, poster, handbill, card, or price-list naming, representing, describing, or referring to any liquor or to the quality or quantities thereof, or giving the name or address of any person manufacturing or dealing in liquors, or stating where liquor may be obtained; but nothing in this section contained shall apply to the receipt or transmission of a telegram or letter by any telegraph agent or operator or post-office employee in the ordinary course of his employment as such agent, operator or employee."

According to the facts in the case stated by the convicting magistrate it appears that the respondent Company took at its office in Vancouver a written order for the purchase of liquor addressed to a company outside the Province, *viz.*, the Gold Seal Limited, in Calgary, Alberta, and forwarded the order to that company with the money for the liquor which it had received from the purchaser, and in the case it is stated that the ordinary course of business was that after the receipt of the order at Calgary the liquor would be shipped direct from Calgary to the purchaser in Vancouver. It is clear that in so acting it did "act as agent" for the Calgary company at least, if not also for the purchaser, which, however, is immaterial. These circumstances are in essentials identical with those that were before the Manitoba Court of Appeal in the case of *Rex* v. *Shaw*, 28 Man. L.R. 325; (1917), 3 W.W.R. 798; 29 Can. Cr. Cas. 130, with the exception that in the *Shaw* case it was not shewn that the purchaser was aware of the source whence the liquor was to be obtained, *i.e.*, whether within or without the Province, but to my mind that fact is immaterial because, as Mr. Justice Cameron says, p. 331:

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"Now it seems to me clear that the taking or receipt of an order by any person within the Province for the supplying of liquor for beverage purposes within the Province, is a transaction that has its beginning and its end within the Province, and constitutes a subject on which the Provincial Legislature has full power to legislate. The making of the request and its receipt constitute a complete transaction within the Province, on which, in my opinion, the local Legislature can act by way of legislative restriction or prohibition. Such a transaction is a matter of a purely local or private nature, within the Province, and therefore within the ambit of its Legislature. In my judgment no other conclusion can be drawn from the judgments of the Judicial Committee to which I have referred."

I am entirely in accord with this view; to take an order in a Province for liquor to be delivered in that Province is a transaction which is complete within the Province and it is not made incomplete because the liquor may or will come from a source outside the Province. What the statute aims at is to prevent the advertisement of, or solicitation of orders for, liquor within its boundaries, or agents for the purchase or sale of liquor doing business therein. By section 57(1) the Legislature recognizes the limitation of its powers and its inability to affect "*bona fide* transactions in liquor between a person in the Province of British Columbia and a person in another Province or in a foreign country" and the "right of any person to import from without the Province liquor for *bona fide* use in his private dwelling-house," but all of this may be done without solicitation or agency or advertising within the Province, which is what the Legislature purports to prohibit. The cases on which the Manitoba Court reached the conclusion it did, which I agree with, are therein set out and I do not think it profitable to add anything to them except one case, *Quong-Wing* v. *Regem* (1914), 49 S.C.R. 440; 6 W.W.R. 270; 23 Can. Cr. Cas. 113, which is of importance as shewing, after reviewing the Privy Council decisions, the extent of provincial powers under section 92, No. 16, of the B.N.A. Act relating to "All matters of a merely local or private nature in the Province." I refer to this instructive case particularly because it was attempted before us to restrict this word "local" to some particular area within a Province which might require special legislative treatment, but, in my opinion, "local" obviously means that whole area over which the local Provincial Legislature and the local

MARTIN, J.A.

Provincial Courts have jurisdiction, *i.e.*, the Province itself, and not a mere part of it. The word indeed is used in that sense in the very same section of the Act in subsection (10), *viz.*, "Local works and undertakings," which of course may be carried out in any part or in all parts of the Province. And another notorious curial application (Federal) of it is to be found in the statutory description of the judge of the Admiralty Court in this Province (myself) comprising the whole of the Province as the district, as the "Local Judge in Admiralty"—*Cf.* the Admiralty Act, Cap. 141, R.S.C. 1906. This view is involved in the decision in *Quong-Wing's* case, wherein it was held that a prohibition by the Legislature of Saskatchewan against the residence or employment of white women in "any restaurant, laundry, or other public place of business or amusement owned, kept or managed by any Chinaman" was valid as being aimed at the abatement of a "local evil" within said subsection (16), though the Act would necessarily operate all over the Province, wherever a Chinaman might establish himself and where white women were to be found, *i.e.*, anywhere and everywhere. It is sometimes overlooked that under the former Liquor Licence Act in this Province all women were put under certain disabilities because hotel licensees were prohibited from serving or selling them liquor in a bar-room (Liquor Licence Act, Cap. 142, R.S.B.C. 1911, Sec. 65), nor could a married woman obtain a hotel liquor licence unless she lived apart from her husband and was of Caucasian race (section 25(*d*)), nor could any male obtain a licence unless "of Caucasian race" (*a*), and liquor could not be sold or given to the seven classes of persons specified in section 64. It is beyond question here that the Legislature is attempting to abate or prevent a "local evil" greater and more wide-spread than that in *Quong-Wing's* case, and I am quite unable to regard the legislation in question as an attempt to indirectly interfere with rights of "trade and commerce" under section 91, No. 2, of the B.N.A. Act, and of importations which are recognized by said section 57: "the *bona fide* transactions" therein referred to may still be interprovincially carried on though they cannot be transacted by an agent within this Province, nor attended

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with those prohibited circumstances of solicitation and advertisement as specified in said sections 52A and 52B: the stopping of advertising the sale of liquor within this Province is in the constitutional sense no more an "interference" with the importation of it than is the stopping of women and others from drinking it when it gets here.

I find myself quite unable to construe "transaction" as being restricted to the whole contract between the purchaser in Vancouver and the vendor in Calgary with all its intermediate steps: there were, in my opinion, for the purpose of regulation, complete "provincial transactions" within the preamble of the Act, and prohibited by it, when the order for the liquor was taken (quite apart from the ultimate filling of it) and the circular displayed in Vancouver. "Transaction" is a wide yet loose term, and while all contracts may be styled transactions yet most transactions are not contracts, of which truth the two sections in question contain many illustrations which suggest themselves upon consideration, *e.g.*, a dealer here might enter into a contract with a newspaper to advertise liquor here —that would be a transaction and also a contract between them outside of the Act, but the appearance of the dealer's prohibited advertisement in the newspaper would be a prohibited "provincial transaction in liquor," for which the newspaper, at least, could be convicted under section 52B apart from contract.

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It follows, therefore, that both convictions were rightly made and the appeal to restore them should be allowed.

GALLIHER, J.A.: This is an appeal from GREGORY, J. who upon a case stated quashed two convictions made by H. C. Shaw, police magistrate of the City of Vancouver, against the respondents. The Crown is appealing.

GALLIHER, J.A.

The convictions were under sections 52A and 52B of the British Columbia Prohibition Act, B.C. Stats. 1916, Cap. 49, as enacted by Cap. 69 of 1919. These amendments are as follows: [already set out in the judgment of MARTIN, J.A.].

Prior to the passing of these sections it is not contended that any offence would have been committed and it seems to me none could have been, in view of the provisions of section 57 of the

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main Act. It is the exceptions in that section which are directly affected by the amendments. The effect of these amendments is that while you are permitted to purchase direct from a source outside the Province you cannot do so by agent.

I do not think it can be doubted that the aim of the Legislature was to prohibit transactions by an agent, and the real question to be decided is, are these amendments *intra vires* of the Provincial Legislature? Among the cases cited to us are: *Rex* v. *Shaw* (1917), 28 Man. L.R. 325; 29 Can. Cr. Cas. 130; *Gold Seal Ltd.* v. *Dominion Express Co.* (1917), 3 W.W.R. 649 (an Alberta case); *Hudson's Bay Company* v. *Heffernan* (1917), [10 Sask. L.R. 322] 3 W.W.R. 167; and *Graham & Strang* v. *Dominion Express Co.* (1920), 48 O.L.R. 83.

With the decision in the Alberta case by Ives, J. I have no quarrel—that was decided under a section similar to our section 57, as it stood before the amendments of 1919, and it is the effect of these amendments which we have to consider.

In the Saskatchewan case it was unanimously held by the Full Court (Haultain, C.J., Newlands, Lamont, Brown and McKay, JJ.), that an Act of that Legislature which declared it illegal for any person to expose or keep liquor in Saskatchewan for export to other Provinces or to foreign countries was *ultra vires* of the Legislature as an interference with trade and commerce. The Act there was intitled "An Act to Prevent Sales of Liquor for Export."

GALLIHER, J.A.

Had our Act been to absolutely prohibit the purchase of liquor from outside Provinces, this case would have been in point, but we have still to consider whether the amendments to our Act are of such a nature as to constitute the interference to trade and commerce which would render the Act *ultra vires* and for this we will have to turn to the Privy Council decisions which were cited to us and to which I will refer later.

The Ontario case does not assist us much. The Manitoba case is not altogether satisfactory. They have a section in the Manitoba Temperance Act (section 119) in all respects similar to our section 57, except that we have a subsection (2) to 57 not to be found in the Manitoba Act, but I do not see that

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that subsection affects the real question to be decided in this case.

By section 1 of Cap. 50 of the Statutes of Manitoba, 1917, the following was enacted:

"1. No person shall within the Province of Manitoba, by himself, his clerk, servant or agent, directly or indirectly, or upon or by any pretence, or upon or by any device or subterfuge whatsoever, canvass for or solicit or take or receive or hold out himself as an agent or intermediary for taking or receiving from any person within the Province of Manitoba any order or instruction for the purchasing or supplying of liquor for beverage purposes within this Province."

The prosecution was had under this section.

Haggart, J. pointed out in his dissenting judgment that this Act was an independent statute and was not expressed to be an amendment of the Manitoba Temperance Act, but the Court of Appeal (Howell, C.J.M., Perdue, Cameron and Fullerton, JJ.A., Haggart, J.A. dissenting) held the Act to be *intra vires* of the Provincial Legislature.

When I say this decision is not altogether satisfactory, I mean in the sense in which it may be applied to the circumstances of this case. Perdue and Cameron, JJ.A. seem to have thought that the legislation there in question must be taken to intend only to apply to transactions having their beginning and end within the Province and such they considered the transaction in question. Perdue, J.A., at p. 329, says:

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"If the authorities charged with the enforcement of the aforesaid chapter 50 should attempt to apply its provisions so as to obstruct or prohibit a transaction in liquor beyond the legislative jurisdiction of the Province or infringe upon the rights of persons outside the Province, it might then become necessary for the Court, on the matter being properly brought before it, to examine and ascertain the intention of the Act, and its application to the transaction then in question. It might in such a case be necessary to consider the constitutional validity of parts of the Act. Such considerations do not, in my opinion, arise in the present case."

Haggart, J.A. dissented, and Howell, C.J.M. agreed with the majority of the Court but gave no reasons. Fullerton, J.A. dealt with the constitutional aspect of the case, but decided only in so far as it affected residents of the Province of Manitoba. At page 340 the learned judge sums up in these words:

"In my opinion the Act in question, to the extent at least of prohibiting residents of the Province taking orders for the purchasing or supply of liquor for beverage purposes within the Province, is *intra vires* of the Legislature of Manitoba."

The net result of the cases I have just been discussing, seems to me to afford us little assistance in grappling with the circumstances of the case before us. We will assume, and there is no contention to the contrary, that as the British Columbia Act stood before the amendment of 1919, no offence would have been committed and that section 57 as it then stood was *intra vires* of the Province. Then are these amendments which create an offence *ultra vires?* They made it an offence to canvass, solicit or act as agent for the sale or purchase of liquor or to publish, distribute or display signs, circulars, advertisements, etc., referring to liquor or where it may be obtained or giving addresses of persons engaged in manufacturing or dealing in liquors, etc.

In substance as affecting this case under 52A, no person can act as agent in procuring liquor for you from a point either within or without the Province, but it is still open to you personally to purchase from outside by means of the telegraph or letter by post under the reservations in clause 52B.

If this is an interference affecting civil rights only within No. 13 of section 92 of the British North America Act, the Legislature have power but to the extent which it applies to the rights of parties outside the Province (and that is involved here), I think we have to determine whether it falls within subsection 16, "matters of a merely local or private nature in the Province"; or can it be said to be an interference with trade and commerce so as to be wholly within the Dominion jurisdiction?

Our guide in this must be the decisions of the Privy Council. In that connection the following cases were cited: *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96; *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), 1 A.C. 588; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73; and *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348.

In reading these authorities it seems difficult to know just where to draw the line and each case must largely be determined on its own facts, but this much can, I think, be deduced

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—that if upon looking at the whole Act and considering the purpose and intent as indicated by the language used, it can be concluded that although to some extent it may trench upon the provision as to trade and commerce, yet, if its true effect is a dealing with matters of a merely local or private nature, it is within the jurisdiction of the Province to pass. The amendments here do not prevent the purchase by a person in British Columbia of liquor from a firm outside the Province for private consumption, but you are obliged to act direct—no agent can act for you. In other words, you are not prohibited from procuring the liquor but the method of procuring it is curtailed. It is true the cutting down of the facilities of procuring may lessen the sales of the outside dealers, but looking at the whole intent and purpose of the Act it is not such an interference with trade and commerce as would deprive the Province of jurisdiction.

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Mr. *Davis* raised the point that the mere taking of the order and the forwarding it with the necessary money would not constitute the offence arrived at, as the order might not be filled. The words are:

> "No person shall . . . . . receive . . . . . orders for the purchase or sale of any liquor, or act as agent for the purchase or sale of liquor."

I think the offence is committed if the order is never filled.

I would allow the appeal and restore the convictions.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the judgment of MARTIN, J.A.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal allowed,
Macdonald, C.J.A. and Eberts, J.A. dissenting.

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

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REX *EX REL.* BRADSHAW v. McKENZIE.

Criminal law — Intoxicating liquors — Prohibition Act — Mens rea — B.C. Stats. 1916, Cap. 49, Sec. 10.

Although a person licensed to sell liquor containing not more than two and one-half per cent. proof-spirits honestly and reasonably believed that the liquor which he sold was not over that strength it is not a defence to a charge of selling liquor over that strength in contravention of section 10 of the British Columbia Prohibition Act. The scope and object of the Act is to absolutely prohibit the sale of liquor above a certain percentage and one who engages in the sale of liquor of a proper percentage of proof-spirits does so at his peril of its being over strength.

In construing the statute with regard to the application of the common law doctrine of *mens rea* to the act made penal thereby, the object and scope of the statute and the purposes for which it was enacted must be considered, and if it can be gathered from these that the intention of the Legislature was to deprive the accused of the application of such doctrine it may be so construed though express language to that effect is not used.

APPEAL by way of case stated from the decision of HOWAY, Co. J. of the 5th of November, 1920, convicting the accused on a charge of selling liquor in contravention of section 10 of the British Columbia Prohibition Act. The case stated was as follows:

"The appellant is the proprietor of the Dunsmuir Hotel in the City of New Westminster and as such is licensed by the City of New Westminster to sell soft drinks including beer up to the strength of 2½ per cent. proof-spirits. On August 9th, 1920, he sold beer to a police officer which proved upon analysis to contain 5.20 per cent. proof-spirits.

"Upon the trial of the appellant on a charge of selling this intoxicating liquor contrary to the provisions of the Prohibition Act the main defence was that he had bought the liquor honestly believing that it did not contain more than 2½ per cent. proof-spirits. In his favour I found as a fact that he honestly and reasonably believed that he had been supplied of that description and that he honestly and reasonably believed that the liquor in question did not contain more than 2½ per cent. proof-spirits. Statement

"I held that such belief afforded no defence to the charge and that he was guilty of an infraction of section 10 of the Prohibition Act.

"The question submitted for the opinion of the Court of Appeal is:

"Was I right in so holding? If so the conviction will stand, but if not the charge will be dismissed."

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The appeal was argued at Victoria on the 14th of January, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. W. B. McInnes, for appellant: It is a question of *mens rea.* We were licensed to sell near-beer. The learned judge found he did not know that it was stronger than the limit allowed. As to the innocent act being a good defence see *Reg.* v. *Tolson* (1889), 23 Q.B.D. 168 at p. 181. The law is that the Act must expressly deprive us of this defence. Section 41 makes away with the necessity of an over-drastic interpretation of the Act: see *Rex* v. *Lee Duck* (1919), 27 B.C. 482 at p. 484; *Sherras* v. *De Rutzen* (1895), 1 Q.B. 918 at p. 920. This is a straight charge under section 10: see *Rex* v. *Hoffman* (1917), 28 Man. L.R. 7 at pp. 22-3; *Rex* v. *Borin* (1913), 29 O.L.R. 584.

Argument

G. E. Martin, for the Crown, referred to *Pearks, Gunston & Tee, Limited* v. *Ward* (1902), 2 K.B. 1; *Mousell Brothers* v. *London and North-Western Railway* (1917), 2 K.B. 836 at p. 843; *Rex* v. *Nat Bell Liquors, Ltd.* (1920), 3 W.W.R. 522; *Parker* v. *Alder* (1898), 19 Cox, C.C. 191 at p. 197; *Buckingham* v. *Duck* (1918), 26 Cox, C.C. 349; *Roberts* v. *Egerton* (1874), L.R. 9 Q.B. 494.

McInnes, in reply: These cases are with relation to the Food Acts which can be distinguished by reason of section 41 of our Act.

Cur. adv. vult.

9th April, 1921.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal for the reasons to be handed down by my brother GALLIHER.

MARTIN, J.A.

MARTIN, J.A.: This case raises the vexed question of *mens rea* which I considered recently in its aspect of unlawful possession in *Rex* v. *Young,* 24 B.C. 482; (1917), 3 W.W.R. 1066, followed in *Rex* v. *Cappan* (1920), 2 W.W.R. 135, where the authorities are well collected by the Manitoba Court of Appeal. There is no doubt about the general rule and as Viscount Reading, C.J., said in *Mousell* v. *London and North-Western Railway* (1917), 2 K.B. 836 at p. 843; 81 J.P. 305;

"The true principle of law is laid down in the case of *Pearks, Gunston & Tee* v. *Ward* (1902), 2 K.B. 1, 11 [71 L.J., K.B. 656]. The passage to which I particularly wish to refer is in the judgment of Channell, J.: 'By the general principles of the criminal law if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant.'"

And again on p. 844:

"*Prima facie*, then, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the Legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not party to, the forbidden act done by his servant. Many statutes are passed with this object. Acts done by the servant of the licensed holder of licensed premises render the licensed holder in some instances liable, even though the act was done by his servant without the knowledge of the master. Under the Food and Drugs Act there are again instances well known in these Courts where the master is made responsible, even though he knows nothing of the act done by his servant, and he may be fined or rendered amenable to the penalty enjoined by the law. In those cases the Legislature absolutely forbids the act and makes the principal liable without a *mens rea*."

In ascertaining the intention of the Legislature where there is room for doubt Viscount Reading said:

"The Court may bear in mind the avowed purpose of the Act and consider whether a particular construction will render the Act effective or ineffective for that purpose."

The intention of the Act before us is clearly indicated by its preamble which states that "it is expedient to suppress the liquor traffic in British Columbia by prohibiting Provincial transactions in liquor." This shews that it is a statute dealing with the public health and welfare and so brings it within *Reg.* v. *Woodrow* (1846), 15 M. & W. 404; 16 L.J., M.C. 122, a case of a retail dealer being innocently in possession of adulterated tobacco, wherein it was said by Pollock, C.B., at p. 415 (15 M. & W.): MARTIN, J.A.

"If this were the case of provisions, or of any matter that affected the public health, it would not be at all unreasonable to require persons dealing in them to be aware of their character and quality, and to be responsible for their goodness, whether they know it or not;—they are bound to take care."

And Baron Parke said, p. 417:

"It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examin-

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ing the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so. The Legislature have made a stringent provision for the purpose of protecting the revenue, and have used very plain words. If a man is in possession of an article, as the defendant was in this case, and that article falls within the terms mentioned in the statute, there is no question but that the offence is proved. If there is any hardship in the case, it does not rest with those who have only to carry the law into effect to remedy it."

Furthermore, this is one of those cases where, in my opinion, the "physical act" of selling is prohibited as was held in *Hotchin* v. *Hindmarsh* (1891), 2 Q.B. 181; 60 L.J., M.C. 146, a case of innocently selling adulterated milk through a servant, and the Court laid stress upon the fact that it was the physical act that was forbidden; as Lord Coleridge, C.J. put it, pp. 186-7:

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"In my opinion, a person who takes the article in his hand, and performs the physical act of transferring the adulterated thing to the purchaser, is a person who sells within this section."

According to the case stated it was the accused who made the sale of the prohibited liquor, but the result would be the same had his servant done so.

The appeal, therefore, should be dismissed.

GALLIHER, J.A.: This comes before us by way of a case stated by HOWAY, Co. J. The accused was convicted for selling liquor of the strength of 5.20 per cent. proof-spirits and while the learned judge found that the accused had been supplied with liquor for sale which he honestly and reasonably believed contained not more than 2½ per cent. proof-spirits (and for which sale he held a licence), he nevertheless held that such belief afforded no defence to the charge and that he was guilty of an infraction of section 10 of the Prohibition Act. The question submitted for our consideration is, "Was I right in so holding?"

GALLIHER, J.A.

In *Reg.* v. *Tolson* (1889), 23 Q.B.D. 168 at p. 181, Cave, J. lays down this proposition:

"At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. . . . . So far as I am aware it has never been suggested that these exceptions

do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication."

And Stephen, J. in the same case at p. 190, citing *Reg.* v. *Prince* (1875), L.R. 2 C.C. 154, states the decision of the Court there to be as follows:

"All the judges therefore in *Reg.* v. *Prince* agreed on the general principle [enunciated by Lord Esher, then Brett, J.], 'that a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no offence at all, is an excuse, and that such an excuse is implied in every criminal charge and every criminal enactment in England,' . . . . though they all, except Lord Esher, considered that the object of the Legislature being to prevent a scandalous and wicked invasion of parental rights [the abduction of a girl under 16], ... it was to be supposed that they intended that the wrongdoer should act at his peril [and the belief that the girl was over 16 years was no defence]."

In the *Tolson* case, *supra,* the dissenting judges, Manisty, Denman and Field, JJ., and Pollock and Huddleston, BB. were unable to distinguish the case of *Reg.* v. *Prince, supra,* while Lord Coleridge, C.J., who was in accord with the majority decision of the Court stated, that as he understood it none of the judges intended to differ from the judgment in *Reg.* v. *Prince.* The majority judges in dealing with the *Prince* case thus expressed themselves: Stephen, J., at p. 191:

"It appears to me that every argument which shewed in the opinion of the judges in *Reg.* v. *Prince* [(1875)], L.R. 2 C.C. 154, that the Legislature meant seducers and abductors to act at their peril, shews that the Legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties, to be a valid and honourable marriage, with a liability to seven years' penal servitude."

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Hawkins, J., at p. 194:

"They [the judges] differed, however, in the application of the law to the facts of the particular case, Brett, J., thinking that there was in the prisoner no such *mens rea* as was necessary to constitute a crime; the rest of the Court thinking that the act of abduction of which the prisoner was guilty, being a morally wrong act, afforded abundant proof of his criminal mind."

Cave, J., at p. 181:

"As I understand the judgments in that case the difference of opinion was as to the exact extent of the exception, Brett, J., the dissenting judge, holding that it applied wherever the accused honestly and reasonably believed in the existence of circumstances which, if true, would have made his act not criminal, while the majority of the judges seem to have held that in order to make the offence available in that case the accused must have proved the existence in his mind of an honest and reasonable belief

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in the existence of circumstances which, if they had really existed, would have made his act not only not criminal but also not immoral."

Wills, J., at p. 180:

"This judgment contains an emphatic recognition of the doctrine of the 'guilty mind,' as an element, in general, of a criminal act, and supports the conviction upon the ground that the defendant, who believed the girl to be eighteen and not sixteen, even then in taking her out of the possession of the father against his will was doing an act wrong in itself."

I think it may be taken that Lord Coleridge, C.J. truly expressed the views of the majority of the Court when he said they did not differ from the judgment in *Reg.* v. *Prince,* but in the view they took of that decision the cases were distinguishable.

There is an interesting article by Silas Alward in 38 C.L.T. 646, on the doctrine of *mens rea,* where the above cases and others are referred to. I do not think I can better express my own views of the conflicting judgments in these cases than by adopting the words of the writer with, perhaps, the elimination of the word "unlawful." At p. 657 he says:

"The conflicting judgments in the two great cases of *Regina* v. *Prince* and *Regina* v. *Tolson* arose largely from the fact that in the former case, the prisoner, apart from the question of the age of the girl, was in the pursuit of a wrongful and immoral act in taking her from the protection and guardianship of her father. While in the latter case, there was nothing unlawful, wrongful or immoral in the re-marriage of the prisoner, who supposed herself to be a widow."

GALLIHER, J.A.

In *Reg.* v. *Woodrow* (1846), 15 M. & W. 404, an appeal to the Court of Exchequer, Pollock, C.B. and Parke, B. held that the plea of *mens rea* did not prevail in the case of a retailer of tobacco on information for having adulterated tobacco in his possession contrary to the statute, even although he had purchased it as genuine and had no knowledge or cause to suspect that it was not so.

I quote from the judgment of Chief Baron Pollock (pp. 415-6):

"If this were the case of provisions, or of any matter that affected the public health, it would not be at all unreasonable to require persons dealing in them to be aware of their character and quality, and to be responsible for their goodness, whether they know it or not;—they are bound to take care. . . . . It may be said, that in this particular instance it worked a great hardship, because it is expressly found, I may take it, that the magistrates, who in the first instance dismissed the information, and the Court of Quarter Sessions, and who decided in favour of the

defendant, were of opinion that he personally had no knowledge of this violation of the law. If the law in a particular case works any hardship, it is either for the Legislature to alter the law, or for the executive department of this branch of the revenue law to abstain from calling for the enforcement of the statute. But if we are called upon to put our construction upon it, I believe we are all of opinion that the due construction of the 3rd and 4th sections is, that this tobacco was forfeited, and that the party is liable to the penalty, whether he is or is not aware that the commodity has been adulterated in the manner in which this turns out to be. In reality, a prudent man who conducts this business, will take care to guard against the injury he complains of, and which Mr. Crompton says he has a right to complain of, and he would not be exposed to it. If he examines the article, he may reject it, and not keep it in his possession; or if he is incompetent to do that, he may take a guaranty that shall render the person with whom he is dealing responsible for all the consequences of a prosecution."

And from Baron Parke (p. 417):

"With respect to the offence itself, I have not the least doubt that the ordinary grammatical construction of this clause is the true one. It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so. . . . . The Legislature have made a stringent provision for the purpose of protecting the revenue, and have used very plain words. If a man is in possession of an article, as the defendant was in this case, and that article falls within the terms mentioned in the statute, there is no question but that the offence is proved. If there is any hardship in the case, it does not rest with those who have only to carry the law into effect to remendy it."

GALLIHER, J.A.

In *Sherras* v. *De Rutzen* (1895), 1 Q.B. 918, Wright, J. at p. 921 says:

"There are many cases on the subject, and it is not very easy to reconcile them. There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered: *Nichols* v. *Hall* [(1873)], L.R. 8 C.P. 322,"

and after referring to *Lolley's Case* [(1812)], R. & R. 237, and the *Prince* case, *supra,* goes on to say:

"Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush, J. in *Davies* v. *Harvey* [(1874)], L.R. 9 Q.B. 433, are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty,"

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and cites *Reg.* v. *Woodrow, supra,* as an exception. Both Wright, J. and Day, J. held, however, that in the case before them, where a licensed victualler was convicted for an offence of supplying liquor to a police constable while on duty, that the Licensing Act did not apply where the licensed victualler *bona fide* believes that the police constable is off duty. Other decisions more or less conflicting were cited to us.

It is hard, in view of the many conflicting decisions, to come to a satisfactory conclusion, especially as the distinction in some of them seems finely drawn, but I think this much can be deduced that where an act is not in itself immoral or illegal, but is made penal by statute, it becomes a question of construction whether the common law doctrine of *mens rea* is intended to apply to it or not. If the statute says so in plain language, there is, of course, no difficulty, but where the statute is silent it becomes a question whether the Legislature intended to take away the common law defence of *mens rea.*

Generally speaking, the authorities seem to point to this, that if such was the intention, it should have been expressed in clear and explicit terms, but that again is subject to this, that in interpreting any statutes of the nature of the one in question here, you must look at the object and scope of the statutes and the purposes for which it was enacted and if you can gather from these that the intention of the Legislature was to deprive the accused of the common law right, it may be so construed though express language is not used.

GALLIHER, J.A.

Now, looking at the Act in question, I think it is clear that the scope and object of the Act was to absolutely prohibit (except as provided in the Act), the sale or disposal of liquor above a certain percentage of proof-spirits within the Province of British Columbia. That being so, there should not have been on the premises of the accused any such liquor for sale or disposal, and the fact that by accident or otherwise, it was there, seems to me something that the accused had to guard against and if he chooses to engage in the sale of liquor of a proper percentage of proof-spirits and for which he was licensed, he does so at the peril of such an accident occurring as apparently occurred here, and that the Legislature so intended.

Mr. *McInnes* refers us to section 41 of the Prohibition Act, and the case of *Rex* v. *Lee Duck* [(1919), 27 B.C. 482]; (1920), 1 W.W.R. 1051, a decision dealing with the effect of said section. It seems to me that section 41 does not assist the accused. He was charged with selling liquor of the strength of 5.20 per cent. proof-spirits. Section 41 reads as follows:

"If, in the prosecution of any person charged with committing an offence against any of the provisions of this Act in selling . . . . liquor, *prima facie* proof is given that such person had in his possession or charge or control any liquor in respect of or concerning which he is being prosecuted, then, unless such person prove that he did not commit the offence with which he is so charged, he may be convicted accordingly."

Assuming the *prima facie* proof to have been given, what is the accused called upon to do here? Prove that he did not commit the offence charged.

GALLIHER, J.A.

It is not denied that the liquor was in his possession or that he sold it, but it is said, I did not know it was over strength, and the learned County Court judge held he reasonably believed that, but the question is still open. Is that a defence?

While I admit it is a case of no little difficulty, in view of conflicting decisions, and that others might well take a different view, I am on the whole impelled to answer the question submitted to us in the affirmative.

MCPHILLIPS, J.A.

McPHILLIPS, J.A. agreed in dismissing the appeal.

Appeal dismissed.

Solicitor for appellant: *W. W. B. McInnes.*
Solicitor for respondent: *George E. Martin.*

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April 9.

1921

REX v. KERR

REX *EX REL.* LAWSON v. KERR.

Criminal law—Intoxicating liquors—Prohibition Act—Liquor found in room in building—Occupied as sleeping apartment and for cooking meals—"Private dwelling-house"—Interpretation—B.C. Stats. 1916, Cap. 49, Sec. 3, 3(a) and 11; 1918, Cap. 68, Sec. 4.

The accused occupied a room in which he slept and cooked his meals in a building on the same floor of which was a tailor shop, photographer's quarters and other occupied rooms and from the hall of which there were entrances through a party-wall to the quarters of a social club in an adjoining building. On appeal from the quashing of a conviction for having intoxicating liquor in a room other than a dwelling-house:—

Held, per MACDONALD, C.J.A., and GALLIHER, J.A., that as subsection (*a*) of section 3 of the Act declares that "the expression 'private dwelling-house' shall not include or mean . . . . any house or building connected by a doorway or covered passage or way of internal communication . . . . with any . . . . club-house [or] club-room" the accused's room was expressly excluded from the term and the conviction should be restored.

Per MARTIN and MCPHILLIPS, JJ.A.: That the room was a "private dwelling-house" within the meaning of section 3 of the Prohibition Act.

The Court being equally divided the appeal was dismissed.

Statement

APPEAL by the Crown from the decision of THOMPSON, Co. J., of the 29th of October, 1920, quashing a conviction by the police magistrate of Fernie, the accused having been charged with having intoxicating liquor in a room other than a private dwelling-house. Two buildings in Fernie known as the Beck Block and Johnson Block adjoined each other by a party-wall. There were three stores on the ground floor, and a stairway at the middle on the Beck side of the party-wall ran from the street to the floor above where a hall ran along the party wall to the back of the building. This floor of the Johnson Block was wholly occupied by the Fernie Club there being two entrances from the hall aforesaid through the party-wall, and on the same floor of the Beck Block were nine rooms, four in front, four in the rear, and a ninth room in the middle between two side halls, with an entrance from the main

hall. This room was occupied by the accused who slept and cooked his meals there. The liquor was found in this room. He was engaged as a clerk in the Fernie Hotel a short distance away. On the quashing of the conviction by THOMPSON, Co. J., the Crown appealed.

The appeal was argued at Victoria on the 11th and 14th of February, 1921, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Carter, for the Crown: The accused was a clerk in the Fernie Hotel a short distance from the room in question. The question is whether the room is a dwelling within the section: see *Welch* v. *Kracovsky* (1919), 27 B.C. 170; *Rex* v. *Sit Quin* (1918), 25 B.C. 362; *Rex* v. *Purdy* (1917), 41 O.L.R. 49; *Rex* v. *Maker* (1920), 48 O.L.R. 182; and *Whimster* v. *Dragoni* (1920), 28 B.C. 132.

Argument

Davis, K.C., for accused: The accused resided, slept, cooked and had his meals in this room: see *Welch* v. *Kracovsky* (1919), 27 B.C. 170 at p. 173. There is not sufficient attention paid to the distinction between "dwelling" and "house." If the principle applied in *Rex* v. *Carswell* (1918), 42 O.L.R. 34; 43 D.L.R. 715, had been applied in former cases it would have brought about an opposite decision: see also *Rex* v. *Martel* (1920), 48 O.L.R. 347.

Carter, in reply.

Cur. adv. vult.

9th April, 1921.

MACDONALD, C.J.A.: The accused occupied one room of a building in which there were the quarters of a social club, a tailor shop and some other rooms, all of which premises were connected with the street and alley by a common hall-way and stairways at front and rear. Whether there were doors of entrance at the street and alley is, to my mind, immaterial. I will assume in the accused's favour that his room falls within the general definition of a "dwelling-house," contained in section 3 of the British Columbia Prohibition Act. The question then arises, was it excluded from that category by subsection (*a*) of said section 3?

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The learned County Court judge from whom the appeal is taken, read subsection (*a*) out of the section altogether as being meaningless, holding that because of its opening words, "without restricting the generality of the above definition," the subsection was self-destructive. In this I think he was in error. It is the duty of the Court to interpret a statute and to give to it, when the language of it is inapt or equivocal, a construction which will not destroy any part of it, if this can be effected. What the Legislature meant by the words above quoted, is not open to very serious doubt. I think the words under discussion merely mean this, that except in the particulars set forth in subsection (*a*), the generality of the definition in the principal section was not to be affected.

It is declared by subsection (*a*) that the expression "private dwelling-house" shall not include or mean any house connected by a doorway or covered passage way, or way of internal communication with any club-house or club-room.

MACDONALD, C.J.A.

Treating the room occupied by the accused, apart from the exclusive words above referred to, as a private dwelling-house, which is defined in the main section to mean, "a separate dwelling with a separate door for ingress and egress," the question then arises, was it a house connected by a way of internal communication with the club rooms across the hall from it and with all the other rooms in the building opening upon the common hall-way? I think it was and that the conviction should be restored.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the learned judge appealed from was, on the facts before him, justified in coming to the conclusion that the isolated single room in question occupied by the accused as his home, "in which he actually resided, cooked, slept and took his meals," was a "private dwelling-house" within the meaning of section 3 of the British Columbia Prohibition Act, Cap. 49 of 1916, as set out in the first three lines of that section. The words in subsection (*a*) following those three lines cannot, I think, be construed as words of special limitation upon the general declaration, because they are expressly declared to be enacted "without restricting the

generality of the above definition of a private dwelling-house," and therefore to give them a restrictive effect would be to fly in the face of and cut down that general definition which it is declared must not be restricted. It is obvious that (*a*) is a clumsy perversion (as applied to restriction) of the well-known language in section 91 of the B.N.A. Act which is aptly applied to the partial definition of distributed legislative powers.

If I may be permitted to say so, with all due respect, the unfortunate discord in the Ontario decisions cited to us arises from the fact that sufficient attention has not been given to the meaning of "dwelling" in the first three lines, as distinct from the expression "house or building" employed in subsection (*a*) because while a dwelling might be a house or building, and a house or building a dwelling, yet all dwellings are not houses, nor all houses dwellings. My view of the matter is that when the premises of the accused can be brought within the definition of "private dwelling-house" within the said three lines his rights acquired under that definition cannot be "restricted" by the language expressed in subsection (*a*). From a perusal of that section it will be observed that this view does not prevent it from having considerable application, several instances of which were suggested during the hearing, and therefore the argument that, by the adoption of the view I support, subsection (*a*) would become inoperative, loses its force.

MARTIN, J.A.

The only point that created some uncertainty in my mind was as to the public use of the front stairway and passage-way from the head of it through the building to the back stairway, and upon which passage the only door of the accused's room opened, but upon an examination of the evidence I am of the opinion that the learned judge was justified in coming to the view as he in effect did come to, that the stairway and passage were in fact and practical use "open" to the public as a common way, whatever they might be held to be as a matter of strict legal ownership.

The Courts have to deal with these questions (since people live now so much in apartments) in the light of changed modern conditions, as this Court did recently in the case of *Welch* v.

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Kracovsky (1919), [27 B.C. 170] 3 W.W.R. 361, wherein we took cognizance of the change in the manner of the living of the people, and in which we considered the question of the breaking open the outer door of a suite of apartments which we held to be a separate and distinct tenement, and I adopted the decision of the Supreme Court of Massachusetts in Term, in *Swain* v. *Mizner* (1857), 74 Mass. 182, wherein it was decided that each of such tenements, or suite of apartments, if complete in itself, and subject to the sole and exclusive use and possession of the tenant, is to be considered in law as a "separate and distinct tenement" constituting the tenant's "dwelling-house; and that it was therefore entitled to the privilege and protection which the law affords to the habitations of men."

MARTIN, J.A.

My view is confirmed by subsection (*b*) which is clearly "notwithstanding the above restrictions" in (*a*) an extension of the definition of private dwelling-house in favour of a suite of rooms in an apartment block, etc., but it does not appear to take cognizance of the fact that a dwelling may consist of a single room within the definition of said three lines.

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

GALLIHER, J.A.

GALLIHER, J.A.: I would allow the appeal and restore the conviction.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the judgment of MARTIN, J.A.

The Court being equally divided the appeal was dismissed.

Solicitor for appellant: *Wm. D. Carter.*
Solicitor for respondent: *F. C. Lawe.*

REX v. CHIN CHONG.

COURT OF APPEAL

1921

March 31.

REX v. CHIN CHONG

Criminal law—Indecent assault—Evidence—Complaint by person assaulted — Admissibility — Substantial wrong — Case stated — Criminal Code, Sec. 1019.

If upon a criminal appeal it appears that evidence was improperly admitted that may have influenced the magistrate adversely to the accused upon a material issue, the conviction should be quashed. *Allen* v. *Regem* (1911), 44 S.C.R. 331 followed.

APPEAL from a conviction by the police magistrate at Vancouver by way of case stated in pursuance of an order of the Court of Appeal of the 1st of March, 1921. The case stated is as follows:

"1. On the 2nd of November, 1920, Iwaza Tanaka laid an information against the defendant for indecent assault on Mrs. K. Tanaka on the 13th of October, 1920, at Vancouver. The defendant was convicted and fined $200, or in default six months' imprisonment.

"2. For the prosecution Kio Tanaka having, *inter alia*, deposed that, on the 13th of October, 1920, while engaged in washing clothes for Mrs. Ham in the basement of Mrs. Ham's house at 642 11th Avenue, Vancouver, the defendant indecently assaulted her. Her husband, Iwaza Tanaka, gave evidence that on the evening of the same day she told him exactly the same story she told in the witness box. The transcript of the proceedings relating to the admission of this evidence is as follows:

" 'When did you first hear about this assault? The very day.

" 'When she came home? Yes.

" 'What did she tell you? The same.

" 'Mr. *Mellish*: I object to what she told.

" 'Mr. *McKay*: That is perfectly clear. That is always admissible in sexual complaints.

" 'COURT: Is it in the case of adults or only children?

" 'Mr. *McKay*: It is always admissible.

" 'Mr. *Mellish*: The first reasonable time to make any complaint would be to Mrs. Ham.

" 'Mr. *McKay*: Her husband is the one she would make a complaint to.

" 'COURT: As far as her husband is concerned, she could not make any complaint to him sooner than she did. In the first place, Mr. *Mellish*, I have to assume that this woman cannot speak English. She really could not make a complaint that would be intelligible at all except to somebody of her own race. I think the evidence is admissible.'

"3. For the defence the defendant denied the allegations, and in rebuttal the prosecution called J. A. Russell, who deposed to a conversation, through an interpreter, at his house with the defendant. The transcript of this evidence reads:

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"'The same evening my chauffeur when I was at home brought the accused in to my house. He says "here is the boy that drives 102." I asked him if he had been at the number—here is my original memorandum I got from the Japanese. I asked him then if he had been to 624 Seventh Avenue; he said he had and then I said, "what sort of a scrap is this you have been getting into," in a casual way, and he told the story he told here today with some variations; but he admitted, he claimed rather, that this woman had tried to seduce him in order to obtain $10. I said "it is hardly likely a woman in her condition would ask you to do anything of that kind." Then he appeared to get frightened and wanted to know if there was some way out of it. I said "I do not think there is; I am afraid they will prosecute you." I said "You can go and see them and offer to pay the doctor's bill and offer to pay the injury which this woman has suffered." There was no mention of $400. I only said that to get clear of the boy. I told him to get a lawyer.'

"4. I certify that the rebuttal evidence given by Mr. Russell did not influence me in arriving at a decision.

Statement

"I submit the following questions for the opinion of this Court as if same had been reserved:

"1. Did I err in admitting the evidence of Iwaza Tanaka of statements made to him, in the absence of the accused, by Kio Tanaka, his wife, who it was claimed had been indecently assaulted?

"2. Did I err in admitting the evidence of J. A. Russell of a conversation with the accused through an interpreter?"

The appeal was argued at Vancouver on the 31st of March, 1921, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mellish, for appellant: It was not shewn that the reasonable time to make a complaint was when she went home. My contention is she should have complained to her mistress where she was working; secondly, the act took place between 9 and 10 in the morning and she went home after two o'clock in the afternoon. The onus is on the Crown to shew the statement was voluntary and that the element of inducement was excluded: see *Rex* v. *Osborne* (1905), 1 K.B. 551 at p. 561; *Rex* v. *McGivney* (1914), 19 B.C. 22; *Rex* v. *Bradley* (1910), 4 Cr. App. R. 225; *Rex* v. *Hart* (1914), 10 Cr. App. R. 176; *Reg.* v. *Lillyman* (1896), 2 Q.B. 167.

Argument

W. M. McKay, for respondent: The husband said she complained to him. The act was committed four miles away from their dwelling. The cases are collected in the report of the *McGivney* case; see also *Hopkinson* v. *Perdue* (1904), 8 O.L.R. 228; *Rex* v. *Norcott* (1916), 25 Cox, C.C. 698. As to paying attention to Russell's evidence see *Rex* v. *Tutty* (1905),

38 N.S.R. 136. Under section 1019, notwithstanding evidence wrongfully admitted, if there is evidence which would justify a conviction it should not be disturbed; see also *Rex* v. *Romano* (1915), 24 Que. K.B. 40; *Rex* v. *Baugh* (1917), 38 O.L.R. 559; *Allen* v. *Regem* (1911), 44 S.C.R. 331 at p. 363.

MARTIN, J.A.: The appeal should be allowed. My view is simply this: In view of the very proper admission made by Mr. *McKay* as to the necessity of having the circumstances surrounding the alleged complaint before us, the only way he has of escaping that is section 1019, and it is clearly laid down in *Allen* v. *Regem* (1911), 44 S.C.R. 331, by a majority of the Court, the Chief Justice, Mr. Justice Duff and Mr. Justice Anglin, that if we can say that the evidence may have influenced the verdict of the jury, causing the accused substantial wrong, then he is entitled to succeed. So I have no hesitation in saying here that I find it absolutely impossible to say the contrary. It is repeated by Mr. Justice Anglin, "may influence them adversely to the accused upon a material issue," page 363. I see no escape from it, and it is our duty to allow the appeal. The conviction is quashed.

MARTIN, J.A.

GALLIHER, J.A.: I take the same view and I do so with regret, because it seems to me that it almost takes away the effective provisions of section 1019. As a matter of fact, it is pretty hard for anyone to say what may or may not influence somebody else. We cannot enter into the cavern—the cells of his mind—and find what is in there. It may be that the words used by the learned justices in the Supreme Court were not intended to have the full effect that it appears to me they have; but on the other hand I cannot say that is not so. Their decision is binding upon us. At least, I for one feel that the Appeal Court here should not try to avoid the decision in *Allen* v. *Regem* (1911), 44 S.C.R. 331.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should succeed. I do not hesitate to say that no sufficient evidence was adduced in the Court below upon which to support this conviction. The evidence which needs to be adduced in a case of

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this character where, as in this particular case, there is no real evidence of any physical assault, is that it is in its nature indecent, and it has to be of that character to warrant a conviction. No evidence of that nature can be pointed to. Further, there is no sufficient evidence of that being done which, in ordinary cases people assaulted would do. When the surrounding circumstances are looked at and when you exclude the evidence of the husband, as I believe it is right to consider that it was illegally adduced, you have such scant evidence that the only conclusion to come to is that there is no sufficient evidence, and if there is no sufficient evidence you cannot rely upon section 1019. I think it would be, upon the facts of this case, highly dangerous in the interests of justice and preservation of the liberty of the subject that evidence so scant in its nature should be held by a Court of Appeal to be sufficient evidence upon which to support a conviction. Upon the whole case I feel satisfied to say that there was no sufficient evidence upon which the conviction could be supported. I do not disagree at all, in fact, I agree with what my learned brothers have said upon the other points, that is, if you pass over the stile and hold that there was some evidence, yet there would then be prejudice to the accused because this evidence, which was illegal, may have influenced the learned magistrate in his decision, and if that be so, at the least the conviction must be quashed and a new trial ordered, but as I understand section 1019, we are not under any compulsion to direct a new trial, although we have power to do it, which is in contradistinction to the power of the Criminal Court of Appeal in England. We have at times quashed convictions without directing a new trial, and I think this is eminently a case in which to quash the conviction, and not a case in which we should direct a new trial.

MCPHILLIPS, J.A.

Appeal allowed and conviction quashed.

COX v. THE BEGG MOTOR COMPANY, LIMITED.

GALLIHER, J.A. (At Chambers)

1921

April 26.

Cox v. Begg Motor Co.

Practice — Court of Appeal — Costs — Taxation — Review — Amount of plaintiff's "claim"—R.S.B.C. 1911, Cap. 53, Sec. 122(2).

The plaintiff claimed $1,000 damages in a County Court action and recovered $250 at the trial. The defendant appealed and the appeal was dismissed with costs.

Held, that the plaintiff's costs on appeal are limited to $100 under section 122(2) of the County Courts Act. The words "where the plaintiff shall claim" in said section mean, claim as determined by the judgment appealed against, and the costs awarded below should not be included in estimating the amount.

Allan v. *Pratt* (1888), 13 App. Cas. 780 applied.

APPLICATION by the defendant for a review of the taxation of the costs of the appeal by the taxing officer at Vancouver. Heard by GALLIHER, J.A. at Chambers in Victoria on the 22nd of April, 1921. Statement

Clearihue, for the application.

N. R. Fisher, contra.

26th April, 1921.

GALLIHER, J.A.: This matter comes before me by way of review of a taxation by the taxing officer at Vancouver.

The action was one for fraudulent representation respecting a motor-car purchased by plaintiff from defendant, in which damages were claimed for $1,000. At the trial the jury awarded $250 damages, and judgment was entered for this amount with costs.

The defendant appealed to this Court and the appeal was dismissed with costs. These costs were taxed at the sum of 300 odd dollars and it is this taxation that is up for review at the instance of the defendant. The defendant's contention is that as the amount awarded by the jury does not exceed $250, the costs should, under section 122, subsection (2) of the County Courts Act be allowed at not exceeding $100; in other words, that the scale of taxation should be fixed by the amount awarded and not by the amount claimed, the plaintiff, on the Judgment

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other hand, contending that the amount claimed is the proper basis on which to fix the scale. As counsel were unable to refer me to any decisions directly in point in our own Court, I thought the matter of sufficient importance to reserve it for consideration and hand down reasons.

Section 116 of the County Courts Act provides that an appeal shall lie to the Court of Appeal from all judgments, orders or decrees, whether final or interlocutory, of the County Court or a judge,

"(*a.*) In any action or cause when the plaintiff shall claim a sum of, or a counterclaim shall be set up of, one hundred dollars or over."

The plaintiffs are under this subsection. They are also, I think, under the first part of subsection (2) of section 122, as follows:

"(2.) In appeals under section 116, where the plaintiff shall claim a sum of . . . . one hundred dollars or over, but not exceeding two hundred and fifty dollars . . . . the costs of such appeal shall not be allowed upon taxation at a greater sum than one hundred dollars."

Defendant's counsel referred me to two cases decided by LAMPMAN, Co. J.: *Johansen* v. *Elliott* (1908), 7 W.L.R. 785, and *Page* v. *Mitchell Motor Agency* (1921), 1 W.W.R. 1107. In *Johnston* v. *Hadden* (1908), 8 W.L.R. 526, HOWAY, Co. J. took a different view to LAMPMAN, Co. J., and allowed costs on the scale of the whole amount recovered, including the moneys paid into Court, but as that was the whole amount claimed it does not assist me in determining the question raised here, neither do the judgments of LAMPMAN, Co. J. In these cases the learned County Court judges would be bound by rule 26 of Order XXII., of the County Court Rules, and their difference of opinion was due to the interpretation of what could be deemed to be the amount recovered. Now, if rule 26 could be held to apply to costs of appeal, there would be no difficulty, but in my judgment that rule is only applicable to the trial below, for in the County Courts Act itself, we find (section 122):

Judgment

"The costs of and consequent upon such appeals shall follow the event of the appeal, and shall, subject to the provisions contained in subsections . . . . (2) [I omit 1 and 3] hereof, be charged and taxed according to the scale in force from time to time in the Supreme Court," etc.

Were it not for the limitation in subsection (2), then under section 122 the costs would be charged and taxed on the Supreme

Court scale and rule 26 does not, in my opinion, apply, as I have just stated. We then get down to the language of sub-section (2), where a plaintiff shall claim a sum of exceeding $250. The plaintiff in the action below claimed $1,000, but was awarded only $250. His claim then against the defendant, when the matter went to appeal, was only $250 and it is the defendant who appeals.

It is to be noted that section 122 deals with the costs of appeal. The plaintiff's claim to the extent of $250 was established in the Court below; he is satisfied and does not appeal; the defendant is dissatisfied and appeals against this judgment and the question to be determined is: Do these words, "where the plaintiff shall claim," etc., mean claim as made in the action below or claim as determined by the judgment appealed against?

I have been referred to no direct authority, but I think I can deduce from the principles enunciated in *Beauvais* v. *Genge* (1916), 53 S.C.R. 353 and *Allan* v. *Pratt* (1888), 13 App. Cas. 780, the true principle which should be applied here. In the *Beauvais* case the majority of the Court held that they had jurisdiction to hear the appeal upon an application to quash an appeal for want of jurisdiction, where the sum recovered was less than $5,000, but the sum demanded in the plaintiff's declaration was $5,017.20. As I read the majority judgments of the Court, it was based largely upon the circumstance that in the Province of Quebec, by Article 2311, R.S.Q., it was provided that "Whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered if they are different," and declined to follow the decision of the Privy Council in *Allan* v. *Pratt,* on the assumption that this provision had not been called to their attention. Mr. Justice Anglin dissented. That learned judge in his judgment, states at p. 373:

Judgment

"Having regard to the reasons assigned by the Judicial Committee in *Macfarlane* v. *Leclaire* [(1862)], 15 Moore, P.C. 181 and *Allan* v. *Pratt* [(1888)], 13 App. Cas. 780 for holding that the right of appeal to the Privy Council should depend upon the amount of the appellant's interest, I would not be prepared to give to the word 'demanded' in clause 3 of

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article 68 C.P.Q. the meaning 'demanded in the action,' even if I were satisfied that the predecessors of article 2311 of the Revised Statutes of Quebec, 1888, had been entirely overlooked in those cases or had been deemed inapplicable, because, to do so, would overturn well-settled jurisprudence with revolutionary consequences, and because that is not the only meaning of which 'demanded' is reasonably susceptible."

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I have, however, no such clause to consider here and I only cite the passage to shew that even with such an enactment to consider, the learned judge adopted the reasoning of the Judicial Committee. It remains then to consider the case of *Allan* v. *Pratt, supra,* and I do so free from any such clause as in the Quebec Act.

The judgment of the Judicial Committee was delivered by the Earl of Selborne; quoting from p. 781:

"Their Lordships are of opinion that the appeal is incompetent. The proper measure of value for determining the question of the right of appeal is, in their judgment, the amount which has been recovered by the plaintiff in the action and against which the appeal could be brought. Their Lordships, even if they were not bound by it, would agree in principle with the rule laid down in the judgment of this tribunal delivered by Lord Chelmsford in the case of *Macfarlane* v. *Leclaire* [(1862)], 15 Moore, P.C. 181, that is, that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal."

Judgment

Here, as I have pointed out, it is the defendant who is appealing and I think the above principle is one that I should apply here.

I have given consideration to the further point pressed by Mr. *Fisher* for the plaintiff, that in any event, I should take into consideration in estimating the amount appealed against, the costs which were awarded as a consequence of the judgment, but I am not prepared to take that view. The costs are not part of the amount in dispute, they simply flow from the judgment.

The application is allowed and the registrar will be directed to tax the costs at not exceeding $100.

Application granted.

THE CORPORATION OF THE DISTRICT OF NORTH COWICHAN v. GORE-LANGTON.

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April 29.

NORTH COWICHAN v. GORE-LANGTON

Municipal law—Expropriation proceedings—Arbitration—Award—Compensation to registered owner—Unregistered conveyance by registered owner—R.S.B.C. 1911, Cap. 127, Sec. 104—B.C. Stats. 1914, Cap. 52, Sec. 362.

A municipal corporation took proceedings to expropriate land for a highway under section 362 of the Municipal Act and the arbitrators awarded compensation to the registered owner.

Held, that in view of section 104 of the Land Registry Act the corporation could not refuse payment to the registered owner because he had previously executed a conveyance of the property that was not registered:

Hanna v. *City of Victoria* (1916), 22 B.C. 555, applied.

An award cannot be contested on the ground that the arbitrators allowed no sum to the corporation for the advantage resulting from the operation of the expropriating by-law where the award is a lump sum and is without error on its face.

APPEAL by plaintiff from the judgment of GREGORY, J., of the 14th of December, 1920, on a motion to set aside an award or refer the matter back to the arbitrators. The relevant facts are that the Municipality decided to run a road through what was known as Swallowfield Farm, owned by the defendant. An expropriation by-law was passed on the 21st of July, 1920, published on the 28th of July, registered in the County Court on the 2nd of August, and in the Land Registry office on the 6th of August following. Notice to treat was served on the defendant on the 10th of August, and on the 31st of August he filed a claim for $11,000 damages. Each party appointed an arbitrator and the third was appointed by GREGORY, J. on the 23rd of September. The board sat on the 14th of October and gave its award on the 15th of October, 1920, for $4,015. On the 24th of June, 1920, Gore-Langton executed a conveyance of the farm to Mr. F. L. Hutchinson. The conveyance was left with Carew Martin, barrister, to be held by him in escrow until the purchase price of $1,000 was paid by Hutchinson. This sum was paid on the 2nd of October, 1920, and Hutchinson then

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filed an application in the Land Registry office for registration of the conveyance. The grounds raised on the application were, that the award was made and based on ownership and occupancy, whereas Gore-Langton was no longer owner or occupant or otherwise interested; also that no sum whatever was allowed for the advantage to the farm accruing from the construction of the road. The motion was dismissed.

The appeal was argued at Victoria on the 26th of January, 1921, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

F. A. McDiarmid, for appellant: There is a judgment against us for $4,015. We cannot pay Gore-Langton and be free from again paying Hutchinson: see *In re Jackson and North Vancouver* (1914), 19 B.C. 147; *In re North Vancouver and Loutet, ib.* 157; *Crossfield* v. *Manchester Ship Canal Co.* (1904), 73 L.J., Ch. 345; *Jones* v. *The Stanstead, Shefford, & Chambley Railroad Company* (1872), 41 L.J., P.C. 19; *Pratt* v. *City of Stratford* (1888), 16 A.R. 5; *Mauvais* v. *Tervo* (1915), 22 B.C. 207. Where a question of law arises on the face of the award or in some document accompanying or forming part of the award, see *Hodgkinson* v. *Fernie* (1857), 3 C.B. (N.S.) 189. This is a statutory arbitration. It has never been held that you cannot go outside the "face of the award": see *Falkingham* v. *Victorian Railways Commissioner* (1900), A.C. 452 at p. 463; *In re Dare Valley Railway Co.* (1868), L.R. 6 Eq. 429. They have set aside an award in cases where the arbitrators did not consider something they should have: see *British Westinghouse Electric and Manufacturing Company, Limited* v. *Underground Electric Railway Company of London, Limited* (1912), A.C. 673; *Sweinsson* v. *Charleswood* (1917), 28 Man. L.R. 189; *Cedars Rapids Manufacturing Co.* v. *Lacoste* (1914), A.C. 569; 83 L.J., P.C. 162.

Argument

Maclean, K.C., for respondent: We were owners at the time notice to treat was served: see *Hanna* v. *City of Victoria* (1916), 22 B.C. 555. We are the only party the Corporation need concern itself with. The relation of vendor and pur-

chaser was established when notice to treat was given, and after that, any one coming in could be disregarded. It is what one does, not what one says, that is of moment. *In re Jackson and North Vancouver* (1914), 19 B.C. 147 does not apply here. The evidence must be clear and satisfying that they have gone wrong in principle before the award will be disturbed: see *In re Northern Counties and Vancouver City* (1901), 8 B.C. 338. There is no wrong principle involved here: see *In re Laursen and South Vancouver* (1913), 18 B.C. 532. The only exception is where error appeared on the face of the award: see *British Westinghouse Electric and Manufacturing Company, Limited* v. *Underground Electric Railways Company of London, Limited* (1912), A.C. 673; *In re Dare Valley Railway Co.* (1868), L.R. 6 Eq. 429 at p. 435. A mistake in law must appear on the face of the award before it is disturbed: see *Hodgkinson* v. *Fernie* (1857), 3 C.B. (N.S.) 189 at p. 203; *Dinn* v. *Blake* (1875), L.R. 10 C.P. 388; *Re Beaver Wood Fibre Co. Limited and American Forest Products Corporation* (1920), 47 O.L.R. 590 at p. 592; *In re Laursen and South Vancouver, supra; Attorney-General for Manitoba* v. *Kelly* (1919), 3 W.W.R. 435 at p. 454. A wrong principle is dealt with in the same manner as a question of law.

Argument

McDiarmid, in reply, referred to *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418.

Cur. adv. vult.

29th April, 1921.

MARTIN, J.A.: On July 21st, 1920, the plaintiff Corporation passed a by-law declaring that "There is hereby expropriated and shall be entered upon, taken and used . . . . for the purpose of a highway a strip of land," in question in this action, and on August 10th the statutory notice was served upon the defendant, under section 362 of the Municipal Act, B.C. Stats. 1914, Cap. 52, declaring the intention of the council to "enter upon, take and use" the said lands in accordance with the plans and specifications thereof duly filed with the clerk.

MARTIN, J.A.

According to our decision in *Hanna* v. *City of Victoria* (1916), 22 B.C. 555; 34 W.L.R. 307; 10 W.W.R. 457, the

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service of this notice to treat constituted the Corporation the owner of the property so "taken" by it, and the title thereto immediately became vested in it, and it is impossible for it to withdraw from that position.

At the time of such taking and vesting, the defendant was the registered owner of the said land, and as such he filed his claim for $11,000 compensation, and upon the facts before us there is nothing to shew that his position has been altered. In such case, under section 104 of the Land Registry Act, R.S.B.C. 1911, Cap. 127, no one else could have been recognized by the arbitrators (appointed under section 359 to settle the disputed question of compensation) when they began to sit, on October 14th last, for that purpose, as having any interest in the said land.

I am unable to accept the submission that because the defendant, after filing his claim, has executed an unregistered conveyance of the land in favour of one Hutchinson, the plaintiff may refuse to pay the defendant (the registered owner) the compensation that has been awarded him on the ground that Hutchinson has an interest therein. That is just what section 104 strikes at when it declares that no "instrument . . . . shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered . . ." See *Bank of Hamilton* v. *Hartery,* 25 B.C. 150; (1917), 3 W.W.R. 964; 26 B.C. 22; (1918), 3 W.W.R. 551; 58 S.C.R. 338; (1919), 1 W.W.R. 868; and *Bailey* v. *City of Victoria,* 60 S.C.R. 38; (1920), 1 W.W.R. 917.

MARTIN, J.A.

There is nothing in *In re Jackson and North Vancouver* (1914), 19 B.C. 147; 4 W.W.R. 1208, in conflict with this view.

As to claims or encumbrances, it is declared by section 370 that the compensation agreed to or awarded "shall stand in the stead of such land and shall be subject to the limitations and charges (if any) to which the said lands were subject . . . ." and that section and the following provide for the settlement of conflicting claims by payment into Court and subsequent adjudication, which sections seem adequate for that purpose, but I do not further consider them because in the view I take of the matter no question of the sort arises here.

If I am right in this opinion, it follows that no valid objection can be taken to the award, because, on the basis that the defendant alone is entitled to all the compensation (as being the registered owner to the exclusion of all other interests), it cannot be even plausibly contended that the arbitrators have "awarded the compensation on a wrong principle" under section 359, and so, in the absence of misconduct, their award cannot be set aside, and therefore the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I am agreeing in the judgment of my brother MCPHILLIPS, and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion, this appeal must fail. Here we have an award made, following the taking of the required steps by the Municipality, to determine compensation for the taking of land for the purposes of the Municipality, *viz.*: for highway purposes. Richard Gerald Gore-Langton was the registered owner of the land at the time of the making of the award, and he was served with the notice under section 362 of the Municipal Act, which deals with the expropriation of land and claims therefor. Gore-Langton later filed his claim, in amount $11,000, made up as follows: Value of the land, $1,000, and for damages by reason of the work, $10,000.

Now the award was made on the 15th of October, 1920, and reads as follows:

"We the undersigned, two of the arbitrators appointed herein, hereby arbitrate and award, adjudge and determine, that the sum of $4,015 is the amount to be paid to the claimant herein, Richard Gerald Gore-Langton, as compensation for the damages caused by the aforesaid expropriation."

One of the arbitrators, T. A. Wood, did not concur in the award and refused to sign same. Now the objection is that the arbitrators have awarded compensation on a wrong principle, in that they have awarded damages upon a claim based upon the ownership and occupancy of the land adjoining the public highway expropriated by the by-law under consideration to a person who was neither owner nor occupant, nor otherwise interested in the real property so expropriated by by-law as aforesaid; and in the alternative, on the further wrong prin-

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ciple that they have allowed no sum whatever to the Corporation for the advantage resulting from the operation of the said by-law.

It would appear that the point was taken before the arbitrators, before the making of the award, that Gore-Langton had sold the lands through which the highway was to be carried to one Hutchinson. Nevertheless, it was apparent that Gore-Langton was still the registered owner, and section 104 of the Land Registry Act, R.S.B.C. 1911, Cap. 127, reads as follows: [The learned judge quoted the section and continued].

It is true that at the time of the award an application had been made for registration of the conveyance from Gore-Langton to Hutchinson, but it was not completed by registration. There could be no certainty of procedure unless there be some time at which the arbitration proceedings could commence and be determined as of that time that is reasonably the time when the notice of expropriation was given, otherwise there would be chaos. The point taken is without merit and in the highest sense technical, as, upon the evidence, it is clear that an absolute title can be obtained by the Municipality to the land in question, and all proper releases for all claims for damages; in truth, there can be no contention to the contrary. It is highly inequitable that all the proceedings initiated by the Municipality should, at the instance of the Municipality, be held to be abortive. It is well to bear in mind what the legal result is when an arbitration is entered upon and an award made and unquestionably here the course of conduct before the arbitrators was to have an award made in pursuance of the provisions of the Municipal Act. In this connection I would refer to the judgment of the Chief Justice of Ontario (Meredith) in *Re Beaver Wood Fibre Co. Limited and American Forest Products Corporation* (1920), 47 O.L.R. 590 at pp. 592-3:

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"On the question of setting aside the award, it is elementary that where the parties have chosen to constitute a court for themselves that court is a court to determine both the law and the facts, and if there is no misconduct on the part of the arbitrators, however much they may have erred either as to the law or the facts, the Court has no jurisdiction to interfere. The only exception to that rule that I know of is where the error appears on the face of the award or is shewn by some document incorporated with it."

Now the award in the present case is without error upon the face, and is determinative of both the law and the facts. I cannot see what jurisdiction exists in this Court or the Court below to review the award in the present case (*Crossfield* v. *Manchester Ship Canal Co.* (1904), 73 L.J., Ch. 345; *Hodgkinson* v. *Fernie* (1857), 3 C.B. (N.S.) 189). Here we have a lump sum awarded and there is no error on the face of the award, and it cannot be assumed that the advantage, if any, from the operation of the by-law was not considered—it may well have been considered. It is pertinent to the question under consideration in the present case to note what Lord Davey said in *Falkingham* v. *Victorian Railways Commissioner* (1900), A.C. 452 at pp. 463-4.

The arbitrators in the present case unquestionably had jurisdiction to determine the matters submitted to them, and exercising that jurisdiction, and no error being shewn upon the face of the award, it is incontestable. In *Re An Arbitration* (1886), 54 L.T. 596, Lord Esher, M.R., in the Court of Appeal at p. 597 said:

"The question is, whether the arbitrator had jurisdiction to try the matters submitted to him. If he had jurisdiction to try these matters, his decision cannot be disputed. . . . . The questions in this case are, first, what is the true construction of the submission to arbitration; and, secondly, what is the dispute between the parties?"

In the same case, Lopes, L.J. said:

MCPHILLIPS, J.A.

"We have not to consider whether the arbitrator has decided rightly, but whether he has acted within his jurisdiction. However he may have decided, if his decision is *intra vires*, we cannot interfere."

It is not contended, nor is there any evidence that Hutchinson, the purchaser from Gore-Langton, is disagreeing with the award, even if that could be a question to be inquired into. It cannot be overlooked that the Municipal Act, in its provisions, absolutely protects the Municipality in that the compensation awarded stands in place of the land. This is a reasonable and proper provision, and the intention of the Legislature is clearly demonstrated that once expropriation proceedings are commenced they will proceed upon the basis of the then existent title, and if it should later develop that there has been a change of ownership pending the making of the award or thereafter,

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and the Municipality has reason to fear any claims or encumbrances, ample provision is made to meet any possible situation, *i.e.*, the person entitled to the land becomes entitled to the money awarded. That the Municipality may fully protect itself is manifest when the following sections of the Act are read: [The learned judge here quoted sections 370 to 374, inclusive, of the Municipal Act, and continued.]

Upon full consideration of these statutory provisions, it is idle to contend that consequent upon the change of ownership subsequent to the arbitration proceedings, although really non-effective in law by reason of section 104 of the Land Registry Act pending registration, that the whole proceedings are abortive. Such is plainly not the expressed intention of the Legislature. On the contrary, every precaution has been taken to give full effect to the expropriation and the award, and the machinery is ample to complete and work out substantial justice to whoever may be entitled to the compensation, as the compensation "shall stand in the stead of such land." So that the Municipality, in the present case, is at liberty to pay the compensation into Court and obtain absolute statutory immunity from any further claim in respect of the "land taken or injuriously affected."

MCPHILLIPS, J.A.

Therefore, upon the whole case, I am of the opinion that GREGORY, J. arrived at the right conclusion in refusing to set aside the award, and that the appeal should be dismissed.

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *Alexander Maclean.*
Solicitor for respondent: *C. F. Davie.*

CANADIAN FINANCIERS TRUST COMPANY, TRUSTEE AND DORRELL, GUARDIAN v. CHAN SHUN CHONG *ET AL.*

CLEMENT, J.

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Jan. 14.

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June 7.

CANADIAN FINANCIERS TRUST CO. *v.* CHAN SHUN CHONG

Executors and administrators—Trustee of estate of deceased—Remuneration—Basis of—R.S.B.C. 1911, Cap. 232, Sec. 80.

Section 80 of the Trustee Act bases the remuneration of a trustee on "the gross value of the estate." In fixing the remuneration of a trustee for the administration of an estate the Court of Appeal allowed 5 per cent. of the amount in the trustee's hands for distribution among the beneficiaries, varying the order of the Court below allowing 5 per cent. of the sum "actually collected" only.

Items charged by a trustee for expenses in going to Victoria were disallowed, having regard to the change of residence of the trustee from Victoria to Vancouver; also certain items of commission were disallowed in view of the commission for remuneration.

APPEAL by plaintiffs from an order of GREGORY, J. of the 15th of January, 1921, fixing their remuneration under section 80 of the Trustee Act and disposing of various items in its accounts. The registrar's certificate was, *inter alia,* as follows:

"The gross value of the estate vested in the trustees . . . . is $33,150. The total amount of the moneys which have come into the hands of the said trustee up to 31st of October, 1920, exclusive of a sum of $4,952.19, being a refund of advances made on behalf of mortgagors, is $45,803.58, and the total amount disbursed by them up to said date exclusive of an item of $561.09 for commission on collection of income which I have disallowed, and the claim for interest on advances which I have reduced by the sum of $179.16, is $20,399. The total amount of the moneys which have come into the hands of the guardians is $7,385, and they have disbursed the said sum of $7,385.

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"In my opinion an allowance of 5 per cent. on the gross value of the estate which has come into the hands of the trustees and guardians respectively up to 31st October, 1920, would be fair and reasonable.

"In my opinion the scheme of division among the beneficiaries . . . . . is a fair and proper one, except that no interest should be charged on sums paid for maintenance but only on those paid for advancement."

Objection was taken by the respondents to all the items under which charges were made for the trustee's expenses to Victoria, on the ground that when appointed trustee the Trust Company was carrying on business in Victoria. They also objected to

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all items for professional charges made by the trustee. They also raised the objection that owing to the trustee ceasing to carry on business in Victoria they had been compelled to disburse about $62 for exchange on cheques drawn in Vancouver. Among the items disallowed to the trustee by the order appealed from were: *Re* J. McLaren, commission on sale of property $115; a number of charges for the trustee's expenses to Victoria on various matters; commission on collection of income $561; *re* interest: disallowance in part of interest on advances made to the estate by the trustee, $179.16; postages, telegrams and exchange $47.91.

Higgins, K.C., for the Trustee.
Dorrell, in person.
Marchant, and *Sinnott,* for the Beneficiaries.

14th January, 1921.

GREGORY, J.: The majority of items objected to were dealt with at the hearing. The item of $4,952.19 must stand as reported by the registrar. The gross value of the estate cannot be increased by adopting a particular method of book-keeping. The item of $561.09 must also stand. The trustee cannot charge commission on these collections as well as a commission for remuneration. Gillespie, Hart & Todd were the trustee's agents, and the company undertook that the employment of an agent should not increase cost to the estate. The trustee is to have a commission of five per cent. on that portion of the estate which it has actually collected.

GREGORY, J.

The guardian, who is an officer of the Trustee Company, performed very little, if any, duty other than that of trustee. The majority of payments were made direct to the beneficiaries by the Trustee where commission covers these services and an allowance of $100 will amply repay him for all his services as guardian of the estate, and he will be allowed that amount. I know of no authority for remunerating a guardian for services performed in connection solely with his duties as guardian of the person of an infant. With the changes mentioned here and at the hearing the report of the registrar will be confirmed.

From this decision the plaintiffs appealed. The appeal was argued at Vancouver on the 4th of April, 1921, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Higgins, K.C., for appellants.
Marchant, and *Sinnott*, for respondents.

Cur. adv. vult.

7th June, 1921.

MARTIN, J.A.: This is an appeal by the trustee of the estate of Chan Fook, deceased, and by the former guardian of his two children, the respondents, from the order of January 15th last fixing their remuneration under section 80 of the Trustee Act, Cap. 232, R.S.B.C. 1911, and disposing of various items in their accounts, which section I recently considered in *Stephen* v. *Miller*, 25 B.C. 388; (1918), 2 W.W.R. 1042, in one aspect which is of assistance herein. The trustee's remuneration was fixed at five per cent. on $36,844, on the basis that that amount was the sum "actually collected up to the 31st of October, 1920," but the said section bases the remuneration on "the gross value of the estate," and there is an undoubted error in the allowance because according to the scheme of distribution among the beneficiaries proposed by the accountant's report, recommended by the registrar in his certificate and approved by the learned judge in the order in question, the amount in the trustee's hands for that purpose is over $43,000, and therefore the "gross value" cannot be less than that sum, and so the five per cent. awarded should be based upon it and not merely upon the sum "collected" as aforesaid. It was submitted that this remuneration on the sum "collected" should only be regarded as an *interim* allowance and so the order should not be interfered with, but in the face of the learned judge's confirmation in his reasons of the specific statement in the registrar's report that he is dealing with the said sum collected as the "gross value," it would not be safe or proper to make such an assumption, for the error would stand as a bar to any further application by the trustee.

As to the other items in dispute, I have carefully considered them and think that the learned judge took the right view,

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having regard to the change of residence of the trustee from Victoria to Vancouver, with the exception of five items, *viz.*, one item, $23, of the trustee's expenses to Victoria on December 18th, 1916, *re* the education of the infants; two items of October 17th and 23rd, 1917, expenses of trustee's visit to Victoria, which were in connection with the unsuccessful application to remove him, which was refused on the 24th of October of that year; and item for $47.91 for postages, telegrams and exchange which was allowed by the registrar and no reason given for disallowance; an item of $179.16 for interest at eight per cent. on advances to the beneficiaries, which I can only infer from the somewhat scanty material, were advanced upon a contract to that effect; these five items should, therefore, in my opinion, be allowed to the trustee.

Then with respect to the guardian's remuneration of $100. That certainly seems a small amount but unfortunately for him

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he has brought forward no evidence which would justify us, in my opinion, in interfering with the discretion exercised by the learned judge below.

The order appealed from should be varied accordingly. I see no good reason why, in the circumstances, the costs of both parties should not come out of the estate, this case differing in this respect from *Stephen* v. *Miller, supra.*

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with my brother MARTIN. In the result the appeal is allowed in part.

EBERTS, J.A.

EBERTS, J.A. concurred in the result.

Appeal allowed in part.

Solicitor for appellants: *Frank Higgins.*
Solicitor for respondent Chan Shun Chong: *W. P. Marchant.*
Solicitor for respondent Chan Shun Sing: *P. J. Sinnott.*

THE ROYAL BANK OF CANADA v. IZEN.

MORRISON, J.

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ROYAL BANK OF CANADA v. IZEN

Banks and banking—Guarantee—Promissory notes—Securing part of debt—Whole debt secured by mortgage—Guarantor's right to security on payment—Marshalling.

The plaintiff held a mortgage to secure a debt for a portion of which the defendant was liable as indorser of two promissory notes.

Held, that the defendant is not entitled as a condition of recovery against him on his liability and without payment of the whole debt secured by the mortgage, to have the mortgage security handed over to him.

In order to marshal, not only must there be two creditors of the same person but one of them must have two funds belonging to the same person to which he can resort.

APPEAL by defendant from the decision of MORRISON, J., in an action tried by him at Vancouver on the 15th of November, 1920, to recover $3,534.11, the balance due on two promissory notes. In the year 1913, the defendant agreed with the Bank to become surety for one Billo who was indebted to the Bank and he indorsed two promissory notes made by Billo and held by the Bank, amounting in all to $5,900. In order to secure the defendant, Billo and one Chas. Reid gave him a mortgage on two lots in Vancouver. The defendant made certain payments in reduction of the debt until 1915, when one C. F. Bigger, with the consent of all parties, assumed the liability of Billo on the said notes (this being in connection with the taking over by Bigger of Billo's jewelry business) and Bigger became the principal debtor. Billo wished to be relieved of the mortgage he had given the defendant as security and this was arranged by Mrs. Bigger giving a mortgage to the Bank as security for the original debt. On this being done the defendant released the Billo-Reid mortgage. In December, 1915, Bigger became insolvent. The defendant then made further payments on account of the debt and gave a mortgage on a one-fifth interest he had in a lot in Vancouver. Later the Bank demanded payment of the balance due and the defendant asked that the Mrs. Bigger mortgage held as security by the Bank be transferred to him. The Bank claimed that

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this mortgage also secured a debt of Bigger's at another branch of the Bank. The Bank claimed it was understood and agreed when Bigger became the principal debtor that the mortgage should cover both debts. The defendant denied that there was any disclosure as to Bigger's debt at the branch office of the Bank.

Alfred Bull, and *W. H. Campbell,* for plaintiff.
J. A. MacInnes, and *Arnold,* for defendant.

31st December, 1920.

MORRISON, J.: The inclusion of the East-end debt of $1,900 in the mortgage was a part of the agreement between the parties. I am unable, after a great deal of consideration of the whole course of dealings between all the parties in this transaction, to accede to Mr. *Arnold's* strong submission as to the memorandum in writing dated February 29th, 1916. Mr. Crosbie, for some time before the suit came to trial, had severed his connection with the plaintiff Bank, and I would not characterize him as a partizan witness. Before I am justified in holding that his signature and that of Mr. McDonald were placed on the document in order to manufacture further evidence, I must exhaust every other theory as opposed to such serious contention. On a full consideration of the whole matter, I cannot bring myself to say that the Bank did more than they were justified in doing to fully protect the interests of the people's money entrusted to them for use in just such business transactions. The position of banks in obtaining, with the greatest particularity, the fullest security commensurate with their obligations to their depositors is too often pressed by counsel as being more than the necessities of the transaction call for or indeed fraudulent as is hinted at in this case. Even although this East-end debt were included as a matter of abundant caution, yet it was that degree of caution that might be expected of a prudent banker, having regard to the parties and the character of their dealings. Judgment for plaintiff. The counterclaim is dismissed.

MORRISON, J.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 4th and 7th of March, 1921, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

J. A. MacInnes, for appellant: When Billo was released as to the mortgage on the two lots, the defendant insisted the mortgage from Mrs. Bigger should take its place, Bigger becoming the primary debtor. As to using memorandum to refresh memory see *Maugham* v. *Hubbard* (1828), 8 B. & C. 14. They said nothing about Bigger's indebtedness at the other branch of the Bank and are responsible for that: see *Lazard Bros. & Co.* v. *Union Bank of Canada* (1920), 47 O.L.R. 76; and 608 at p. 611. We have a right in the circumstances, of marshalling the securities: see De Colyar on Guarantees, 2nd Ed., 187. It is the duty of the Bank to realize on the security: see Halsbury's Law of England, Vol. 21, p. 304, par. 543; Vol. 13, p. 142, pars. 164-5; Vol. 15, p. 509, par. 261; *In re Westzinthus* (1833), 5 B. & Ad. 817; *Ex parte Kendall* (1811), 17 Ves. 514 at p. 520; *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 50 L.J., Ch. 355.

Alfred Bull, for respondent: The mortgage from Bigger was to secure his debt to the Bank. Izen was a guarantor for a portion of the debt only. The Bank have the whole mortgage: see *Farebrother* v. *Wodehouse* (1856), 23 Beav. 18. The cost and debt were included with full knowledge of Izen and the Court below so found. With reference to using a memorandum to refresh one's memory see Taylor on Evidence, 11th Ed., p. 964, par. 1412; *The King* v. *The Inhabitants of St. Martin's, Leicester* (1834), 2 A. & E. 210; *Doe* v. *Perkins* (1790), 3 Term Rep. 749; *State* v. *Rawls* (1820), Thayer's Cases on Evidence, 2nd Ed., 1191. We are not bound to hand over the mortgage until the debt is paid: see *The Chioggia* (1898), P. 1.

Argument

Reginald Tupper, on the same side: There is no right to the security until the debt has been paid. There is a contract between the plaintiff and the principal debtor which amends the whole transaction: see Halsbury's Laws of England, Vol. 15, p. 509, pars. 964-5.

MacInnes, in reply.

Cur. adv. vult.

MORRISON, J.

1920

Dec. 31.

7th June, 1921.

COURT OF APPEAL

1921

June 7.

ROYAL BANK OF CANADA v. IZEN

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

MARTIN, J.A.: This appeal is not free from doubt, in my opinion, yet I find myself unable, upon a consideration of the whole case, to say that the learned judge has failed to reach the right conclusion (without adopting the views expressed in his reasons), and therefore the appeal should be dismissed.

GALLIHER, J.A.: After a careful perusal of the evidence, I am of opinion that the learned trial judge came to a right conclusion on the facts.

I have no doubt as to the admissibility of the memorandum sworn to by the witness Crosby, and even apart from that, when one examines the series of transactions between the parties, one must, I think, incline to the view that the $1,900 debt was intended by all parties to be included in the Bigger mortgage. The position then is simple: The Bank holds a mortgage on the Bigger property for $4,679. Of this amount $2,798 is upon notes indorsed by Izen and upon which he is liable to the Bank, and the balance $1,900 is the amount due on a note made by C. F. Bigger and indorsed by G. C. Bigger and M. J. Bigger, and as to which Izen has no liability.

GALLIHER, J.A.

It is a case, then, of the Bank holding a mortgage on the same property upon the amount of which as to one portion Izen is liable, and as to the remaining portion he is not liable. Izen has been called upon by the Bank to pay the portion upon which he is liable and agrees to do so if the Bank will hand him over the securities they hold. This the Bank refuses to do unless he pays the amount of $1,900 on which he is not liable.

As against the primary debtor the mortgaged premises are the only property that can be resorted to. As laid down by Gorrell Barnes, J., in *The Chioggia* (1898), P. 1 at p. 6:

> "According to equitable doctrines, in order to marshal not only should there be two creditors of the same person, but one of them should have two funds belonging to the same person, to which he can resort."

That does not pertain here.

As to the right to have the security handed over on payment of the moneys for which Izen is liable, the case of *Farebrother* v. *Wodehouse* (1856), 23 Beav. 18, seems to me to be on all fours with the case at bar. That case was disapproved of in *Forbes* v. *Jackson* (1882), 19 Ch. D. 615; 51 L.J., Ch. 690, but on reading the case of *Forbes* v. *Jackson,* I think it must be admitted that the remarks of the text writer, De Collyar on Guarantees, 3rd Ed., at p. 325, are to the point. Referring to *Forbes* v. *Jackson* the learned writer says:

"Now it is to be noticed that in this case it was admitted that the subsequent advances were made without the surety's knowledge or consent. It is, therefore, submitted that this circumstance is quite sufficient of itself to support the judgment of Hall, V.-C., and that, consequently, his decision in no way conflicts with *Farebrother* v. *Wodehouse* [(1856)], 23 Beav. 18, where, at the time the suretyship was entered into, the surety knew [as I have found here] that the securities held by the creditor were intended to cover not only the sum guaranteed, but also another sum to which the promise of the surety did not extend."

I would dismiss the appeal.

Appeal dismissed.

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

COURT OF APPEAL

1921

April 29.

WALLS v. HANSEN

WALLS v. HANSEN AND BEN.

Interpleader—Ship seized under execution—Sale of interest to foreigner—Validity—R.S.C. 1906, Cap. 113, Sec. 5—Can. Stats. 1914, Cap. 49, Sec. 17; 1920, Cap. 59, Sec. 1.

On an interpleader, the issue was between the plaintiff, who held a writ of execution against a judgment debtor, and a claimant of a one-third interest in a ship under a purchase from the judgment debtor. The plaintiff's contention that the claimant being a foreigner, the sale to him of an interest in the vessel was a void transaction was overruled.

Held, on appeal, affirming the decision of MACDONALD, J., that although the policy of the law is that no foreign subject may own any share in a British ship, the transaction of purchase is not void, the only consequence being that the ship ceases to be British, and may be forfeited in certain circumstances.

Statement

APPEAL by plaintiff from the decision of MACDONALD, J. of the 24th of June, 1920, on an interpleader issue. The plaintiff had sold a ship known as the "Sea Bird" to the defendant, the purchase price being $1,500, of which $500 was paid in cash, the balance to be paid in one year. The bill of sale was recorded with the collector of customs. The plaintiff at the same time obtained as collateral security a second mortgage on 160 acres in Holberg and also obtained from the purchaser an undertaking that he would not sell or otherwise dispose of the ship until the balance of the purchase price was paid. The balance of the purchase price not being paid the plaintiff sued the defendant on his covenant in the mortgage, obtained judgment and issued execution. The ship was seized under the execution by the sheriff, the defendant at the time being in possession. The claimants Paul Hansen and Viggo Ben claimed that they had each purchased an undivided one-third interest in the ship, paying $750 each for their interest. Hansen is a Norwegian and Ben a Dane, and the plaintiff raised the objection that they could not hold an interest in a British ship. It was held by the trial judge that the execution creditor succeeded as against Ben but failed as against Hansen, who was

entitled to an undivided one-third interest in the ship. The execution creditor appealed.

The appeal was argued at Victoria on the 27th of January, 1921, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Lowe, for appellant: The ship was under two tons and the sections of the Canada Shipping Act do not apply as to registration. Hansen has no right to claim any interest in a British ship and the sale to him by the defendant is void: see Howell on Naturalization, pp. 51-2; *Cutten* v. *McFarlane et al.* (1869), 7 N.S.R. 468. As to a foreigner being an "owner" see Halsbury's Laws of England, Vol. 1, p. 398, par. 812. As to an alien's rights see Halsbury's Laws of England, Vol. 22, p. 306, par. 675; *Manning's Case* (1849), 1 Den. C.C. 467 at p. 478.

Maclean, K.C., for respondent: This craft could not be registered; the licence was for fishing. With relation to section 17 of the Naturalization Act you may transfer a British ship to an alien and it is a good transfer but it may cease to be a British ship and may be subject to confiscation. The property, however, will pass. It must pass to make the ship subject to confiscation: see MacLachlan on Merchant Shipping, 5th Ed., 29; Abbott on Merchant Ships & Seamen, 14th Ed., 81. The property is in the defendant and he holds as trustee for Hansen; the plaintiff cannot take it: see *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51 at p. 55; Cababe on Interpleader, 3rd Ed., 80; *Schroeder* v. *Hanrott* (1873), 28 L.T. 704.

Argument

Lowe, in reply referred to *Couper* v. *Mackenzie* (1906), 8 F. 1202; *The Tommi; The Rothersand* (1914), 13 Asp. M.C. 5 at p. 7; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521 at p. 534; *Watson* v. *Duncan* (1879), 6 R. 1247 at p. 1251; Piggott on Nationality, Pt. I., pp. 179 and 257.

Cur. adv. vult.

29th April, 1921.

MARTIN, J.A.: Under the interpleader issue the question arises as to the one-third interest (21 1/3 shares) claimed by Hansen in the schooner "Sea-Bird," a vessel of about seven

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and one-half tons, too small to be registered under section 5 of the Canada Shipping Act, Cap. 113, R.S.C. 1906, but licensed as a fishing and trading vessel under section 32. Hansen claims his interest cannot be seized under the *fi. fa.* against the judgment debtor, Michelsen, because he *bona fide* purchsed his said interest from Michelsen under a written agreement dated May 15th, 1919. We stated during the argument that the finding of the learned judge below that this was a *bona fide* transaction should not be disturbed.

But this leaves for consideration the objection that as Hansen is admittedly an alien, a Norwegian, he cannot hold an interest in the vessel, and therefore this is a void transaction, and section 17 of The Naturalization Act, 1914, Can. Stats. 1914, Cap. 44, is invoked, as re-enacted by Can. Stats. 1920, Cap. 59, Sec. 1. That section after conferring upon an alien the capacity to take, acquire, hold and dispose of real and personal property of every description, provides that the "section shall not operate so as to,—Qualify an alien to be the owner of a British ship."

It will be noted that the language simply refuses to qualify him as an owner, so the question arises as to what is the consequence of an alien contracting to purchase a share in a "British ship," which this vessel is, though it cannot be registered. As pointed out in Temperley on Merchant Shipping,

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2nd Ed., pp. 1, 2, the expression "British Ship" is not defined in the Merchant Shipping Act, 1894, but it is negatively enacted in section 1, that: "A ship shall not be deemed to be a British ship unless owned by persons of the following description," etc., and aliens are not included in that description.

It was decided in *Reg.* v. *Arnaud* (1846), 9 Q.B. 806; 16 L.J., Q.B. 50, that a British corporation may be the owner of a British ship though some of its shareholders are aliens; but it was intimated that if all its shareholders were aliens the Court might not be powerless to deal with such a situation; and see to the same effect, *The Tommi* (1914), P. 251; 84 L.J., P. 35; 13 Asp. M.C. 5 at p. 7, but the observations of Lord Macnaghten (on the converse case of a foreign corporation with all its members British subjects) in *Janson* v. *Driefontein Consoli-*

dated Mines, Limited (1902), A.C. 484 at p. 497; 71 L.J., K.B. 857 must be borne in mind.

In *The "Tommi"* case it was said: The policy of our municipal law is that no foreign subject may own any share in a British ship," and Lord Justice Brett said in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521 at p. 536; 52 L.J., Q.B. 220:

"If she belongs absolutely and entirely to English owners, she is an English ship before she is registered, and whether she is registered or not. . . . . It seems to me the nationality of a ship depends solely upon her ownership, and as to her liability it does not matter about her being registered. Therefore it seems to me on the question of fixing the defendants with liability for the negligence of the captain and crew of the Atjeh, who are admitted to be the servants of the defendants, that the defendants cannot escape liability by saying their ship was not registered as a British ship, but that she was registered as a Dutch ship. She was nevertheless an English ship, and the defendants are liable according to English law."

But what is the consequence if a foreigner buys and pays for a share in a British ship and thereby runs counter to the said public policy of sole British ownership? The appellant submits that such a transaction is void, whereas the respondent submits that the only consequence is that the ship ceases to be British and may be forfeited in certain circumstances—*Cf.* Halsbury's Laws of England, Vol. 26, p. 11. It is admitted that a British ship may be validly sold as a whole by transferring all the shares to an alien (of which transactions there have been countless cases), so it is clear that the rule of public policy does not prevent dealing in such ships, and a contract to sell a British ship to a foreigner is usually in times of international peace and amity a valid and desirable thing to do as tending to encourage trade. But the said rule of public policy here steps in and says the consequence of such a dealing is not that the contract for sale is void but that the ship is no longer British and so loses the advantage and protection of British laws. Now, if the consequence of a contract for the sale of all the shares in a ship is merely that she ceases to be British, why should the consequence be different if only part of the shares be the subject of the contract? In either case the test is—are all the shares "owned wholly" by the "persons

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qualified" under said section 1? If they are not so owned then the ship loses her nationality and is not entitled to be upon the register. Though the point has never apparently been raised in the English Courts, this is the view held by leading text writers, *e.g.*, MacLachlan on Merchant Shipping, 5th Ed., 29, thus:

"A British ship is a vessel that belongs wholly to owners of the description given in the statute (M.S.A. 1894, Sec. 1). A valid transfer may be made of a share in such vessel to a person who does not answer the description of a British owner; but the vessel thereby loses her British character, and her certificate of registry must be given up (*Ibid.* Secs. 21, 44 (10)). The Registry is thereby closed, except so far as relates to unsatisfied mortgages: *ibid.*, and M.S.A. 1906, Sec. 52 (1). If a ship be kept on the register after an unqualified person has acquired, as owner, an interest in her, she will be subject to forfeiture (M.S.A. 1906), Sec. 51. See also M.S.A. 1894, Secs. 69, 71, *infra*, pp. 74, 75, as to forfeiture if a ship owned wholly or in part by any unqualified persons assumes the British national character. See further as to forfeiture, *infra*, pp. 75, 76."

Temperley, *supra*, p. 2:

"Where a vessel is registered as a British ship, she cannot divest herself of her national character and the liabilities attached to it, except by ceasing to be owned wholly by persons qualified to be owners of British ships and thereupon closing her British register."

Abbott on Merchant Ships & Seamen, 14th Ed., 81:

"Ships once registered apparently continue British ships and entitled to the privileges of such ships until they are transferred to persons not qualified to be owners of British ships or are actually or constructively lost, taken by the enemy, burnt or broken up, or so altered as not to correspond with the register."

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Halsbury's Laws of England, Vol. 26, p. 16:

"Only persons and corporations qualified under statute may become and remain either legal or beneficial owners of a British ship or share therein, and no ship is deemed a British ship unless entirely owned by qualified persons."

The authority chiefly relied upon in opposition to this view is the case of *Cutten* v. *McFarlane et al.* (1869), 7 N.S.R. 468, wherein the Supreme Court of Nova Scotia held that as an alien could not hold a share in a registered British ship, a secret agreement by which he purchased a quarter of the shares in such a ship on certain conditions was void as against public policy and so could not be enforced. That case must be read in the light of the facts, and the outstanding fact is that though the alien purchased and paid for the sixteen sixty-fourth shares,

yet that vital fact was kept concealed from the registrar of shipping and the vessel continued to stand on the register in the name of her original owner till after his death—in other words, a species of falsification of the register and a violation of the principal object of the Act (The Merchant Shipping Act, 1854) in that respect, whereby sections 18, 38, 45, 53, 55, 56, 103, 106, etc., were evaded. The agreement set up was, in effect, that the owner was to hold the plaintiff's quarter shares secretly in trust and that when the vessel was sold the owner was to sell all the shares and account to the plaintiff for his portion thereof, but it turned out that after the owner died his executors sold only his three-fourths share thus excluding the plaintiff's share from the benefit of the sale, and so the plaintiff sued for damages for breach of the agreement. The Court unanimously held that an "agreement . . . . of such character" could not be enforced and many authorities, more or less in point, are reviewed in support of that conclusion. I have carefully examined the lengthy judgment, and based as it is upon the fact of concealment and evasion, I find nothing in it, when it is restricted to the facts as it ought to be, that is really in conflict with the opinion I have come to in the case at bar wherein the element of a secret arrangement to continue a false register is wholly absent. There is, of course, a sound public policy declared, in effect, by the Act, which is, that unqualified persons shall not become owners of British vessels, but the Act while declaring that policy also in effect declares the consequence and the penalty for its infraction, which are that where an unqualified person is allowed to become an owner of even a part of such a ship, she loses her nationality and ceases to be British with all the consequential disadvantages of that loss to her owners, and also incurring the risk of forfeiture. But this is quite a different thing from a prohibition against carrying on the business of selling ships to aliens or others, and I am of the opinion that as the object of the statute in its assertion of public policy has been accomplished by depriving the vessel in question of her British nationality (apart from any other penalty), it cannot be said that the purchase by the defendant of his one-third share therein is

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void or illegal, and therefore that interest is not subject to seizure on the *fi. fa.* against Michelsen and so the appeal should be dismissed.

GALLIHER, J.A.: I concur in the reasons for judgment of my brother MARTIN.

MCPHILLIPS and EBERTS, JJ.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Moresby, O'Reilly & Lowe.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

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1921

June 7.

IN RE FLORENCE SILVER MINING CO., LTD.

IN RE FLORENCE SILVER MINING COMPANY, LIMITED.

Water Act—Conditional licences—Board of investigation—Cancellation—Appeal—B.C. Stats. 1914, Cap. 81, Secs. 16, 17, 50, 91, 288 to 292; 1918, Cap. 98, Sec. 17; 1920, Cap. 102, Sec. 7.

The appellant held two water records issued respectively in 1896 and 1904 from Woodberry Creek. In 1915, the Board of Investigation under the Water Act, 1914, after hearing all parties interested, directed the issue of two conditional licences to the appellant in pursuance of sections 288 and 289, of said Act which were to embody terms, *inter alia*, that the works required to be constructed and necessary for the carriage and distribution of water be commenced on or before the 1st of June, 1920, and completed, and the water beneficially used on or before the 1st of November, 1924. The conditional licences were issued on the 9th of July, 1919. At the instance of the respondent the Florence Silver Mining Company proceedings were taken in July, 1920, under section 17 of the Act and the Board of Investigation ordered the cancellation of the provisional licences on the ground that the powers granted under the licences were not exercised in good faith for three consecutive years.

Held, on appeal, reversing the decision of the Board of Investigation, that as the Board made an order on the 9th of July, 1919, allowing the appellant until the 1st of November, 1924, to make a beneficial use of the water for the purposes for which it was granted, and cancelled his records and licences because he did not make beneficial use of the water for a period of time preceding that date, the order of the Board should be set aside and the appellant's rights restored.

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1921

June 7.

IN RE FLORENCE SILVER MINING CO., LTD.

APPEAL by D. H. Nellis from an order of the Board of Investigation under the Water Act granting an application by the Florence Silver Mining Company for the cancellation of the rights to use water from Woodberry Creek under water records Nos. 8 and 49 and conditional licences Nos. 3994 and 3997. The appellant, who owned what was known as the Lake Shore Group of mining claims, held water grants Nos. 8 and 49 issued in 1896 and 1904 respectively. The Board of Investigation held an inquiry concerning the waters of Woodberry Creek in 1915, all parties interested being present, and as renewals of water grants Nos. 8 and 49 directed the comptroller of water rights to issue the appellant conditional licences. These were issued as Nos. 3994 and 3997 and embodied terms that required the completion of certain works necessary for the carriage and distribution of the water before final licence would issue. The facts are set out fully in the judgment of the Chief Justice.

Statement

The appeal was argued at Vancouver on the 2nd and 3rd of March, 1921, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Hamilton, K.C., for appellant: The licences were cancelled on the ground of non-user for three years. The licences were issued in 1919 and we contend the three-year period has not expired. There is no proof that there has been three successive years of non-user. They say non-user of the water voids the conditional licence, but there is no duty to exercise the powers until 1924 under the conditional licences. We have a presumptive right under section 291 of the 1914 Act.

Argument

S. S. Taylor, K.C., for respondent: We are entitled to a cancellation of these licences under section 7 of the Act of 1920. He says there has not been a *bona fide* use in good faith and not colourably. The licence does not protect them from work until 1924. They must comply with the conditions and they have done nothing for over three years.

Hamilton, in reply.

Cur. adv. vult.

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IN RE FLORENCE SILVER MINING CO., LTD.

7th June, 1921.

MACDONALD, C.J.A.: This is an appeal under section 50 of the Water Act, 1914. The appellant was the holder of two records made in 1896 and 1904 respectively, giving the holder liberty to divert water from Woodberry Creek for mining and other purposes specified therein.

In 1915 the Board of Investigation constituted under said Act made enquiry concerning the waters of Woodberry Creek and after hearing all parties concerned, affirmed the validity of said records, and directed the comptroller of water rights to issue to the appellant conditional licences, in pursuance of powers in that behalf contained in sections 288 and 289 of the said Act, embodying terms, *inter alia,* that the works required to be constructed by the licensee before final licence would be issued, were those necessary for the carriage and distribution of water, that the construction of same should be commenced on or before the 1st of June, 1920, and should be completed and the water beneficially used for the purpose set out in the conditional licences on or before the 1st of November, 1924.

The order of the Board just referred to, refers in its opening to the 14th of June, 1915, as if that were its date, but at the end contains these words: "made and entered into the 9th day of July, 1919." The conditional licences bear the latter date.

MACDONALD, C.J.A.

Mr. *Taylor* contended that section 91 of the Act, which provides for the issue of conditional licences, has no application to a case where there were prior records, but I think said section 289 disposes of this contention.

On the 26th of July, 1920, pursuant to section 17 of the said Act, the comptroller of water rights served notice upon the appellant, calling upon him to shew cause, at a meeting of the Board, why his conditional licences should not be revoked on the ground that the same had not been acted upon or had ceased to be acted upon. The respondent in this appeal, the Florence Silver Mining Company, Limited, had applied to the Board for a licence to divert water from the said Creek and had requested the Board to cancel the appellant's said licences and his said records.

Counsel for the respondent in opening before the Board,

clearly set forth the ground upon which cancellation was asked for and which he specified in these words:

"No beneficial use or attempt to use the water has been made."

The chairman of the Board also stated the ground of complaint to be "non-user." Not a word was said about non-commencement of the work within the time aforesaid.

By their order the Board of Investigation now determines that the powers granted under the said records and licences have "not been exercised in good faith for three consecutive years," and they direct the comptroller of water rights to cancel the said records and said conditional licences unquestionably for that reason. In giving this reason for their order of cancellation, the Board, it is evident, had in mind section 16 of the Act. That section as amended by Cap. 102 of the Act of 1920, Sec. 7, reads in part as follows:

"If the powers granted under any licence shall not be exercised (in good faith and not colourably) for three successive years, the licence shall become null and void."

Even if it can be said that this section is applicable to default in commencement of the work, the case which the appellant was called upon to meet had solely to do with "non-user" of the water.

It is also to be noted, though I do not found my decision upon it, that the works which were to be constructed were really works of repair or re-construction of old works damaged by fire. The appellant was under the impression that the commencement of construction of the works had reference not to this work of reconstruction and repair but to the works of 1896 when the dam, flume and mining plant were constructed or in course of construction. If there was any legitimate ground of complaint that the appellant had not commenced the reconstruction of the flume which had been partially burned within the time specified, one would expect that the comptroller of water rights or the engineer would have called the appellant's attention to the fact and have given him the opportunity to rectify his omission before taking the drastic proceedings which were adopted here. There is no suggestion that delay, if any, in commencement of construction had rendered it difficult to make completion within the time specified. The nature of

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the work to be done and the evidence as to the time which would be required to do it makes it quite manifest that no just complaint could be founded on the default, if any, in commencement of construction.

The situation then, as we find it in this appeal, is that while the Board of Investigation on the 9th of July, 1919, made an order allowing the appellant until the 1st of November, 1924, to make a beneficial use of the water for the purposes for which it was granted, they cancelled his records and licences because he did not make beneficial use of the water for a period of time preceding that date. With respect, I think the Board was in error and that their order must be set aside, and the appellant's right restored under said records and conditional licences.

The respondent should pay the costs.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in allowing the appeal and with costs.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with the reasons for judgment of my brother the Chief Justice.

Appeal allowed.

Solicitors for appellant: *Hamilton & Wragge.*
Solicitor for respondent: *James O'Shea.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council:

CANADIAN PACIFIC WINE COMPANY, LIMITED v. TULEY *et al.* (p. 472).—Affirmed by the Judicial Committee of the Privy Council, 21st July, 1921. See 90 L.J., P.C. 233; (1921), 2 A.C. 417; (1921), 3 W.W.R. 49; 60 D.L.R. 529.

CHASSY AND WOLBERT v. MAY AND GIBSON MINING CO. (p. 83).—Affirmed by Supreme Court of Canada, 9th December, 1921. See (1922), 2 W.W.R. 225.

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. DUNLOP, ATTORNEY-GENERAL, AND GRANBY CONSOLIDATED CO. LTD. (p. 333).—Affirmed by the Judicial Committee of the Privy Council, 18th November, 1921. See (1922), 1 A.C. 214 (note); (1921), 3 W.W.R. 817; 61 D.L.R. 1.

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. WILSON AND MCKENZIE, ATTORNEY-GENERAL, AND GRANBY CONSOLIDATED CO. LTD. (p. 333).—Reversed by the Judicial Committee of the Privy Council, 18th November, 1921. See 91 L.J., P.C. 21; (1922), 1 A.C. 202; 126 L.T. 451; (1921), 3 W.W.R. 817; 61 D.L.R. 1.

FINUCANE v. THE STANDARD BANK OF CANADA (p. 251).—Affirmed by Supreme Court of Canada, 7th June, 1921. See (1922), 3 W.W.R. 314; 59 D.L.R. 465.

HAWKS v. HAWKS (p. 64).—Affirmed by Supreme Court of Canada, 20th June, 1921. See (1921), 3 W.W.R. 285; 59 D.L.R. 430.

JAPANESE TREATY ACT, 1913, *In re* THE (p. 136).—Affirmed by Supreme Court of Canada, 7th February, 1922. See (1922), 2 W.W.R. 429.

THORNDYKE-TRENHOLME CO. INC. v. THE WILLIAM LYALL SHIPBUILDING COMPANY LIMITED (p. 376).—Affirmed by Supreme Court of Canada, 7th June, 1921. See (1921), 3 W.W.R. 333; 59 D.L.R. 490.

Case reported in 28 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

ROYAL BANK OF CANADA v. SKENE & CHRISTIE (p. 401).—Reversed in part by Supreme Court of Canada, 2nd November, 1920. See 59 D.L.R. 469.

Case reported in 27 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

VAN HORNE, DECEASED, *In re* ESTATE OF SIR WILLIAM, AND THE SUCCESSION DUTY ACT. THE ROYAL TRUST COMPANY v. MINISTER OF FINANCE (p. 269).—Decision of the Supreme Court of Canada, reversing the decision of the Court of Appeal which affirmed the decision of HUNTER, C.J.B.C., reversed by the Judicial Committee of the Privy Council, 27th October, 1921. See 91 L.J., P.C. 8; (1922), 1 A.C. 87; 126 L.T. 207; (1922), 3 W.W.R. 749.

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plaintiff Company by way of subsidy. The Vancouver Island Settlers' Rights Act, 1904, as amended in 1917, provided that "upon application to the Lieutenant-Governor in Council on or before the first day of September, 1917, shewing that any settler occupied or improved land within said railway-land belt prior to said Act of 1883 with the *bona fide* intention of living on the said land accompanied by reasonable proof of such occupation or improvement and intention a Crown grant of the fee simple in such land shall be issued to him or his legal representative." Applications were made by the defendants thereunder (their predecessors in title having acquired surface rights by pre-emption) and they were heard by the Governor in Council, counsel for the plaintiff Company (who received seven days' notice of the proceedings) being present, who asked for an adjournment and the right to cross-examine witnesses on their affidavits submitted in evidence. This was refused and after the hearing Crown grants issued. In an action for a declaration that the Crown grants were null and void in so far as they purported to grant the minerals or that portion of the surface over which the plaintiff was entitled to exercise acts of ownership it was held by the trial judge that under the Settlers' Rights Act aforesaid, there must be a hearing of which the plaintiff was entitled to notice; that the notice received was inadequate and as the evidence in support of the claim as to occupation, etc., consisted only of solemn declarations of witnesses the application for an adjournment should have been granted and counsel should have been given the right to cross-examine the witnesses on their declarations and in the absence of such cross-examination there was not "reasonable proof" as required by the Act. *Held*, on appeal, in the Wilson case, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that the evidence in the declarations did not amount to "reasonable proof" as required by the Act, and therefore the Executive had no power to issue the Crown grant; and in the Dunlop case, reversing the decision of GREGORY, J. (EBERTS, J.A. dissenting), that the evidence in the declarations did amount to "reasonable proof" and the defendant was entitled to succeed. *Held*, further, (EBERTS, J.A. dissenting), that the amending Act of 1917 was *intra vires* of the Provincial Legislature (as dealing with property and civil rights in the Province) notwithstanding the fact that the plaintiff's railway had been declared to be a work for the general benefit

of Canada and the disallowance of said amendment (which amendment extended the time for application) did not invalidate the Crown grants issued thereunder prior to such disallowance. *Held*, further, in the Wilson case, that damages recoverable by the plaintiff should be assessed under the milder rule, allowing the innocent trespasser the cost of severance of the coal as well as bringing it to the bank. [On appeal to the Privy Council, the judgment of the Court of Appeal was reversed in the Wilson case, and affirmed in the Dunlop case.] ESQUIMALT AND NANAIMO RAILWAY COMPANY v. WILSON AND MCKENZIE, ATTORNEY-GENERAL, AND GRANBY CONSOLIDATED CO. LTD. ESQUIMALT AND NANAIMO RAILWAY COMPANY v. DUNLOP, ATTORNEY-GENERAL, AND GRANBY CONSOLIDATED CO. LTD. - **333**

2.——*Intoxicating liquors—Inter-provincial trade — Taking orders for liquor delivered from another Province — B.C. Stats. 1916, Cap. 49, Secs. 52A and 52B; 1919, Cap. 69—B.N.A. Act.*] Sections 52A and 52B of the British Columbia Prohibition Act, as enacted by Cap. 69, B.C. Stats 1919, is *intra vires* of the Provincial Legislature and prohibits taking orders within the Province for the purchase of liquor outside the Province and displaying within the Province circulars giving the name and address of persons dealing in liquor outside the Province. The legislation relates to matters "of a merely local or private nature in the Province" within section 92, No. 16, of the British North America Act and is not an interference with "trade and commerce" such as to deprive the Legislature of jurisdiction (MACDONALD, C.J.A. and EBERTS, J.A. dissenting). The taking of an order within the Province for liquor to be delivered within the Province is a transaction which is complete within the Province and is not made incomplete because the liquor comes from a source outside the Province: the word "transaction" should not be construed as applying only to the whole contract between the purchaser and the vendor with all its intermediate steps. REX *ex rel.* VOLUME v. WESTERN CANADA LIQUOR COMPANY, LIMITED. - - **499**

3.——*Japanese Treaty Act—Provincial Government contracts — Term forbidding employment of Japanese—Authorization of Provincial Legislature—Ultra vires—British North America Act (30 & 31 Vict., c. 3), Secs. 91, 92 and 132.*] The Legislative Assembly of the Province of British Columbia has no jurisdiction to legislate as to

if accused's counsel had maintained his position that "the trial within the trial" should first have been completed and the Crown should have called the suppressed witness, he would have been entitled to a case stated; but having subsequently called the third party as a witness himself, thereby becoming a party to reopening the trial of the question, he could not then recede from its consequences, and the Court could give him no remedy. *Rex* v. *De Mesquito* (1915), 21 B.C. 524 applied. REX v. GAUTHIER. - - - - - - - **401**

5.——*Game Act—Seizure of beaver pelts in close season—No permit—Confiscation—B.C. Stats. 1914, Cap. 33, Secs. 33, 50, 51 and 54.*] The accused having been found with 70 beaver skins in a sleigh during the prohibited season without a permit, was convicted under section 33 of the Game Act and the skins were confiscated. *Held*, on appeal, that although the words "any part of the animal" are not included in section 51 of the Act in construing the section regard must be had to the whole Act and the objects for which it was enacted and the magistrate was right in ordering the confiscation of the skins under said section. REX *ex rel.* CLINE v. KRAMER. - - **132**

6.——*Indecent assault—Evidence—Complaint by person assaulted—Admissibility—Substantial wrong—Case stated—Criminal Code, Sec. 1019.*] If upon a criminal appeal it appears that evidence was improperly admitted that may have influenced the magistrate adversely to the accused upon a material issue, the conviction should be quashed. *Allen* v. *Regem* (1911), 44 S.C.R. 331 followed. REX v. CHIN CHONG. - - - - - - - **527**

7.——*Intoxicating liquors—Charge of illegal possession—Forfeiture of automobile without notice to owner—Evidence—B.C. Stats. 1916, Cap. 49, Secs. 11 and 52; 1920, Cap. 72, Sec. 27.*] Under section 52 of the British Columbia Prohibition Act "if it is proved before any police or stipendiary magistrate or two justices of the peace that any automobile . . . . is employed in carrying any liquor for the purpose of selling or disposal of the same illegally, such automobile . . . . so employed may be seized and declared forfeited." One Smith was convicted for unlawfully having liquor in his possession and the automobile in which Smith was carrying the liquor was declared forfeited under said section 52. The evidence was that the automobile belonged to one Tosey, but Smith who was driving the automobile was hired by others to assist in taking the liquor from Vancouver across the boundary into the United States. Before reaching the boundary they turned back and on the way back the automobile was searched and seized by peace officers. By an order of HUNTER, C.J.B.C. the declaration of forfeiture was quashed on the ground that the owner of the car received no notice to appear on said proceedings nor was he heard. *Held*, on appeal, MARTIN and GALLIHER, JJ.A. dissenting, that the gist of the offence is the purpose to dispose of the liquor illegally. There is no evidence of such purpose and the onus being on the prosecution the order appealed from should be affirmed. *Per* MCPHILLIPS, J.A.: The reasonable construction of section 52 is that the illegal purpose must be connected with the owner of the automobile and a declaration of forfeiture without the owner having an opportunity of being heard is contrary to natural justice and a statute should not be given such effect unless its wording is intractable. *In re* PROHIBITION ACT AND TOSEY. - - - - - - - - - **438**

8.——*Prohibition—Occupant of premises—"Permitting or suffering drunken persons to consume liquor or assemble or meet"—Duplicity—B.C. Stats. 1915, Cap. 59, Secs. 12(3), 14, 80, 99 and 102; 1916, Cap. 49, Sec. 38.*] A guest in a hotel went to his room late at night with bottles of liquor, bringing a friend with him. They drank the liquor and made some disturbance until arrested about an hour later. The accused who was proprietor of the hotel went to bed before the guest had arrived and knew nothing of what took place. He was convicted on a charge that being the owner or occupant of a hotel he did "permit and suffer drunken persons to consume liquor therein" and did "permit and suffer drunken persons to assemble or meet therein" contrary to section 24 of the British Columbia Prohibition Act. The conviction was quashed on *certiorari*. *Held*, on appeal, affirming the decision of MORRISON, J., that irrespective of the question of duplicity, the accused cannot be convicted on said charge where the consumption of liquor or meeting of persons was without any knowledge, connivance or carelessness on his part. *Per* MACDONALD, C.J.A.: The magistrate reserved his decision for the purpose of obtaining the opinion of the Attorney-General upon the construction of the statute. Now, while the Attorney-General may properly advise executive officers of the Government, he

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cannot be appealed to for advice by judicial officers. *Per* MARTIN, J.A.: Conviction on such a charge is objectionable because of duplicity, there being two offences charged, but the Court has power to cure the defect by striking out one of the charges; as to what charge should be struck out depends upon the facts in the case. REX *ex rel.* CLERKE v. DOBIE. - - - - - - **188**

9. —— *Prohibition — Sale of beer by brewery—Over two and one-half per cent. proof-spirit—Innocent mistake by shipper —B.C. Stats. 1916, Cap. 49, Sec. 10.*] In compliance with an order from a hotel for near-beer (not over two and one-half per cent. proof-spirit) a brewery company delivered 17 dozen bottles. Three of these bottles were seized by the Provincial police, an analysis shewing the contents exceeded two and one-half per cent. proof-spirit. The evidence of the manager of the Brewery and his son (who had charge of the bottling) was that regular tests were made of the beer and that prior to the delivery in question it was discovered that certain bottles ran over the two and one-half per cent. limit and they were set aside in a pile to be later poured back into the vats and brought under the allowed percentage. The shipper being short of stock used a portion of this pile to complete the order from the hotel not having been informed that this pile was over-proof. The magistrate accepted his evidence but nevertheless found that the Brewery did deliver bottled beer more than two and one-half per cent. proof-spirit and convicted and fined the Brewery $1,000. *Held*, on appeal, by way of case stated that the conviction should be quashed. REX *ex rel.* BRADSHAW v. WESTMINSTER BREWERY LIMITED. - - **321**

10. —— *Intoxicating liquors — Prohibition Act—Conviction—Certiorari—Corporation—Affidavit of merits required under section 53 of Act—Incapacity of corporation—Right to remedy—B.C. Stats. 1916, Cap. 49, Secs. 53 and 54.*] Under section 53 of the British Columbia Prohibition Act no writ of *certiorari* shall issue to quash a conviction unless the party applying shall produce an affidavit "that he did not by himself or by his agent, servant or employee or by any other person, with his knowledge or consent, commit an offence." Section 54 takes away the right of appeal unless the party appealing shall make such affidavit. On an application for *certiorari* to bring up a conviction for unlawfully keeping liquor a preliminary objection by the Crown that the affidavit required by said section 53 had not been produced was sustained. *Held*, on appeal, reversing the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the Legislature in enacting said sections had not in mind corporations which are incapable of making the required affidavit: as the right to apply for a writ of *certiorari* existed independently of section 53 and still exists unless taken away by it, corporations not being within its purview, are not deprived of the remedy. REX v. THE CANADIAN PACIFIC WINE COMPANY, LIMITED. - - - - - - - - **490**

11. —— *Prohibition Act — Liquor found in room in building—Occupied as sleeping apartment and for cooking meals—"Private dwelling-house" — Interpretation — B.C. Stats. 1916, Cap. 49, Secs. 3, 3(a) and 11; 1918, Cap. 68, Sec. 4.*] The accused occupied a room in which he slept and cooked his meals in a building on the same floor of which was a tailor shop, photographer's quarters and other occupied rooms and from the hall of which there were entrances through a party-wall to the quarters of a social club in an adjoining building. On appeal from the quashing of a conviction for having intoxicating liquor in a room other than a dwelling-house:—*Held, per* MACDONALD, C.J.A., and GALLIHER, J.A., that as subsection (*a*) of section 3 of the Act declares that "the expression 'private dwelling-house' does not include or mean . . . . any house or building connected by a doorway or covered passage or way of internal communication . . . . with any . . . . club-house [or] club-room" the accused's room was expressly excluded from the term and the conviction should be restored. *Per* MARTIN and MCPHILLIPS, JJ.A.: That the room was a "private dwelling-house" within the meaning of section 3 of the Prohibition Act. The Court being equally divided the appeal was dismissed. REX *ex rel.* LAWSON v. KERR. - - **522**

12. —— *Intoxicating liquors—Prohibition Act—Mens rea—B.C. Stats. 1916, Cap. 49, Sec. 10.*] Although a person licensed to sell liquor containing not more than two and one-half per cent. proof-spirits honestly and reasonably believed that the liquor which he sold was not over that strength it is not a defence to a charge of selling liquor over that strength in contravention of section 10 of the British Columbia Prohibition Act. The scope and object of the Act is to absolutely prohibit the sale of liquor above a certain percentage and one who engages in

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STATUTES—*Continued.*

WATER AND WATERCOURSES—*Cont'd.*

and 1904 from Woodberry Creek. In 1915, the Board of Investigation under the Water Act, 1914, after hearing all parties interested, directed the issue of two conditional licences to the appellant in pursuance of sections 288 and 289, of said Act which were to embody terms, *inter alia*, that the works required to be constructed and necessary for the carriage and distribution of water be commenced on or before the 1st of June, 1920, and completed, and the water beneficially used on or before the 1st of November, 1924. The conditional licences were issued on the 9th of July, 1919. At the instance of the respondent the Florence Silver Mining Company proceedings were taken in July, 1920, under section 17 of the Act and the Board of Investigation ordered the cancellation of the provisional licences on the ground that the powers granted under the licences were not exercised in good faith for three consecutive years. *Held*, on appeal, reversing the decision of the Board of Investigation, that as the Board made an order on the 9th of July, 1919, allowing the appellant until the 1st of November, 1924, to make a beneficial use of the water for the purposes for which it was granted, and cancelled his records and licences because he did not make beneficial use of the water for a period of time preceding that date, the order of the Board should be set aside and the appellant's rights restored. *In re* FLORENCE SILVER MINING COMPANY, LIMITED. - - **558**

WILL — *Codicil — Inconsistent with will — Construction — Surrounding circumstances —Consideration of in aid of construction— Specific legacy.*] A testator bequeathed her house and furniture to her daughter G. and the residue of her estate to two executors, which included the carrying on at their discretion a certain business of which the testatrix was a two-thirds owner, and out of such residue of her estate to pay certain sums and "to divide my . . . interest in the said business or what remains thereof . . . one-third thereof to my grandson W. . . . and the balance thereof to my daughter G." There was then a provision as to the division of certain company shares and a residuary devise in favour of G. Subsequently the testatrix conveyed by deed to G. her residence and furnishings and gave her certain sums of money. Later by codicil the testatrix revoked the bequest to W. of the portion of her interest in the business and charged her interest in the business with

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the sum of $1,000 in favour of a certain daughter and further provided "after such payment I give . . . . the whole of my . . . . interest remaining in the said business . . . . to my son F. and my grandson W. . . . . in equal shares," in all other respects confirming her will. *Held*, that by the codicil the bequest to W. of the one-third share of testatrix's interest in the business was revoked and in lieu thereof W. and F. were given her entire interest in the business to the exclusion of G. and subject only to the bequest of $1,000; notwithstanding the fact that this construction might result in revoking or rendering impossible of performance other dispositions in the original will not so treated in the codicil; that the Court was entitled to consider "the surrounding circumstances" at the time of the execution of the codicil in case of any ambiguity which was thereby removed; that the gift to W. and F. was a specific legacy (subject to the right of said legatee of $1,000) and therefore the beneficiaries named in the will other than W. and F. had no right to intervene or seek any redress in connection with the business. NIMMO v. ADAMS *et al.* - - - **277**

2.——*Promise to devise by—Death of promisor—Evidence—Corroboration.* **241**
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